

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
- Alexandria Division -**

**IN RE: BLACKWATER ALIEN TORT  
CLAIMS ACT LITIGATION**

**Case No. 1:09-cv-615  
Case No. 1:09-cv-616  
Case No. 1:09-cv-617  
Case No. 1:09-cv-618  
Case No. 1:09-cv-645  
(consolidated for pretrial purposes) (TSE/IDD)**

**DEFENDANTS' REPLY MEMORANDUM  
IN SUPPORT OF THEIR MOTIONS TO DISMISS**

Peter H. White (Va. Bar. No. 32310)  
pwhite@mayerbrown.com  
Andrew J. Pincus (*pro hac vice*)  
Michael E. Lackey, Jr. (*pro hac vice*)  
Mayer Brown LLP  
1909 K Street, N.W.  
Washington, DC 20006-1101  
Telephone: (202) 263-3000  
Facsimile: (202) 263-3300  
*Counsel for Defendants*

August 17, 2009

TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	iv
I. THE ALIEN TORT STATUTE CLAIM MUST BE DISMISSED .....	1
A. Customary International Law Does Not Reach The Private, Non-State Conduct Alleged In The Complaints .....	2
B. Plaintiffs Do Not Allege Any Conduct That, If Proven, Would Subject A Defendant To Primary Liability.....	4
C. There Is No International Law Norm Of Secondary Liability That Reaches Defendants .....	5
1. There Is A Clear Consensus Against Acceptance Of Corporate Liability As An International Law Norm.....	6
2. Plaintiffs Have Not Identified A Viable International Law Norm Of Secondary Liability.....	7
D. None Of The Underlying Wrongdoing Alleged Violates A Norm Of The Law Of Nations Cognizable Under The ATS.....	8
1. The “War Crimes” Allegations Do Not State A Claim .....	8
2. The “Summary Execution” Allegations Do Not State A Claim .....	9
E. Punitive Damages Are Not Available Under The ATS .....	11
II. THE RICO CLAIMS MUST BE DISMISSED.....	13
A. The Claims Against Mr. Prince Must Be Dismissed Because The Complaints Do Not Allege That Mr. Prince Committed The Only Predicate Acts That Plaintiffs Have Standing To Assert .....	13
1. A RICO Claim Must Allege Facts Establishing That The Defendant Personally Committed Every Element Of Each Predicate Offense .....	14
2. Plaintiffs Do Not Allege That Mr. Prince Personally Committed The Predicate Offenses .....	14
3. Even If The New Allegations In Plaintiffs’ Opposition Could Be Considered, They Would Not Cure The Flaws In Plaintiffs’ Complaints .....	16
4. The Alleged Murders Are Not Chargeable Under State Law Because They Occurred In Iraq .....	18
B. No Conduct Or Effects Occurred In The United States That Would Warrant An Extraterritorial Application Of RICO .....	19

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
C. The Complaints Fail To Allege That Mr. Prince Acquired An Interest In Or Controlled The Affairs Of A RICO Enterprise Through A Pattern Of Racketeering Activity. ....	20
D. Plaintiffs’ Claims For Punitive Damages And Injunctive Relief, As Well As The Time-Barred Claim of Plaintiff Al-Rubae, Must Be Dismissed .....	21
III. THE INSUFFICIENCY OF PLAINTIFFS’ FEDERAL CLAIMS WARRANTS DISMISSAL OF THE REMAINING, STATE LAW CLAIMS .....	22
IV. THE POLITICAL QUESTION DOCTRINE BARS PLAINTIFFS’ CLAIMS.....	23
A. Plaintiffs’ Negligent Hiring And Training Claims Raise Non-Justiciable Political Questions .....	24
B. Plaintiffs’ Remaining Tort Claims Also Raise Non-Justiciable Political Questions.....	25
V. IRAQI LAW BARS PLAINTIFFS’ NON-FEDERAL CLAIMS .....	28
A. Virginia’s Choice-Of-Law Rules Dictate That Iraqi Law Applies To The Non-Federal Claims .....	28
B. Plaintiffs Erroneously Interpret CPA Order No. 17, Under Which USTC Is Immune From Suit .....	30
C. Iraqi Law Does Not Recognize Vicarious Liability .....	30
D. Iraqi Law Does Not Recognize The Tort Of Spoliation.....	34
E. Iraqi Law Does Not Permit Punitive Damages.....	34
F. Even If Virginia Law Governs, The Non-Federal Claims In <i>Sa’adoon</i> Should Be Dismissed .....	35
VI. THE NEGLIGENT HIRING AND SUPERVISION CLAIMS ARE BARRED FOR ADDITIONAL REASONS.....	35
A. The Government Contractor Defense Bars These Claims.....	35
B. The Doctrine Of Absolute Immunity Bars These Claims.....	36
VII. CERTAIN PLAINTIFFS’ CLAIMS MUST BE DISMISSED .....	39
A. The Claims Of The Estate Plaintiffs Must Be Dismissed.....	39
B. Other Plaintiffs’ Claims Are Time-Barred .....	40
1. Virginia’s Two-Year Statute Of Limitations Applies.....	40
2. Plaintiff Saed Is Not Entitled To Equitable Tolling.....	41
VIII. CERTAIN DEFENDANTS MUST BE DISMISSED.....	43
A. All Claims Against Mr. Prince Must Be Dismissed .....	43

**TABLE OF CONTENTS**

(continued)

	<b>Page</b>
B. Corporate Defendants Other Than USTC Must Be Dismissed .....	44
CONCLUSION.....	44

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases:</b>	
<i>Aktepe v. USA</i> , 105 F.3d 1400 (11th Cir. 1997) .....	26
<i>Al Shimari v. CACI Premier Tech., Inc.</i> , No. 1:08cv827 (E.D. Va. Mar. 18, 2009) .....	3, 24, 38
<i>Alejandro v. Republic of Cuba</i> , 996 F. Supp. 1239 (S.D. Fla. 1997) .....	11
<i>Almog v. Arab Bank, PLC</i> , 471 F. Supp. 2d 257 (E.D.N.Y. 2007) .....	11
<i>Argentine Republic v. Amerada Hess Shipping Corp.</i> , 488 U.S. 428 (1989).....	6
<i>Arias v. Dyncorp</i> , 517 F. Supp. 2d 221 (D.D.C. 2007) .....	7
<i>Arnold v. Groobey</i> , 77 S.E.2d 382 (Va. 1953).....	40
<i>Ashcroft v. Iqbal</i> , 189 S. Ct. 1937 (2009).....	15
<i>Axel Johnson, Inc. v. Carroll Carolina Oil Co.</i> , 145 F.3d 660 (4th Cir. 1998) .....	22
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	26, 27
<i>Baragona v. Kuwait Gulf Link Transfer Co.</i> , No. 1:05-cv-1267-WSD, 2007 WL 4125734 (N.D. Ga. Nov. 5, 2007).....	33
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	15
<i>Bigio v. Coca-Cola Co.</i> , 239 F.3d 440 (2d Cir. 2000).....	10
<i>Bowoto v. Chevron Corp.</i> , 2007 WL 2349341 (N.D. Cal. Aug. 14, 2007) .....	7

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
<i>Bowoto v. Chevron Corp.</i> , 557 F. Supp. 2d 1080 (N.D. Cal. 2008) .....	7
<i>Boykins Corp. v. Weldon, Inc.</i> , 266 S.E.2d 887 (Va. 1980).....	41, 42
<i>Boyle v. United Technologies Corp.</i> , 487 U.S. 500 (1988).....	36
<i>Broderick v. Roache</i> , 751 F. Supp. 290 (D. Mass. 1990) .....	16
<i>Burger-Fischer v. Degussa AG</i> , 65 F. Supp. 2d 248 (D.N.J. 1999) .....	4
<i>Burns v. Stafford County</i> , 315 S.E.2d 856 (Va. 1984).....	41
<i>Butters v. Vance International, Inc.</i> , 225 F.3d 462 (4th Cir. 2000) .....	37, 38, 39
<i>Cabello v. Fernandez-Larios</i> , 402 F.3d 1148 (11th Cir. 2005) .....	7, 11
<i>Carmichael v. Kellogg, Brown &amp; Root Servs., Inc.</i> , No. 08-14487, 2009 WL 1856537 (11th Cir. June 30, 2009).....	<i>passim</i>
<i>Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.</i> , 511 U.S. 164 (1994).....	6, 7
<i>Cheatle v. Rudd’s Swimming Pool Supply Co.</i> , 360 S.E.2d 828 (Va. 1987).....	43
<i>Chesapeake Supply &amp; Equipment Co. v. J.I. Case Co.</i> , 700 F. Supp. 1415 (E.D. Va. 1988) .....	29
<i>Cisneros v. Aragon</i> , 485 F.3d 1226 (10th Cir. 2007) .....	11
<i>City of Bedford v. James Leffel &amp; Co.</i> , 558 F.2d 216 (4th Cir. 1977) .....	43
<i>Clark v. Takata Corp.</i> , 192 F.3d 750 (7th Cir. 1999) .....	32

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
<i>Cooper v. Smith &amp; Nephew, Inc.</i> , 259 F.3d 194 (4th Cir. 2001) .....	33
<i>Davis v. Cole</i> , 999 F. Supp. 809 (E.D. Va 1998) .....	43
<i>Davison v. Seal-Skins</i> , 7 F. Cas. 192 (2d Cir. 1835).....	3
<i>Doe v. Broderick</i> , 225 F.3d 440 (4th Cir. 2000) .....	2
<i>Doe v. Islamic Salvation Front</i> , 257 F. Supp. 2d 115 (D.D.C. 2003).....	9
<i>Edgar v. MITE Corp.</i> , 457 U.S. 624 (1982).....	29
<i>Enahoro v. Abubakar</i> , 408 F.3d 877 (7th Cir. 2005) .....	9
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64 (1938).....	1
<i>In re Estate of Ferdinand Marcos Human Rights Litig.</i> , 25 F.3d 1467 (9th Cir. 1994) .....	11
<i>Fiberlink Communications Corp. v. Magarity</i> , 24 F. Appx. 178 (4th Cir. 2001).....	41
<i>Flores v. Southern Peru Copper Corp.</i> , 414 F.3d 233 (2d Cir. 2003).....	11
<i>Grunenthal GmbH v. Hotz</i> , 712 F.2d 421 (9th Cir. 1983) .....	20
<i>Guaranty Trust Co. v. York</i> , 326 U.S. 99 (1945).....	41
<i>Hamdan v. Rumsfeld</i> , 548 U.S. 557 (2006).....	10
<i>Ibrahim v. Titan Corp.</i> , 391 F. Supp. 2d 10 (D.D.C. 2005).....	3

