35th Round Table on current issues of International Humanitarian Law

Private Military and Security Companies

San Remo, 6-8 September 2012

Key Legal Questions Arising in Armed Conflict – Detention Activities by PMSCs

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This presentation addresses the challenges of holding private military contractors legally accountable for their participation in egregious violations of international law, including torture and war crimes, which occurred in the context of detention activities. Using three cases litigated in the United States as case studies – *Saleh v. Titan, Al Shimari v. CACI,* and *Al-Quraishi v Nakhla and L-3* – which were brought by Iraqis held in U.S.-run detention centers, including Abu Ghraib,[1] I will address (1) the legal framework used by the plaintiffs to seek accountability; (2) the legal framework in place in the United States at the time and discuss what limitations, if any, were placed on the activities carried out by contractors, what the contractual and regulatory framework required of contractors in terms of their conduct and their supervisory structure; (3) legal defenses raised by the contractors, including government contractor defense, battlefield preemption, derivative immunity and the political question doctrine; and finally (4) the current status of legal accountability efforts in U.S. courts.

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[1] Pleadings and other information about these proceedings can be found at: http://www.ccrjustice.org/ourcases/current-cases/saleh-v-titan (*Saleh v Titan*); http://www.ccrjustice.org/ourcases/current-cases/al-shimari-v-caci-et-al (*Al Shimari v CACI*); and http://www.ccrjustice.org/ourcases/current-cases/al-quraishi (*Al-Quraishi v. Nakhla and L-3*).

(written version of remarks: Updated October 2012)

Among other related points that I will briefly mention in this discussion are the role of code of conducts in the litigation, immunity provisions in the host state, the status of contractors under international law, and holding corporations accountable for international law violations and extra-territorial jurisdiction—questions currently pending before the U.S. Supreme Court in the *Kiobel v. Royal Dutch Petroleum* litigation in the context of the Alien Tort Statute.[2]

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The cases related to the alleged torture and other serious mistreatment of Iraqi civilian detainees against two private military contractors, under contract with various components of the United States government, for acts committed in U.S.-run detention facilities in Iraq, including Abu Ghraib. CACI provided interrogation services, and Titan, which has changed its name twice (L-3 Services and currently Engility Corporation), provided translation services and then also interrogation services. As found in U.S. military investigations into the severe mistreatment of detainees at Abu Ghraib, CACI and Titan employees were involved in the torture and other serious mistreatment of detainees.[3]

In each of the three cases, Plaintiffs have brought claims of war crimes, torture and cruel and inhuman and degrading treatment, as well as common law claims of assault and battery, sexual assault and negligent hiring and supervision, against the two private contractors for their alleged role in a conspiracy to torture. Between the three cases, more than 335 Iraqi civilians assert that the two corporations international, including the Geneva Conventions, and U.S. law

[2] U.S. Supreme Court Case No. 10-1491. Information about *Kiobel*, including pleadings, can be found at: http://www.ccrjustice.org/ourcases/current-cases/kiobel.

[3] *See, e.g.,* A. Taguba, Art. 15-6: Investigation of the 800th Military Police Brigade (2004), available at http://www.dod.mil/pubs/foi/detainees/taguba/. Plaintiffs also rely on the court martial testimony of military co-conspirators and statements of other detainees.

by sending employees to Abu Ghraib and other detention centers where they directly and indirectly participated in the torture of detainees and participated in covering up or otherwise remaining silent about the torture. All plaintiffs were released from detention without charge.

Plaintiffs brought these civil actions in U.S. federal court under the Alien Tort Statute (18 U.S.C. § 1350) and state law. The ATS allows non-US citizens to bring tort claims for violations of the "law of nations" in US federal courts. The U.S. Supreme Court has found that violations of the law of nations include violations of human rights or international criminal law that are specific, universal and obligatory.[4] Plaintiffs assert that their claims of war crimes, cruel, inhumane and degrading treatment, and torture, which include allegations of rape, forced nudity and sexual violence, satisfy this standard.

At the time the contractors were hired by various U.S. agencies, U.S. federal regulations required that all private military contractors abide by U.S. laws, including the War Crimes Statute (18 U.S.C. § 2441) and the Torture Statute (18 U.S.C. § 2340), and that contractors retained the responsibility of supervising and disciplining their employees. U.S. regulations made clear that contractors were non-combatants, and as such, fell outside the military chain of command and the military system of discipline.[5] CACI employees were required to abide by a CACI code of conduct. Defendants have argued, however, that they were essentially soldiers in

[4] The first modern human rights case brought under the ATS is *Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980). The Supreme Court upheld use of this law in such cases in *Sosa v. Alvarez-Machin*, 542 U.S. 692 (2004).

