Florida A & M University Law Review

Volume 4
Number 1 *Fall 2008/Spring 2009*

Article 3

Fall 2009

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THE GOVERNMENT CONTRACTOR DEFENSE AND SUPERIOR ORDERS IN INTERNATIONAL HUMAN RIGHTS LAW

*Jill M. Fraley**

ABSTRACT

As military functions are increasingly outsourced to corporate contractors, civil courts face adjudicating issues of tort liability arising from actions occurring in war zones. Currently, victims of torture and other invasive military techniques used at Abu Ghraib and Guantanamo Bay seek to prevail over issues of sovereign immunity and to hold corporations responsible for the actions of their employees. In response, corporations shield themselves with the government contractor defense: an affirmative defense developed in the context of product liability actions. Recent articles have overwhelmingly suggested that the defense will prevail and often have argued that it should prevail due to issues of sovereign immunity.

This article makes a novel claim that places the government contractor defense in the context of international law. This article examines the theoretical foundations of the government contractor defense, comparing the elements of the defense to the international law of human rights, and argues that the government contractor defense is reducible to a claim of "superior orders." The government contractor defense is attempting to hang on the coattails of sovereign immunity, i.e., the defense is nothing more than saying, "the government told me to do it." Indeed, this is what corporations argue to establish the traditional prima facie case for the government contractor defense: specific orders and compliance with those orders. In light of the analytical similarity between the two defenses, and given the absolute ban of the superior orders defense in international law, the government contractor defense is unacceptable in the context of claims of human rights violations.

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I. INTRODUCTION

In recent decades, the United States has become an international forum for civil tort litigation stemming from violations of basic human rights laws, including prohibitions of genocide, war crimes, and torture.[1] In those cases, plaintiffs have sought monetary damages from individuals, sovereigns, and corporations.[2] Recent examples include two consolidated New York cases that ultimately resulted in a Second Circuit ruling allowing claims to proceed against Radovan

1. *See, e.g.*, Saleh v. Titan Corp., 353 F. Supp. 2d 1087 (S.D. Cal. 2004) (alleging torture); *see also* Kadic v. Karadz, 70 F.3d 232 (2d Cir. 1995) (alleging genocide and war crimes).

2. *See, e.g.*, *Saleh*, 353 F. Supp. 2d at 1087 (against military contractor), Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.C. 2005) (against military contractor); Rasul v. Rumsfeld, 414 F. Supp. 2d 26 (D.C. 2006), *vacated*, 129 S. Ct. 763 (2008)(mem.)(suit against member of U.S. executive and military officials); *Kadic*, 70 F.3d at 232 (against a foreign leader); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (against a foreign nation); Estates of Ungar ex. rel Strachman v. Palestinian Auth., 315 F. Supp. 2d 164 (D.R.I. 2004) (against Palestinian Authority and PLO).

Karadzic for war crimes committed in the former Yugoslavia[3] as well as the famous torture case of *Filartiga v. Pena-Irala*.[4] As these examples suggest, the United States has developed a hospitable forum for civil rights litigation even where the plaintiffs and defendants are non-citizens and the acts took place in foreign countries.

The most recent wave of civil litigation originates in alleged human rights violations committed by the U.S. military and its associated contractors in Afghanistan, Iraq, and Guantanamo Bay.[5] In recent years, military contractor involvement has been so commonly cited in torture allegations that Congressman David Price of North Carolina introduced legislation that would forbid contractor involvement in interrogations of military prisoners.[6] The cases against military contractors mark a significant point in the history of civil human rights litigation in U.S. courts. The movement of military contractors into the field of providing security services in foreign nations opens up a new category of potential defendants in human rights litigation. The availability of new contractor defendants may well shape the future of human rights litigation plaintiffs because contractors may be more susceptible to suits than other defendants have been in the past. The U.S. military is relying on contractors in greater numbers and for a greater range of products and services.[7] While there is some argument about precisely what it means for military services to be "privatized," and precisely where that line should be drawn, commentators tend to conclude that privatization has increased in recent

3. *See Kadic*, (consolidating Doe et al. v. Karadz i, 93 Civ. 0878 (PKL) and Kadic v. Karadz i, 93 Civ. 1163 (PKL)).

4. 630 F.2d 876 (1980).

5. *See, e.g.*, *Saleh*, 353 F. Supp. 2d at 1087; *Ibrahim*, 391 F. Supp. 2d at 10; CACI Int'l v. St. Paul Fire and Marine Ins. Co., 567 F. Supp. 2d 824 (E.D. Va. 2008) (seeking declaration of insurance coverage for alleged incidents of torture at Abu Ghraib); *Iraqis Sue Over Abu Ghraib Treatment*, APS DIPLOMAT RECORDER, July 5, 2008, available at 2008 WL 13699940 (Citing pending litigation against CACI International and L-3 Communications); *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (seeking damages against a Canadian oil company for allegedly aiding and abetting genocide and other human rights violations in the Sudan).

6. Interrogation and Detention Reform Act of 2008, H.R. 7056, 110th Cong. (2008).

7. *See* Steve Fainaru, Big Boy Rules (2008) (describing U.S. reliance on government contractors to provide security services in war zones and the lack of supervision over those contractors by the federal government); Cong. Comm., GAO-08-966, Rebuilding IRAQ: DOD and State Department Have Improved Oversight and Coordination of Private Security Contractors in IRAQ, but Further Actions Are Needed to Sustain Improvements (2008) (statement of William M. Solis, Director, Defense Capabilities and Management) (citing "extensive reliance" of the U.S. government on military security contractors).

decades.[8] Contractors are "tak[ing] over traditional military functions."[9]

Increased privatization, and the array of military functions carried out by private contractors, has resulted in changing civil litigation trends. While military contractors previously faced suits based on products claims, the provision of services during military actions provides new and expanded grounds for claims, including violations of human rights during security, detention, and interrogation operations.[10] Multiple cases have raised claims that contractors committed and conspired to commit torture.[11] Reports from multiple sources state that contractors allowed, instructed, or participated in incidents of abuse and violence that may rise to the level of torture.[12] Human Rights First has compiled multiple reports describing alleged human rights violations by military contractors in Iraq. These include needless, reckless injuries and deaths of civilians resulting from "accidents." These accidents occurred when contractors suddenly diverted civilian cars that offered no threat.[13] The report also described excessive use of force and indiscriminate harm to unarmed civilians.[14] Contractors were also described as giving instructions to lower level military personnel to carry out the physical abuses or torture described at Abu Ghraib.[15] In addition, photos captured the involvement of contractors in the use of unapproved stress positions at Abu Ghraib.[16] One male contractor was also cited in an alleged rape of a juvenile male prisoner at the facility.[17] Overall, the Fay Report, one of several to investigate the abuses at Abu Ghraib, cited forty-four improper incidents, ten of which involved private contractors.[18]

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8. *See* Antenor Hallo De Wolf, *Modern Condottieri in Iraq: Privatizing the War from the Perspective of International and Human Rights Law*, 13 IND. J. GLOBAL LEGAL STUD. 315 (2006) (For a discussion of privatization in more depth; *see also* Paul Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C.L. REV. 397, 443 (2006)).

9. Henry A. Giroux, *Education After Abu Ghraib: Revisiting Adorno's Politics of Education*, 18 CULTURAL STUDIES 779, 803 (2004).

10. *See* Smith v. Halliburton Co., No. H-06-0462, 2006 WL 1342823 (S.D. Tex. 2006) (complaint alleged liability based on providing security services in Iraq).

11. *See, e.g., Saleh*, 353 F. Supp. 2d at 1087; *Ibrahim*, 391 F. Supp. 2d at 10.