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
<i>Jones v. R.S. Jones &amp; Assocs., Inc.</i> , 431 S.E.2d 33 (Va. 1993).....	40
<i>Kadic v. Karadzic</i> , 70 F.3d 232 (2d Cir. 1995).....	2, 8, 10, 11
<i>Katz v. Odin, Feldman &amp; Pittleman, P.C.</i> , 332 F. Supp. 2d 909 (E.D. Va. 2004) .....	16
<i>King v. Lasher</i> , 572 F. Supp. 1377 (S.D.N.Y. 1983).....	16
<i>Klaxon Co. v. Stentor Elec. Mfg. Co.</i> , 313 U.S. 487 (1941).....	40
<i>Kramer v. Time Warner, Inc.</i> , 937 F.2d 767 (2d Cir. 1991).....	35
<i>Khulumani v. Barclay Nat’l Bank Ltd.</i> , 504 F.3d 254 (2d Cir. 2007) .....	5
<i>Lane v. Halliburton</i> , 529 F.3d 548, 566-67 (5th Cir. 2008) .....	24
<i>Limestone Dev’t Corp. v. Vill. of Lemont</i> , 520 F.3d 797 (7th Cir. 2008) .....	15
<i>Lizarbe v. Hurtado</i> , No. 1-07-CV-21783, 2008 WL 941851 (S.D. Fla. Mar. 4, 2008) .....	12
<i>Lockney v. Vroom</i> , 61 Va. Cir. 359, 2003 WL 22382577 (Va. Cir. Ct. Mar. 21, 2003).....	42
<i>Luddeke v. Amana Refrigeration, Inc.</i> , 387 S.E.2d 502 (Va. 1990).....	42
<i>Malek Adhel</i> , 43 U.S. 210, 232 (1844) .....	3
<i>Mangold v. Analytic Services, Inc.</i> , 77 F.3d 1442 (4th Cir. 1996) .....	36, 37, 38, 39
<i>McMahon v. Presidential Airway</i> , 502 F.3d 1331 (11th Cir. 2007) .....	23

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
<i>Milton v. IIT Research Institute</i> , 138 F.3d 519 (4th Cir. 1998) .....	29
<i>Mora v. New York</i> , 524 F.3d 183 (2d Cir. 2008).....	5
<i>Moreno v. Baskerville</i> , 452 S.E.2d 653 (Va. 1995).....	19
<i>Mujica v. Occidental Petroleum Corp.</i> , 381 F. Supp. 2d 1164 (C.D. Cal. 2005) .....	11
<i>O’Hazza v. Exec. Credit Corp.</i> , 431 S.E.2d 318 (Va. 1993).....	43
<i>Overstreet v. Kentucky Cent. Life Ins. Co.</i> , 950 F.2d 931 (4th Cir. 1991) .....	43
<i>Perrin v. United States</i> , 4 Ct. Cl. 543 (1868) .....	4
<i>Presbyterian Church of Sudan v. Talisman Energy, Inc.</i> , 453 F. Supp. 2d 633 (S.D.N.Y. 2006).....	5
<i>Register v. Cameron &amp; Barkley Co.</i> , 467 F. Supp. 2d 519 (D.S.C. 2006).....	16
<i>Rep. of Ecuador v. ChevronTexaco Corp.</i> , 499 F. Supp. 2d 452 (S.D.N.Y. 2007).....	32
<i>Richmond, Fredericksburg &amp; Potomac R.R. v. Forst</i> , 4 F.3d 244 (4th Cir. 1993) .....	35
<i>Rowe v. Hoffman-La Roche, Inc.</i> , 917 A.2d 767 (N.J. 2007).....	29
<i>Russell v. Gennari</i> , No. 1:07cv793, 2007 WL 3389998 (E.D. Va. Nov. 8, 2007).....	37
<i>Ryan v. Ohio Edison Co.</i> , 611 F.2d 1170 (6th Cir. 1979) .....	2
<i>Saleh v. Titan Corp.</i> , 436 F. Supp. 2d 55 (D.D.C. 2006).....	3

**TABLE OF AUTHORITIES**

(continued)

	<b>Page(s)</b>
<i>Sanville v. Bank of Am. Nat’l Tr. &amp; Savs. Ass’n</i> , 18 Fed. Appx. 500 (9th Cir. 2001).....	15
<i>Saperstein v. Palestinian Authority</i> , No. 1:04-cv-20225, 2006 WL 3804718 (S.D. Fla. Dec. 22, 2006).....	8, 9
<i>Sarei v. Rio Tinto, PLC</i> , 487 F.3d 1193 (9th Cir. 2007) .....	7
<i>Sarei v. Rio Tinto, PLC</i> , 550 F.3d 822 (9th Cir. 2008) (en banc) .....	7
<i>Sedima, S.P.R.L. v. Imrex Co.</i> , 473 U.S. 479 (1985) .....	13
<i>Sherley v. Lotz</i> , 104 S.E.2d 795 (1958) .....	40
<i>In re Sinaltrainal Litig.</i> , 474 F. Supp. 2d 1273 (S.D. Fla. 2006) .....	8
<i>Slavchev v. Royal Caribbean Cruises, Ltd.</i> , 559 F.3d 251 (4th Cir. 2009) .....	22
<i>Smith v. Halliburton Co.</i> , No. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006).....	23, 25
<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004).....	<i>passim</i>
<i>In re South African Apartheid Litig.</i> , 617 F. Supp. 2d 228 (S.D.N.Y. 2009).....	2, 5
<i>State v. Wilkerson</i> , 295 N.C. 559 (1978) .....	18
<i>Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.</i> , 128 S. Ct. 761 (2008).....	6
<i>Tarbrake v. Sharp</i> , 894 F. Supp. 270 (E.D. Va. 1995) .....	35
<i>Taveras v. Taveraz</i> , 477 F.3d 767 (6th Cir. 2007) .....	11

**TABLE OF AUTHORITIES**

(continued)

	<b>Page(s)</b>
<i>Tel-Oren v. Libyan Arab Republic</i> , 726 F.2d 774 (D.C. Cir. 1984).....	10
<i>Tel-Phonic Servs. v. TBS Int’l, Inc.</i> , 975 F.2d 1134 (5th Cir. 1992) .....	16
<i>Thomas v. Renaissance Housing Corp., Inc.</i> , 62 Va. Cir. 151, 2003 WL 21787717 (Va. Cir. Ct. June 10, 2003).....	42
<i>Tiffany v. United States</i> , 931 F.2d 271 (4th Cir. 1991) .....	27
<i>TWI d/b/a Servco Solutions v. CACI Int’l, Inc.</i> , No. 1:07cv908, 2007 WL 3376661 (E.D. Va. Nov. 9, 2007).....	37
<i>United States v. Baker</i> , 24 F. Cas. 962 (2d Cir. 1861).....	4
<i>United States v. Fischel</i> , 686 F.2d 1082 (5th Cir. 1982) .....	17
<i>United States v. Klintock</i> , 18 U.S. 144 (1820).....	3
<i>United States v. Le</i> , 316 F. Supp. 2d 355 (E.D. Va. 2004) .....	18, 19
<i>United States v. Licavoli</i> , 725 F.2d 1040 (6th Cir. 1984) .....	14, 17
<i>United States v. Pungitore</i> , 910 F.2d 1084 (3d Cir. 1990) .....	14
<i>United States v. Raper</i> , 676 F.2d 841 (D.C. Cir. 1982).....	17
<i>United States v. Shahani-Jahromi</i> , 286 F. Supp. 2d 723 (E.D. Va. 2003) .....	32
<i>United States v. Williams</i> , 342 F.3d 350 (4th Cir. 2003) .....	17
<i>United States v. Winstead</i> , 708 F.2d 925 (4th Cir. 1983) .....	17

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
<i>United States v. Yousef</i> , 327 F.3d 56 (2d Cir. 2003).....	12
<i>Vanguard Fire &amp; Supply Co., Inc. v. NLRB</i> , 468 F.3d 952 (6th Cir. 2006) .....	37
<i>Velásquez-Rodríguez v. Honduras</i> , 1989 Inter-Am. Ct. H.R. (Series C) No. 7 ¶ 38 (July 21, 1989) .....	12
<i>Ware v. Hylton</i> , 3 U.S. (3 Dall.) 199 (1796) .....	4
<i>Waters v. Churchill</i> , 511 U.S. 661 (1994).....	6
<i>Webster v. Fall</i> , 266 U.S. 507 (1925).....	12
<i>Westminster Invest Corp. v. Lamps Unlimited</i> , 379 S.E.2d 316 (Va. 1989).....	42
<i>Wheatley v. Wicomico County</i> , 390 F.3d 328 (4th Cir. 2004) .....	37
<i>Whitaker v. Kellogg Brown &amp; Root, Inc.</i> , 444 F. Supp. 2d 1277 (M.D. Ga. 2006) .....	23, 25
<i>Williams v. Commonwealth</i> , No. 0552-02-1, 2003 WL 1810494 (Va. App. Apr. 8, 2003) .....	17
<i>Wiwa v. Royal Dutch Petroleum Co.</i> , 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).....	7
<i>Wiwa v. Royal Dutch Petroleum Corp.</i> , 2009 WL 1574869 (S.D.N.Y. Apr. 23, 2009).....	11
<i>Wiwa v. Royal Dutch Petroleum Corp.</i> , 226 F.3d 88 (2d Cir. 2000).....	11
<i>Zaboth v. Beall</i> , 26 Va. Cir. 269, 1992 WL 884464 (Va. Cir. Ct. Jan. 29, 1992).....	40
 <b>Statutes, Rules And Regulations:</b>	
18 U.S.C. § 1959.....	18, 19

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
18 U.S.C. § 1961.....	16
18 U.S.C. § 1962.....	20, 21
18 U.S.C. § 2441.....	2, 8
28 U.S.C. § 1331.....	1
28 U.S.C. § 1350 .....	9, 10
28 U.S.C. § 2680.....	38
Fed. R. Civ. P. 44.1 .....	32
 <b>Miscellaneous:</b>	
CPA Order No. 17.....	30
John Y. Gotanda, <i>Punitive Damages: A Comparative Analysis</i> , 42 COLUM. J. TRANSNATIONAL L. 391 (2004) .....	12
CHRISTINE D. GRAY, <i>JUDICIAL REMEDIES IN INTERNATIONAL LAW</i> 28 (1990).....	12
H.R. Rep. No. 102-367 (1991).....	10
Wayne R. LaFave, <i>Criminal Law</i> (4th ed.) § 14.1(f).....	15
Hon. Jed S. Rakoff & Howard W. Goldstein, RICO: Civil and Criminal Law and Strategy § 1.04[1] & § 1.06[2] .....	14, 21
Restatement (Third) of Foreign Relations, Section 901 .....	12
Hans Wehr, <i>A DICTIONARY OF MODERN STANDARD ARABIC</i> (4th ed. 1979).....	31
9A Wright & Miller, <i>FEDERAL PRACTICE &amp; PROCEDURE</i> § 2444 (3d ed. 2008).....	32

Apparently recognizing the substantial body of legal authority precluding the claims asserted in these actions and the insufficiency of the Complaints' allegations, Plaintiffs in their Opposition attempt to supplement the Complaints with frequent citations to inflammatory assertions from two illegitimate declarations that are the subject of Defendants' motion to strike and to an excerpt from a book. Because there is no legal or factual basis for allowing these cases to proceed, however, the Complaints must be dismissed.

