IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ESTATE OF HIMOUD SAED ABTAN, et al., **Plaintiffs,** **v.** **ERIK PRINCE, et al.,** **Defendants.**	**Civil Action No. 1:09-cv-617-LMB-TRJ**

DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED COMPLAINT

Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 17(b)(3), Defendants hereby move to dismiss Plaintiffs' First Amended Complaint. Dismissal is required for the following reasons: (1) Plaintiffs fail to state a claim under the Alien Tort Statute (28 U.S.C. § 1350) or the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. §§ 1961-62, 1964), and without these claims there is no basis for federal jurisdiction; (2) the Complaint presents nonjusticiable political questions; (3) Plaintiffs fail to state a claim under applicable Iraqi law; (4) Plaintiffs' claims must be dismissed under the government contractor defense; (5) Plaintiffs' claims are barred by absolute immunity; (6) Plaintiffs have not established capacity to sue; (7) Plaintiffs have failed to state a claim against certain Defendants; and (8) Plaintiffs have sued a non-legal entity.

The grounds for Defendants' Motion are set forth more fully in the accompanying Memorandum of Law.

WHEREFORE, Defendants respectfully request that the Court grant their Motion. A proposed order is attached.

Dated: July 20, 2009

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July 2009, I will electronically file the foregoing Motion with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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In addition, I hereby certify that on this 20th day of July 2009, I caused a copy of the foregoing Motion to be sent by hand delivery to the same party.

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IN THE UNITED STATES DISTRICT COURT
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ALEXANDRIA DIVISION

ESTATE OF HIMOUD SAED ABTAN, et al., **Plaintiffs,** **v.** **ERIK PRINCE, et al.,** **Defendants.**	**Civil Action No. 1:09-cv-617-LMB-TRJ**

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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STATEMENT

Plaintiffs are Iraqi residents asserting claims for injuries allegedly suffered in Iraq as a result of actions in Baghdad in September 2007. They seek recovery from a government contractor providing security services in Iraq whose actions were governed by detailed standards prescribed by the United States and closely supervised by United States government employees.

The injuries and deaths described in the complaint's allegations,[1] like the many thousands of other injuries and deaths that have occurred in Iraq,[2] are tragic. But—for several independent reasons—Plaintiffs have not stated a claim upon which relief may be granted by this Court.

The principal Defendant in this case, U.S. Training Center ("USTC"), for 6 years provided security services to protect diplomats pursuant to a contract with and under the close direction of the State Department.[3] Teams of independent contractors ("ICs") working with USTC under the contract escorted U.S. diplomatic personnel to and from meetings throughout Baghdad.

This action involves claims for damages resulting from deaths and injuries alleged to have occurred in Baghdad on September 16, 2007; Plaintiffs allege that ICs opened fire without justification in a location known as Nisoor Square in Baghdad. Compl. ¶¶ 2, 44-48.

The complaint's allegations go far beyond describing the harm allegedly suffered by Plaintiffs. They include an encyclopedia of vituperative assertions, including characterizing Defendants as "an ongoing criminal enterprise" and that Defendants' continued existence "pose[s] a grave and special threat to the well-being of the world." Compl. ¶ 142.

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[1] "Compl." and "complaint" herein refer to Plaintiffs' First Amended Complaint.

[2] From July to November 2007, Coalition and Iraqi government targets were attacked an average of 27 times ***per day*** in Baghdad. *DOD, Measuring Stability and Security in Iraq* (Dec. 2007), at 16 & 22, http://www.defenselink.mil/pubs/-pdfs/FINAL-SecDef%20Signed-20071214.pdf.

[3] The contract was entered into between the State Department and Blackwater Lodge and Training Center, Inc. (App. 2), which changed its name to U.S. Training Center, Inc. *See* Dkt #2.

The Department of Justice—investigated this very incident, charging six ICs with criminal violations. In announcing this indictment, however, the United States Attorney stated that "[t]he indictment does not charge or implicate Blackwater Worldwide" (USTC's predecessor) He emphasized that the indictment was "very narrow in its allegations":

> Six individual Blackwater guards have been charged with unjustified shootings * * * not the entire Blackwater organization in Baghdad. There were 19 Blackwater guards on the * * * team that day * * * . Most acted professionally, responsibly and honorably. Indeed, this indictment should not be read as accusation against any of those brave men and women who risk their lives as Blackwater security contractors.

DOJ, Transcript of Blackwater Press Conference (Dec. 8, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/December/08-nsd-1070.html.

The Supreme Court recently reaffirmed that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action * * * do not suffice." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). A court deciding a motion to dismiss should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth"; with respect to the complaint's "well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id*. at 1950.

Many of Plaintiffs' allegations must be disregarded as "bare assertions * * * [that] amount to nothing more than a 'formulaic recitation of the elements'" of their claims. *Id.* at 1951. What remains, even taken as true, is insufficient "to nudg[e]' [the] claim[s] * * * 'across the line from conceivable to plausible.'" *Id*. (citation omitted).

ARGUMENT

Plaintiffs' allegations do not entitle them to relief under the Alien Tort Statute or the RICO statute (Points I and II). Without these claims, there is no federal jurisdiction (Point III). The

complaint also presents nonjusticiable political questions (Point IV). The non-federal counts must be dismissed under applicable Iraqi law (Point V). The hiring and training allegations also must be dismissed under the government contractor defense (Point VI) and absolute immunity (Point VII). The estates' claims fail for lack of capacity to sue (Point VIII). Any claims remaining against Erik Prince or the corporate defendants other than USTC, must be dismissed because Plaintiffs have alleged no basis for imposing liability on these Defendants (Points IX-X).

I. THE ALIEN TORT STATUTE CLAIMS MUST BE DISMISSED.

Counts one and two alleging "war crimes" and "summary execution," respectively, invoke the Alien Tort Statute ("ATS"). Compl. ¶¶ 75-86; *see* Compl. ¶ 42. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court held that "the ATS is a jurisdictional statute creating no new causes of action." *Id.* at 724. Federal courts possess only a "restrained" authority to recognize causes of action for a "narrow class of international norms" and must exercise "great caution" before concluding that a claim meets this "high bar." *Id.* at 725, 727-29.

Sosa established two prerequisites for recognition of any federal common law cause of action. First, the international law norm on which the claim is based must have as "definite content and acceptance among civilized nations" as piracy, violation of safe conducts, and assaults on ambassadors, the "historical paradigms familiar when § 1350 was enacted." *Id.* at 732. Second, even if a norm meets this "demanding standard of definition" (*id.* at 738 n.30), the court must determine whether, as a matter of domestic law, violations of the norm should be actionable: "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants." *Id.* at 732-33.

A. Defendants And The ICs Are Not State Actors.

The alleged wrongdoers in this case—Defendants and the ICs—are private persons or entities. Because ATS liability is limited to state actors, the ATS counts should be dismissed—the result reached by another court in this District in a case with substantially identical facts. *See Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08cv827, slip op. 60-61 (GBL) (E.D. Va. Mar. 18, 2009) (stating that "the Court is unconvinced that ATS jurisdiction reaches private defendants").

Indeed, in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), then-Judge Scalia held that the "law of nations * * * does not reach private, non-state conduct"; the "basis for [ATS] jurisdiction requires action authorized by the sovereign as opposed to private wrongdoing." *Id*. at 205-07; *accord*, *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 57-58 (D.D.C. 2006); *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 26 (D.D.C. 2005).[4]

B. There Is No Norm Of Secondary Liability Actionable Under The ATS.

None of the allegations suggests that Defendants personally committed war crimes or summary execution. The ATS claim can proceed, therefore, only if some norm of international law makes ***Defendants*** derivatively liable for the alleged acts of the ***ICs***. There is no such norm.

1. Corporations Are Not Subject To Liability Under The ATS.

Sosa requires an ATS plaintiff to show, *inter alia*, that "international law extends the scope of liability for a violation of a given norm *to the perpetrator being sued*" (*id.* at 732 n.20) (emphasis added). The international consensus is ***against*** secondary liability for corporations.

"Crimes against international law are committed by men, *not by abstract entities*, and only by punishing individuals who commit such crimes can the provisions of international law be

[4] Plaintiffs have not alleged that Defendants acted under color of law. But "color of law" provides "no middle ground between private action and government action, at least for the purposes of the [ATS]." *Saleh*, 436 F. Supp. 2d at 57-58; *see also Doe I*, 393 F. Supp. 2d at 26.

enforced." *The Nuremberg Trial*, 6 F.R.D. 69, 110 (1946) (emphasis added); *see also In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 57 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2524 (2009). Accordingly, international law "plainly do[es] not recognize" vicarious liability for an "artificial entity." *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 321-26 (2d Cir. 2007) (Korman, J., concurring & dissenting). Thus, the various statutes governing international criminal tribunals restrict the tribunals' jurisdiction to "natural persons."[5] In the case of the Rome Statute, the drafters considered corporate liability, but rejected it, in accordance with the United States' position. *See* U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an Int'l Crim. Ct., at 134-35 ¶ 54, U.N. Doc. A/Conf. 183/13 (Vol. II) (1998).

2. Defendants' Conduct Is Not Actionable Under International Law.

Even if corporations could be liable under the ATS, no such liability is available here. Under *Sosa*, ATS jurisdiction extends only to conduct that is proscribed by the law of nations with the same "definite content and acceptance among civilized nations" as the historical paradigms of piracy and violation of safe conducts. *See* 542 U.S. at 732. "As the [ATS] is merely a jurisdictional vehicle for the enforcement of universal norms, the contours of secondary liability must stem from international sources." *In re South African Apartheid Litig.*, Case No. 02 MDL 1499, 2009 WL 960078, at *11 (S.D.N.Y. Apr. 8, 2009).

Plaintiffs do not explain the theory of secondary liability that they mean to invoke. The complaint makes a passing reference to Defendants' "conspir[ing]" with the ICs. Compl. ¶ 80, 85. But there is no international law norm imposing liability based on a conspiracy between a

[5] *See* Statute of the Int'l Criminal Tribunal for the Former Yugoslavia, art. 6, 32 I.L.M. 1192, 1194 (1993); Statute of the Int'l Criminal Tribunal for Rwanda, art. 5, 33 I.L.M. 1602, 1604 (1994); Rome Statute of the Int'l Criminal Ct. ("Rome Statute"), art. 25(1), 37 I.L.M. 1002, 1016 (1998) (not ratified by the U.S.).

corporation and its alleged employees or agents. Indeed, U.S. domestic law precludes such liability. *See, e.g., Perk v. Vector Resources Group, Ltd.*, 485 S.E.2d 140, 144 (Va. 1997). Moreover, the Supreme Court has made clear that conspiracy is applicable to war crimes only when its object is "genocide" or a "common plan to wage aggressive war" (*Hamdan v. Rumsfeld*, 548 U.S. 557, 610 (2006) (plurality op.)); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 664-65 (S.D.N.Y. 2006). Even if there were such a definite norm, moreover, recognizing a cause of action under the ATS for "conspiracy" would produce significant adverse practical consequences—allowing plaintiffs to extend private damages liability far beyond the state actors that are the focus of international law, based solely on a claim of conspiracy—and therefore violate the second step of the *Sosa* inquiry. *See* p. 3 *supra*. The same two flaws preclude Plaintiffs from resting secondary liability on their allegations of "facilitat[ing], order[ing], acquies[ing], confirm[ing] [and] ratif[ying]" (Compl. ¶¶ 80, 85)—Plaintiffs have identified no definite international law norm recognizing such liability and the practical consequences preclude recognition of such a claim under *Sosa*.