12. *See, e.g., The Taguba Report*, March 2004, *in The Torture Papers: The Road to Abu Ghraib* 405, 417-19 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

13. Human Rights First, *Private Security Contractors at War: Ending the Culture of Impunity* 12-13 (2008), *available at* http://www.humanrightsfirst.info/pdf/08115-usls-psc-final.pdf.

14. *Id.* at 2, 6.

15. *Private Security Contractors at War*, *supra* note 14, at 52.

16. *Id.* at 53.

17. *Id.*

18. *Id.*

The Justice Department admitted to at least one open criminal investigation against a military contractor in Iraq as a result of such incidents.[19] Similarly, in the Taguba Report, which examined potential abuses of detainees by the U.S. government, concluded that contractors were involved and specifically listed a member of the Titan Corporation as a suspect.[20] The report concluded that other contractors were witnesses and potentially aided, abetted, or conspired with U.S. military personnel to commit torture and other abuses.[21]

Because a number of these alleged acts of torture at Abu Ghraib were reportedly committed directly by the contractors rather than the U.S. military, potential civil suits by foreign plaintiffs who suffered abuses will not face the substantial hurdle of governmental immunity, and therefore may be more effective than suits brought against the U.S. government or executive officials. The success of such suits will be determined by the role of the military contractor defense. If the courts allow the military contractor defense, it may serve to virtually eliminate liability for military contractors. On the other hand, if the defense is barred as inapplicable to security service contracts, then civil suits against the contractors are likely to lead to damage awards.

In the last few years, several articles have reflected on the government contractor defense in the context of Abu Ghraib and Guantanamo Bay.[22] Overwhelmingly, those articles emphasized the

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19. *Id.*

20. *The Taguba Report*, *supra* note 12, at 405, 417-19.

21. *Id.* (citing the involvement of contractors from Titan and CACI International in torture incidents at Abu Ghraib).

22. *See* Ryan Micallef, *Liability Laundering and Denial of Justice Conflicts Between the Alien Tort Statute and the Government Contractor Defense*, 71 BROOK. L. REV. 1375 (2006) (arguing that the government contractor defense should be banned in ATS cases except in specific cases); Robin M. Donnelly, *Civilian Control of the Military: Accountability for Military Contractors Supporting the U.S. Armed Forces Overseas*, 4 GEO. J.L. & PUB. POL'Y 237 (2006) (describing the defense as a "significant hurdle" for plaintiffs in suits against military contractors for acts arising out of the provision of security services); Kateryna L. Rakowsky, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. CIV. RTS. & CIV LIBERTIES 365 (2006) (arguing for strict application of the military contractor defense's limitations as provided by the Supreme Court in Boyle v. United Technologies and citing the trend of the "expanding" defense in recent military conractor litigation stemming from Abu Ghraib); Roger Doyle, *Contract Torture: Will Boyle Allow Private Military Contractors to Profit from the Abuse of Prisoners?*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L. J. 467 (2007) (describing the government contractor's defense as "a significant substantive barrier" between plantiffs and the possibility of recovering damages against military contractors for torture); Valerie C. Charles, *Hired Guns and Higher Law: A Tortured Expansion of the Military Contractor Defense*, 14 CARDOZO J. INT'L & COMP. L. 593 (2006) (arguing that the defense should not apply to claims brought under the ATS because applying the defense would leave plaintiffs without a remedy or forum); Jeremy Joseph, *Striking the Balance: Domestic Civil Tort Liability for Private Security Contractors*, 5 GEO.

strength of the government contractor defense, and thus were pessimistic about the possibility of plaintiffs waging successful suits against government contractors. Indeed, some commentators have argued specifically for the clarification of the government contractor defense as indeed available within the context of services provided by military contractors.[23] The argument in favor of providing the defense to contractors is based on the U.S. government's extensive reliance on military contractors.[24] It is postulated that without the contractors' involvement in security services, the military would be unable to reach its intended national security goals. In contrast, this article argues that the government contractor defense should not be permitted where the contractor faces tort claims stemming from violations of international law of human rights. While the U.S. may significantly rely on contractors for assistance in military operations, this reliance is not a significant consideration that would outweigh the necessity of holding contractors liable for violations of international human rights law just as soldiers who committed the same acts would be under military law.

The government contractor defense is based upon the same notion as the superior orders defense under international law. The superior orders defense is the claim that a party should not be liable because a higher governmental authority instructed that party to carry out an action in violation of international law.[25] The superior orders defense has been discredited in the context of international law as a result of Nazi officers attempting to claim the defense in post-World War II war crimes tribunals.[26] While the defense continues to be raised by those seeking to avoid liability, particularly those serving at lower levels in the militaries, the defense is less likely to be successful as a defense to a claim and more likely to be considered a mitigating factor.[27] While some questions remain about the fairness of not allowing the superior orders defense in all situations, the defense is less likely to be available for those crimes that are egregious violations of

J. L. & PUB. POL'Y 691 (2007) (recommending that the government contractor defense be available to private military contractors in the security service/torture cases).

23. *See, e.g.*, Joseph, *supra* note 23, at 723.

24. David M. Walker, *Defense Management DOD Needs to Reexamine Its Extensive Reliances on Contractors to Improve Management and Oversight* (Washington: Accountability Office, http://www.gao.gov/new.items/d08572t.pdf. (last visited Mar. 16, 2009).

25. International Criminal Law 123-128 (M. Cherif Bassiouni ed., 2d ed. 1999).

26. Gary Solis, *Obedience of Orders and the Law of War: Judicial Application in American Forums*, 15 AM. U. INT'L. L. REV. 481, 483 (2000).

27. *Id.* at 483-485.

international law.[28] This article argues that because the superior orders defense rejected under International Law, particularly for those less debatable violations such as genocide and torture, the military contractor defense should not be available to contractors sued for acts of torture, given that the fairness issues of the superior orders defense would be more serious in a criminal as opposed to a civil forum.

The link between the government contractor defense and the superior orders defense is described in more detail below. Part II provides an overview of U.S. civil litigation on human rights violations, particularly summarizing the three most relevant statutory claims systems. Part III provides a brief history and theoretical summary of the superior orders defense in international law. Part IV summarizes the government contractor defense in the context of products liability litigation. Part V analyzes the policy foundations of the government contractor defense. Finally, Part VI provides a discussion of the banned superior orders defense and its relationship to promoting human autonomy and preventing future human rights violations. The article concludes ultimately that the government contractor defense is not analytically distinct from the superior orders defense in any meaningful way. Therefore, under treaty obligations in International Law, American courts should not make the defense available when the allegations stem from violations of international human rights law.

II. Civil Human Rights Litigation in the United States

Before examining the government contractor defense and its relationship to the superior orders defense, it is important to establish the statutory framework that surrounds litigation of human rights claims in the United States. Three statutory schemes are particularly relevant: the Alien Tort Statute, the Federal Tort Claims Act, and the Torture Victims Protection Act. Each of these statutes plays a substantial role in providing for and limiting litigation based on human rights violations.

A. Alien Tort Statute

The Alien Tort Statute (ATS) provides access to the federal courts for claims based on torts committed outside the United States.[29]

28. *Id.* at 483-484 (egregious violations are torture or genocide rather than use of excessive force).