**I. THE ALIEN TORT STATUTE CLAIM MUST BE DISMISSED.**

Plaintiffs attempt to avoid the standards for recognition of claims under the Alien Tort Statute ("ATS") established by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), asserting that "even were the ATS not to exist, under 28 U.S.C. § 1331 federal common law would look to the War Crimes Act . . . and customary international law" and authorize the Court to fashion a new cause of action for damages. Plaintiffs' Opposition to Motion to Dismiss, Dkt. No. 30 ("Pl. Opp."), at 34.

But *Sosa* stands for precisely the opposite proposition. *Sosa* reaffirmed the "watershed" holding of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), that "federal courts have no authority to derive 'general' common law." 542 U.S. at 729. The Supreme Court explicitly rejected the notion that federal courts may recognize new causes of action under 28 U.S.C. § 1331 at will, explaining that the ATS is a unique statute, "enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations." *Id.* at 731 n.19. *Sosa* leaves no doubt that the ATS is the only jurisdictional

basis upon which federal courts may recognize “private claims under federal common law for violations of any international law norm.” *See id.* at 732.<sup>1</sup>

Plaintiffs’ proposal that the Court “borrow[] the standard” from the War Crimes Act (18 U.S.C. § 2441)—a criminal statute—to set the “applicable tort standard” for their claims (Pl. Opp. 37-38) also is contrary to well-settled limits on the authority of federal courts. “Since there is no federal common law,” federal private causes of action “must be created by statute either expressly or implicitly,” and cannot be inferred from the existence of a federal criminal statute. *Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1178 & n.7 (6th Cir. 1979); *see also Doe v. Broderick*, 225 F.3d 440, 447-48 (4th Cir. 2000). As *Sosa* noted: “The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.” 542 U.S. at 727.

Plaintiffs’ claims, therefore, are viable only if they comply with the “demanding” standards set forth in *Sosa*. 542 U.S. at 738 n.30; *see also* Consolidated Memorandum of Law in Support of Defendants’ Motions to Dismiss, Dkt. No. 38 (“Def. Mem.”), at 6. They do not, and the ATS counts of the Complaints accordingly must be dismissed.

**A. Customary International Law Does Not Reach The Private, Non-State Conduct Alleged In The Complaints.**

Plaintiffs do not dispute that Defendants are private persons and entities, rather than state actors. Nor do they even attempt to refute the reasoning of the several courts that have held the ATS inapplicable to claims against non-state actors. *See* Def. Mem. 6-7 (citing cases). Instead,

---

<sup>1</sup> Plaintiffs’ citations to *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009), are also misleading and do not support their position here. *See* Pl. Opp. 38. In those cases, the plaintiffs sought recovery under the ATS, not under an unrelated, newly-fashioned common law cause of action. *See Kadic*, 70 F.3d at 246; *South African Apartheid Litig.*, 617 F. Supp. 2d at 245.

Plaintiffs assert incorrectly that *Sosa* “held” that ATS claims may be brought against parties in the absence of any state action. Pl. Opp. 39. That principle was neither explicit nor implicit in *Sosa*’s holding that arbitrary detention was not a norm of customary international law that met the “high bar” for recognition of a federal claim. 542 U.S. at 727; *see also Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 57-58 (D.D.C. 2006) (*Sosa* did not overrule *Sanchez-Espinoza*).

Plaintiffs point to the offense of piracy—which historically has been recognized as giving rise to ATS liability on the part of private actors—as evidence that they may advance claims against Defendants. Pl. Opp. 39. The viability of an ATS claim against a private actor, however, hinges on “whether international law extends the scope of liability for a violation of a *given norm* to the perpetrator being sued.” *Sosa*, 542 U.S. at 733 n.20 (emphasis added). Plaintiffs’ claims here rest not on piracy but on the very different international norms prohibiting war crimes and extrajudicial killings.<sup>2</sup>

Moreover, Plaintiffs’ reliance on piracy is misplaced because piracy has historically been “one of a limited number of exceptions” to the principle that private actors are not bound by the law of nations. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 14 n.2 (D.D.C. 2005). By definition, a pirate “commits hostilities upon the subjects and property of any or all nations, without . . . any pretence of public authority.” *The Malek Adhel*, 43 U.S. 210, 232 (1844); *Davison v. Seal-Skins*, 7 F. Cas. 192, 193 (2d Cir. 1835). “[P]ersons under the acknowledged authority” of a state are not pirates, *United States v. Klintock*, 18 U.S. 144, 152 (1820), even when they “exceed[] [their] authority,” *Davison*, 7 F. Cas. at 193. Under “familiar principle[s] of international law,” being

---

<sup>2</sup> Plaintiffs made the identical argument opposing the *Al Shimari* defendants’ motion to dismiss in that case (which also involved claims based on war crimes), which the court *sub silentio* rejected. *See* Memorandum In Opposition To Motion To Dismiss, at 25 (Dkt. #53), *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08cv827 (E.D. Va. Mar. 18, 2009).

vested with governmental authority is a *defense* to “a charge of the crime of . . . piracy” on the high seas. *United States v. Baker*, 24 F. Cas. 962, 964 (2d Cir. 1861).

Plaintiffs also appeal to a non-existent obligation under the “common law of war” to “provide adjudicatory process to those injured by misconduct during war time.” Pl. Opp. 41 n.14. In fact, since the early days of the Republic it has been the law that claims for wartime injury belong to the injured party’s nation and cannot be asserted in a private suit. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796) (Chase, J.); *Perrin v. United States*, 4 Ct. Cl. 543 (1868); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 273 (D.N.J. 1999).

Accordingly, the Court should dismiss Plaintiffs’ ATS claims for lack of jurisdiction.

**B. Plaintiffs Do Not Allege Any Conduct That, If Proven, Would Subject A Defendant To Primary Liability.**

Plaintiffs’ argument that Mr. Prince is directly liable for violations of the ATS (Pl. Opp. 42-44) is untenable. According to their Complaints, the shootings that constitute alleged war crimes and extrajudicial killings were perpetrated by independent contractors (“ICs”) under contract with USTC. *See, e.g.*, Abtan Compl. ¶¶ 44-45; Hassoon Compl. ¶ 30. They do not allege any involvement by Mr. Prince in those shootings.

Plaintiffs’ theory that Mr. Prince is “directly liable” for these shootings in which he did not participate apparently rests on a series of supplemental allegations in one of the illegitimate declarations appended to Plaintiffs’ Opposition. Plaintiffs cannot rely on factual allegations outside the pleadings to overcome a motion to dismiss, as explained in detail in Defendants’ motion to strike the “John Doe” affidavits (Dkt. No. 50).

Even taking as true these supplemental allegations, Plaintiffs have asserted no plausible theory of direct liability. They make no attempt to connect their allegations about Mr. Prince’s personal conduct (*see* Pl. Opp. 43) to an actionable violation of *the law of nations*, which is the

crux of an ATS claim. They have not identified *any* norm of international law—let alone a norm with the widespread “accept[ance]” and “specificity” mandated by *Sosa* (542 U.S. at 725)—implicated by Mr. Prince’s own conduct. They cite no authority for the proposition that the alleged negligent or reckless recruitment or deployment of contracting personnel, or the failure to “listen[] to ... employees” (Pl. Opp. 43) may rise to the level of a war crime or an extrajudicial killing. Because Plaintiffs have “pointed to no sources which evince support for the specific customary international law tort proposed,” their theory of direct liability is not viable. *Mora v. New York*, 524 F.3d 183, 208 (2d Cir.), *cert. denied*, 129 S. Ct. 397 (2008).<sup>3</sup>

**C. There Is No International Law Norm Of Secondary Liability That Reaches Defendants.**

Because Plaintiffs’ allegations of direct liability are deficient, their ATS claims depend on the existence of a norm of secondary liability that reaches Defendants. Plaintiffs urge the Court to apply “federal common law tort principles on liability” in evaluating the scope of Defendants’ liability. Pl. Opp. 42. However, under *Sosa*, an ATS claim may go forward only when “*international law* extends the scope of liability for a violation of a given norm *to the perpetrator being sued*.” 542 U.S. at 733 n.20 (emphasis added). “*Sosa* requires that this Court recognize only forms of liability that have been universally accepted by the community of developed nations.” *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 263 (S.D.N.Y. 2009); *see also id.* at 255-57; *Khulumani*, 504 F.3d at 269 (Katzmann, J., concurring); *id.* at 337 (Korman, J., concurring & dissenting in part); *Presbyterian Church of Sudan v. Talisman*

---

<sup>3</sup> Because Defendants other than Mr. Prince are corporate entities that can act only through others, those entities by definition cannot be directly liable.

*Energy, Inc.*, 453 F. Supp. 2d 633, 665 n.64 (S.D.N.Y. 2006).<sup>4</sup> Plaintiffs have advanced no theory of liability that satisfies this standard.

**1. There Is A Clear Consensus Against Acceptance Of Corporate Liability As An International Law Norm.**

Plaintiffs' only response to the argument that international law consistently declines to impose liability on corporate entities (Def. Mem. 7-8) is to string-cite cases in which ATS claims have proceeded against corporations.<sup>5</sup> Pl. Opp. 44-45. These decisions—none of which is controlling—are unpersuasive because they largely *assume* the existence of corporate liability without expressly analyzing the issue under the *Sosa* framework, as the Supreme Court's opinion expressly requires. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) (“[C]ases cannot be read as foreclosing an argument that they never dealt with.”). Defendants are aware of no court that has applied the *Sosa* standard and found an international consensus that customary international law applies to corporations. The ATS claims against the corporate defendants should therefore be dismissed.

---

<sup>4</sup> Even if “federal common law tort principles on liability” were at all relevant, those principles would *preclude* recognition of, for example, aiding-and-abetting liability under the ATS. *See* Def. Mem. 10 n.8. The Supreme Court has held that the doctrine of civil aiding-and-abetting liability is “at best uncertain in application” and cannot be applied to a judicially created private right of action without express legislative authorization. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180-82 (1994); *see Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 768-69 (2008).

<sup>5</sup> Plaintiffs' citation to *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (Pl. Opp. 47), does not advance their position here. *Argentine Republic* had nothing to do with the scope of liability under the ATS. The issue was whether the Foreign Sovereign Immunity Act is “the sole basis for obtaining jurisdiction over a foreign state” in the federal courts. *Id.* at 434. The statement that the ATS does not “distinguish among classes of defendants” refers only to the fact that it does not expressly subject foreign sovereigns to suit. *Id.* at 438.

**2. Plaintiffs Have Not Identified A Viable International Law Norm Of Secondary Liability.**

Plaintiffs' ATS claims are deficient for the additional reason that they have not pled a viable theory of secondary liability. *See* Def. Mem. 8-11. Their only response to this argument is to assert in a footnote that "war crime and summary execution claims clearly may be brought under many modes of liability," all of which "apply to ATS claims." Pl. Opp. 43 n.15. Even if claims theoretically "may be" maintained on a theory of secondary liability, Plaintiffs have not articulated any such theory in their pleadings here: the Complaints do not allege facts that, if true, would be sufficient to establish secondary liability. *See* Def. Mem. 10-11. Plaintiffs do not even attempt to argue otherwise.