Finally, even if a claim of secondary liability could be asserted, Plaintiffs' allegations are insufficient. Paragraphs 80 and 85 set forth only "[t]hreadbare recitals of the elements of a cause of action" that "do not suffice." *Iqbal*, 129 S. Ct. at 1949. The allegations that "some" ICs supposedly "are chemically influenced by steroids and other judgment-altering substances" (Compl. ¶ 51) or that some ICs "have been involved in human rights abuses" (Compl. ¶ 53) indicate nothing about the ICs involved in the incident that is the subject of this lawsuit. Similarly, the assertion that Defendants have a "corporate culture" (Compl. ¶ 50) that does not punish excessive use of force is by itself insufficient to establish a plausible basis for relief on any secondary liability theory, and thus fails the standard set by the Supreme Court in *Iqbal*.

C. The ICs Did Not Commit "War Crimes."

The war crimes claim suffers from two additional, independent, deficiencies. First, to constitute a war crime, the conduct giving rise to the claim must be performed by a "[p]art[y] to a conflict." *Kadic*, 70 F.3d at 242-43. Plaintiffs do not allege that Defendants or the ICs are parties to the conflict or otherwise "combatants involved in the * * * war." *In re Sinaltrainal Litig.*, 474. F. Supp. 2d 1273, 1287 (S.D. Fla. 2006). As Plaintiffs acknowledge, Defendants were retained by the State Department for the limited purpose of providing diplomatic security in Baghdad. Compl. ¶ 44. Although those services were performed in a war zone, the ICs were not a general purpose combat force.

Second, a war crimes claim under the ATS must arise from acts that "were committed in furtherance of war hostilities." *In re Sinaltrainal*, 474. F. Supp. 2d at 1287-88; *see also Kadic*, 70 F.3d at 242. Conduct is not actionable under the ATS as a "war crime" simply because it occurred in the midst of an armed conflict. *Saperstein v. Palestinian Authority*, No. 1:04-cv-20225, 2006 WL 3804718, at *8 (S.D. Fla. Dec. 22, 2006); *accord Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120-21 (D.D.C. 2003). Plaintiffs do not link the misconduct they allege to some political or military objective. The complaint instead asserts that Defendants were motivated by ***commercial*** goals. Compl. ¶¶ 1, 38, 52. The misconduct was allegedly committed "in furtherance of * * * business interests and activities" (*In re Sinaltrainal*, 474 F. Supp. 2d at 1287), and the war crimes claim is deficient for that reason as well.

D. The "Summary Execution" Count Does Not State A Claim.

The summary execution count (Compl. ¶¶ 82-86) also must be dismissed for two additional independent reasons. First, summary execution committed outside the course of genocide or war crimes is actionable as a violation of the law of nations "only when committed by state officials or under color of law." *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995).

The complaint alleges, however, that "[t]he killings were not carried out under the authority of any country or court" (Compl. ¶ 83). Plaintiffs have accordingly pled themselves out of court.

Second, by enacting the Torture Victims Protection Act (28 U.S.C. § 1350, *note* § 2(a)(2)), Congress "specifically provided a cause of action for [certain] violations" of the law of nations, including extrajudicial killings, and "set out how those claims must proceed." *Enahoro v. Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005). Claims for summary execution under the ATS are precluded because they would circumvent Congress's carefully crafted scheme. *Id.* at 885; *see also Sosa*, 542 U.S. at 726.

E. Punitive Damages Are Not Available Under The ATS.

Plaintiffs' claim for punitive damages cannot be based on the ATS. Punitive damages are not recognized by most jurisdictions outside the United States. They have been described as "repugnant to * * * fundamental conceptions of justice" and "utterly intolerable." Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 195 (2005). Necessarily, therefore, punitive damage claims cannot meet *Sosa*'s first requirement of clarity and universality. *See* NINA H. B. JORGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES 206-07 (2000) ("[I]nternational law cannot currently be said to embrace punitive damages."). Prohibiting punitive damages in ATS actions is also consistent with the goal of securing uniformity in the domestic application of international law. *See Apartheid*, 2009 WL 960078, at *11 & n.137 (because the ATS is a "jurisdictional vehicle for the enforcement of universal norms," "the outcome of an [ATS] case should not differ from the result that would be reached under analogous jurisdictional provisions in foreign nations").

II. THE RICO CLAIM MUST BE DISMISSED.

Plaintiffs amended the complaint to add a claim based on the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. §§ 1961-62, 1964); *see* Compl. ¶¶ 114-142.

Because RICO allows recovery only for injury to property, they seek as damages three times the cost of repairing 13 cars damaged in the September 16 incident. In view of these *de minimis* damages, it seems likely that the RICO count—with its allegations of multiple murders, child prostitution, drug trafficking, and the like—was included solely because the sensational charges might lead a jury to decide the case on the basis of prejudice and passion.

To state a claim under Section 1962(b) and (c) of RICO, Plaintiffs must allege: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly * * * [acquires] or maintains an interest in [(§ 1962(b))], or participates in [(§ 1962(c))], (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir. 1983). In addition, under RICO's civil remedies provision (18 U.S.C. § 1964(c)), Plaintiffs must allege (8) that they were "injured in [their] business or property" and (9) that such injury was "caused by predicate acts." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985).

Plaintiffs' RICO allegations are deficient for four independent reasons. First, Plaintiffs do not allege that Mr. Prince—the only Defendant against whom they assert their RICO claim—committed or otherwise participated in any of the alleged predicate acts. Second, Plaintiffs cannot show that the alleged injury to their business or property—damage to their cars—was caused by the conduct that qualifies as RICO predicate acts, and they thus lack standing to sue. Third, RICO cannot be applied extraterritorially to alleged acts in Iraq. Fourth, Plaintiffs fail to allege a qualifying pattern of predicate acts. Finally, Plaintiffs are not entitled to punitive damages or injunctive relief under RICO, so those requests for such relief must be dismissed.

A. Defendant Prince Committed No Acts Constituting A Pattern Of Racketeering Activity.

Plaintiffs make a number of sensational allegations about the acts supposedly committed by "the Prince RICO Enterprise." Compl. ¶ 119. A RICO claim, however, "is not against a RICO enterprise, but against a RICO Defendant." *Palmetto State Medical Center, Inc. v. Operation Lifeline*, 117 F.3d 142, 148 (4th Cir. 1997). "To demonstrate a pattern of racketeering activity," therefore, a plaintiff must show that, "at a minimum, *each* RICO defendant committed two acts of racketeering activity within a ten-year period." *Id.* (emphasis added); *see also DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001).[6] Plaintiffs have not met this requirement.

Tthe only allegation of ***any*** conduct by Mr. Prince, the sole RICO defendant, is that he "has created an enterprise." Compl. ¶ 117. That allegation is a legal conclusion not eligible for the presumption of truth under the Supreme Court's ruling in *Iqbal*. Moreover, that "conduct" does not fall within the definition of "racketeering activit[ies]" set forth in Section 1961(1).

Because the complaint thus fails to allege that Mr. Prince committed even a single predicate act, the RICO claim must be dismissed. *See, e.g., Brannon v. Boatmen's First Nat'l Bank*, 153 F.3d 1144, 1150 (10th Cir. 1998) ("[P]laintiffs have simply failed to allege that [a defendant] engaged in a 'pattern of racketeering activity.'"); *Emery v. American Gen. Fin., Inc.*, 938 F. Supp. 495, 499 (N.D. Ill. 1996) ("[I]t is clear that liability under RICO is limited to persons who have 'personally committed' at least two predicate acts of racketeering.").

Even if this fatal deficiency were ignored, the claim is insufficient for two additional reasons. *First*, a RICO plaintiff may not simply allege in conclusory terms a violation of one of

[6] *Palmetto* and *DeFalco* concerned claims under Section 1962(c). But the requirement that each defendant have committed RICO predicates derives from the phrase "through a pattern of," which also appears in Sections 1962(a) and (b). It therefore governs claims under those provisions as well. *See, e.g., Adena, Inc. v. Cohn*, 162 F. Supp. 2d 351, 358 (E.D. Pa. 2001).

the state or federal laws described in Section 1961(1). Rather, the plaintiff must allege "facts that support each statutory element of a violation of one of" those laws. *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1087 (11th Cir. 2004); *see also Joyner v. Abbott Labs.*, 674 F. Supp. 185, 190 (E.D.N.C. 1987) (the "factual basis for the 'acts of racketeering'" must be alleged "with enough specificity to show there is probable cause that the defendant committed the crimes alleged"). Plaintiffs have not alleged any facts that support a plausible inference that Mr. Prince committed each statutory element of any of the crimes they allege. *Raney*, 370 F.3d at 1087.

Second, a RICO plaintiff also must allege facts demonstrating that, "through a pattern of" crimes that Mr. Prince himself engaged in, Mr. Prince "acquir[ed] or maintain[ed] [an] interest in" or "conduct[ed] or participat[ed] * * * in the conduct of" the enterprise. 18 U.S.C. § 1962(b)-(c). Plaintiffs have not in any way linked Mr. Prince to the predicate acts they set forth, and have certainly not done so with the requisite factual specificity. Neither have Plaintiffs attempted to connect the predicate acts (that they fail properly to allege) to the "acquisition or maintenance" or "conduct or participation" by Mr. Prince or any particular person. The RICO count accordingly must be dismissed.

B. Plaintiffs Lack Standing To Assert The RICO Claim.

A RICO plaintiff "only has standing if * * * he has been injured in his business or property by the conduct constituting the [Section 1962] violation." *Sedima*, 473 U.S. at 496-97. The "compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern." *Id.* at 497. In *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992), the Court elaborated on this requirement, emphasizing that the damages recoverable under RICO may compensate only the harm proximately caused by those predicate acts. That requires, among other things, a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* The Plaintiffs asserting the RICO claim here lack standing under this test.

The sole injury to business or property alleged in the complaint is "property damage to [the] cars [of 13 named Plaintiffs] during" the September 16, 2007, incident. Compl. ¶ 115. And the only acts that could even plausibly be claimed to have proximately caused that injury are the alleged "murders" arising out of the September 16, 2007 incident; the other alleged predicate acts (Compl. ¶¶ 133-39) had no connection—and certainly no *proximate* connection—with that property damage. The viability of the RICO claim accordingly turns on whether the September 16 "murders" qualify as predicate acts under the statute.

To constitute a predicate act under RICO, an act must fall within the definition of "racketeering activity" in 18 U.S.C. § 1961(1). Plaintiffs presumably rest their designation of the September 16 "murders" as predicate acts on the reference in Section 1961(1) to "any act * * * involving murder, * * * which is chargeable under State law."