29. 28 U.S.C § 1350 (2005) (statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of

The ATS vests the federal courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[30] Thus, the ATS "confers subject matter jurisdiction when the following conditions are met: (1) an alien sues, (2) for a tort, (3) that was committed in violation of the 'law of nations' or a treaty of the United States."[31] The third prong of this test limits the second prong, requiring that the tort either violate "customary international law" or a treaty of the United States that provides a private right of action.[32] When the three elements of the ATS are met, the statute confers jurisdiction, but it does not create a private right of action for foreign torts.[33] Therefore, the ATS "does not confer rights nor does it impose obligations or duties," but rather the ATS is exclusively jurisdictional in nature.[34]

The ATS relies upon customary international law to provide a cognizable private cause of action for violations of the most fundamental and universal human rights.[35] Historically, the first fundamental rights of international law were recognized by Blackstone as the right of safe passage, safety of ambassadors, and piracy.[36] Courts now recognize, however, that the ATS must be viewed as referring to contemporary universal human rights norms.[37] Torts that fall short of universal principals of human dignity are not cognizable under the ATS.[38] The ATS depends specifically on customary international law,

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the law of nations or a treaty of the United States," and also grants jurisdiction over acts committed outside the U.S., but does not create a cause of action in itself—reference must be made to an existing cause under international law.); *see also* Sosa v. Alvarex-Machain, 542 U.S. 692, 724-25 (2004).

30. 28 U.S.C. § 1350 (2005) (law of nations is customary international laws).

31. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 164-5 (5th Cir. 1999) (*citing Kadic*, 70 F.3d at238).

32. Stutts v. De Dietrich Group, No. 03-CV-4058(ILG), 2006 U.S. Dist. LEXIS 47638 (E.D.N.Y. June 30, 2006).

33. Sosa v. Alvarez-Machain, 542 U.S. 692, 700 (2004).

34. *Rasul*, 414 F. Supp. 2d at 38.

35. *See, e.g., Kadic*, 70 F.3d at 238; Bigio v. Coca-Cola Co., 239 F.3d 440, 447 (2d Cir. 2000). Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495 (S.D.N.Y. 2005).

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

37. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (quoting United States v. Smith, 18 U.S. 153, 160-61 (1820) Contemporary universal human rights norms may be located by "consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.").

38. Frazer v. Chicago Bridge and Iron, No. H-05-3109, 2006 U.S. Dist. LEXIS 23367 at 16 (S.D. Tex. Mar. 27, 2006) (granting defendant's motion to dismiss because negligence and negligence per se are not recognized under the Alien Tort Statute).

as opposed to treaties, most of which are not enforceable as private rights of action in U.S. courts.

In 2004, the U.S. Supreme Court decided *Sosa v. Alvarez-Machain*, a decision that determined the status of Customary International Law within the courts of the United States.[39] Customary International Law refers not to a complex body of law, but rather to the most basic of human rights norms agreed upon between nations, essentially instilling prohibitions against slavery, piracy, genocide, and torture. This limited content is legitimated by no particular moral theory, but solely by international consensus, an idea that compliments our form of democracy. Indeed, these rights are guaranteed only within the framework of human rights, in other words, as rights that apply not against individuals, but only against "state actors" or sovereigns.[40] Thus, Customary International Law "does not reach private, non-state conduct" even when that conduct includes torture, execution, and rape.[41] It is a body of law limited to human rights' basic goals, to affirm rights of the citizens against their sovereign to be free from such things as torture, genocide, and slavery.

Federal courts have the authority to cautiously determine when it is appropriate to imply a cause of action for the violation of international human rights law.[42] Courts constrain those implied causes of actions narrowly to acts that are "clear and unambiguous" violations of international law.[43] Such violations have been identified as "a handful of heinous actions . . . each of which violates definable, universal and obligatory norms."[44]

The concept of "customary international law" has been explored in several recent cases. These cases have established that genocide, war crimes, and enslavement are cognizable violations under the ATS.[45] Similarly, terrorist attacks are also cognizable offenses under

39. *Sosa*, 542 U.S. 692.

40. *Tel-Oren*, 726 F.2d at 775 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (Edwards, J., concurring).

41. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 205-7 (D.C. Cir. 1985).

42. *Sosa*, 542 U.S. 692 at 694.

43. *Filartiga*, 630 F.2d at 884.

44. *Tel-Oren*, 726 F.2d at 781 (Acts include torture, murder, slavery, genocide, inhumane or degrading treatment, and systemic racial discrimination, among others).

45. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 305 (S.D.N.Y. 2003) (recognizing genocide, war crimes, torture, and enslavement as violations of international law); *Filartiga*, 630 F.2d at 884 (torture is a violation of customary international law), *Kadic*, 70 F.3d at 241-242 (torture, genocide cognizable under ATS as violations of international law).

intentional law and will support jurisdiction under the ATS.[46] In such circumstances, the "courts may fashion domestic common law remedies to give effect to violations of customary international law."[47] For example, applying the ATS, the Eleventh Circuit upheld a district court's verdict of both compensatory and punitive damages against a group of individuals for torture during a military dictatorship in Ethiopia.[48]

The ATS has also been applied in torture cases. *Filartiga v. Pena-Irala* established that torture falls within those "clear and unambiguous" violations of international law.[49] In *Filartiga*, a group of citizens from Paraguay sued a non-U.S. citizen in U.S. federal courts citing the torture and extra-judicial killing of a relative because of his political views.[50] The district court dismissed the complaint for lack of subject matter jurisdiction within the federal courts over an incident that took place abroad involving non-U.S. citizens.[51] The Second Circuit reversed the dismissal, finding subject matter jurisdiction in the federal courts under the ATS because torture constituted a violation of customary international law.[52]

The Second Circuit drew this conclusion "[i]n the light of the universal condemnation of torture in international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world."[53] Specifically, the Second Circuit stated that, "there is at present no dissent from the view that the guaranties [of human rights and fundamental freedoms] include, at a bare minimum, the right to be free from torture."[54] Thus, "for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."[55] Since *Filartiga* was decided, other courts have consistently agreed that torture is among the most certain prohibitions of customary international law and therefore cognizable as a claim under the ATS.[56]

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46. Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 99-100 (D.C. 2003) (finding jurisdiction under the Alien Tort Statute for the attacks of September 11, 2001).

47. Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996).

48. *Id.*

49. *Filartiga*, 630 F.2d at 884.

50. *Id.* at 878-880.

51. *Id.* at 878.

52. *Id.* at 884.

53. *Id.* at 880.

54. *Id.* at 882.

55. *Id.* at 890.

56. *See* Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002) (including rape as a form of torture); Hilao v. Estate of Ferdinand, 25 F.3d 1467, 1475 (9th Cir. 1994) ("the right to be free from torture is fundamental and universal"); Siderman de Blake v. Republic of

Since a torture claim is derived from customary international law, so are the limitations. The primary limit of customary international law in torture cases is that the law applies only to state actors. Customary international law "does not reach private, non-state conduct" even when that conduct includes torture, execution, and rape.[57] Thus, the D.C. Circuit, in *Tel-Oren* held that customary international law would provide a remedy under ATS jurisdiction only where torture was carried out either by or at the direction of a state.[58] The Second Circuit agreed in *Kadic v. Karadzic*, finding that the alleged crimes would be cognizable as violations of international law only if those crimes were committed under state or official action.[59] While acknowledging that some crimes may be cognizable as individual violations of international law, including slave trading, piracy, and aircraft hijacking, the court concluded that torture was prohibited in international law only when committed by a state or at the direction of the state.[60]

State action, otherwise described as acting "under color of law" is determined by reference "to principles of agency law and to jurisprudence under 42 U.S.C. § 1983."[61] Thus, the corporation may be liable when it "acts together with state officials or with significant state aid."[62] State action has been found where the defendant and the state participated in the alleged tortuous action jointly.[63] State action may also be shown where the defendant and state had "substantial cooperation."[64]

The evidence of state action requirement is particularly interesting to consider in the context of the military contract. While evidence of state orders is normally a part of the military contractor's affirmative defense, such evidence is also a part of the plaintiff's claim to jurisdiction under the ATS where the torts include torture.[65] Thus, in the process of seeking the defense, the contractor will also substanti-

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Argentina, 965 F.2d 699, 716 (9th Cir. 1992) ("There is no doubt that the prohibition against official torture is a norm of customary international law.").