More fundamentally, there is no sufficiently definite international law norm authorizing secondary liability. Def. Mem. 9-11. The cases Plaintiffs cite rely on their own *ipse dixit*, uncritically follow other (often pre-*Sosa*) cases without analyzing the relevant international-law norms, or ignore the Supreme Court's holding in *Central Bank* that aiding-and-abetting liability cannot be applied to a judicially created private right of action without express legislative authorization. 511 U.S. at 180-82.<sup>6</sup> Plaintiffs have offered no reasoned legal basis for imposing liability on Defendants here.

---

<sup>6</sup> *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1090 (N.D. Cal. 2008), cites *Bowoto v. Chevron Corp.*, 2007 WL 2349341, at \*4-7 (N.D. Cal. Aug. 14, 2007), which in turn cites *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202-03 (9th Cir. 2007), a decision that was later vacated by the en banc Ninth Circuit. *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc). In *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 228 (D.D.C. 2007), the defendants themselves performed the challenged "aerial spraying of cocaine and heroin fields," so there was no question of secondary liability. In *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at \*14 n.17 (S.D.N.Y. Feb. 28, 2002), the district court expressly declined to "address the merits of defendants' arguments concerning secondary liability under the ACTA or the TVPA." *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005), simply follows other courts.

**D. None Of The Underlying Wrongdoing Alleged Violates A Norm Of The Law Of Nations Cognizable Under The ATS.**

Even if there were viable allegations of secondary liability here, Plaintiffs would be obligated to allege facts that, if true, would establish a primary violation of the ATS that was aided and abetted by Defendants' actions—*i.e.*, that the ICs who allegedly committed the shootings engaged in an actionable violation of the law of nations.

**1. The “War Crimes” Allegations Do Not State A Claim.**

Again relying on the War Crimes Act, Plaintiffs argue that one need not be a combatant to commit a war crime. Pl. Opp. 35-36. Even if this were true as a matter of domestic criminal law, it is at odds with norms of customary international law, under which a war crime can be committed only by a “[p]art[y] to a conflict.” *See Kadic*, 70 F.3d at 242-43;<sup>7</sup> Def. Mem. 11. And Plaintiffs' assertion that the criminal conduct need not be committed in furtherance of hostilities (Pl. Opp. 36 n.12) is inconsistent with the War Crimes Act itself, which encompasses only offenses “committed *in the context of and in association with* an armed conflict not of an international character.” 18 U.S.C. § 2441(c)(3) (emphasis added). Nor, under international law, can a claim of war crimes be premised on the bare allegation that conduct occurred in the midst of an armed conflict. *See, e.g., In re Sinaltrainal*, 474 F. Supp. 2d at 1287-88; *Saperstein v. Palestinian Authority*, No. 1:04-cv-20225, 2006 WL 3804718, at \*8 (S.D. Fla. Dec. 22, 2006).<sup>8</sup>

---

<sup>7</sup> Although *Kadic* recognized that “insurgent military groups” as well as “recognized nations” could be “parties to a conflict,” it in no sense disavowed the established principle that a claim for war crimes cannot be based on private conduct. *See* 70 F.3d at 242-43; *see also In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1287 (S.D. Fla. 2006), *aff'd sub nom, Sinaltrainal v. Coca-Cola Co.*, No. 06-15851, 2009 WL 2431463 (11th Cir. Aug. 11, 2009).

<sup>8</sup> Plaintiffs have mischaracterized the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”). Pl. Opp. 36 n.12. In fact, *Prosecutor v. Kunarac*, Nos. IT-96-23-A, IT-96-23/1-A ¶ 55 (June 12, 2002), confirms that the “acts of the accused must be closely related to the armed conflict” in order for the laws of war to even potentially apply. The other case Plaintiffs cite, *Prosecutor v. Jelusic*, No. IT-95-10 (July 5, 2001), addresses the *mens rea*

Plaintiffs’ position—which appears to be that any crime against a non-combatant in a war zone is a war crime—“is unsupported by authority” and untenable. *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120-21 (D.D.C. 2003). Such a broad conception of war crimes would “make district courts international courts of civil justice” (*Saperstein*, 2006 WL 3804718, at \*8), a role incompatible with the “restrained” conception of federal common law authority that *Sosa* contemplates (542 U.S. at 725).

## 2. The “Summary Execution” Allegations Do Not State A Claim.

Plaintiffs’ allegations of “summary executions” also fail to support their ATS claims, for at least two reasons. First, summary execution is not actionable under the ATS because Congress’s enactment of the Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350 note, displaced the use of federal common law to recognize causes of action in this domain. *See* Def. Mem. 12. Contrary to Plaintiffs’ assertion (Pl. Opp. 40), neither *Sosa* nor the TVPA’s legislative history rejected this notion. *Sosa* confirms that the TVPA’s purpose was to “establish[] an unambiguous and modern basis for federal claims of torture and extrajudicial killing”; it does not speak to whether the such federal claims are actionable *under the ATS*. 542 U.S. at 728 (internal quotation marks omitted); *see also Enahoro v. Abubakar*, 408 F.3d 877, 884 (7th Cir. 2005). And the TVPA’s legislative history merely “indicates that the enactment of the [TVPA] did not signal that torture and killing are the *only* claims which can be brought under the [ATS].” *Enahoro*, 408 F.3d at 885 n.2. Because Plaintiffs have stated that they are not invoking the TVPA (Pl. Opp. 40), the Court need look no further to dismiss the summary execution claim.

Second, summary execution is not actionable where, as here, the plaintiff asserts that the killings “were not carried out under the authority of any country or court.” Abtan Compl. ¶ 83;

---

requirement for *genocide* (*i.e.*, the specific intent to “achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group” (*id.* ¶ 46)), which does not illuminate the definition of *war crimes* under international law.

Hassoon Compl. ¶ 96; *see* Def. Mem. 12. That allegation is dispositive because “by definition, summary execution is ‘murder conducted in uniform.’” *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Edwards, J., concurring); *see also Kadic*, 70 F.3d at 243; *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000).

Plaintiffs ignore this fatal flaw in their pleadings, instead invoking a scattershot of irrelevant sources. *Sosa* (cited at Pl. Opp. 36), for example, discusses summary execution in the context of the TVPA (*see* 542 U.S. at 728), under which an extrajudicial killing presents a cognizable claim *only if it is committed by a state actor*. *See* TVPA, 28 U.S.C. § 1350 note § 2(a) (requiring that conduct be “under actual or apparent authority, or color of law, of any foreign nation”); H.R. Rep. No. 102-367, 4-5 (1991) (TVPA “makes clear” that “the plaintiff must establish some governmental involvement in the . . . killing to prove a claim”).

Also inapposite is *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (cited at Pl. Opp. 36-37). There, the Court observed that Common Article III of the Geneva Conventions forbids “[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *Id.* at 630. Plainly, this prohibition is directed at official action, not private action—only states can pass sentences, carry out executions, pronounce judgments, constitute courts, or afford judicial guarantees.

And Plaintiffs blatantly mischaracterize *Kadic* when they assert that the Second Circuit “looked only at whether the [TVPA] required state action” for claims of summary execution. Pl. Opp. 39-40. The Second Circuit held that “the alleged atrocities” (torture and summary execution) “are actionable under *the Alien Tort Act*, without regard to state action, to the extent

that they were committed in pursuit of genocide or war crimes, and otherwise. . . to the extent that [the defendant] is shown to be a state actor.” 70 F.3d at 244 (emphasis added).<sup>9</sup>

If Plaintiffs’ expansive definition of summary execution were adopted, every single unlawful killing of a non-citizen would be actionable under the ATS as a violation of the law of nations. The Court should decline Plaintiffs’ invitation to “open the floodgates” to a torrent of routine wrongful death litigation in the federal courts. See *Taveras v. Taveraz*, 477 F.3d 767, 782 (6th Cir. 2007); accord *Cisneros v. Aragon*, 485 F.3d 1226, 1231 (10th Cir. 2007) (“[T]he law of nations, particularly the subset of that law enforceable under the ATS, does not include a norm simply because the norm is enshrined in the domestic law of all civilized societies.”).

**E. Punitive Damages Are Not Available Under The ATS.**

*Sosa*’s “requirement of clear definition,” which “limit[s] the availability of relief in the federal courts for violations of customary international law” (542 U.S. at 733 n.21), would bar this Court from awarding punitive damages even if Plaintiffs had stated a claim for war crimes or summary execution. Punitive damages are disfavored in many foreign jurisdictions and

---

<sup>9</sup> The additional cases Plaintiffs cite (at 37) do not aid their argument. See *Wiwa v. Royal Dutch Petroleum Corp.*, 226 F.3d 88, 105 (2d Cir. 2000) (citing TVPA); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 293 (E.D.N.Y. 2007) (recognizing that “non-State actors” are not liable for summary execution); *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997) (“The proscription of summary execution or murder *by the state* appears to be universal . . . .”) (emphasis added and internal quotation marks omitted). In the other decisions, the wrongdoer who committed the killing was undisputedly a state actor, so the court had no occasion to address the issue presented here. See *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) (Chilean military officer); *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) (President of the Republic of the Philippines); *Wiwa v. Royal Dutch Petroleum Corp.*, 2009 WL 1574869, at \*1 (S.D.N.Y. Apr. 23, 2009) (Nigerian military government); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1168 (C.D. Cal. 2005) (Columbian Air Force), remanded, 564 F.3d 1190 (9th Cir. 2009); *Alejandro*, 996 F. Supp. at 1252 (Cuban military).

In addition, the Supreme Court has deemed United Nations materials like those that Plaintiffs cite (at 40 & n.13) to “have little utility” in “establish[ing] the relevant and applicable rule of international law” under *Sosa*. 542 U.S. at 734-35; see also *id.* at 738 n.30; *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 250-52 (2d Cir. 2003).

accordingly cannot be characterized as universally accepted as a matter of customary international law. Def. Mem. 12-13.<sup>10</sup> It necessarily follows that punitive damages are not available for claims brought under the ATS.

Without addressing this reasoning, Plaintiffs cite pre-*Sosa* cases that awarded punitive damages.<sup>11</sup> Pl. Opp. 46. These decisions lend no support to Plaintiffs' position, because "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

Plaintiffs also quote out of context Section 901 of the Restatement (Third) of Foreign Relations. See Pl. Opp. 45. That section, by its terms, applies only to actions in which "a state ... has violated a legal obligation to another state"—not to suits involving private parties. *Id.* cmt. A (emphasis added). Moreover, the Restatement "is not a primary source of authority upon which, standing alone, courts may rely for propositions of customary international law. Such works at most provide evidence of the practice of States, and then only insofar as they rest on factual and accurate descriptions of the past practices of states." *U.S. v. Yousef*, 327 F.3d 56, 99

---

<sup>10</sup> See also John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNATIONAL L. 391, 396 (2004) ("There is no consensus among countries on the availability of punitive damages . . . ."); CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 28 (1990) ("[T]he extreme rarity of clear awards of punitive damages in arbitral practice suggest that it is not a suitable remedy in international law."); *Velásquez-Rodríguez v. Honduras*, 1989 Inter-Am. Ct. H.R. (Series C) No. 7 ¶ 38 (July 21, 1989) ("Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time.").