The complaint does not identify which "State law" the alleged murders are supposedly "chargeable under." It is plain, however, that the September 16, 2007 "murders" that Plaintiffs allege in support of their RICO claim are not "chargeable under" the law of Virginia. They were committed in Iraq (Compl. ¶¶ 2, 44-45), and "[e]very crime to be punished in Virginia must be committed in Virginia" (*Moreno v. Commonwealth*, 452 S.E.2d 653, 655 (Va. 1995)). Indeed, these "murders" are not chargeable under the law of ***any*** State, because it is a well established principle that "there can be no territorial jurisdiction where conduct and its results both occur outside its territory." Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW § 4.4 (2d. ed. 2008); *see also* MODEL PENAL CODE § 1.03(1) ("[A] person may be convicted under the law of this State of an offense committed by his own conduct or the conduct of another for which he is legally accountable if * * * either the conduct that is an element of the offense or the result that is such an element occurs within this State * * *."); RESTATEMENT (FIRST) CONFLICT OF LAWS § 425

("[A] state has no jurisdiction to make an act or event a crime if the act is done or the event happens outside its territory."). All of the conduct with respect to the September 16, 2007 "murders" took place in Iraq and, because the alleged victims reside there, the results also occurred in Iraq. The "murders" therefore cannot qualify as predicate acts.

Because plaintiffs thus have failed to allege damage to property proximately caused by a pattern of predicate acts, they lack standing and the RICO count must be dismissed.

C. RICO Does Not Apply Extraterritorially.

Because "Congress generally legislates with domestic concerns in mind," there is a "legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application." *Small v. United States*, 544 U.S. 385, 388-89 (2005). The courts that have addressed the issue have uniformly concluded that a RICO claim cannot be premised on foreign conduct with foreign effects. *E.g.*, *Butte Mining PLC v. Smith*, 76 F.3d 287, 291-92 (9th Cir. 1996); *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996).

Virtually all of the alleged predicate acts appear to involve exclusively foreign conduct and foreign effects. That appears to be true of all the supposed "murders" to which the complaint refers (Compl. ¶¶ 121-132), the sexual exploitation allegations (Compl. ¶ 137), and the destruction of evidence that allegedly occurred "on or after September 16, 2007" (Compl. ¶ 135). The complaint fails to identify where the other predicate acts occurred (Compl. ¶¶ 133-134, 136, 138-139) and any injury or effect that the alleged misconduct caused. It therefore does not allege facts establishing that a "material" part of the misconduct that "*directly* cause[d] the losses" occurred in the United States. *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424 (9th Cir. 1983) (emphasis added); *see also Liquidation Com'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1352 (11th Cir. 2008); *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1306 (S.D. Fla. 2003), *aff'd in relevant part*, 416 F.3d 1242 (11th Cir. 2005) (even

domestic conduct is insufficient when it is "far removed from the completion of the wrongdoing"). Plaintiffs request an impermissible extraterritorial application of RICO, and the RICO count must be dismissed on this ground as well.

D. Plaintiffs Have Not Adequately Alleged A Pattern Of Racketeering Activity.

Plaintiffs' allegations concerning a pattern of racketeering activity, however, are deficient in another respect. To plead the requisite "pattern" under RICO, "'a plaintiff * * * must show that the racketeering predicates are related." *ePlus Technology, Inc. v. Aboud*, 313 F.3d 166, 181 (4th Cir. 2002). For predicate acts to be "related," they must have "'the same or similar purposes, results, participants, victims, or methods of commission, or otherwise [be] interrelated by distinguishing characteristics and [not be] isolated events.'" *Id.* at 182.

Although Plaintiffs assert a "pattern of murder" (Comp. ¶ 121), they allege no facts about either the participants (beyond a vague and inadequate reference to "the Prince RICO Enterprise") or the methods of the alleged murders that would support a plausible inference that they form a pattern. The same is true of the other predicate acts. *See* Compl. ¶¶ 133-139. The complaint, moreover, contains no allegations whatsoever about any common purpose of the predicate acts beyond the "naked assertion devoid of factual content" (*Iqbal*, 129 S. Ct. at 1949) that they were "designed to create more wealth for Defendant Erik Prince and the Prince RICO Enterprise" (Compl. ¶ 119). *See Heller Fin. v. Gramm Co.*, 71 F.3d 518, 524-25 (5th Cir. 1996) ("reaping the profits" theory is insufficient to establish relationship and show RICO pattern).

This "lack of any clear and distinct relationship between the alleged acts defeats a component necessary for liability under RICO." *Davis v. Hudgins*, 896 F. Supp. 561, 569 (E.D. Va. 1995), *aff'd* 87 F.3d 1308 (4th Cir. 1996); *see also Marketing Products Management, LLC v. Healthandbeautydirect.com, Inc.*, 333 F. Supp. 2d 418, 426-29 (D. Md. 2004). Because the complaint's "minimal assertions do not permit [the Court] to realistically assess the purposes,

participants, or methods of the alleged acts to determine their relatedness" (*Synergy Financial, L.L.C. v. Zarro*, 329 F. Supp. 2d 701, 713 (W.D.N.C. 2004)), the RICO count must be dismissed.

E. Punitive Damages And Injunctive Relief Are Not Available Under RICO.

Plaintiffs' remedial request under RICO includes "punitive damages" and extensive injunctive relief. Compl. ¶ 3, 155. Punitive damages, however, are unavailable under RICO. *See SouthStar Funding, LLC v. Sprouse*, No. 3:05-CV-253-W, 2007 WL 812174, at *5 (W.D.N.C. 2007); *Toucheque v. Price Bros.*, 5 F. Supp. 2d 341, 350 (D. Md. 1998); *Mylan Laboratories, Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1084 (D. Md. 1991); *see also Humana Inc. v. Forsyth*, 525 U.S. 299, 313 (1999). The injunctive relief authorized by 18 U.S.C. § 1964(c) is likewise not available to a private plaintiff. *See Oregon Laborers Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 967-68 (9th Cir. 1999); *Minter v. Wells Fargo Bank, N.A.*, 593 F. Supp. 2d 788, 794-95 (D. Md. 2009); *see also Johnson v. Collins Entertainment Co., Inc.*, 199 F.3d 710, 726 (4th Cir. 1999); *In re Fredeman Litigation*, 843 F.2d 821, 828-29 (5th Cir. 1988); *R.J. Reynolds Tobacco Co. v. Market Basket Food Stores, Inc.*, 2007 WL 319965, at *8-9 (W.D.N.C. 2007). Plaintiffs' requests for these remedies under RICO should therefore be dismissed even if the RICO count in its entirety is not.

III. THE COURT SHOULD NOT EXERCISE SUPPLEMENTAL JURISDICTION OVER THE REMAINING CLAIMS.

Plaintiffs assert five bases for federal jurisdiction—ATS, RICO, federal question, diversity, and supplemental. Compl. ¶ 42. ATS and RICO jurisdiction are lacking and the remaining counts do not arise under federal law and therefore cannot support federal question jurisdiction. Diversity jurisdiction is absent: the complaint contains no allegations about Plaintiffs' citizenship (only allegations about their residence). *See Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 145 F.3d 660, 663 (4th Cir. 1998). Even if Plaintiffs are citizens of Iraq, there

would be no diversity jurisdiction, because Defendant Greystone LTD is a foreign citizen (*see* Greystone Decl., Ex. A); "alien citizenship on both sides of the controversy destroys diversity" (*Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 120 (4th Cir. 2004) (en banc)).

This case thus may proceed only as a matter of supplemental jurisdiction. The Court has discretion to dismiss supplemental jurisdiction claims when original jurisdiction claims have been dismissed. *See* 28 U.S.C. § 1367(c)(3)). That discretion should "[c]ertainly" be exercised when "federal claims are dismissed before trial." *Ruttenberg v. Jones*, 603 F. Supp. 2d 844, 873-74 (E.D. Va. 2009); *see also Moseley v. Price*, 300 F. Supp. 2d 389, 400 (E.D. Va. 2004).

IV. PLAINTIFFS' CLAIMS RAISE NONJUSTICIABLE POLITICAL QUESTIONS.

Plaintiffs' claims invite the Court to second-guess a myriad of State Department decisions about how best to protect diplomats in a war zone—an inquiry precluded by the political question doctrine. The complaint accordingly must be dismissed.[7]

A. Standard of Review

Because the political question doctrine is a matter of justiciability, the plaintiff bears the burden of establishing that the doctrine does not apply. *Richmond, Fredericksburg & Potomac R.R. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). A court should not attach any "presumptive truthfulness * * * to the plaintiff's allegations" (*Fisher v. Va. Elec. and Power Co.*, 243 F. Supp. 2d 538, 540 n.2 (E.D. Va. 2003)), but "regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings" (*Balzer & Assocs., Inc.*

[7] Plaintiffs' claim (Compl. ¶¶ 58-59) that the contract violates the Anti-Pinkerton Act (5 U.S.C. § 3108) cannot be entertained, because Plaintiffs have not joined the United States, an indispensable party to any such claim. *See Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 20 (D.D.C. 2005). The Act prevents the government from contracting with "organizations that offer quasi-military and armed forces for hire," not with an organization—like USTC—"providing guard or protective services * * * even though the guards are armed." *U.S. ex rel. Weinberger v. Equifax*, 557 F.2d 456, 463 (5th Cir. 1977); *accord Matter of: Brian X. Scott*, 2006 WL 2390513 (Comp. Gen. Aug. 18, 2006).

v. Union Bank and Trust Co., 2009 WL 1675707, at *4 (E.D. Va. June 15, 2009) (internal quotation marks omitted)).

B. The Political Question Doctrine Is At Its Height When Consideration Of A Case Would Intrude Upon Military and Foreign Affairs.

The political question doctrine holds that courts may not entertain claims requiring review of decisions "constitutional[ly] commit[ed]" to a political branch, claims as to which there is "a lack of judicially discoverable and manageable standards," or claims that cannot be decided "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962). "[N]ational security and foreign relations" matters are "the quintessential sources of political questions." *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006); *see also Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

The Eleventh Circuit recently affirmed the dismissal of a suit against a government contractor on political question grounds, holding that the government's "plenary control" over the activity giving rise to the suit—convoys transporting fuel through a "warzone"—meant that resolution of the plaintiff's claims "would require extensive reexamination and second-guessing of many sensitive judgments" for which there were "no judicially manageable standards." *Carmichael v. Kellogg, Brown & Root*, ___ F.3d ___, No. 08-14487, 2009 WL 1856537 at *1, *2, *6 (11th Cir. June 30, 2009); *see also Whitaker v. Kellogg, Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006) (what a "reasonable driver in a combat zone, subject to military regulations and orders, would do" is not fit for judicial resolution). Decisions about how to protect diplomats in a war zone are no less constitutionally committed to the Executive Branch. Plaintiffs' claims, must be dismissed under the political question doctrine.

C. The Complaint Challenges Decisions That Are Constitutionally Committed To The Political Branches And As To Which There Are No Judicially Ascertainable Standards.

1. The Actions Of The ICs Could Not Be Examined Without Calling Into Question The Policy Judgments And Tactical Decisions Of The State Department.

Counts one through six assert that ICs used unnecessary force on September 16, 2007 while providing security services during a "period of armed conflict" in Baghdad. Compl. ¶ 77.

A decision to use force in a war zone is a classic political question—standards do not exist for assessing "whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1363 (11th Cir. 2007) (internal quotation marks omitted); *see also Tiffany*, 931 F.2d at 277-78; *Zuckerbraun v. Gen. Dynamics Corp.*, 755 F. Supp. 1134, 1142 (D. Conn. 1990).