57. Sanchez-Espinoza v. Reagan, 770 F.2d at 206-7.

58. *Tel-Oren*, 726 F.2d at 791.

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

60. *Id.* at 243.

61. *Id.* at 245.

62. *Id.(citing* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)).

63. Sable Communications of California, Inc. v. Pacific Tel. & Tel. Co., 890 F.2d 184, 189 (9th Cir. 1989).

64. Ge v. Peng, 201 F. Supp. 2d 14, 21-22 (D.D.C. 2000).

65. See, *Kadic*, 70 F.3d at 245 (finding that state action is required for jurisdiction under the ATS).

ate the plaintiff's claim to jurisdiction under the ATS. While this is an interesting practical problem for litigants, the "state action" requirement relates specifically to the issue of the superior orders defense. It is important to note that as the basis of both the plaintiff and defense claims, each party will be arguing that a governmental or military body directed the conduct at issue.

B. Federal Tort Claims Act

As a sovereign, the United States government maintains the right to determine when it will or will not consent to be sued.[66] When the Federal Tort Claims Act (FTCA) was enacted, the United States exercised that right, granting a limited waiver of sovereign immunity.[67] The FTCA provides the only remedy for torts committed by the government or government employees who are acting within the scope of their employment.[68] The FTCA does not specifically address the liability of contractors who act at the direction of the federal government. However, the FTCA is relevant to the analysis of government contractor liability because the FTCA is often cited as the source of multiple justifications for the government contractor defense.[69]

The justifications for the government contractor defense arise from two limitations to the FTCA's waiver of sovereign immunity. These two limitations are as follows: claims resulting from exercise of the "discretionary function"[70] and claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[71] The discretionary function exception to the waiver of liability was first examined in this context in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). In *Boyle*, a wrongful death suit for damages allegedly caused by a defective helicopter design, the Supreme Court found that at issue in the case was a governmental policy decision about the trade-offs between military effectiveness and passenger safety.[72] The court found that the FTCA's discretionary function ex-

66. U.S. v. Mitchell, 445 U.S. 535, 537-538 (1980).

67. 28 U.S.C. § 2674 (2005).

68. 28 U.S.C. § 2679 (2005).

69. Boyle v. United Techs. Corp., 487 U.S. 500, 511 (1988) (the court's analysis is summarized in Ibrahim v. Titan, 391 F. Supp. 2d. at 17-19, as having "concluded that the application of state law liability theory presented a 'significant conflict' with federal policies or interests, finding guidance in the 'discretionary function' exception to the Federal Tort Claims Act (FTCA).").

70. 28 U.S.C. § 2680(a) (2005).

71. 28 U.S.C. § 2680(j) (2005).

72. *Boyle*, at 511-513.

ception provided the government room to preserve for such policy-making decisions with immunity from suit resulting from such policy decisions.[73] *Boyle* concluded that when a contractor acted pursuant to such an act of discretionary authority of the government, the contractor too should be shielded from tort liability, so long as there was strict compliance with the government's instructions.[74] On the other hand, the "combatant activities" exception refers explicitly to any activities that take place in the "time of war."[75] In *Koohi v. United States*, the court found that the "combatant activities" exception was designed to summarize a basic tort principle: that no duty of care is owed to someone targeted in a military action even if accidentally targeted.[76] Following upon the Supreme Court's analysis of these two FTCA exceptions to give guidance in expanding the military contractor defense, lower courts have continued to examine these two exceptions as a part of the theoretical justifications for both limitations and extensions of the government contractor defense.[77]

C. *Torture Victims Protection Act*

In 1991, the Torture Victim Protection Act (TVPA) amended the Alien Tort Statute by adding a definition of torture and specifically affirming a grant of jurisdiction for cases of torture.[78] The TVPA defines torture as "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering. . .whether physical or mental, is intentionally inflicted on that individual."[79] While the TVPA did not specifically include a discussion of sexual offenses, some courts have held that alleged sexual abuse comes within the umbrella of cruel, inhuman, and degrading treatment while others have concluded that such acts are more difficult to define than "torture, execution, disappearance, or arbitrary detention."[80]

Beyond the definition of cruel, inhuman, and degrading treatment, the wording used in the TVPA has created two issues of

73. *Id.*

74. *Id.* at 512.

75. 28 U.S.C. § 2680(j) (2005).

76. Koohi v. United States, 976 F.2d 1328, 1337 (9th Cir. 1992) (this case involved a civilian aircraft).

77. See, *Ibrahim*, 391 F. Supp. 2d at 17.

78. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2005)).

79. 28 U.S.C. § 1350, section 3(b) of Torture Victim Protection Act of 1991.

80. Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1181 (2005) (quoting Xuncax v. Gramajo, 886 F.Supp. 2d 162, 186 (D. Mass. 1995)).

interpretation. First, when torture by contractors is alleged, it is important to note that the TVPA uses the term "individual."[81] Some courts have concluded that the plain meaning of this term is a limitation to real persons, rather than corporations,[82] while other courts have concluded that corporations are individuals under the statute.[83] Since usage of the terms "individual" and "person" in other legal contexts have at times included corporations,[84] the issue remains unresolved.

Second, the TVPA establishes liability of "any individual who, under actual or apparent authority, or color of law, of any foreign nation. . ." commits acts of torture.[85] This definition of torture contains the phrase "foreign nation," which by its plain meaning in a U.S. statute might be interpreted to suggest that the definition of torture is limited to individuals acting under the actual or apparent authority of a government other than the United States. Arguing the plain meaning of the statute, contractors of the U.S. government could claim that the TVPA does not apply to them. While issues of terminology could arguably limit the applicability of the TVPA to contractors working under the U.S. government, this may not be fatal to plaintiffs' suits. The TVPA is not necessary to establish a cause of action for torture since the ATS can provide a remedy directly by reference to customary international law. For example, in *Mujica v. Occidental Petroleum Corp.*, the court denied claims against the corporation under the TVPA, holding that the domestic oil company accused of human rights abuses in Colombia was not an "individual" as required by the TVPA. However, the Court accepted that a claim for torture could still continue under customary international law through the jurisdiction of the ATS.[86]

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81. 28 U.S.C. § 1350. Section 2 of Torture Victim Protection Act of 1991 provides that civil liability is available for an "individual" who is acting "under actual or apparent authority, or color of law, of any foreign nation.

82. *Mujica*, 381 F. Supp. 2d at 1176 (dismissing TVPA claims against defendants on the grounds that defendant was a corporation rather than an individual and stating that "individual" does not including corporations (citing *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005))).

83. Estate of Rodriquez v. Drummond Co., Inc., 256 F. Supp. 2d 1250, 1266-67 (N.D. Ala. 2003) (Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1358-59 (S.D. Fla. 2003)) (finding no intent to exclude corporations from liability in the TVPA's legislative history, noting that corporations are "persons" as described within other areas of law).

84. Clinton v. City of New York, 524 U.S. 417, 428 (1998) (noting that individual is synonymous with person and person "includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies as well as individuals.").

85. 28 U.S.C. § 1350(2)(a) (1991).

86. *Mujica*, 381 F. Supp. 2d at 1183.