<sup>11</sup> The one post-*Sosa* case Plaintiffs mention is *Lizarbe v. Hurtado*, No. 1-07-CV-21783 (S.D. Fla. Mar. 4, 2008), but that was a default judgment obtained against a party who "did not retain a defense lawyer and presented no defense." See 2008 WL 941851; Motion for Default Judgment and Trial On Damages and Memorandum of Law, 2007 WL 5082874 (S.D. Fla. Sept. 28, 2007).

(2d Cir. 2003). In this case, State practice confirms that punitive damages are a disfavored remedy in actions between private parties.

## **II. THE RICO CLAIMS MUST BE DISMISSED.**

Plaintiffs acknowledge the insufficiency of their RICO allegations, asking the Court to look beyond the Complaints to their illegitimate declarations to flesh out a theory of liability that, even if properly pleaded in the Complaint, would not suffice to state a RICO claim. Plaintiffs propose a novel approach under which the already-expansive RICO statute would be broadened further to impose liability even where the defendant has not himself committed any predicate act, and where the predicate acts and their effects occurred entirely outside the United States. This strained theory of RICO liability stretches the statute far beyond its breaking point.

### **A. The Claims Against Mr. Prince Must Be Dismissed Because The Complaints Do Not Allege That Mr. Prince Committed The Only Predicate Acts That Plaintiffs Have Standing To Assert.**

A plaintiff has standing to assert a RICO claim only if he has been harmed proximately “by predicate acts sufficiently related to constitute a pattern.” *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985); *see* Def. Mem. 16-17 Plaintiffs appear to concede that the only alleged predicate acts proximately related to the injury that they claim—the damage to their cars—are the “murders” that supposedly occurred when their cars were damaged, and thus recognize that their standing turns upon whether those “murders” qualify as predicate acts.. *See* Opp. 30-31.<sup>12</sup> They do not, for multiple reasons.

---

<sup>12</sup> Plaintiffs repeat their far-flung allegations of tax evasion (Pl. Opp. 6-7, 30, 32) and weapons smuggling (Pl. Opp. 10, 12, 30), but lack standing to seek damages based on such conduct because, even if it had occurred, that conduct did not proximately cause any injury to Plaintiffs’ business or property. *See* Def. Mem. 16-17.

**1. A RICO Claim Must Allege Facts Establishing That The Defendant Personally Committed Every Element Of Each Predicate Offense.**

Plaintiffs argue that they need not plead any conduct by Mr. Prince himself, because there is no requirement that the RICO defendant “personally commit” the predicate acts. *Id.* That is plainly wrong. Def. Mem. 15. Even the case on which Plaintiffs rely, *United States v. Licavoli*, 725 F.2d 1040 (6th Cir. 1984), states the contrary: “For a defendant to be convicted under RICO he must have committed more than one act of racketeering activity.” *Id.* at 1045-46 (emphasis added); *see also* Def. Mem. 14-15. In *Licavoli*, a criminal case, the indictment charged defendant *himself* with committing the predicate acts of murder, as well as with violating RICO. *See* 725 F.2d at 1044; *see also United States v. Pungitore*, 910 F.2d 1084, 1100, 1134 (3d Cir. 1990) (defendant “appeared at [the victim’s] office . . . and shot him when he opened the door” and therefore was “found guilty of . . . conspiracy to murder and attempted murder”).

**2. Plaintiffs Do Not Allege That Mr. Prince Personally Committed The Predicate Offenses.**

Plaintiffs concede that their Complaints allege that that the predicate acts of murder were committed by “the Prince RICO Enterprise,” not by Mr. Prince personally. *See* Pl. Opp. 21 & n.8. That alone requires dismissal of the RICO claim, which is lodged only against Mr. Prince.

Even if Plaintiffs had alleged that Mr. Prince personally committed all of the acts that the Complaints attribute to “the Prince RICO Enterprise,” they would fail to satisfy the clear requirements for pleading a RICO claim. It is well-settled that “courts strictly require a RICO complaint to allege every essential element of each predicate act.” Hon. Jed S. Rakoff & Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy* (hereinafter “Rakoff & Goldstein, RICO”) § 1.04[1], at 1-30; *see also id.* at 1-30 n.23 (citing cases); Def. Mem. 15-16.

The essential elements of murder under any state law are: “(1) There must be some conduct (affirmative act, or omission to act where there is a duty to act) on the part of the

defendant. (2) He must have an accompanying ‘malicious’ state of mind (intent to kill or to do serious bodily injury; a depraved heart; an intent to commit a felony). (3) His conduct must ‘legally cause’ the death of a living human-being victim.” Wayne R. LaFave, *Criminal Law* (4th ed.) § 14.1(f), at 733. Plaintiffs’ Complaints do not plead any of these elements. They do not set forth facts establishing an affirmative act or omission by the Prince RICO Enterprise sufficient to support criminal liability. They do not allege facts showing that the Prince RICO Enterprise acted with malice. And they do not allege facts demonstrating that the Prince RICO Enterprise’s conduct proximately caused any deaths. Instead, they assert in starkly conclusory terms that the Prince RICO Enterprise “committed murder” on multiple occasions. *See* Abtan Compl. ¶¶ 121-131; Hassoon Compl. ¶¶ 133-141. That is insufficient to state a RICO claim.

Because Plaintiffs have failed to allege facts coming anywhere close to establishing each of the elements of murder for any of the “murders” listed in the Complaints, their RICO claims should be dismissed. The Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), like its successor, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), “teaches that a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case.” *Limestone Dev’t Corp. v. Vill. of Lemont*, 520 F.3d 797, 802-03 (7th Cir. 2008). This concern applies with special force “to a RICO case, which resembles an antitrust case in point of complexity” and in the availability of treble damages and attorneys’ fees to prevailing plaintiffs. *Id.* at 803. “RICO cases, like antitrust cases, are ‘big’ cases and the defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim.” *Id.* at 803.<sup>13</sup>

---

<sup>13</sup> Even before *Twombly* and *Iqbal*, courts recognized that facially deficient RICO claims required dismissal. *See, e.g., Sanville v. Bank of Am. Nat’l Tr. & Savs. Ass’n*, 18 Fed. Appx. 500, 501 (9th Cir. 2001) (affirming dismissal of RICO claim where complaint failed to allege

**3. Even If The New Allegations In Plaintiffs' Opposition Could Be Considered, They Would Not Cure The Flaws In Plaintiffs' Complaints.**

Apparently recognizing the inadequacy of their pleadings, Plaintiffs set forth in their Opposition a slew of additional factual allegations. Supplemental allegations in a brief (or in book excerpts or declarations) may not supplement a complaint, and may not be considered by the Court on a motion to dismiss. *See, e.g., Katz v. Odin, Feldman & Pittleman, P.C.*, 332 F. Supp. 2d 909, 917 n.9 (E.D. Va. 2004) (it is “axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss”).

Moreover, the legal standards governing criminal offenses “involving murder” (18 U.S.C. § 1961(1)) present an insurmountable barrier to Plaintiffs’ efforts. Plaintiffs simply cannot allege facts establishing that Mr. Prince could be prosecuted criminally for murder.

First, Plaintiffs acknowledge that each of the alleged killings was committed by ICs under contract with USTC, not by Mr. Prince. *See, e.g., Opp.* 29, 31 (claiming Mr. Prince’s “men” shot and killed Iraqi civilians). Neither USTC nor any of the ICs who allegedly committed these killings is a defendant to any of the RICO causes of action.

Second, Mr. Prince is not alleged to have been present during any of these killings. Nor is he alleged to have specifically ordered or directed any of these killings. Those facts render clearly inapplicable the cases Plaintiffs cite for the proposition that an individual may be charged with murder when he does not kill with his own hands.

---

intent to defraud, an element of the predicate acts of mail and wire fraud); *Tel-Phonic Servs. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1140 (5th Cir. 1992) (affirming dismissal of RICO claim for failure to state a claim); *Register v. Cameron & Barkley Co.*, 467 F. Supp. 2d 519, 536 (D.S.C. 2006) (dismissing RICO claim for failure to state a claim); *Broderick v. Roache*, 751 F. Supp. 290, 294 (D. Mass. 1990) (dismissing RICO claim “because the conduct alleged is clearly not chargeable under the Massachusetts extortion statute”); *King v. Lasher*, 572 F. Supp. 1377, 1383 (S.D.N.Y. 1983) (dismissing RICO claim where, among other problems, “[t]he complaint does not allege the intent necessary for an indictable offense under the predicate crimes”).

The first case on which Plaintiffs rely is *United States v. Licavoli*, 725 F.2d 1040 (6th Cir. 1984), in which the defendant, a mafia “kingpin,” was tried for a particular murder that *he specifically ordered and directed*. *See id.* at 1043 (defendant “decided that he needed to have one Danny Greene killed” and “had others in his organization contact Raymond Ferritto regarding his wish to have Greene killed”).

Plaintiffs also cite *Williams v. Commonwealth*, No. 0552-02-1, 2003 WL 1810494 (Va. App. Apr. 8, 2003) (Pl. Opp. 25), in which the defendant was convicted of aiding and abetting second-degree murder. *Williams* recognizes that aiding-and-abetting liability requires that the defendant “was guilty of some overt act in furtherance of the crime.” *Id.* (citing *Augustine v. Commonwealth*, 226 Va. 120, 124 (1983)). In *Williams*, the defendant’s acts included “loading his gun, permitting [the shooter] to use his gun, and driving the car as [the shooter shot at [the victim’s] vehicle.” *Id.* Similarly, in *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003) (Pl. Opp. 23), the defendant participated in a robbery knowing that it might result in the victim’s death; shot the victim himself once and attempted to shoot him again; gave the gun to his accomplice, who used it to shoot the victim again; alerted his accomplice that the victim was still alive, prompting the accomplice to shoot the victim again; and took a share of the proceeds from the robbery. *Id.* at 356. No comparable conduct is alleged here.

Moreover, an aider or abettor must have “the specific intent to facilitate the commission of a crime by another.” *United States v. Raper*, 676 F.2d 841, 849 (D.C. Cir. 1982) (citing *United States v. Prince*, 529 F.2d 1108 (6th Cir. 1976)); *see also, e.g., United States v. Winstead*, 708 F.2d 925, 927 (4th Cir. 1983) (defendant must be “aware of the principals’ criminal intent and the unlawful nature of their acts”); *United States v. Fischel*, 686 F.2d 1082, 1087 (5th Cir. 1982) (“To aid and abet, the defendant must share in the intent to commit the offense as well as

participate in some manner to assist its commission.”). Plaintiffs have cited no case in which conduct even approaching the level of generality of their extra-Complaint assertions regarding Mr. Prince has been deemed sufficient to establish the requisite intent to facilitate murder.