As the Eleventh Circuit recently explained, when a contractor works under government-prescribed standards and government control that "thoroughly pervade" the contractor's work, "it would be impossible to make any determination regarding" the contractor's alleged misconduct without bringing the government's judgments into question. *Carmichael*, 2007 WL 1856537 at *8; *see id.* at *19 (negligent training claim barred when contractor personnel's training is "deeply bound up with military regulations"); *see also Bancoult*, 445 F.3d at 433, 436-37; *Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986) (when government and contractor work closely together "it is nearly impossible to contend that the contractor [acted negligently] without actively criticizing" the government's decisions). Given the State Department's pervasive direction to and control over USTC, this Court cannot decide the appropriateness of the ICs' use of defensive force without also deciding the appropriateness of the State Department procedures, methods, tactics, training, supervision, and control that underlie the governmental authorization to use defensive force—the very inquiry precluded by the political question doctrine.

Thus, the State Department-issued Tactical Operating Procedure ("TacSOP"), which was incorporated into the contract, defined in exhaustive detail the procedures to be followed by the ICs during the course of their missions protecting U.S. diplomatic personnel as they traveled to and from meetings throughout Baghdad. It prescribes the information to be covered in pre-mission briefs (TacSOP, App. A (App. 235)), duty descriptions for ICs and support staff (TacSOP, Ch. 1, pp. 6-8 (App. 132-34)), and communications procedures (TacSOP, Ch. 2 (App. 135)). Moreover, the TacSOP specifies, in more than 180 pages of detailed instructions, the activities to be conducted in each stage of a protective security operation, such as planning, stage time, movement, and post-mission or recovery for protective security teams, low visibility teams, advance teams, counter assault teams, tactical support teams, explosive detection dog handlers, defensive marksmen, and air support. TacSOP, Chs. 6-13 (App. 156-234).

The contract also contained detailed rules governing the use of force. The State Department's Deadly Force Policy, which was incorporated into the contract, provides that "deadly force is permissible when there is no safe alternative to using such force and without it the PSS [Protective Security Specialist] or others would face imminent and grave danger." *See* WPPS II Contract, § C, App. P (App. 73-76). Consistent with the State Department's Deadly Force Policy, the U.S. Ambassador to Iraq has issued a Mission Firearms Policy that states:

> Determining whether deadly force is necessary may involve instantaneous decisions that encompass many factors, such as the likelihood that the subject will use deadly force on the individual or others if such force is not used by the individual; the individual's knowledge of the capabilities of the threatening party or situation; the presence of other persons who may be at risk if force is not used; and the nature and the severity of the subject's conduct or the danger posed.

Mission Firearm Policy, U.S. Embassy, Baghdad, at 4 (App. 80). Of particular relevance here, the rules on the use of defensive force in that Policy state that "[s]hooting to disable a vehicle is authorized" and that "[i]n order to ensure safe separation from motorcade and suspected or likely

VBIED [vehicle-borne improvised explosive devices], shots may be fired into the vehicle's engine block as needed to prohibit suspected or likely VBIED from entering into an area where the protective detail would be exposed to a VBIED attack." *Id.* at 9 (App. 85). The Department of State rules state that after "feasible" warnings have been given, "if the vehicle continues to be a threat," a security detail "is authorized to fire into the windshield to stop the threat." *Id.*

Finally, the contract clearly delineated the State Department's control over each security mission. The State Department's Regional Security Officer ("RSO") was explicitly authorized to make tactical decisions regarding all aspects of each mission conducted by ICs. *See* Task Order 2006-06 RFP ¶ 6.1 (App. 105); *see also* TacSOP, Ch. 3, at 4 (App. 155) (granting the RSO initial mission approval authority and requiring RSO approval of changes to missions); *id.* Ch. 6, at 2 (App. 158) (Department authority to approve missions and assign personnel). The contract expressly placed all missions "under the daily oversight of the [State Department's] RSO [Regional Security Office] or the RSO's designee." WPPS II Contract ¶¶ 6.0-6.1 (App. 104); *see* WPPS II Contract § C, ¶ 1.5.3 (App. 5) (RSO exercises "on-site authority over the Contractor's [protective services] detail"). The contract mandated that each security mission "maintain constant communication with RTOC [Regional Tactical Operations Center, where the State Department RSO was stationed] and notify RTOC of any changes in status, route checkpoints, or other pertinent information." TacSOP, Ch. 3, at 4 (App. 155).

Such rules clearly reflect the type of discretionary, policy-laden judgments that balance safety, protection, and other factors (e.g., foreign relations and the accomplishment of the Department of State's overall diplomatic mission) against the inherent risks associated with authorizing the use of deadly force in defense of Department of State personnel and individuals that protect them. Had the Department of State desired a different tradeoff of civilian protection

against diplomatic safety, it would have selected different policies or a different quantum of oversight. The political question doctrine bars this court from second-guessing the Department of State's decisions. Such judgments are committed to the elected branches of our government.

Nor may the judiciary entertain tort claims based on any alleged failure of USTC or individual ICs to comply with the standards specified by the State Department. Otherwise, the political question doctrine would permit claims based on alleged noncompliance with the rules of engagement that are routinely issued to guide combat troops. Like all tactical judgments, decisions to use force during a protective security mission necessarily are "split-second decisions in circumstances that are tense, unpredictable, and rapidly evolving." Mission Firearms Policy, at 4 (App. 80); WPPS II Contract § C, App. P (App. 73-76). As such, the ICs' decisions to discharge their firearms while conducting security missions in a war zone on the streets of Baghdad are no more susceptible to judicial oversight than any other decision in a combat zone. *See Tozer v ?????*, 792 F.2d at 406; *Whitaker*, 444 F. Supp. 2d at 1282.

2. Any Judicial Inquiry Into The Hiring And Training Of ICs Would Necessarily Intrude On Decisions Committed To The Executive Branch.

Count 7 alleges that USTC negligently hired and trained the ICs involved in the incident. Compl. ¶¶ 106-108. Again, Plaintiffs' grievance is with the State Department's policy decisions.

The contract requires USTC to submit every resume it receives to the State Department for pre-screening. See WPPS II Contract, § C, ¶ 4.3.1 (App. 6). The contract gave the Department the authority to prevent any applicant from providing services as an IC under the contract. WPPS II Contract § C, App. F (App. 11-12). The Department gives personnel in key positions an even higher level of scrutiny. *See id.*, App. B (App. 9-10). The contract specified the screening procedures utilized by USTC—which include psychological, medical, and dental exams; background checks; drug testing; and monitoring for stability and performance during

training. *See* WPPS II Contract § C, ¶ 4.3.1.2 (App. 6-7); *id.* § C, App. F (App. 11-12); Task Order 2006-06, ¶ 6.6 (App. 107); Task Order Proposal 2006-0006, at 54 (App. 113).

Plaintiffs allege that the State Department's screening procedures failed to weed out applicants with criminal records and participants in human rights abuses. *See* Compl. ¶¶ 53-54. Whether the Department's procedures were adequate, and whether alternative or additional steps might have been wise, are classic political questions entrusted to the political branches. *See Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983).

Successful applicants were required to undergo an intensive training regimen specified in the contract, which devoted over 500 pages to detailed specifications of each element of the training program. The 164-hour training program was approved by the Department after a full, on-site demonstration. Many of the programs were created by the State Department; the remainder were developed by USTC in accordance with detailed specifications from the Department. *See* WPPS II Contract, § C, ¶ 4.3.2.1 (App. 13-15); *id.* App. G, §§ 5.1, 9 (App. 7); Task Order Proposal 2006-0006 ¶¶ 4.17, 4.24-4.26 (App. 123, 126-27).

Trainees received instruction in the State Department's Deadly Force Policy, the use of weapons, and the proper procedures for conducting motorcade operations. *See* WPPS II Contract § C, App. G, Attach. 5 (App. 16-18); Task Order 2006-06 Technical Proposal, ¶¶ 4.0-4.7, 4.12 (App. 114-119, 122). Trainees also were required to satisfy specific criteria set by the Department to be authorized to handle weapons. *See, e.g.*, WPPS II Contract, § C, App. G, Attach. 7-9 (App. 19-24); *id.* App. N (App. 25-72). The ICs training was required to be at least as rigorous as that provided to the Department's security personnel. WPPS II Contract, App. G, § 5.3.1 (App. 14); *id.* App. U (App. 93-101) (incorporating syllabus for the State Department's Field Firearms Officer course); Task Order 2006-06 Technical Proposal ¶ 2.10 (App. 110).

The contractual specifications for each element of the IC training program were incredibly detailed. As just one example, 20 pages of the TacSOP were devoted to specifying how ICs were to be instructed on appropriate responses to sixteen different types of attacks on a motorcade, including how to "engage" the threat, hold security, and conduct a proper counter-assault. *See* TacSOP, Ch. 9 (App. 181-200).[8] The contract specified that—following the training program—ICs were required to demonstrate knowledge and/or proficiency of, among other things: (a) the functions of fourteen separate persons operating within a protective detail; (b) the "terrorist attack cycle" and various terrorist groups; (c) at least six different types of protective formations; (d) proper formations and positioning during different types of events, such as arrivals, departures, speeches, press conferences, and motorcades; (e) how to respond to specific types of attacks on protectees; and (f) various survival skills and defensive tactics. *See* WPPS II Contract, § C, App. G, Attach. 5 (App. 16-18).

The Supreme Court has recognized that the training of military personnel falls to the Executive Branch, free of judicial oversight. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see also Tiffany*, 931 F.2d at 278. The same conclusion applies to the State Department's detailed policy determinations regarding the appropriate training standards for security personnel providing protective services in a war zone

V. THE NON-FEDERAL CLAIMS ARE NOT ACTIONABLE.

Plaintiffs do not identify a source of law for counts three through eight, which allege common-law torts. Non-federal claims brought in a district court are subject to the forum state's choice of law rules. *Limbach Co. LLC v. Zurich Am. Ins. Co.*, 396 F.3d 358, 361 (4th Cir. 2005).

[8] The provisions included in the Appendix are just some of those that demonstrate pervasive State Department control. The entire contract fills five 4-inch binders, which we will provide to the Court if requested.

Virginia's "settled rule" is that the law of the "place of the wrong" determines the substantive rights of the parties. *Jones v. R.S. Jones & Assocs., Inc.*, 431 S.E.2d 33, 34 (Va. 1993); *McMillan v. McMillan*, 253 S.E.2d 662, 663 (Va. 1979). For tort claims, the place of the wrong is "where the last event necessary to make an act liable for an alleged tort takes place." *Quillen v. Int'l Playtex, Inc.*, 789 F.2d 1041, 1044 (4th Cir. 1986) (internal quotation marks omitted). Plaintiffs sustained their alleged injuries in Iraq. Iraqi substantive law therefore governs their non-federal claims. Under Iraqi law the claims are not actionable.[9]

A. Defendants Are Immune From Suit Under Iraqi Law.

The Coalition Provisional Authority ("CPA") was established in 2003 to govern Iraq temporarily and restore security. *See* CPA Regulation No. 1. In June 2004, the Administrator of the CPA issued Order No. 17, which immunized contractors like USTC from "Iraqi legal process," defined as "any * * * legal proceedings in Iraqi courts or other Iraqi bodies, whether criminal, civil, or administrative." CPA Order No. 17 §§ 1(10), 4(3); *see also id.* § 2(1) (extending immunity to contractors, as well as their subcontractors and employees). Order 17 was in effect when the events giving rise to this lawsuit occurred and bars the non-federal claims

Virginia courts do not hesitate to follow choice of law rules that leave a plaintiff without a remedy. *See McMillan*, 253 S.E.2d at 663 (affirming the dismissal of a suit based on Tennessee's "common-law rule of interspousal immunity"); *see also Milton v. ITT Research Institute*, 138 F.3d 519, 522-53 (4th Cir. 1998) (choice of law ruling resulted in dismissal).