The TVPA establishes liability for acts of torture[87] but does not involve itself in the more nuanced questions regarding the possibility of liability for aiding and abetting or for conspiracy to commit torture. Given the factual context of the torture allegations arising from Afghanistan and Iraq where contractors and military personnel may have acted in conjunction, the issue of liability for aiding and abetting may become significant.[88] Defendants have already taken advantage of the lack of specificity in the TVPA, arguing that the TVPA does not recognize or allow for aiding and abetting liability. For example, in *Mujica,* the defendant oil company argued that the TVPA did not recognize a cause of action for aiding and abetting torture. Nevertheless, the court addressed this issue, concluding "that the TVPA does provide for aiding and abetting liability."[89] In reaching this decision, *Mujica* relied on several other recent cases that found the TVPA supported liability for aiding and abetting.[90]

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87. 28 U.S.C. § 1350 (1991). The TVPA provides a civil remedy for acts of torture, where torture is defined as "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

"(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

"(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

"(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

"(C) the threat of imminent death; or

"(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

88. *See Private Security Contractors at War*, *supra* note 14, at 52-53 (citing the involvement of contractors from Titan and CACI International in torture incidents at Abu Ghraib, particularly in giving orders to military personnel for torture incidents and in being present in photographs depicting torture, and therefore allowing even if not participating in the torture practices).

89. *Mujica*, 381 F. Supp. 2d at 1174.

90. Barrueto v. Larios, 205 F. Supp. 2d 1325, 1332 (S.D. Fla. 2002) (stating that TVPA's legislative history is applicable to aiders and abettors of unlawful acts); Doe v. Saravia, 348 F. Supp. 2d 1112, 1149 (E.D. Cal. 2004) (plaintiff sought aiding and abetting liability against an officer who arranged and paid for an assassination to be carried out by another individual; the court held that the TVPA's legislative history supports liability for accomplices); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002) (noting that a U.S. Senate Report indicates that the TVPA was intended to reach accomplice liability).

Whether the party is the principal or simply aiding and abetting, the TVPA applies to those acts taken "under color of law." Actions taken "under color of law" are generally understood to be acts taken "together with state officials or with significant state aid."[91] Again, in the case of military contractors' actions, this definition points to a governmental directive to carry out the alleged tortuous activity. This issue will become significant when the superior orders defense is examined more closely.

III. THE SUPERIOR ORDERS DEFENSE

A person who claims the defense of superior orders asks that his conduct be excused on the grounds that he did not himself choose the relevant action but rather was directed to do so by a governing political or military authority.[92] The defense is not novel, as it dates back to the first known instance of a "war crimes tribunal" in 1474.[93] In early Austrian forums, the defense was rejected by the tribunal on the grounds that orders from the Duke could not be accepted when they violate "the law of God."[94]

In the last century, the superior orders defense received spectacular international press when Adolph Eichmann claimed it during his trial in 1961.[95] Eichmann first articulated his superior orders defense when he minimized his own choices to act and explained that he was merely "a little cog in the machinery."[96] By the descriptions of historians, Eichmann was the person with primary responsibility for the "final solution" to the "Jewish problem" and thus was responsible for directing operations in forced removal and concentration camps.[97] At his trial, Eichmann repeatedly emphasized his role as merely a soldier who accepted his orders without questioning them.[98] The defense,

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

92. International Criminal Law 123-128 (M. Cherif Bassiouni ed., 2d ed. 1999).

93. Solis, *supra* note 26, at 485.

94. *See generally* Matthew R. Lippman, *Humanitarian Law: The Development and Scope of the Superior Orders Defense*, 20 PENN. ST. INT'L L. REV. 153 (2001) ("the law of God" was a term used to mean a most foundational violation of the dignity of human beings as creatures of God).

95. *Id.* at 184.

96. A. EICHMANN, *Eichmann Tells His Own Damning Story*, LIFE MAGAZINE, Nov. 28, 1960, at 19, available at http://www.einsatzgruppenarchives.com/trials/profiles/confession.html (last visited February 9, 2009)

97. Matthew Lippman, *Genocide: The Trial of Adolph Eichmann and the Quest for Global Justice*, 8 BUFF. HUM. RTS. L. REV. 45, 50 (2002).

98. Jochen Von Lang ET. AL., Eichmann Interrogated: Transcripts from the Archives of Israeli Police 158 (1983).

which became known as "superior orders," was explicitly rejected in Eichmann's trial.[99] The Nuremberg Tribunal determined that superior orders could not be used as a defense to war crimes although in some instances the judge could consider superior orders in mitigating punishment.[100]

Since that time, both international law and U.S. law have affirmed that clear violations of *jus cogens*, such as torture, cannot be justified by a defense of superior orders.[101] War crimes tribunals from Nuremberg to Yugoslavia have affirmed that superior orders do not relieve the defendant from responsibility for his actions in violation of the laws of war.[102] Additionally, under U.S. law, the defense will not protect a U.S. soldier who acted on orders of his superior officers if the illegal act at issue was a clear violation of international law.[103]

Banning superior orders as a defense to war crimes is a movement based on a specific understanding of the nature of international law and individual responsibilities under that law. This was illustrated when the Nuremburg Tribunal rejected Eichmann's defense of superior orders. The Nuremburg decision understood international law to apply not only to nations but also to individual persons.[104] Applying international law to persons not only meant that individuals could be responsible for violations but also that those individuals were charged with certain duties, including the duty to examine whether an order violates customary international law before following that order. This understanding was deemed necessary to prevent human rights violations. "Crimes against international law were committed by men, not by 'abstract entities,' and only by punishing individual perpetrators can the provisions of international law be preserved and enforced."[105] Thus, the ban on the superior orders defense is ultimately a recognition that international law exists as an external, higher authority to which all individuals must submit, over and above any

99. *See* Lippman, *supra* note 93, at 184.

100. *See* Lippman, *supra* note 93, at 184.

101. U.S. Dep't of the Navy, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.1.4 (1997).

102. Solis, *supra* note 25, at 510.

103. Solis, *supra* note 25, at 510. However, liability may be mediated by consideration of superior orders as essentially an extenuating circumstance. Additionally, the rule is limited to "clear violations," such as torture, rape, and slavery. Individual soldiers are not asked to make tough calls about borderline practices or to know the detail of complex international laws.

104. *See* Lippman, *supra* note 92, at 182.

105. *See* Lippman, *supra* note 92, at 182.

obligations to follow the orders of a particular government or military body.[106]

The superior orders defense bears a striking resemblance to the government contractor defense. Indeed, there is analytically no meaningful difference between the two in the context of human rights violations by a contractor. The superior orders defense suggests that a person should be immune from prosecution, provided that he followed instructions as given to him by a superior officer acting under a government. The government contractor defense suggests that a person or corporation should be immune from a tort suit, provided that government orders were given and followed. In both cases, there is a transfer of governmental immunity to the agent who is acting on behalf of the government. Given the strong resemblance between the two defenses, the government contractor defense should be considered a companion to the superior orders defense, and therefore, should not be allowable in the case of clear violations of international law.

There is some debate about the propriety of banning the superior orders defense in all circumstances, particularly those instances where the guilt of an individual soldier is not clear.[107] Those doubts apply to circumstances where defendants face criminal charges, possibly even the death penalty.[108] While there may be reasons to consider the defense as a mitigating factor with criminal charges, particularly offenses punishable by death are involved , the reasoning is not necessarily transferable to torts where the worst punishment that a party could receive is monetary damages or an injunction. It is also important to note that defendants will be sophisticated corporations that are able to retain legal counsel to advise on the laws of war.

IV. The Development of the Government Contractor Defense in Products Liability

Although one of the rationales for the government contractor defense is found in the FTCA's affirmation of governmental discretion and immunity, the defense was judicially created.[109] Therefore, no statute has set forth the nature and scope of the defense although the

106. *See* Solis, *supra* note 25, at 510.

107. *See, e.g.*, Solis, *supra* note 26.

108. *See generally*, Solis, *supra* note 26, regarding the advisability of banning the defense completely.

109. Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988).

defense was codified as part of the Homeland Security Act of 2002.[110] The government contractor defense exists as a part of federal common law and serves to protect a contractor from liability under state tort statutes when the contractor acted specifically pursuant to government instructions.[111] Initially, the government contractor defense existed in various forms with different circuits recognizing a series of related yet distinct defenses for military contractors.[112]

In *Boyle v. United Technologies*, decided in 1988, the Supreme Court affirmed the existence of the government contractor defense and specified its scope.[113] The defense was developed in the context of products liability suits and the emphasis was on the immunity of the federal government when it acted to procure goods for military use.[114] In *Boyle*, plaintiffs brought a products liability suit alleging wrongful death against a military contractor that had manufactured a helicopter. The helicopter was manufactured under a contract with the U.S. government that used very specific design specifications approved by the government. The specifications required the helicopter doors to open outward, a feature that plaintiffs particularly cited as dangerous to passengers. The plaintiffs' decedents were killed when the helicopter crashed into the ocean. Documents produced in discovery indicated that the government was aware of the risk of having the doors open only outward, notably, that the doors could not be opened under water due to the pressure of the liquid against the exterior. However, the documents indicated that the government was aware of this flaw but considered it a trade-off. The government determined that there were strategic military benefits if the doors opened outward, including unloading the helicopter faster. *Boyle*'s facts were particularly

110. 6 U.S.C.A. §442(d) (West 2002) (d) Government Contractor Defense (1) In general Should a product liability or other lawsuit be filed for claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies approved by the Secretary, as provided in paragraphs (2) and (3) of this subsection, have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller, there shall be a rebuttable presumption that the government contractor defense applies in such lawsuit. This presumption shall only be overcome by evidence showing that the Seller acted fraudulently or with willful misconduct in submitting information to the Secretary during the course of the Secretary's consideration of such technology under this subsection. This presumption of the government contractor defense shall apply regardless of whether the claim against the Seller arises from a sale of the product to Federal Government or non-Federal Government customers.

111. *Boyle*, 487 U.S. at 512.

112. *See, e.g.*, Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985); Johnston v. United States, 568 F. Supp. 351 (D. Kan. 1983); Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985).

113. *Boyle*, 487 U.S. at 511-13.

114. *Id.* at 511.

sympathetic to the contractor. United Technologies followed the government's specifications to the letter but was sued for having done so.

The Supreme Court focused on sovereign immunity as the justification and this specifically influenced the test created in *Boyle* for applying the defense.[115] The government contractor defense has as three specific prongs: (1) specifications, (2) conformance to those specifications, and (3) disclosure to the federal government.[116] The test was designed to apply only where liability for the contractor would threaten the government's "discretionary function."[117] In essence, the first two prongs require that the contractor's act results from an order of the government and that the order was followed.

While the defense initially developed in products liability cases, it has expanded in scope to include services contracts in limited circumstances. In addition, there have even been extensions of the defense to non-military contractors of the government.[118] For example, the government contractor defense has also been asserted in cases concerning drugs distributed by U.S. companies abroad, where experimental drugs were used outside of FDA regulations and resulted in death.[119] Additionally, the defense was codified and expanded by the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), which brought the defense back to its original roots in products, focusing on the development of new technologies that would support anti-terrorism efforts of the United States after the terrorist attacks of 9/11.[120]

Other changes may be happening more slowly through judicial application of the defense. While the defense has traditionally been justified under the "discretionary function" exception to the FTCA waiver of immunity, contractors are seeking to use the FTCA's "combatant activities exception." Contractors have argued that the decisions in *Koohi v. United States* and *Bentzlin v. Hughes Aircraft*, demonstrate extensions of the "combatant activities exception" immunity beyond the government to military contractors.[121] Moving beyond

115. *Id.* at 511-13.

116. *Id.* at 512.

117. *Id.*

118. *See* Burgess v. Colorado Serum Co., 772 F.2d 844, 847 (11th Cir. 1985) (affirming summary judgment for defendant, a non-military contractor and producer of a veterinary vaccine).

119. *See Adamu*, 399 F. Supp. 2d at 495 (plaintiffs argued that experimental use of drugs by a U.S. corporation violated human rights laws).

120. 6 U.S.C. § 441-444 (2005).

121. *See* Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486 (C.D. Cal. 1993).

the Supreme Court's pre-emption of state law analysis in *Boyle*, the *Koohi* case wove a stronger strand through the defense: an absolute proclamation, based on the combatant activities exception of the FTCA, as establishing that there is "no duty of reasonable care" in time of war.[122] The distinction is significant because if there was indeed "no duty of reasonable care" in time of war, that assertion would be a part of federal common law stemming from the FTCA "combatant activities" provision rather than state law. As a part of federal common law, the "no-duty rule" would function to shield government contractors from liability in both federal and state court, whereas the traditional government contractor defense was limited to shielding the contractor from state tort liability.[123]

Koohi and *Bentzlin*, products liability cases that involved the use of weaponry during combat, have not been followed by other courts.[124] One case has already specifically endorsed this limitation. In *Smith v. Halliburton*, the court found that the "combatant activities" rationale would extend only to defective products suits.[125]

In summary, the government contractor defense has evolved significantly over the past thirty years, moving from products liability to services, and even reaching non-military contractors of the federal government. Contractors have successfully pushed the boundaries of the defense.

V. Applying the Government Contractor Defense to Human Rights Violations

This section compares the government contractor defense to the superior orders defense. The discussion begins with the various rationales for the government contractor defense: federalism and preemption, separation of powers and the political question doctrine, and sovereign immunity. As important and established as these rationales are, in instances where basic human rights are allegedly violated by a contractor, the establishment of the government contractor defense is eerily similar to the superior orders defense.

122. *Koohi*, 976 F.2d at 1336-7.

123. *Koohi*, 976 F.2d at 1335-36.

124. Distinguishing *Koohi* and *Benzlin*: Fisher v. Halliburton, 390 F. Supp. 2d 610 (S.D. Tex. 2005); Lessin v. Kellogg, Brown & Root Services, Inc., No. CIVA H-05-01853, 2006 WL 3940556 (S.D. Tex. June 12, 2006); Carmichael v. Kellogg, Brown & Root Services, Inc., 450 F. Supp. 2d 1373 (N.D.Ga. 2006); Smith v. Halliburton Co., Civil Action No. H-06-0462, 2006 WL 1342823, at *1 (S.D. Tex. May 16, 2006).

125. *Smith*, 2006 WL 1342823 (S.D. Tex. May 16, 2006).

A. *Rationales for the Government Contractor Defense*

Three primary rationales have been articulated in support of the government contractor defense. Each of these rationales is linked to the idea of a superior governmental order to carry out a forbidden act. In the sections below each, of the three primary rationales is examined in detail.

1. Federalism and Preemption

Under *Boyle*, the government contractor defense was framed as a question of preemption: the degree to which national defense concerns of the federal government prevented the normal operation of state tort laws.[126] The problem has been conceptualized in terms of the Supremacy Clause which forbids state regulation of the federal government, and the "foreign affairs doctrine" which maintains that foreign relations and national defense are the exclusive province of the political branches.[127]

The Supremacy Clause prevents the states from regulating activities of the federal government.[128] While cases citing the Supremacy Clause have generally involved regulatory issues, such as taxation and environmental monitoring, government contractors have also raised the issue. The Supreme Court has specifically determined that the Supremacy Clause's limit on state regulation of federal activities continues to apply when the activities are carried out by a private government contractor rather than by the federal government.[129] The foreign affairs doctrine prevents states from entering "into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[130] All "power over foreign affairs is reserved to the federal government."[131] In practice, the foreign affairs doctrine means that state laws are displaced where normal operation of those laws would "disturb foreign relations."[132]

Both the foreign affairs doctrine and the Supremacy Clause are linked to the idea that the federal government has the right and capacity to give orders that cannot be impeded or later questioned by state

126. *Boyle*, 487 U.S. at 507-08.
127. *Id.*
128. McCulloch v. Maryland, 17 U.S. 316 (1819).
129. Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988).
130. Zschernig v. Miller, 389 U.S. 429, 432 (1968).
131. Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003).
132. *Zschernig*, 389 U.S. at 441.

level political bodies.[133] While these doctrines have applied in preemption and politics, violations of international human rights laws are a unique situation. In rejecting the superior orders defense, international human rights law have determined that every individual has the responsibility of understanding conduct that is absolutely prohibited under international law.[134] The individual has the responsibility of adhering to the prohibitions even when directly ordered by a superior officer to do otherwise. Thus, while many federal governmental decisions are not reviewable by courts, the rejection of the superior orders defense in international law means that each individual is responsible for reviewing every order, of every government, that may violate international human rights law. It is then, an absurd result to say that the state level courts cannot do what international human rights law charges each individual with the responsibility of doing.