[5] Two amicus briefs were filed by retired military members explaining the fundamental principles of international humanitarian law applicable to contractors, the military structure and military disciplinary system, and the distinction between corporate contractors and members of the armed services. *See, e.g., Al Shimari v. CACI*, Brief of *Amici Curiae* Retired Military Officers in Support of Petitioners, Dec. 20, 2011, available at: http://www.ccrjustice.org/files/2011-12-20%20Amicus%20Brief%20of%20Retired%20Military%20Officers%20Supporting%20Plaintiffs.pdf.

all but name, and should enjoy the same legal protections bestowed on members of U.S. military. Plaintiffs have strongly challenged this characterization, citing both U.S. and international humanitarian law provisions which place these for-profit, employees-at-will outside the military structure.

To date, none of the cases have been adjudicated on the merits. Rather, the litigation has focused primarily on whether certain defenses claimed by the private military contractors can serve as a bar to liability or a bar to suit. These defenses, invoked primarily in relation to the state law claims, have included the government contractor defense, battlefield preemption, derivative sovereign immunity and the political question doctrine.

The government contractor defense is a judge-made defense that developed in the products-liability context.[6] Under this defense, a government contractor cannot be held liable for state law claims when, first, there is a conflict between state law and federal law, and second, the contractor acted in compliance with the instructions and specifications ordered by the government. In the context of providing interrogation and interpretation services, rather than a product, the contractors have argued that the common law tort claims such as assault and battery should be preempted under the "combatant activities" exception of the Federal Tort Claims Act – a statute which explicitly states that it does not apply to contractors. In response, plaintiffs have argued that there is no conflict between state and federal law, since seek to prevent and punish acts of torture, and that the government required that the contractors comply with the legal prohibitions on torture, and thus any act of torture conflicted with the instructions of the government.

[6] The lead case for the government contractor defense is *Boyle v United Technologies Corp.*, 487 U.S. 500 (1988).

"Battlefield preemption" developed in the context of the *Saleh v Titan* litigation. On appeal, a two-judge majority of the Court of Appeals of the District of Columbia found, in essence, that there could be no room for tort law in the context of war, and that the application of tort law must be preempted so as not to hamper the battlefield commanders. This novel form of preemption evolved out of another theory of preemption, namely field preemption, under which it is recognized that federal law can "occupy the field" (such as in the context of recognition of a foreign state or immigration), leaving no room for the application of state law. There is a mixed record of courts accepting this defense.

Defendants have argued that because they have been hired by the United States, which enjoys sovereign immunity, and working with the military, they are entitled to a form of "derivative immunity." Plaintiffs have argued that the various reasons underlying sovereign immunity, under either international law or domestic law, are inapplicable to for-profit corporations. To the extent that contractors have argued that they should enjoy the same immunities of U.S. officials, plaintiffs have argued that U.S. officials are not given automatic immunity, but must show that they were acting within the scope of their employment. To date, this argument has not been successful in the torture contractor cases.

The political question doctrine is well established in U.S. law.[7] Under this separation-of-powers doctrine, cases may be deemed non-justiciable because, in essence, adjudication would require the judicial branch to overstep its role and intrude on matters constitutionally committed to the executive or legislative branches. Notably, the United States has not moved to have any of these cases under the political question doctrine. This argument has been unavailing to date.

[7] *See Baker v. Carr,* 369 U.S. 186 (1962).

As for the claims brought under the Alien Tort Statute for violations of international law, defendants have challenged these claims on numerous grounds. First, defendants have argued that non-state actors, including corporations, cannot be held liable for violations of international law including torture and war crimes. (The issue of corporate liability under the ATS is currently pending before the U.S. Supreme Court; four Courts of Appeal have found corporations can be held liable, while one Court of Appeal has found, in a 2-1 decision, that they cannot.) Defendants have also argued that plaintiffs are improperly asserting that the acts alleged are private acts, in which case they fall beyond the scope of international law, as well as that the acts alleged involve state action, in which case, defendants assert that the acts should be immunized under sovereign immunity. Defendants have also challenged whether cruel, inhuman and degrading treatment is recognized with the sufficient specificity and universality to constitute a norm of international law under the ATS.

These defenses and arguments have been, or are currently being, adjudicated in the context of three cases. The current status of each case and the responses to legal arguments raised are as follows.