B. The Vicarious Liability Asserted Here Is Not Recognized Under Iraqi Law.

Even if Order 17 does not apply, Plaintiffs' claims arising from the September 16 incident (*i.e.*, counts three through six) are not actionable under Iraqi law. In these counts,

[9] Foreign law is determined at the motion to dismiss stage by an expert's declaration. Fed. R. Civ. P. 44.1; *see Haywin Textiles v. Int'l Fin. Bank*, 152 F. Supp. 2d 409, 411 (S.D.N.Y. 2001).

Plaintiffs seek to hold Defendants vicariously liable for the alleged actions of the ICs. Under the law of Iraq vicarious liability is not available in the circumstances alleged present here.[10]

Iraq has a civil law system, and the principles of legal interpretation under Iraqi law therefore differ significantly from those in common law jurisdictions like the United States. Declaration of Professor Haider Ala Hamoudi ("Hamoudi Decl."), Ex. B ¶¶ 7-8. The controlling sources of law in Iraq are the provisions of codes covering discrete legal areas (such as company law, personal status law, and civil law) and commentaries of learned experts. *Id.* ¶¶ 7-9.

The Iraqi Civil Code and its authoritative commentaries recognize a general principle of "wrongful action." A "wrongful action" is roughly equivalent to a common law tort and consists of three elements: fault, harm, and causation. Hamoudi Decl. ¶¶ 13-19. Vicarious liability rules are considerably more circumscribed than under the common law. Article 213 of the Civil Code limits vicarious liability to "the government, the municipalities, the foundations that provide public services, and every person who exploits one of the industrial or trade foundations." *Id.* ¶ 20. This provision does not cover "people *or companies* that exploit foundations other than trade and industrial foundations [or] individuals who do not form foundations but engage in industrial or trade activity or anything else." *Id.* (emphasis in original).

The terms "government" and "municipalities" in the Civil Code provision are self-explanatory. The term "foundations" refers to institutions that provide public services and are owned and operated by the Iraqi government. Hamoudi Decl. ¶ 21. The last category of entities—a "person who exploits a foundation of trade or industry"—applies to contractors that

[10] Some of the Complaint's non-federal counts mention "aid[ing] and abet[ting]" (Compl. ¶ 89), or "conspir[ing]" and other phrases that could be read as intimating secondary liability (Compl. ¶ 96). To the extent that any of these putative bases for liability are even available under the applicable law, Plaintiffs offer nothing more than "[t]hreadbare recitals" of legal conclusions, and their allegations are therefore insufficient. *Iqbal*, 129 S. Ct. at 1949.

work with the previously defined "foundations." *Id.* ¶ 22. To fall under this category, a private company must have a direct contractual relationship with the government of Iraq or any entity wholly or majority owned by the government. *Id.* ¶ 23.

As a consequence, vicarious liability in Iraq does not extend to privately owned companies that have no contractual relationship with the Iraqi government. Hamoudi Decl. ¶¶ 20, 23-27. None of the Defendants has a contractual relationship with the Iraqi government. And yet counts three through six of the complaint seek to hold Defendants vicariously liable for the alleged misconduct of the ICs. These counts should be dismissed.

C. Iraqi Law Does Not Recognize A Tort of Spoliation.

Spoliation of evidence is not a separately actionable tort under Iraqi law. Hamoudi Decl. ¶ 30. That is also the rule in Virginia. *See Bass v. E.I. Dupont De Nemours & Co.*, 28 F. App'x 201, 206 (4th Cir. 2002). Count eight should therefore be dismissed.

D. Punitive Damages Are Unavailable Under Iraqi Law.

Damages under Iraqi law are exclusively compensatory. Hamoudi Decl. ¶¶ 31-32. Iraqi law thus does not recognize punitive damages. *Id.* ¶ 31. For that reason, and because the ATS and RICO counts, even if not dismissed, cannot support an award of punitive damages (Points I.E, II.E *supra*), Plaintiffs' prayer for punitive damages (Compl. ¶ 143) must be dismissed.

VI. THE NEGLIGENT HIRING AND TRAINING CLAIMS ARE BARRED BY THE GOVERNMENT CONTRACTOR DEFENSE.

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Supreme Court held that a contractor could not be subject to state-law tort suits based on its performance of an equipment contract with the federal government if "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier

but not to the United States." *Id.* at 512. This defense applies to service contracts. *See, e.g.*, *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1335 (11th Cir. 2003); *Richland-Lexington Airport Dist. v. Atlas Prop., Inc.*, 854 F. Supp. 400, 422-23 (D.S.C. 1994). The negligent hiring and training claims (count seven) are barred by the government contractor defense ("GCD").

A. Detailed Contractual Provisions Defined The Standards For Hiring And Training The ICs.

The first element of the GCD is that the government approved reasonably precise procedures concerning the conduct underlying the plaintiff's claim. The contract between USTC and the government prescribed extraordinarily detailed procedures and standards for hiring and training ICs. *See* pp. 21-23 *supra*. The first element of the GCD is plainly satisfied.

B. Plaintiffs Do Not Allege That Defendants Failed To Comply With The Detailed Contractual Standards For Hiring And Training ICs.

The second element of the GCD is that the contractor's performance conformed to the standards set by the government. The complaint does not allege that USTC failed to comply with the contractual standards governing hiring.

The same is true of the allegations concerning training. Plaintiffs assert that Defendants "fail[ed] to train personnel properly." Compl. ¶ 107 (c). But this "legal conclusion[]" cast in the form of a factual allegation is not binding on the court (*Robinson v. Am. Honda Motor Co.*, 551 F.3d 218, 222 (4th Cir. 2009)), and the complaint alleges no facts indicating that the training of ICs did not comply with the contractual specifications—the issue that is relevant under the GCD.

C. There Are No Risks In Relying On The Contractual Hiring And Training Standards That Were Known To USTC But Not To The State Department.

Under the final element of the GCD, the contractor must have warned the government of any "dangers in reliance on the procedures that were known to [the contractor] but not to the United States." *Hudgens*, 328 F.3d at 1335. The level of detail of these standards and their

similarity to those for the Department's own security service employees render any such allegation wholly implausible. The hiring and training allegations in count seven are barred by the GCD and should therefore be dismissed.

VII. THE NEGLIGENT HIRING AND TRAINING CLAIMS ARE ALSO BARRED BY ABSOLUTE IMMUNITY.

In *Mangold v. Analytic Services*, 77 F.3d 1442 (4th Cir. 1996), the Fourth Circuit held that the "absolute immunity" applicable to "federal officials exercising discretion while acting within the scope of their employment" extends to government contractors. *Id.* at 1446-47. The court reasoned that, "[i]f absolute immunity protects a particular governmental function, no matter how many times or to what level that function is delegated, it is a small step to protect that function when delegated to private contractors." *Id.* at 1447-48; *see also TWI v. CACI Int'l, Inc.*, No. 1:07-cv-908, 2007 WL 3376661, at *3 (E.D. Va. Nov. 9, 2007). If USTC is not eligible for the GCD on the ground that it retained discretion, Defendants are immune under *Mangold*.

Mangold immunity requires that the contractor was performing "delegated actions in the government's stead" and that the conduct at issue was "within the scope of employment." *TWI*, 2007 WL 3376661, at *3. USTC was plainly performing delegated actions that would otherwise have been performed by the State Department, because the Department ordinarily provides its own diplomatic security services. The hiring and training of ICs, moreover, was clearly within the scope of employment under the contract. If the GCD does not bar Plaintiffs' hiring and training claims, therefore, absolute immunity does.

VIII. THE CLAIMS OF THE "ESTATE" PLAINTIFFS MUST BE DISMISSED.

Some of the Plaintiffs are "Estates" of individuals who allegedly died as a result of the September 16 incident. Compl. ¶¶ 4-7, 19-21, 23. The "capacity to sue or be sued" of an estate is determined by "the law of the state where the [district] court is located." Fed. R. Civ. P.

17(b)(3). To represent an estate under Virginia law, a person must "[q]ualif[y]"—as an executor, administrator, or personal representative—before a Virginia court. *See* Va. Code Ann. § 26-59(A) (non-resident representative); Va. Code Ann. §§ 64.1-116 to 64.1-122.2 (resident representative); *see also* Va. Code Ann. § 8.01-50(B) (wrongful death statute). Admission as a personal representative in another jurisdiction is insufficient (*see Harmon v. Sadjadi*, 639 S.E.2d 294, 301-02 (Va. 2007)), and failure to qualify in Virginia is a bar to suit (*see, e.g., Johnston Mem. Hosp. v. Bazemore*, 672 S.E.2d 858, 860 (Va. 2009)).

Moreover, the jurisdiction of probate here presumably is Iraq. The law of Iraq requires special proceedings to obtain capacity to act on behalf of an estate. Under the Iraqi code, the Personal Status Court must appoint an individual known as a *qassam shar'i*, who determines the identity of the deceased and the heirs, and issues a report determining how the estate should be divided. Hamoudi Decl. ¶ 37. Without the appointment and report of a *qassam shar'i*, no litigant may bring a civil suit on behalf of an estate. *Id.* ¶¶ 37-41.

The complaint does not allege that anyone has been appointed *qassam shar'i* in Iraq, much less that anyone has qualified to represent the estates in a Virginia court. Failure to obtain capacity to sue requires dismissal. *See Schieszler v. Ferrum College*, 236 F. Supp. 2d 602, 613 (W.D. Va. 2002); *see also Myelle v. American Cyanamid Co.*, 57 F.3d 411 (4th Cir. 1995).

IX. THE CLAIMS AGAINST DEFENDANT PRINCE MUST BE DISMISSED.

The complaint does not allege that Mr. Prince directly injured or harmed any Plaintiff. The only conceivable basis for Mr. Prince to remain in this suit, therefore, is if he could somehow be held vicariously liable. For such liability to attach, however, Plaintiffs would have to establish not only the liability of USTC—the entity that contracted with the State Department to provide diplomatic security in Iraq—but also that there was some basis for ignoring the separate corporate existence of USTC and disregarding the corporate forms of several other entities.

Plaintiffs have alleged no facts supporting this "extraordinary" remedy. *O'Hazza v. Executive Credit Corp.*, 431 S.E.2d 318, 320 (Va. 1993).

Plaintiffs' allegations concerning veil piercing are as follows: "Blackwater * * * is actually * * * wholly owned and personally controlled by [Mr. Prince] (Compl. ¶ 1); "Mr Prince, through [other Defendants], owns and controls the various Xe-Blackwater entities" (Compl. ¶ 33); and Mr Prince, "act[s] through a web of companies" that "were formed merely to reduce legal exposures and do not operate as individual and independent companies" (Compl. ¶ 38).