Finally, Plaintiffs have not alleged facts showing that Mr. Prince’s conduct was the proximate cause of the deaths at issue here. Even taking as true the allegation that Mr. Prince negligently or recklessly deployed certain ICs to Iraq, Plaintiffs have not alleged that the same ICs who were improperly deployed were involved in the murders for which they seek to hold Mr. Prince responsible. Thus, there is no causal link—not even an attenuated one—between Mr. Prince’s conduct and the deaths giving rise to Plaintiffs’ murder allegations. Consequently, even if Plaintiffs’ allegations were true, this conduct would not be chargeable as murder. *See, e.g., State v. Wilkerson*, 295 N.C. 559, 580 (1978) (murder “does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death”).

#### **4. The Alleged Murders Are Not Chargeable Under State Law Because They Occurred In Iraq.**

Plaintiffs do not dispute that states lack jurisdiction to prosecute criminal conduct that occurs and whose effects are felt outside its borders, and that the “murders” alleged here—which occurred in Iraq—accordingly are not chargeable under the law of any state. Def. Mem. 17-18. Instead, they argue that RICO uses the term “chargeable under State law” simply to “describe[] the type of general conduct which will serve as a RICO predicate.” Opp. 24. On Plaintiffs’ theory, a RICO claim may be premised on conduct that occurs anywhere in the world as long as the conduct would have qualified as a predicate act had it occurred in the United States.

Plaintiffs rely on this Court’s decision in *United States v. Le*, 316 F. Supp. 2d 355 (E.D. Va. 2004) (Ellis, J.), applying 18 U.S.C. § 1959, a statute criminalizing violent crimes in aid of racketeering activity. In fact, the Court’s reasoning in *Le* supports Defendants’ position.

Addressing whether it was “necessary that the state law alleged to prohibit an assault with a dangerous weapon under § 1959 carry that precise label,” the Court concluded that it was not. 316 F. Supp. 2d at 360. The Court explained that “Congress, not wishing to unnecessarily create new crimes, sought to craft § 1959 so that it reached the generic conduct described therein, whatever label a particular state might use to criminalize that conduct.” *Id.*

Plaintiffs’ suggestion that a killing chargeable under *no* state’s law, because it occurred outside the United States, may nevertheless serve as a predicate offense under RICO, is at odds with the Court’s reasoning. That expansive construction of the term “chargeable under State law” *would* “create new crimes,” precisely the result Congress sought to avoid. Indeed, the Court noted in *Le* “that a § 1959 charge based on an assault with a dangerous weapon in violation of state law would fail if the state where the conduct occurred did not criminalize such conduct.” *Id.* at 360 n.11. Because the permissible reach of Virginia’s criminal law, like the law of any other state, is limited to offenses “committed in Virginia” (Def. Mem. 17 (quoting *Moreno v. Baskerville*, 452 S.E.2d 653, 655 (Va. 1995))), the killings alleged here are not chargeable under state law within the meaning of RICO.

**B. No Conduct Or Effects Occurred In The United States That Would Warrant An Extraterritorial Application Of RICO.**

Plaintiffs’ theory of RICO liability is untenable for the additional reason that it would give the statute an impermissible extraterritorial effect. *See* Def. Mem. 18-19. Plaintiffs argue that sufficient conduct occurred in the United States to justify applying the statute. Pl. Opp. 32-33. Plaintiffs rely principally on alleged “misrepresentations to the Internal Revenue Service” (Pl. Opp. 32), which are unrelated to the “murders” that form the basis of their RICO claims, and which they lack standing to challenge. *See supra* page 13 & n.12.

The other conduct occurring in the United States that Plaintiffs cite is their allegation that Mr. Prince “runs his Enterprise from his offices in McLean, Virginia.” Pl. Opp. 32. (Plaintiffs’ attempt to supplement this allegation with the assertion that Mr. Prince “often conducts his criminal Enterprise from the North Carolina location” and uses a U.S. bank (Pl. Opp. 32-33) cannot be considered because those statements do not appear in the Complaints). The fact that Mr. Prince’s “directions to his Enterprise occur in the United States,” Plaintiffs insist, warrants the application of RICO. Pl. Opp. 33.

But RICO can be applied to crimes occurring outside the United States only when the defendant engaged in conduct in the United States that was not “merely preparatory,” but rather “directly cause[d] the losses.” *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424 (9th Cir. 1983) (citation and internal quotation marks omitted); *see also* Def. Mem. 19. Plaintiffs have not alleged *any* specific acts by Mr. Prince occurring in the United States, let alone any that *directly caused* the damage to their cars.

Plaintiffs also assert in a footnote that “Mr. Prince’s misconduct has had significant impact on the United States,” warranting an extraterritorial application of RICO. Pl. Opp. 33 n.11. Plaintiffs do not state what these effects are. Plaintiffs’ own losses—the damage to their vehicles—were felt only in Iraq. Plaintiffs’ attempt to apply RICO extraterritorially is yet another reason why the claims must be dismissed.

**C. The Complaints Fail To Allege That Mr. Prince Acquired An Interest In Or Controlled The Affairs Of A RICO Enterprise Through A Pattern Of Racketeering Activity.**

The Complaints charge violations of both subsections 1962(b) and (c) of title 18. A violation of subsection (b) requires that the defendant “acquire or maintain” an “interest in or control of” an enterprise “through a pattern of racketeering activity.” 18 U.S.C. § 1962(b). Similarly, subsection (c) makes it unlawful “to conduct or participate ... in the conduct of” an

enterprise's affairs "through a pattern of racketeering activity." *Id.* § 1962(c). Plaintiffs have not pled a "pattern" of racketeering activity, because they have not alleged that the "murders" were related. *See* Def. Mem. 19.

And even if they had properly alleged that Mr. Prince engaged in a pattern of racketeering activity, the Complaints would still be deficient because they do not allege that *through* that racketeering activity, Mr. Prince acquired or maintained an interest in or controlled the affairs of the purported "Prince RICO Enterprise." *See* Def. Mem. 16.

Plaintiffs respond only that "there is a natural 'person' Mr. Prince, who created a distinct 'enterprise' to engage in criminal conduct." Pl. Opp. 28. An allegation that the defendant created an enterprise to engage in criminal conduct, however, is not what the statute requires. Subsection (b) requires that the defendant acquire or maintain an interest in an enterprise *through* the alleged pattern of racketeering activity. "Subsection 1962(b) requires that the *object* of the predicate racketeering activity itself be to gain an interest in or control of the particular enterprise." Rakoff & Goldstein, RICO § 1.06[2], at 1-81 (emphasis in original). Subsection (c) similarly requires that the defendant conduct or participate in the RICO enterprise's affairs *through* the alleged racketeering activity. Plaintiffs' Complaints lack any such allegations.

**D. Plaintiffs' Claims For Punitive Damages And Injunctive Relief, As Well As The Time-Barred Claim of Plaintiff Al-Rubae, Must Be Dismissed.**

Plaintiffs do not dispute that punitive damages and injunctive relief are not available under RICO. *See* Def. Mem. 20-21. Accordingly, those requests for relief must be dismissed even if Plaintiffs' RICO claims are not. Nor do Plaintiffs dispute that the claim of plaintiff Al-Rubae in the *Hassoon* case is time-barred. *See* Def. Mem. 44. Consequently, that claim should be dismissed as well.

### **III. THE INSUFFICIENCY OF PLAINTIFFS' FEDERAL CLAIMS WARRANTS DISMISSAL OF THE REMAINING, STATE LAW CLAIMS.**

Plaintiffs argue that even if their federal claims fail, their suits must remain in federal court on the basis of diversity jurisdiction. Pl. Opp. 18 n.6. Plaintiffs appear to concede, however, that their Complaints contain no allegations about their citizenship—only allegations about their residence. Def. Mem. 21. Absent this information, there is no basis for diversity jurisdiction. *See, e.g., Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 145 F.3d 660, 663 (4th Cir. 1998) (“state citizenship for purposes of diversity jurisdiction depends not on residence, but on national citizenship and domicile”).

Even if Plaintiffs had pled Iraqi citizenship, the foreign citizenship of defendant Greystone LTD would destroy diversity. Def. Mem. 21. Plaintiffs suggest that the Court should not “credit Greystone as a real foreign company” because, among other things, Mr. Prince sits on its board and it uses a bank based in the United States. Pl. Opp. 18 n.6. Plaintiffs do not dispute that Greystone is incorporated in Barbados, and indeed the documents on which they rely show as much. *See* Pl. Opp. Ex. I. Consequently, even if Plaintiffs are correct in their speculation about Greystone’s activities in the United States, diversity is lacking. The Fourth Circuit has explained:

Construing 28 U.S.C. § 1332(c)(1), we conclude that a corporation with its principal place of business in one of the United States and incorporated under the laws of a foreign state has dual citizenship for purposes of diversity jurisdiction. *See* 28 U.S.C. § 1332(c)(1) (“a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business”). It is both a citizen of a State and a citizen of a foreign state.

*Slavchev v. Royal Caribbean Cruises, Ltd.*, 559 F.3d 251, 254 (4th Cir. 2009) (holding that suit by Bulgarian citizen against company incorporated in Liberia with principal place of business in Florida failed to satisfy “the long-standing requirement of *complete* diversity, which is applied to the dual citizenship of corporations”).

Plaintiffs do not suggest any reason that this Court should exercise supplemental jurisdiction over their state law tort claims. Consequently, the Complaints should be dismissed in their entirety.

#### **IV. THE POLITICAL QUESTION DOCTRINE BARS PLAINTIFFS' CLAIMS.**

Plaintiffs' principal response to Defendants' invocation of the political question doctrine is a non-sequitur—they argue that the fact that the events at issue occurred in a war zone does not render their claims nonjusticiable. Pl. Opp. 49-51. But Defendants' political question argument is not grounded principally in Baghdad's wartorn environment, but rather in the State Department's close control of USTC and the ICs pursuant to the extraordinarily detailed provisions of the governing contracts. Def. Mem. 24-31.

Plaintiffs' wishful comment that the contracts "have no relevance to the claims" (Pl. Opp. 48) is simply wrong. Courts reviewing political question claims by government contractors assess the terms of the governing contracts to determine whether the tort claims asserted against the contractor would implicate government decisions and intrude on Executive Branch prerogatives in the manner prohibited by the political question doctrine. *See, e.g., Carmichael v. Kellogg, Brown & Root Servs., Inc.*, No. 08-14487, 2009 WL 1856537 at \*6, \*19, \*24 n.14 (11th Cir. June 30, 2009); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1279-80 (M.D. Ga. 2006).<sup>14</sup>

---

<sup>14</sup> Plaintiffs rely on *McMahon v. Presidential Airways*, 502 F.3d 1331 (11th Cir. 2007) (Pl. Opp. 51 & n.19), but the court of appeals there rejected the invocation of the political question doctrine based solely on the allegations of the complaint. Indeed, the court invited the defendants to renew their motion to dismiss on the basis of an expanded record (502 F.3d at 1365), which the defendants there have done. Here, the motion is based on the extraordinarily detailed provisions of the contracts, which are properly before this Court.