The first case, *Saleh v. Titan*, was filed in the district court in the federal District of Columbia in 2004. The district court judge dismissed the ATS claims, finding merit in the defendants' argument that non-state actors could not be held liable for torture, and that if the plaintiffs were alleging state action, particularly in the context of torture, that the defendants would them enjoy immunity for these claims. Following limited discovery, the district court found that CACI did not enjoy the protections of the government contractor defense, because it retained some supervisory capacity over its employees working at Abu Ghraib. The court found that the defense was applicable in the case of Titan/L-3, which provided interpreters, because the

court found that these contractors were integrated into the military chain of command. On appeal, a majority of the Court of Appeals for the District of Columbia found, over a strong dissent, that all claims must be dismissed under a broad "battlefield preemption" theory. Plaintiffs petitioned the Supreme Court to review the case. After the Obama Administration's Acting Solicitor General submitted an amicus brief arguing that the legal issues related to private military contractor liability should be allowed to "percolate" in the courts of appeal and were not yet ripe for Supreme Court review, the plaintiffs' petition was denied in June 2011 and the case was closed.[8]

Al Shimari v CACI and *Al-Quraishi v. Nakhla and L-3* were both filed in June 2008. In March 2009, the district court in *Al Shimari*, which was filed in the Eastern District of Virginia, rejected defendants' argument that the case should be dismissed at the outset based on the government contractor defense, derivative immunity or the political question doctrine. The judge did, however, dismiss the plaintiffs' ATS claims based on the finding that "tort claims against government contractor interrogators are too modern and too novel to satisfy the *Sosa* [*v. Alvarez-Machain*] requirements for ATS jurisdiction." The district court judge in the *Al-Quraishi* case, being heard in Maryland, denied the defendants' efforts to dismiss the case at the outset. In so doing, Judge Peter Messitte found that claims for torture, war crimes, and cruel, inhuman and degrading treatment could be brought under the ATS against the corporate defendants.

[8] The district court is available here: http://ccrjustice.org/files/6.29.06%20Order.pdf; the Court of Appeals decision is available here: http://www.ccrjustice.org/files/2011-12-20%20Amicus%20Brief%20of%20Retired%20Military%20Officers%20Supporting%20Plaintiffs.pdf; the amicus brief submitted by the United States is available here: http://ccrjustice.org/files/09-1313%20Titan%20US%20Br%20(2).pdf.

The defendants in both the *Al Shimari* and *Al-Quraishi* decisions appealed the decisions of the district court judges. Plaintiffs challenged the appeal as premature. In September 2011, in a 2-1 decision, a panel of the Court of Appeals for the Fourth Circuit found that it had jurisdiction over the appeal, and that both cases should be dismissed under what amounted to a broad "battlefield preemption" theory. Plaintiffs sought review of this decision before all fourteen judges of the Fourth Circuit sitting *en banc* and such an appeal was heard in January 2012. In May 2012, in an 11-3 decision, the Fourth Circuit dismissed defendants' appeals, remanding the cases to the district court for discovery. Notably, the United States submitted an amicus brief in the *en banc* review, in which it argued that, first, the appeal was premature, and second, while the government contractor defense based on the "combatant activities exception" can be invoked to preempt certain state law claims under particular circumstances, it was inappropriate for this defense to be used when the allegations constitute torture, as defined in under federal law.[9]

Upon remand to the district courts, the two cases have diverged: 71 plaintiffs and defendants reached a settlement in the *Al-Quraishi* case in October 2012 and the case was thereby voluntarily dismissed. The *Al Shimari* case is set to begin discovery and a trial date is likely to be set for spring or summer 2013. The *Al Shimari* plaintiffs submitted a motion for reconsideration of the dismissal of the ATS claims, which is currently pending.

These cases illustrate the various legal issues that have been raised in the context of civil litigation against private military contractors operating in U.S.-run detention centers, as well as the different approaches taken to the cases by judges reviewing what many consider to be novel

[9] The U.S. amicus brief, filed in January 2012, is available here: http://ccrjustice.org/files/US%20Brief%201.14.12.pdf

questions of law. Decisions taken in the *Al Shimari* case will likely serve to clarify many of these questions. It remains to be seen whether there will be interventions or actions taken by either the legislative or executive branches, or indeed international bodies, that could help guide the court in this case, and impact the extent to which private military contractors that are alleged to have conspired in torture and other serious violations of international law can be held liable.