Assuming that Mr. Prince "own[s]" USTC, however, mere ownership obviously cannot suffice to pierce the corporate veil. That leaves only Plaintiffs' claim about supposed "control" by Mr. Prince and their assertion that "various" entities "were formed merely to reduce legal exposure[]." Compl. ¶ 38. Even before *Iqbal*, these assertions would have been insufficient "conclusory allegations or legal conclusions" *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). Plaintiffs allege no facts providing a plausible basis for applying the "extraordinary exception" to the rule of "immunity [for] stockholders." *Cheatle v. Rudd's Swimming Pool Supply Co.*, 360 S.E.2d 828, 831 (Va. 1987). Mr. Prince therefore must be dismissed as a Defendant. *See In re James River Coal Co.*, 360 B.R. 139, 173 (Bankr. E.D. Va. 2007); *Apace Comm'ns v. Burke*, 522 F. Supp. 2d 512, 520-22, 523 (W.D.N.Y. 2007).

X. CORPORATE DEFENDANTS OTHER THAN USTC MUST BE DISMISSED.

Plaintiffs also have named as Defendants a number of corporate entities other than USTC—the company that entered into the contract with the State Department. Compl. ¶¶ 34-41. But they do not allege any wrongful act by these entities or any plausible argument for disregarding the corporate form. These defendants accordingly should be dismissed.

CONCLUSION

For the foregoing reasons, the complaint should be dismissed.

Dated: July 20, 2009

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July 2009, I will electronically file the foregoing Memorandum with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Susan L. Burke
Burke O'Neil LLC
1000 Potomac Street
Washington, DC 20007
Telephone: (202) 445-1409
Facsimile: (202) 232-5513
sburke@burkeoneil.com

In addition, I hereby certify that on this 20th day of July 2009, I caused a copy of the foregoing Memorandum to be sent by hand delivery to the same party.

/s/
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Counsel for Defendants

Exhibit A

DECLARATION OF CHRISTOPHER BURGESS

I, Christopher Burgess, subject to penalty of perjury, state the following:

1. I am Managing Director of Greystone LTD ("Greystone"), a position I have held for four (4) years. I have principal responsibility for directing and overseeing all operations of Greystone. My office is located in Moyock, North Carolina and I live in Norfolk, Virginia.

2. I am submitting this Declaration to attest to Greystone's incorporation in Barbados.

3. Greystone was incorporated in Barbados in 2004 and complies with relevant Barbados law.

I have provided this Declaration for use in the lawsuits *Abtan et al. v. Prince et al.*, *Albazzaz et al. v. Prince et al.*, *Sa'adoon et al. v. Prince et al.*, *Hassoon et al. v. Prince et al.*, and *Rabea et al. v. Prince et al.*, all of which I understand are pending in federal court in the Eastern District of Virginia.

I declare under penalty of perjury that the foregoing are true and correct.

Executed on: 13 JULY 09

Signature: 

Print Name: Chris Burgess

Exhibit B

EXPERT REPORT OF HAIDER ALA HAMOUDI

ESTATE OF ALI HUSSAMALDEEN IBRAHIM ALBAZZAZ ET AL. v.
ERIK PRINCE ET. AL
CASE NO. 1:09-cv-00616-JCC-JFA

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

I. Background and Qualifications

1. My name is Haider Ala Hamoudi. My resume is attached as Attachment A hereto. I have been an Assistant Professor of Law at the University of Pittsburgh School of Law since 2007. For the past several years, I have assisted the Government of Iraq in matters of legislation and constitutional affairs, either through the Ministry of Foreign Affairs or through the United States Embassy in Baghdad. In so doing, I have reviewed Iraqi laws, opinions of the Federal Supreme Court of Iraq concerning Iraqi legislation and the Iraqi constitution, and met frequently with Iraqi legislators on amendments to the Iraqi constitution, and on Iraqi legislative priorities.

2. Before joining the faculty at the University of Pittsburgh School of Law, I was an Associate in Law at the Columbia University School of Law, beginning in 2005. From 2003-2005, I worked as a Project Manager for two years inside of Iraqi law schools on a USAID funded project organized by the International Human Rights Law Institute of DePaul University. The project focused on improving legal education within Iraq, and on introducing Iraqi law schools to more experience based forms of learning, such as clinics, moot courts and externships. I lectured widely within Iraqi law schools, held a number of joint seminars for Iraqi graduate law students with judges and law professors in the area of commercial law and contracts, and spent a great deal of time within courtrooms, or in lawyers' offices, often with students, analyzing and discussing both substantive law and legal strategies.

3. I have a JD and a JSD from the Columbia University School of Law. My primary research interests are Middle Eastern private law, with a primary focus on Iraq, and Islamic law, with a private law focus. Since 2005, I have written approximately eight research papers, a doctoral dissertation and a book, all on the subjects of Iraq, Iraqi law and/or Islamic law. My dissertation deals in significant part with the role that Islamic law plays in the Iraqi legal system, as well as the role of Islamic Law in the organization of commercial activity in Iraq. One of my papers,

entitled *Toward the Establishment of a Rule of Law Society: Introducing Clinical Legal Education into Iraqi Law Schools* and published in the Berkeley Journal of International Law, addresses clinical education in Iraq and has been widely cited by clinicians doing international work. Another, entitled *Money Laundering Amidst Mortars: Legislative Process and State Authority in Post-Invasion Iraq* and published in Transnational Law and Contemporary Problems, discusses the means by which law is enacted in post-Saddam Iraq, and some of the difficulties of legal legitimacy during the period of American rule. Two other papers discuss the intersection of Islamic law with Iraqi law, focusing on both Iraqi juristic thought as well as the substance of Iraqi law. These were published, respectively, in the Virginia Journal of International Law and the Berkeley Journal of Middle Eastern and Islamic Law. In addition to these publications, other papers have appeared in the American Journal of Comparative Law and Middle East Law and Governance, both of which are highly regarded, peer reviewed scholarly journals.

4. I have read and lectured extensively on Shi'ism, Iraqi law, Middle Eastern law, and Islamic law at universities and bar associations throughout the United States. I currently have a book contract with the University of Chicago Press for a book on legislative and constitutional processes in Iraq.

5. My parents are both from Iraq, and I grew up speaking Arabic in the home. I am entirely fluent in the language. As a result, all quotations herein are to Arabic texts, and the English translations are my own.

II. An Overview of the Iraqi Legal System

6. The Iraqi legal system is a civil law system. The main sources of law within the system are therefore codes rather than statutes or judicial precedents. Some Codes, such as the Company

Code or the Commercial Code, have large numbers of provisions transplanted from Continental European, and largely French, sources. In other codes, such as the Personal Status Code (dealing with the law of the family as well as wills and inheritance), Islamic law is the dominant source of the substantive rules. The Civil Code, which is the relevant law for our purposes, is an amalgam of French law and Islamic law. Its drafter, Abdul Razzaq al Sanhuri, was by far the most renowned Arab legal scholar of the previous century. He had earlier drafted the largely similar Egyptian Civil Code and later drafted codes for Libya, Kuwait and Jordan (though the latter two were only completed after his death). The template of the Sanhuri Code has been transplanted and is now the dominant one throughout the Middle East.

7. Because Iraq is a civilian system, and its law takes the form of codes, the means used to interpret that law differ considerably from common law methods of reasoning and interpretation. Whereas a statute in a common law system is effectively layered on top of the common law, a code preempts entirely the area of law that it covers, supplanting any previously existing rules with its provisions. This is obvious from the first provision of the Code, which reads that "the provisions of this legislation shall apply to all matters encompassed by it, in letter or in spirit." (Article 1(a)).

8. It is in the area of statutory interpretation, however, where the distinction between common law and civilian law diverge most dramatically. First of all, there is no notion of binding judicial precedent, and courts generally do not cite other courts in reaching their determinations. Though cases may be cited as persuasive authority, most law school students have never seen a single case when they graduate from law school. Instead, it is the commentaries of legal experts in the law which are the most commonly cited sources of law in the Iraqi system and in practice the most authoritative.

9. Among the commentators, there is the tremendous respect afforded the person of Sanhuri himself. Given his role as drafter of not only the Iraqi Civil Code, but also the Egyptian, the Libyan, the Jordanian and the Kuwaiti codes, his authority within the Arab world is unparalleled. The result is that Sanhuri's multivolume commentary of the Egyptian Civil Code, *Al-Wasit*, is widely available throughout the Arab world and is a commonly used reference source to which all have access. Sanhuri has a second, smaller work (referenced herein as the "Sanhuri summary") that focuses on the nature of obligation as well that is commonly referenced.

10. That said, Sanhuri's commentary focuses exclusively on the Egyptian Civil Code, which does diverge from that of Iraq in many respects. To address this, lawyers consult commentaries specific to the Iraqi Civil Code. By far the most well known and most official, relating specifically to the theory of obligation (under which wrongful actions, which are roughly analogous to tort in the common law system, fall), is *Al-Wajiz*, by Dr. Abdul Majid Hakim et al. It was first published by the Ministry of Higher Education and Research in 1980 and is still widely used and available in Iraq. Dr. Hakim has another work entitled *Masadir Al-Iltizam* [The Sources of Obligation] that is also frequently referenced. The most recent version of that book was published in 2007. Another publication widely available in northern Iraq is a work by Dr. Mundher Fadhil, also called *Al-Wasit*, comparing Islamic law and non-Arab legal systems to the Iraqi Civil Code on any number of topics, including the theory of obligation.

11. In keeping with civil law interpretive traditions, I have referred primarily, in addition to the text of the Code, to *Al-Wajiz*, *Masadir al-Iltizam*, Sanhuri and Fadhil.

12. I have also consulted numerous other Iraqi legal codes and commentaries, including without limitation:

(i) the Civil Evidence Code;

(ii) a commentary to the Civil Evidence Code written by Asmat Abdul Majid Bakr, a legal advisor to the Iraqi Conseil d'Etat, a body which hears administrative cases and also provides counsel on bills before the Iraqi legislature;

(iii) the Civil Procedure Code;

(iv) a popular commentary to the Civil Procedure Code written by Abdul Rahman Al-A'lam (referred to herein as the "Civil Procedure Commentary"); and

(v) the Personal Status Code.

III. Analysis

A. Iraqi Tort Law

1. The Nature of "Obligation"

13. Within the civilian system, contract and tort are combined under a single doctrine known as "obligation," meaning as a general matter the duty of an individual to another, either as specified in contract or as imposed by law. (Sanhuri 1:847; Fadhil 260). Therefore, in the Code and often the commentaries, reference is made to "obligations." "Non-contractual obligation," which is intended to cover the more specific area of what are also called "wrongful actions" (i.e. tort), appears with some frequency as well. In this report, in an attempt to remain as close as possible to the statutory text and the authorities in question, I use the civil law terminology when quoting or paraphrasing the relevant authorities.

2. General Principles of Tort

14. Unlike American law, Iraqi law does not identify specific torts, but rather has a general set of provisions that govern broadly what are known as "wrongful actions." This is clear from the text of the Code itself. Article 202 indicates that harmful acts to the person, such as killing, wounding, assault or any other type of infliction of injury, entitle the victim to compensation.