2. Separation of Powers and the Political Question Doctrine

Another primary justification of the government contractor defense is the doctrine of a non-justiciable political question. Political question cases are "committed for resolution to the halls of Congress or the confines of the Executive Branch," because those cases "revolve around policy choices and value determinations" that have been constitutionally delegated to those branches.[135] The political question doctrine affirms that issues of national policy must be given to the people through their political representatives.[136] At its essence, the political question doctrine "is primarily a function of the separation of powers."[137]

When the political question doctrine applies, it removes jurisdiction from the court.[138] While the political question doctrine is a commonly cited justification for the government contractor defense, it is also an unique and separate defense.[139] The political question doc-

133. *Boyle*, 487 U.S. at 507-508.

134. *See* Solis, *supra* note 25, at 510 (by implication every corporation has a duty to understand international law).

135. Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 230 (1986).

136. Occidental of Umm Al Qaywayn v. Certain Cargo of Petroleum, 577 F.2d 1196 (5th Cir. 1978).

137. *Baker*, 369 U.S. 186, 210 (1962).

138. *Occidental*, 577 F.2d at 1203.

139. *See, e.g.*, McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, (M.D. Fla. 2006) (arguing political question doctrine as defense to tort claim against contractor for death of U.S. servicemen killed in flight); Ibrahim v. Titan, 391 F. Supp. 2d at 15 (noting the court's rejection of defendant's claim of political question doctrine as immunity from tort suit for torture).

trine raises issues of whether or not the plaintiff's allegations are, in fact, justiciable.[140] Thus, while the government contractor defense only results in state law preemption, the political question doctrine results in the court refusing to hear the action.[141] When the political question doctrine is raised, the defendant may argue that the court "may not take cognizance of the plaintiff's action."[142] The defendant further noted that when the motion is sustained, the political question doctrine can render an entire case or controversy beyond the reach of the courts.[143]

Although the doctrine can result in completely barring a claim, the defense will not necessarily apply in allegations of torture by military contractors or other military-related actions. For example, in *Koohi*, a case where a U.S. warship shot down a civilian aircraft, the Ninth Circuit ruled that the plaintiff's claims should not be dismissed under the political question doctrine.[144] More recently, in *Ibrahim v. Titan Corporation*, a case that alleged torture by government contractors at Abu Ghraib, the court rejected the defendants' argument that the claims were barred by the political question doctrine.[145] Similarly, in *McMahon v. Presidential Airways, Inc.*, the court ruled that the political question doctrine did not bar claims arising from an aircraft crash in Afghanistan, because the claim implicated primarily issues of tort law rather than military tactics.[146] In general, courts appear to be applying the political question doctrine less frequently and more cautiously.[147]

The test for a political question involves a review of six possible situations:

> (1) a textually demonstrable constitutional commitment of the case to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a

140. *Baker*, 369 U.S. 186, 210 (1962) (noting political question doctrine requires nonjusticiability of matters due to separation of powers).

141. *Ibrahim*, 391 F. Supp. 2d at 16 (discussing the political question doctrine as placing items "beyond judicial cognizance").

142. *Koohi*, 976 F.2d at 1331 (noting defendant's assertion that political question doctrine render case beyond court's reach).

143. *Id.*

144. *Koohi*, 976 F.2d at 1331 (noting that a "key element" in the analysis is the seeking of damages rather than injunctive relief).

145. *Ibrahim*, 391 F. Supp. 2d at 15.

146. McMahon v. Presidential Airways, Inc., 460 F. Supp. at 1331.

147. *See McMahon*, 460 F. Supp. at 1319 (stating that "[i]ndeed, it is with increasing rarity that a case is dismissed on political question grounds" (citing *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 65-69 (E.D.N.Y. 2005))).

> kind clearly for non-judicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[148]

These six possible situations are not, however, of equal importance. The six possibilities "are probably listed in descending order of both importance and certainty."[149]

Arguments by defendant-contractors are likely to focus on the first two situations.[150] Questions related to "provisions for national security and defense" are "perhaps the most clearly marked for judicial deference."[151] In fact, "[t]he Constitution mandates that war and foreign policy are the provenance of the Executive."[152] The political question doctrine stems not only from our basic separation of powers but also from a concern that "many such questions uniquely demand [a] single-voiced statement of the Government's views."[153] Thus, any case involving accusations of violations of human rights on foreign soil is likely to raise the possibility of a non-justiciable political question.

In recent decades, several decisions have underscored the reluctance of courts to become involved in matters of military strategy and national defense. In *Gilligan v. Morgan*, a case involving the training of National Guard troops, the U.S. Supreme Court stated, "it is difficult to conceive of an area of governmental activity in which the courts have less competence."[154] When applying the military contractor defense, the Fifth Circuit has found that "interference by civilian courts with military authority inevitably raises both questions about judicial competency in this area and separation of powers concerns."[155] Additionally, the Second Circuit has stated even more absolutely that "[t]he strategy and tactics employed on the battlefield are clearly not subject to judicial review."[156] Thus, precedent suggests that courts will be extremely cautious in involving themselves in decisions of the military

148. *Baker*, 369 U.S. at 217.

149. Vieth v. Jubelirer, 541 U.S. 267, 278 (2004).

150. Both were argued in Smith v. Halliburton, and both were rejected at the time the Motion to Dismiss was denied on May 16, 2006.

151. Tiffany v. United States, 931 F.2d 271, 277 (4th Cir. 1991).

152. Fisher v. Halliburton, Inc., 454 F. Supp. 2d 637, 641 (S.D Tex. 2006).

153. *Baker*, 369 U.S. at 211.

154. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

155. *Bynum*, 770 F.2d at 562.

156. *Tiffany*, 931 F.2d at 277.

during times of war. One of the primary concerns voiced by the courts is that "[i]n order to hear [the] case, the court would have to substitute its judgment for that of the Army."[157] This justification, however, strongly conflicts with the international law consensus on the barred superior orders defense which requires that all persons consistently question governmental orders when those orders call for a violation of the limited number of absolute principles of human rights law.[158]

Additionally, clear violations of international human rights laws implicate another constitutional principal: checks and balances. Historically, courts have tackled political questions of human rights issues where the other branches would allow oppression, violence, and injustice to continue.[159] Courts, thus, may aspire to use their power to force the government to adhere to fundamental human rights and dignity. While constitutional rights have been historically limited to United States citizens, the courts have also recognized that at the time the Constitution was created there existed an international customary law of human rights that the framers intended to be accessible through federal common law.[160] "With the founding of the 'more perfect union' of 1789, the law of nations became preeminently a federal concern," and thus a part of the federal common law as opposed to the common law of the states.[161]

If the political question doctrine forbids the courts entry into these areas of law, then the executive and legislative branches are essentially able to confer the authority to commit war crimes at least until the people have a chance to remove them from office at the next election. Such an interpretation is not consistent with the history of U.S. courts as sources of justice and redress when none is available elsewhere.[162] As the Supreme Court has previously stated, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties. . . which makes the defense of the Nation worthwhile."[163] Moreover, it is the basic intent of international law to supersede even executive powers of the nations, thus "confer[ing] fundamental rights upon all people vis-à-vis their own gov-

157. *Fisher*, 454 F. Supp. 2d at 643.