**A. Plaintiffs' Negligent Hiring And Training Claims Raise Non-Justiciable Political Questions.**

The contracts are especially detailed in the realm of hiring and training, giving the State Department what can only be described as “thoroughly perva[sive]” control over these activities. *Carmichael*, 2009 WL 1856537, at \*8; *see* Def. Opp. 26-28, 29-31 (describing contractual provisions). Plaintiffs do not deny this.

The very terms of these contracts embody sensitive judgments of the Executive Branch concerning how best to ensure the safety of American diplomats traveling through a war zone. The Court would be forced to consider, for example, whether the 164 hours of training specified were enough, whether the designated training facilities were up to par, and whether the criteria listed to achieve authorization to handle weapons were sufficiently rigorous. *See* Def. Mem. 29 (citing contractual provisions). These are precisely the types of “sensitive judgments customarily entrusted to the [government]” and not susceptible to judicial resolution. *Carmichael*, 2009 WL 1856537, at \*18.

More importantly, the detailed contractual specifications here supplanted the standard of care that would be applicable in a traditional negligence case, leaving the Court “without any manageable standards for making reasoned determinations regarding the[] fundamental elements of negligence claims.” *Id.* at \*13. As the court observed in *Carmichael*, the dictates of Defendants’ relationship with the government preclude the trier of fact from relying upon the “familiar touchstones” of “common sense and everyday experience.” *Id.* at \*14. Consequently,

---

Similarly, *Al Shimari*’s conclusion that the political question doctrine did not bar consideration of the claims advanced in that case in large part rested on the fact that the contracts were not before the court. *See* Memorandum Order, *Al-Shimari v. CACI Premier Tech., Inc.*, No. 1:08cv827 (E.D. Va. Mar. 18, 2009), at 22, 34. The court understandably declined to “blindly accept” the defendants’ contention that their activities were subject to the government’s “persistent and pervasive supervision.” *Id.* at 13; *see also Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008) (remanding for further fact-finding as to whether political question was presented).

the Court is left without any standards for evaluating Defendants' conduct and without any choice but to examine the judgments of the State Department reflected in the contracts. *See, e.g., id.*, at \*7; *Whitaker*, 444 F. Supp. 2d 1277, 1282; *Smith*, 2006 WL 2521326, \*6.

Indeed, neither in the Complaints nor in any other admissible evidence do Plaintiffs assert that Defendants failed to comply with the hiring and training provisions of the contracts. They state only that “[h]ad Mr. Prince and his men abided by the terms of the State Department contract, and used lethal force only when necessary, the Plaintiffs would not have lost their loved ones.” Pl. Opp. 48. At most, that statement is an assertion that the ICs failed to abide by the use of force standards set forth in the contracts—it says nothing about compliance with the hiring and training provisions.<sup>15</sup>

In light of the State Department's pervasive control of Defendants' hiring and training of ICs, Plaintiffs' negligent hiring and training claims should be dismissed.

**B. Plaintiffs' Remaining Tort Claims Also Raise Non-Justiciable Political Questions.**

Plaintiffs do not dispute that the State Department's pervasive control of Defendants' operations in Baghdad extended well beyond the realm of hiring and training, dictating as well detailed procedures for preparing and conducting security missions, detailed rules governing the use of force, and close supervision of all security operations by State Department officials. *See* Def. Mem. 26-28. Nor do they dispute that their remaining tort claims implicate “split second decisions” about the appropriate use of force in “circumstances that are tense, unpredictable, and rapidly evolving.” Def. Mem. 28 (quoting WPPS II Contract). Because there are no judicially

---

<sup>15</sup> In addition, Plaintiffs' reference to the pending criminal prosecutions of certain ICs is irrelevant to application of the political question doctrine to the negligent hiring and training claims, because those claims are not the subject of any criminal proceeding. As Plaintiffs acknowledge, the charges against the ICs relate only to the lawfulness of their use of force in the Nissor Square shooting at issue in the *Abtan* Complaint. *See* Pl. Opp. 49, 52, Exs. B & C.

manageable standards for determining whether reasonable care was used in such circumstances, Plaintiffs' tort claims are not justiciable. *See* Def. Mem. 25 (citing cases); *see also, e.g., Aktepe*, 105 F.3d at 1404 (“courts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life”).

Rather than explain *how* their claims are susceptible to judicial resolution, Plaintiffs say only that they *must be* because the Justice Department is prosecuting certain ICs for related offenses. *See* Pl. Opp. 49, 53. This assertion is of no aid to the Court in determining how to proceed without a “readily available judicial standard” to evaluate Defendants’ conduct. *Carmichael*, 2009 WL 1856537, at \*13; *see also Baker v. Carr*, 369 U.S. 186, 210 (1962) (“the lack of satisfactory criteria for a judicial determination” is one of the “dominant considerations” in whether a claim presents a political question” (citation omitted)). It is precisely because of the judiciary’s need for standards by which to resolve the cases before it that *courts*, not prosecutors, are the arbiters of justiciability.

Plaintiffs are also incorrect that the criminal proceedings prove that their civil claims “do not intrude on any Executive prerogative.” Pl. Opp. 53. When the Justice Department is prosecuting a criminal case, the Executive Branch retains control of the scope and nature of the proceeding, and can dismiss at any time if thorny or intrusive political issues arise. A suit by private plaintiffs does not have the same built-in safeguards against intrusion on executive prerogatives. *Cf. Sosa*, 542 U.S. at 727 (explaining that absence of “the check imposed by prosecutorial discretion” is why courts are reluctant to infer private rights of action).

Precisely this problem is illustrated here. The Executive Branch has determined only that a small subset of the conduct at issue in the present cases—the conduct of six ICs in Nissor Square—warrants criminal prosecution. *See* Pl. Opp. 53 & Ex. B. The Justice Department

explicitly noted that it was not “charg[ing] or implicat[ing] Blackwater Worldwide” or any of the other 13 Blackwater guards present in Nissor Square. *See* Def. Mem. 4 (quoting U.S. Attorney); *see also id.* (noting that “[m]ost [of the ICs] acted professionally, responsibly, and honorably”). Yet Plaintiffs have brought claims arising out of not only the Nissor Square incident, but also nearly a dozen other incidents in which the Justice Department has not brought any charges.

Plaintiffs also make the puzzling argument that *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991), requires this Court to entertain their suit. Pl. Opp. 52. *Tiffany*, however, was a case that the court *dismissed* as nonjusticiable. *See* 931 F.2d at 282. Plaintiffs invoke a snippet from the opinion in *Tiffany* noting that the plaintiff there (asserting claims against the government) had not alleged “that the government violated any federal laws.” Pl. Opp. 52 (quoting 931 F.2d at 280). They extrapolate from there that “[t]he Court held that, if the conduct at issue violates federal statutes or formal published regulations, the judiciary has the power, and indeed the obligation, to exercise jurisdiction, even over Executive Branch officials.” *Id.* This reasoning is flawed on numerous levels.

First, *Tiffany* held no such thing. Plaintiffs’ say-so cannot transform a peripheral observation into a holding. Second, Plaintiffs’ unexplained assertion that “the political question analysis turns on whether plaintiffs allege” a violation of federal law (Pl. Opp. 52) would discard decades of case law built around the six factors outlined in *Baker v. Carr*. Indeed, virtually any tort claim can be characterized as a claimed “violation of federal law”—governing federal law standards almost always generally preclude wrongful exercise of federal authority—and Plaintiffs’ theory therefore would as a practical matter mean the complete elimination of the political question doctrine. (Indeed, Plaintiffs fail to explain why they conclude that the political

question doctrine was properly applied in *Carmichael* (Pl. Opp. 53) even though the plaintiffs in that case alleged that the contractor acted wrongfully.)

Because Plaintiffs' have failed to offer any suggestion as to what standards the Court should apply in adjudicating their claims, or how it could do so without second-guessing a myriad of sensitive State Department judgments about how to ensure the safety of U.S. diplomats traveling in a war zone, they have not carried their burden of establishing that their claims are justiciable. *See* Def. Mem. 22-23.

## V. IRAQI LAW BARS PLAINTIFFS' NON-FEDERAL CLAIMS.

### A. Virginia's Choice-Of-Law Rules Dictate That Iraqi Law Applies To The Non-Federal Claims.

Plaintiffs concede that “Virginia uses the *lex loci delicti* doctrine” (Pl. Opp. 67)—meaning that the law of the “place of the wrong” governs the parties’ substantive rights (Def. Mem. 32). Plaintiffs do not dispute that, 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.” Def. Mem. 32 (quoting *Quillen v. Int’l Playtex, Inc.*, 789 F.2d 1041, 1044 (4th Cir. 1986)). Nor do they dispute that, in this case, that place is Iraq. Consequently, the choice-of-law analysis clearly dictates that Iraqi law governs.

Plaintiffs nonetheless suggest that resolution of this critical preliminary issue should “await the close of discovery” (Pl. Opp. 63), but they provide no credible reason for doing so. Plaintiffs assert that discovery will reveal that Mr. Prince made certain “decisions” relevant to their claims from his offices in Virginia, and engaged in additional unspecified “wrongdoing” in North Carolina. Pl. Opp. 62-63. However, under Virginia’s “settled rule” that the place of the “last event” determines the applicable law, the place of Mr. Prince’s alleged conduct cannot affect the choice-of-law analysis. Def. Mem. 32 (quoting *Jones v. R.S. Jones & Assocs., Inc.*,

431 S.E.2d 33, 34 (Va. 1993); *see also, e.g., Milton v. IIT Research Institute*, 138 F.3d 519, 522 (4th Cir. 1998) (declining invitation to “disregard the directive of Virginia law, which we are bound to apply in this diversity action”). The fishing expedition that Plaintiffs seek simply cannot produce any evidence that will alter the outcome of the choice-of-law inquiry.

Plaintiffs also argue that this Court can ignore Virginia’s choice-of-law rule if results in the application of a law that “would violate public policy or the interests of the forum state.” Pl. Opp. 67. Plaintiffs do not *advocate* setting aside Iraqi law on this basis—they simply suggest tepidly that “the court is also free to ignore Iraqi law if it believes application of such law contravenes the public policy.” Pl. Opp. 67.

Plaintiffs’ concern appears to be that Iraqi law leaves them without a remedy. Ensuring a remedy for nonresidents of the forum state, however, is not a basis for declining to apply another state’s law, particularly where, as here, that law is the law of the state in which the plaintiffs reside. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (“While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders.”); *see also, e.g., Chesapeake Supply & Equipment Co. v. J.I. Case Co.*, 700 F. Supp. 1415, 1421 (E.D. Va. 1988) (“Denial of comity is generally limited to “something immoral [or] shocking to one’s sense of right.” (alteration in original)). To the contrary, allowing a resident of a foreign state alleging injuries occurring in the foreign state “to by-pass his own state’s law and obtain compensation for his injuries in [the forum] State’s courts completely undercuts [the foreign state’s] interests, while overvaluing [the forum state’s] true interest in th[e] litigation.” *Rowe v. Hoffman-La Roche, Inc.*, 917 A.2d 767, 776 (N.J. 2007).