Article 203 indicates that in the case of killing, or in the case of death by reason of wounds or any other harmful act, the perpetrator is responsible for compensating those who "have become impoverished and have been deprived of sustenance because of the killing or death." Article 204 is a broader provision, indicating that any "transgression that results in the injury of another beyond that which was mentioned in the previous Articles is covered by compensation."

There are three elements needed for an action to be considered wrongful. First, there must be fault. Second, there must be harm. Finally, there must be a causal connection between the fault and the harm. (Sanhuri 1:878; *Al-Wajiz* 2:212). Therefore, within Iraq, and with certain limitations discussed below, a plaintiff does not as a general matter allege any number of individual torts, but rather alleges that there has been fault, recognizable harm, and a causal connection between the two.

a. Fault

15. Fault is perhaps the easiest of the elements to discuss. There are particular types of fault that to some extent resemble individual torts but that are not relevant here. These are specifically the squandering of another's property (Article 196), the usurpation of another's property (Article 192) and misuse of a legal right (Article 7), the latter referring to situations such as the construction of a wall on one's property in order to deny his neighbors light and air. (*Al-Wajiz* 1:231)

16. Beyond this, fault falls into two categories, which are the intention to cause harm, and the negligent causing of harm. On the issue of intention, Sanhuri describes intent as existing when "an individual intends harm to another," and uses the civilian (French) term, *delit civil*, to describe it. (Sanhuri 1:882). *Al-Wajiz* also delineates intention and negligence as the two bases of fault as a general matter and then uses cursory language to describe intent. (*Al Wajiz* 1:215).

Negligence is also discussed in both accounts, and the standard is similar to that in the United States. Sanhuri indicates that deviations on the negligence standard must be judged as against an ordinary person, specifically as follows:

> The ordinary person is one who represents the masses. And so he is neither lacking in intelligence nor extreme in vigilance so that he is among the best, nor is he limited in his wit or lacking in care so that he descends to the dregs. . . . And he is the one whom Roman Law recognized and called him the reasonable head of the family. (Sanhuri 1:884-885)

Al-Wajiz describes the standard in similar fashion. (*Al-Wajiz* 1:216).

b. Harm

17. Harm is composed of two types. The first is material harm, where what must be shown are, first, that there was a loss of a financial interest on the part of the victim, and second, that the harm was certain and not speculative. (Civil Code Article 207; Sanhuri 1: 970-80; *Al-Wajiz* 1:212-13). The second type of harm is moral harm.

c. Causation

18. Finally, there is the issue of causation. Sanhuri divides this area into "division into many causes" and "the chain of results" in a manner that is similar to "but for" causation and proximate cause in the United States. (Sanhuri 1: 1023-1038). *Al-Wajiz* largely mimics the discussion in a more cursory form. (*Al-Wajiz* 1:239-243).

19. Thus, while much of the discussion of tort is recognizable to an American legal professional, the approach is not. More important than the actual elements, however, there are specific limitations in Iraqi law that are directly relevant in this case.

B. Vicarious Liability

20. Vicarious liability does not extend under Iraqi law to privately owned companies which do not have a direct contractual relationship with the government of Iraq or any entity wholly or

majority owned by it. Article 213 of the Iraqi Civil Code specifically limits the application of vicarious liability to "the government, the municipalities, the foundations that provide public services, and every person who exploits one of the industrial or trade foundations." *Al-Wajiz* explains as follows:

> And the requirements of the Iraqi provision do not provide for this kind of liability on people *or companies* that exploit foundations other than trade and industrial foundations, or on individuals who do not form foundations but engage in industrial or trade activity or anything else. (*Al-Wajiz* 2:259) (emphasis mine).

21. "Foundations" are institutions providing public services owned or operated by the Iraqi government. Foundations would thus include Iraqi government entities, such as universities and hospitals, as well as the government owned (wholly or by majority) companies that historically controlled the vast portion of the trade and industrial sector.

22. The Code language, "{e}very person who exploits a foundation of trade or industry," refers to contractors that work with such foundations, such as for example, a contractor that works pursuant to a contract provided by the Iraqi government owned and operated Company for Contracts and Projects for Water and Sewage. Most contractors in Iraq would historically be selected and paid by an Iraqi government-owned company, meaning that they would be subject to principles of vicarious liability.

23. However, a contractor is not a person "who exploits a foundation of trade or industry" unless that contractor has a direct contractual relationship with the government of Iraq or entities owned by it, as explained above.

24. There are several reasons that Article 213 must be so read. First of all, the focus of Article 213 relates expressly to public organizations—governments, municipalities and institutions performing a public service. Moreover, in the context of Iraq, the heavily socialist tilt of its last few regimes has meant that huge sectors of the economy fell within the public sector, which

included wholly owned government institutions and companies, as well as institutions in the "mixed sector," where the government owned a majority of shares. Hospitals, universities, and nearly all large industries (ranging from cement companies to textile manufacturers to the producers of refrigerators, freezers and even disposable plates and cutlery) fell largely within one of these two categories. The private sector was miniscule by comparison.

25. This conclusion that Article 213 does not cover a private contractor unless there is a direct contractual relationship with the Iraqi government is also supported by *Al Wajiz.* That authoritative commentary indicates that Article 213 would not generally extend the principles of vicarious liability to "maids, secretaries, cooks, and drivers" (*Al-Wajiz* 1:260), nearly all of whom are employed in companies in Iraq. *Al-Wajiz* recognizes that the Iraqi rules on vicarious liability are narrow and notes disappointment over this. (*Al-Wajiz* 260).

26. Other civil code provisions demonstrate the narrowness of vicarious liability principles in Iraqi law, as *Al-Wajiz* and Fadhil both note. For example, Article 212(a) of the Iraqi Civil Code indicates that a father, and then a grandfather, is responsible for the acts of a child in their custody, but extends no similar protection, as Egypt does, to others within a person's custody, such as an insane person, meaning that the acts of an insane person who kills another while in the legal custody of an guardian cannot be attributed to the guardian. (*Al-Wajiz* 1:254; Egyptian Civil Code Art. 153; Fadhil 354-355).

27. Finally, it should be noted that Article 213 is consistent with Islamic Law, which has no vicarious liability. As Sanhuri has pointed out, he drafted the provisions of the Iraqi Civil Code to more closely reflect the substantive provisions of Islamic Law than those of the Egyptian Civil Code, which he had earlier drafted.

C. Statute of Limitations

28. Article 232 establishes a broad statute of limitations, applicable to all wrongful acts, of three years from the date that the victim of the wrongful act was aware of the harm arising from the wrongful act. (*See also Al Wajiz* 1:244). Article 429 of the Code also contains a broad statute of limitations for other claims of a violation of an obligation unless otherwise limited in the Code.

29. Articles 430 and 431 contain an array of more limited statutes of limitations for particular actions. For example, a salary claim must be made within five years under Section 430(1). Under Section 431 (1)(b), the claim of a hotel or a restaurant for an unpaid bill must be made within a year. Section 431(1)(c) creates a one year limitation for a servant or laborer's claim for wages, paid daily or otherwise. Though none of these exceptions is applicable here, they help to demonstrate the broad nature of the statutes of limitation set forth in Articles 232 and 429.

D. Spoliation of Evidence

30. Neither the Civil Code nor the commentaries make any reference to the notion of spoliation of evidence, or anything related to it, as a wrongful act. It is therefore not what would be under American law a separately actionable tort. The only direct reference in the legal codes appears in Article 248 of the Penal Code, which relates to concealing evidence of a crime but does not give rise to any claim for damages.

E. Punitive Damages

31. It is abundantly clear that Iraqi law does not recognize punitive damages. There is no provision in the Code authorizing them, and in the civilian system, in the absence of a provision, the court has no authorization. Article 207, which deals specifically with the question of awarding damages, reads as follows:

> 1. The court shall measure the compensation in all instances to the amount that represents the harm suffered by the victim and what he has lost in earnings, provided that this is a natural result of the wrongful act.
>
> 2. Taken into account in the measurement is the prevention from the benefits of things and may include guarantees of wages.

32. *Al-Wajiz* makes clear that compensation is for harm suffered, both material and moral. (*Al-Wajiz* 2:57). Sanhuri likewise indicates clearly that "compensation in any form—compensation for a specific matter or as replacement, in cash or in kind, compensation in installments or in capital—is measured in accordance with the direct harm that occurred by virtue of the fault." (Sanhuri 1:1097). Sanhuri and *Al Wajiz* also confirm the absence of punitive damages by describing the distinction between civil and criminal liability in a manner that makes unmistakably clear that the purpose of a civil trial cannot involve punishment or deterrence in any form. Relevant portions of each commentary are quoted below:

> Criminal responsibility is built on harm to the community, and the foundation of civil responsibility is harm to an individual. And on the basis of this major difference between the two responsibilities there are the following distinctions:
>
> (1) The recompense for criminal responsibility is punishment in the name of the community, and the recompense for civil responsibility is compensation for the individual that restores his wealth;
>
> (2) Punishment as criminal recompense is to rebuke the criminal and to deter others but the civil recompense aims to end the harm and ease its effects on the victim. . . . (*Al-Wajiz* 1:201).
>
> ---
>
> Criminal responsibility is built on the principle that there is a harm that has affected the community. But civil responsibility is built on harm that affects the individual. And that result leads to the following: The recompense for criminal responsibility is punishment, and the recompense for civil responsibility is compensation. . . . (Sanhuri 1:843)

III. Claims Made on Behalf of an Estate

33. Under Iraqi law, heirs to an estate may not initiate a suit on behalf of the estate in the absence of a determination by an official known as a *qassam shar'i* that delineates who the appropriate heirs are, and what their inheritance is.

34. According to *Al Wajiz*, heirs may make a claim on behalf of an estate, and they then divide the estate, according to the religious rules of inheritance. (*Al Wajiz* 1:249). The Civil Procedure Code supports this conclusion, indicating in Article 5 that an heir may be a litigant against or on behalf of a deceased. However, there are procedural steps, which derive ultimately from Islamic law, that must be undertaken in order for this provision to be realized.

35. Under Islamic law, which governs matters of inheritance in Iraq and indeed in the vast majority of the Muslim world, a person may only bequeath one third of his estate (Article 70, Personal Status Code). The vast majority of the estate is divided according to set rules of inheritance, set forth, in the case of Iraq, in the Personal Status Code. The precise rules of division, and who is entitled to inherit at all, depend entirely on the existence, and number, of living children, grandchildren, spouses, parents and other relatives. The rules are complex and entirely mandatory.

36. Given that an heir must only be entitled to recover from the estate his portion thereof, it is impossible for a court to divide the estate of an individual among his heirs unless one knows precisely who all of the blood relatives are, so that the Islamic apportionment can be made.

37. This problem is resolved is through the appointment of an official by the Personal Status Court known as a *qassam shar'i.* This official will determine who the deceased is, the identity of the living heirs, and make a determination by way of a report on how the estate is supposed to be divided between them.

38. According to a 1962 decision of the Court of Cassation of Iraq, this is a necessary step before a litigant can initiate a civil suit. Otherwise the court will not even know if the litigant is an heir entitled to inherit at all, and if the litigant is not, then he or she would have no standing to initiate the suit in the first place.