158. *See* Solis, *supra* note 25, at 510.

159. *See, Ibrahim*, 391 F. Supp.2d at 16 (noting that there is no issue of separation of powers where the acts of the contractor "violate clear United States policy" against human rights crimes).

160. *Sosa,* 542 U.S. 692.

161. *Filartiga*, 630 F.2d at 878.

162. Boumediene v. Bush 128 S.Ct. 2229, 2277 (2008) (affirming U.S. courts as a source of justice and redress when none are available elsewhere).

163. United States v. Robel, 389 U.S. 258, 264 (1967).

ernments."[164] Therefore, questioning the orders of governmental bodies when those orders violate international human rights law is not only acceptable but is necessary to further the safety and dignity of people everywhere.

In response, contractors are likely to argue a practical problem of judicial interference with military strategy: the need for the military to accept risks beyond those normally tolerated by citizens.[165] National security requires that our military "push technology towards its limits and thereby incur risks beyond those that would be acceptable for ordinary consumer goods."[166] The higher tolerance for risk is an acceptable argument when made specifically in products liability suits. However, it does not logically carry over to torture. The higher tolerance for risk is not appropriate in international human rights law which has developed a consensus on the absolute prohibition of torture.[167]

3. Sovereign Immunity and Costs

The third primary justification for the government contractor defense is the problem of costs of litigation being passed on in a way that violates sovereign immunity. The federal government is generally immune from suit, whether the suit is brought in state or in federal court.[168] While the FTCA functions as consent of the government to be sued, this consent applies in only very limited circumstances.[169] Moreover, the FTCA specifically affirmed sovereign immunity for "any claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war."[170]

In terms of sovereign immunity, the government contractor defense was initially justified because contractors' costs in litigation logically would be passed on to the government, thus effectively allowing plaintiffs to avoid governmental immunity from suit.[171] Since extra costs would be "passed-through" to the government, allowing tort suits to proceed against contractors would be equivalent to allowing

164. *Filartiga*, 630 F.2d at 885.

165. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449-50 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

166. Tozer v. LTV Corp., 792 F.2d 403, 406 (4th Cir. 1986) (quoting McKay v. Rockwell International Corp., 704 F.2d 444, 449-50 (9th Cir. 1983)).

167. *Filartiga*, 630 F.2d at 884.

168. *See, e.g.*, Mitchell, 445 U.S. at 535.

169. 28 U.S.C. § 1346(b).

170. 28 U.S.C. § 2680(j).

171. *Boyle*, 487 U.S. at 510.

suits against the government.[172] The costs to the government must be made judicially irrelevant in the context of fundamental human rights and the violation of customary international laws. The courts cannot allow the development of a market for services that include torture and other human rights violations at the State's behest.

Finally, the "pass-through" rationale is of minor concern in the traditional justifications of the defense. In writing for the majority, Justice Scalia accepted the rationale in *Boyle*, but Justices Brennan, Marshall and Blackmun disagreed, suggesting that the pass-through of costs was only a "marginal" concern.[173] Since the pass-through rationale is controversial even in a simple products liability action, it is a less likely justification in the difficult context of human rights violations. Courts should be wary about putting monetary values on the violation of human rights.

B. The Prima Facie Case and the Superior Orders Defense

As elaborated by the U.S. Supreme Court, the government contractor defense requires proof of three elements. These three elements are as follows: specifications, conformance to those specifications, and disclosure of known risks to the federal government.[174] The first prong of the test is widely considered to be the most significant hurdle. The first prong requires that the activity or product at issue be specifically requested by the federal government. Invitations, musings, and general suggestions do not qualify as specific requests.[175] Furthermore, courts strictly require "reasonably precise specifications."[176] If the contractor is able to prove the first prong, then to meet the second prong, it must then prove that it adhered to the specifications that were provided.[177] The defendant must prove that it was able to "strictly adhere to previously established, government-approved specifications."[178]

These two prongs are notably similar to the prima facie case one would present under the superior orders defense, were it allowed in international law. For the government contractor defense, one would argue that the government provided the instructions/specifications, and secondly, that the contractor followed those to the letter. The su-

172. *Id.* at 511-512.
173. *Id.* at 523-4 (Brennan, J., dissenting).
174. *Id.* at 512.
175. *Id.*
176. *Boyle*, 487 U.S. at 512.
177. *Id.*
178. *See* Colin P. Cahoon, *Boyle Under Siege*, 59 J. AIR L. & COM. 815, 836 (1994)

perior orders defense requires that an individual received orders from a senior officer or governmental official and complied with those orders. Thus, for the superior orders defense, one would argue instructions from an agent of the government, and strict compliance with those instructions. Therefore, proof of both defenses follows the same analytical chain.

VI. Superior Orders and Ensuring Human Rights

There is a lasting moral and political significance to prohibiting the superior orders defense in human rights litigation. Scholars who have studied the problem of human rights violations after the Holocaust have concluded that the best possible method of preventing such gross violations in the future is encouraging "human autonomy."[179] Thus, the future of human rights and human dignity can be affirmed by encouraging every individual's critical engagement with the issues and by strenuously upholding the individual's right to refuse orders in violations of basic human dignity. This most significant endeavor is not possible if the superior orders defense is tolerated in civil human rights litigation. Courts must conclude that the government contractor defense does not apply to human rights violations.[180]

VII. Conclusion

At one time, American law played a significant role in the development of international human rights law, but in recent years, the United States "has had no more than a walk-on part in their clarification and application by international institutions."[181] This change has largely resulted from the refusal of the political branches to ratify, and even theoretically engage, the more recent treaties establishing human rights. The United States' reduced role in international human rights, along with the scandal of Abu Ghraib, and the criticism of Guantanamo Bay, have created an unfortunate international reputation. These acts have "undermined the moral and political credibility" of the United States.[182] In light of this negative evaluation, critical attention will be paid to how the United States deals with claims against its own

179. Giroux, *supra* note 9, at 796.

180. *See, e.g.*, In re Agent Orange Product Liability Litigation, 373 F. Supp. 2d 7, 91 (E.D.N.Y. 2005).

181. Lillich, Richard B., The Constitution and International Human Rights, 83 Am. Journal of Int'l L. 851, 853 (1989).

182. Giroux, *supra* note 9, at 782.

citizens and corporations for violations of international human rights. Fortunately, civil litigation may give reason for hope.

Through civil litigation, the judicial branch should affirm its willingness to check the political branches, particularly the executive branch, and force compliance with international human rights principles. The possible repercussions are significant. Courts may be able to curtail a "rogue" executive administration that may endorse torture. Courts may be able to restore the U.S. image internationally on human rights issues. Even where the U.S. refuses to ratify an international treaty, if the norm contained in the treaty becomes a part of customary international law, then that norm "ipso facto becomes supreme federal law and hence may regulate activities, relations or interests within the United States" through the judicial branch.[183] While this possibility is exciting, the ability of the courts to use customary international law is very much dependent on how the courts interpret the Alien Tort Statute and the potential defenses.

Therefore, while the political branches may continue to disengage or refuse to refrain from curtailing outrageous conduct under the guise of National Security, the judicial branch is becoming increasingly involved in international human rights through the litigation of individual civil claims, including claims against American contractors. Judicial willingness to hear those claims and to limit the applicability of defenses—such as the government contractor defense and the political question doctrine—will set the stage for the future of the American role in international human rights.

183. Lillich, *supra* note 179, at 856.