39. In this 1962 decision, Order 3106H, dated December 15, 1962 (and copied in the Civil Procedure Commentary, 1:86), the Court declared as follows:

> The trial court issued its appealed ruling before it *ascertained the soundness of the litigants* . . . through the appointment and the presentation of a *qassam shar'i* to delimit the inheritance . . . and this was a deficiency which caused the ruling to be unsound. Therefore [the court] has decided to vacate [the ruling] on this ground and to return the papers of the suit to the court to address the aforementioned deficiency and then to issue a ruling according to the law. . . . (Emphasis mine).

40. The language of the Court is precise and clear. That language, from the highest court of Iraq, has been repeated in a commonly referenced Civil Procedure Commentary. It indicates that in the absence of the determination of the *qassam shar'i*, there is no way to know that the litigant intending to sue on behalf of the estate is even an heir entitled to a portion of the estate. If he or she is not, then their standing to sue under Article 5 of the Civil Procedure Code evaporates, and they no longer can act as a litigant in the case.

41. The *qassam shar'i* is therefore a necessary step to initiate a suit on behalf of an estate under Iraqi law.

IV, Choice of Law

42. Article 27(a) of the Iraqi Civil Code sets forth the choice of law standard for "non-contractual obligations" (i.e. torts). This indicates that the governing law for Civil Code purposes is "the law of the state where the facts that gave rise to the obligation occurred." There

is nothing in the commentaries that addresses this, presumably because it seems relatively clear in the vast majority of cases.

Conclusions

43. On the basis of the foregoing, I conclude the following:

- Vicarious liability does not extend under Iraqi law to privately owned companies which do not have a direct contractual relationship with the government of Iraq or any entity wholly or majority owned by it.
- Article 232 establishes a broad statute of limitations, applicable to all wrongful acts, of three years from the date that the victim of the wrongful act of the harm done to him, and in no event longer than fifteen years from the date that the wrongful act occurred.
- Neither the Civil Code nor the commentaries make any reference to the notion of spoliation of evidence, or anything related to it, as a wrongful act. It is therefore not what in the US would be a separately actionable tort.
- Under Iraqi law, heirs to an estate may not initiate a suit on behalf of the estate in the absence of a determination by an official known as a *qassam shar'i* that delineates who the appropriate heirs are, and what their inheritance is.
- Article 27(a) of the Iraqi Civil Code sets forth the choice of law standard for "non-contractual obligations" (i.e. torts). It indicates that the governing law for Civil Code purposes is "the law of the state where the facts that gave rise to the obligation occurred."

Respectfully Submitted,

Haider Ala Hamoudi
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University of Pittsburgh
School of Law

Date: July 13, 2009

ATTACHMENT A

Dr. Haider Ala Hamoudi

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Publications

Books, Dissertations

- HOWLING IN MESOPOTAMIA (Beaufort Books 2008)
- TOWARD A LEGAL UNDERSTANDING OF THE SHARI'A (Columbia University Dissertation)

Law Review Articles

- *Dream Palaces of Law: Western Constructions of the Muslim Legal World,* 32 HAST. INT. & COMP. L. REV. __(2009) (forthcoming).
- *Between Symbiosis and Schizophrenia: The Rights of Iraqi Refugees under Iraqi Law,* RUTGERS LAW RECORD __ (2009) (forthcoming)
- *Book Review: Orientalism and The Fall and The Rise of the Islamic State* 2 MID. E. L. & GOV. __ (2009) (forthcoming)
- *The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law,* 56 AM. J. COMP. L. 423 (2008)
- *You Say You Want a Revolution: Deviationist Doctrine, Interpretive Communities and the Origins of Islamic Finance,* 48 VA. J. INT. L. 249 (2008)
- *Baghdad Booksellers, Basra Carpet Merchants, and the Law of God and Man: Legal Pluralism and the Contemporary Muslim Experience,* 1 BERK. J. ISL. & MID. EAST. L. 83 (2008)
- *Muhammad's Social Justice or Muslim Cant?: Langdellianism and the Failures of Islamic Finance,* 40 CORNELL INT. L. REV. 89 (2007)
- *Money Laundering Amidst Mortars: Legislative Process and State Authority in Post-Invasion Iraq,* 16 TRANS. L. & CONTEMP. PROB. 523 (2007).
- *Jurisprudential Schizophrenia: Form and Function in Islamic Finance,* 7 CHI. J. INT. L. 605 (2006)
- *Toward the Establishment of a Rule of Law Society: Introducing Clinical Legal Education into Iraqi Law Schools,* 23 BERKELEY J. INT. L. 113 (2005)

Popular Media Articles

- *Legal Lip Service* (Forbes.com, April 21, 2008)
- *The Economic Rights of Displaced Iraqis, under Iraqi Law* (ILSA Quarterly 17:1, March 2008)

Presentations

Academic, Legal

- *The Death of Islamic Law,* Duke University Law School (March 2, 2009)
- *Rhetoric and Reality in Islamic Finance,* Fordham University School of Law (February 26, 2009)
- *Rights of Iraqi Refugees under Domestic Iraqi Law,* Rutgers University (Newark) School of Law (October 24, 2008)
- *Dream Palaces of Law: Western Constructions of the Muslim Legal World,* Annual Conference of the American Society of Comparative Law (October 3, 2008)
- *Commerce among Merchants in Shi'i Iraq,* University of Cincinnati School of Law (April 25, 2008)
- *A Comparison of Shi'i and Sunni Approaches to Religious Authority in Contemporary Islam,* Univ. of Pittsburgh Dept. of Religious Studies (Feb. 13, 2008)
- *Fatawa in Shi'i Islam,* New York City Bar Association Special Event (January 22, 2008)
- *Islamic Finance, A View from the Mosque,* Asian Affairs Section, New York City Bar Association (January 15, 2008)
- *Liberalism and Shi'i Islam,* Yale University (December 7, 2007)
- *Shi'ism and Sunnism in Contemporary Iraq,* American Association of Law Schools (January 5, 2007)
- *State Authority in Post Invasion Iraq,* George Washington Univ. Law School (October 3, 2006)

Other

- *The Tragedy of Iraq's Refugee Crisis,* Chicago Humanities Festival (November 6, 2008)
- *Iraq Between the Personal and the Political,* San Jose Book Expo (October 25, 2008)

Significant General Media Interviews

- Television Interview with Bridges TV (largest Muslim American network) concerning Iraq (April 24, 2008)
- Interview with Voice of America concerning referendum in Kirkuk (April 16, 2008)
- Interview with Leonard Lopate (WNYC Radio) concerning experiences in Iraq (April 14, 2008)
- Interview on Open Line with Fred Andrle concerning experiences in Iraq (May 8, 2008)
- Interview with *Columbus Dispatch* concerning experiences in Iraq (April 13, 2008)
- Interview with *Pittsburgh Post Gazette* concerning experiences in Iraq (Feb. 27, 2008)

Professional Experience

June 2007—Present ***U. Pitt. School Of Law*** ***Pittsburgh***

Assistant Professor of Law

Subjects: Contracts, Commercial Transactions, Islamic Law
Areas of Research: Transnational Commercial Law, Middle Eastern Commercial Law, Islamic Law and Finance
Law School Committees: Steering (2008-09); Colloquium (2008-09); Appointments (2007-08)
AALS Committees: Islamic Law (2008-09)
Coach of Jessup International Moot Court Team (2009)

July 2005—June 2007 ***Columbia Law School*** ***New York City***

Associate in Law

Dec. 2003—July 2005 ***DePaul University*** ***Baghdad, Iraq***

Project Manager

Manager of a USAID funded project to reform legal education in Iraq. Worked closely with Iraqi university professors, deans and students as well as prominent members of the practicing Iraqi bar and judiciary on issues related to the implementation of program. Lectured extensively on American legal concepts and American legal education. Coached first two Iraqi teams to participate in the Jessup International Moot Court Competition in Washington.

Dec. 2003-June 2004 ***Iraq Governing Council*** ***Baghdad, Iraq***

Legal Advisor, Finance Committee

Engaged in legal review of all commercial and financial legislation presented to the Iraqi Governing Council for its approval, including current laws on money laundering, copyright, securities and bankruptcy.

Dec. 1997-May 2003 ***Debevoise & Plimpton*** ***Hong Kong, East Java and New York***

Associate

Sept. 1996—Sept. 1997 ***Southern District of New York*** ***New York***

Law Clerk to Hon. Constance Baker Motley.

Other Relevant Experience

Academic

Summer 2008

Assisted International Human Rights Law Institute in collection and presentation of data relating to human rights violations committed by the Saddam regime in southern Iraq.

April 2008

Advised, Escorted and Arranged for Participation of Iraqi Team in 2008 Jessup International Moot Court Competition.

Other

Summer 2008-Current

Expert witness for Guantanamo Bay detainee on issues concerning Iraqi and Islamic law and culture.

December 2007—June 2008

Expert witness concerning issues of Islamic inheritance law for matter pending in Pennsylvania probate courts.

Education

2008 Columbia Law School New York
Doctor of Juridicial Science (J.S.D.)

Dissertation, entitled *Toward a Modern Understanding of the Sharia,* articulates a modern, legal approach to Islamic Law, with a particular focus on the legal context of Shi'i Iraq.

1993-1996 Columbia Law School New York
Juris Doctor

- Stone Scholar (top 15% of class) for all three years.
- Managing Editor, *Journal of Transnational Law.*
- Teaching Assistant to Former Dean of Law School, David Leebron.
- Research Assistant to Professor Harold Edgar on legal and ethical consequences of various biomedical advances.

1989-1993 Massachusetts Institute of Technology Cambridge, MA
Bachelor of Science, Physics w. Electrical Engineering Minor
Bachelor of Science, Humanities (Islamic/Near Eastern Studies)

- Member of Sigma Pi Sigma, Physics Honor Society.
- Selected as Burchard Scholar for Excellence in the Humanities and Social Sciences for bachelor's thesis relating to the structural development of Iraqi political parties in the pre-Ba'ath era.

Other

- Fluent in Arabic, proficient in German, Bahasa Indonesia.
- Admitted to practice in New York State and the Southern District of New York.

Appendix

DECLARATION OF FRED ROITZ

I, Fred Roitz, declare under the penalty of perjury that the following is true and correct:

1. I am the Secretary for U.S. Training Center, Inc. ("USTC') and an Executive Vice President for Xe Services LLC. Over the last four years I had principal responsibility for the administration of USTC's government contracts.

2. I submit this declaration for the purpose of authenticating exhibits that are being submitted in the lawsuits *Abtan et al. v. Prince et al.*; *Albazzaz et al. v. Prince et al.*; *Sa'adoon et al. v. Prince et al.*; *Hassoon et al. v. Prince et al.*; and *Rabea et al. v. Prince et al.*, all of which I understand are pending in federal court in the Eastern District of Virginia.. I have personal knowledge of the matters set forth herein.

3. Exhibits 1-3 are true and correct copies of excerpts of documents that governed the relationship between the State Department and USTC with respect to USTC's work in Iraq, as follows:

a. Exhibit 1 contains excerpts from the WPPS II Base Contract, which has an award date of June 6, 2005.

b. Exhibit 2 contains excerpts from the WPPS II Contract Task Order Request, dated February 8, 2006.

c. Exhibit 3 contains excerpts from the Tactical Standard Operating Procedure, dated October 2006.

Executed on July 13, 2009 in Moyock, NC.

Fred Roitz

Appendix provisionally filed under seal