Accordingly, the Court should decline Plaintiffs’ invitation to consider setting aside the clearly applicable law of Iraq in favor of the law of Virginia.

**B. Plaintiffs Erroneously Interpret CPA Order No. 17, Under Which USTC Is Immune From Suit.**

Plaintiffs recognize that USTC is a “Coalition Contractor” that was “supplying goods and/or services” at the time of the alleged torts, but argue that under CPA Order No. 17, “contractors are not exempt from Iraqi substantive tort law.” Pl. Opp. 64-65. However, Plaintiffs fail to address the express language of the Order’s section 4(3): “Contractors shall be immune from legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any subcontract thereto.” *See* Pl. Opp. 64-65 (citing CPA Order No. 17 §§ 1(5), 4(4)). Section 4(3) and the related provisions discussed in Defendants’ opening brief, (at 32-33), provided broad immunity to contractors, such as USTC, who served either the Multinational Force, the CPA, or Foreign Liaison Missions or their personnel. CPA Order No. 17 § 2. Contrary to Plaintiffs’ argument, Defendants do not dispute this Court’s “jurisdiction” as a court of the “nationality of [the] Contractor.” Pl. Opp. 65 (quoting CPA Order No. 17 § 4(7)). Instead, Defendants have shown that the relevant provisions of the CPA Order provide broad immunity and prevent liability in litigation such as this.

**C. Iraqi Law Does Not Recognize Vicarious Liability.**

In the event the Court determines that CPA Order No. 17 does not immunize Defendants from suit, the relevant part of Iraq’s Civil Code makes clear that Defendants cannot be held vicariously liable for the ICs’ alleged torts.

In his initial report, Professor Hamoudi explained that the relevant Iraqi Civil Code provisions, the most authoritative commentaries on Iraqi law, and the history of Iraq’s legal system make clear that a private company operating in Iraq without a direct contractual relationship with the Iraqi government cannot be held vicariously liable for the allegedly tortious acts of its employees (or, here, the ICs). Def. Mem. 33-34. In response, Plaintiffs have

submitted statements from three opinion witnesses, each of whom quotes or paraphrases the relevant Code provision and simply asserts—without supporting analysis—that, contrary to the plain language of the Code, any company can be held vicariously liable in Iraq. Plaintiffs’ opinion witness materials are inadequate and incorrect.

There is no dispute that Article 219 of the Iraqi Code controls the vicarious liability issue. As Professor Hamoudi explained, Article 219 states that “the government, the municipalities, the foundations that provide public services, and every person who exploits one of the industrial or trade foundations” can be held vicariously liable for the acts of their employees. Hamoudi Decl. ¶ 20; *see* Pl. Opp., Exs. J, K, L.<sup>16</sup>

The only potentially applicable part of Article 219 is the phrase “person who exploits one of the industrial or trade foundations.” But the plain meaning of the words “industrial or trade foundations” cannot support imposing vicarious liability on anyone who uses a private company to conduct business in Iraq. If Plaintiffs’ witness statements were correct, “Iraqi legislators would have used the well-known Arabic term for ‘company’ (*sharika*),” Hamoudi Supp. Decl. ¶ 4, rather than the phrase “person who exploits one of the industrial or trade foundations.” As Professor Hamoudi explained in his initial report (¶ 21)—and Plaintiffs do not dispute—the term “foundations” generally refers to Iraqi “institutions providing public services.” Exploiting such a

---

<sup>16</sup> Dr. Saleem’s and Mr. Fadhil’s statements are translated as asserting that Article 219 applies to “any person exploiting one of the industrial or commercial institutions.” Pl. Opp., Exs. J, L; *see id.*, Ex. M, N. Dr. Aziz’s translated statement substitutes “using” for “exploiting.” *Id.*, Ex. K. At the end of the quoted phrase, the Language Innovations LLC service, which was used by Plaintiffs’ counsel, translated the Arabic word “*mu’assasa*” from Article 219 as “institutions” instead of “foundations.” Hamoudi Supp. Decl. ¶ 4 n.1. As Professor Hamoudi explains, however, “[t]he term in fact originates from the verb ‘*assasa*, which means ‘to found, to establish, or to set up,’ according to the authoritative Arabic English Dictionary, used in virtually every American and British university department that deals with the Arabic language.” *Id.* (citing Hans Wehr, A DICTIONARY OF MODERN STANDARD ARABIC (4th ed. 1979)). “That dictionary also includes “foundation” as the first definition of the term *mu’assasa*.” *Id.*

foundation should be understood as historically referencing (and being limited to) “‘mixed sector’ companies,” in which “an individual or private company would enter into a joint venture with a government entity, with the government entity owning a significant portion of the shares of the joint venture.” Hamoudi Supp. Decl. ¶ 4.

None of Plaintiffs’ opinion witnesses explains what Article 219’s “person who exploits an industrial or trade foundation” language means or provides any reasoning to support the assertion that this phrase applies to USTC. They also fail to address the most well-known and authoritative commentaries on the Iraqi Code—which make clear that principles of vicarious liability are not applicable to all companies operating in Iraq. Hamoudi Supp. Decl. ¶¶ 6-8; Hamoudi Decl. ¶¶ 20-25. Instead, Plaintiffs’ witnesses simply assert that “[t]here is no restriction limiting the institution of a legal proceeding against a specific type of company” and that “[t]he stipulation [in Article 219] came unconditional.” Pl. Opp., Ex. J; *see id.*, Exs. K, L.

Although “‘expert testimony accompanied by extracts from foreign legal materials has been and will likely continue to be the basic mode of proving foreign law’” (*United States v. Shahani-Jahromi*, 286 F. Supp. 2d 723, 726 n.4 (E.D. Va. 2003) (quoting *Universe Sales Co., Ltd. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999)), when “the proffered expert offers nothing more than a ‘bottom line’ conclusion, he does not assist” the court.<sup>17</sup> *Clark v.*

---

<sup>17</sup> The determination of foreign law is a question of law. Fed. R. Civ. P. 44.1; *see also Rep. of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452, 454 (S.D.N.Y. 2007). When the parties’ positions on a foreign law issue are “not harmonious,” the court can “request a further showing by counsel, or engage in its own research, or direct that a hearing be held, with or without oral testimony, to resolve the issue.” 9A Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 2444, at 355 (3d ed. 2008). That said, “federal courts have not felt bound by the testimony of foreign law experts and upon occasion have placed little or no credence in their opinions when not supported adequately.” *Id.* at 346. Plaintiffs’ witness statements fail to address the issues presented in Professor Hamoudi’s initial report or otherwise to support their assertions; as such, they do not merit further proceedings or preclude immediate resolution of this issue. *See id.* at 354-55.

*Takata Corp.*, 192 F.3d 750, 759 (7th Cir. 1999); *see also Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 203 (4th Cir. 2001) (“As the Supreme Court has repeatedly held, ‘nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.’” (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999))). Because the “bottom line” assertions set forth in Plaintiffs’ expert statements are unhelpful and erroneous, the Court should reject their arguments, accept Professor Hamoudi’s analysis of Article 219, and hold that Defendants cannot be vicariously liable for the alleged torts of the ICs under Iraqi law.

Finally, Plaintiffs’ reliance on the decision and expert report from *Baragona v. Kuwait Gulf Link Transfer Co.*, No. 1:05-cv-1267-WSD, 2007 WL 4125734 (N.D. Ga. Nov. 5, 2007), is misplaced. The cited opinion was issued in the context of a default proceeding, and when the defendant later appeared, the district court vacated its opinion and dismissed the lawsuit on jurisdictional grounds. *See, id.*, Order and Opinion, Dkt. No. 114 (N.D. Ga. May 8, 2009), *appeal pending*, No. 09-12770-AA (11th Cir.). Even putting aside the lack of precedential effect of such a vacated district court opinion, the Iraqi lawyers’ statement in *Baragona*, which is included with Plaintiffs’ brief here (Ex. N at 4), completely fails to analyze the issues addressed by Professor Hamoudi and, instead, contains only unsupported assertions. Moreover, as Professor Hamoudi explains in his supplemental report (¶ 12), the court’s opinion in *Baragona* contains faulty reasoning—improperly beginning by analyzing an Iraqi judicial decision (which is a correct method of analysis in a common law system, but not in a civil law system, *see* Def. Mem. 33), “then work[ing] backwards to the legislation” (or Code)—and also reaches a conclusion that is inconsistent with the Code’s language and the most important commentaries. *Id.* ¶ 12.

**D. Iraqi Law Does Not Recognize The Tort Of Spoliation.**

Plaintiffs do not dispute that “[s]poliation of evidence is not a separately actionable tort under Iraqi law.” Def. Mem. 35. Accordingly, the counts listed in our opening brief, *id.*, should be dismissed.<sup>18</sup>

**E. Iraqi Law Does Not Permit Punitive Damages.**

Plaintiffs have no direct response to Defendants’ argument that Iraqi law does not permit punitive recoveries in civil cases. *See* Def. Mem. 35; Hamoudi Decl. ¶¶ 31-32. Instead, without supporting declarations from their proffered Iraqi law experts, Plaintiffs equate punitive damages with what they term “‘moral’ damages” and assert that in Iraq, “any damage incurred by a damaged party shall be taken into account when determining damages, *regardless of type of damage.*” Pl. Opp. 67. These unsubstantiated arguments are incorrect for at least three reasons.

*First*, Plaintiffs’ discussion of “‘moral’ damages” finds no support in Iraqi law. As Professor Hamoudi explains, although Iraqi law recognizes “moral harms” associated with torts and provides compensation for, among other things, losses in reputation, honor, and emotional well being, “there is no such thing in Iraqi law as ‘moral damages.’” Hamoudi Supp. Decl. ¶¶ 13, 16. What is more, “it is abundantly clear from the [most persuasive commentators] that moral harm, and the damages arising therefrom, are compensatory and specific to the victim of the alleged wrong, and bear no relationship to punitive damages.” Hamoudi Supp. Decl. ¶ 16.

*Second*, Plaintiffs’ contention that Iraqi law allows compensation for “any damages incurred by a damaged party,” regardless of type, is unavailing, because punitive damages do not compensate for damage incurred by a plaintiff. “The purpose of punitive damages is to punish

---

<sup>18</sup> Plaintiffs also do not dispute that spoliation is not actionable under Virginia law. Def. Mem. 35.

the offender, not to compensate the victim.” *Tarbrake v. Sharp*, 894 F. Supp. 270, 272 (E.D. Va. 1995).

*Third*, Plaintiffs’ mischaracterize the only authority on which they rely. As Professor Hamoudi explains, that 1968 decision from Iraq’s Court of Cassation, which is discussed in a well-known commentary, pertains only to the types of *compensatory* damages available to the plaintiff. Hamoudi Supp. Decl. ¶ 17. “Punitive damages were not an issue in the case and were not discussed at all by the court.” *Id.*

Because no Iraqi authority supports an award of punitive damages, Plaintiffs’ prayers for such relief should be dismissed. *See* Def. Mem. 35.

**F. Even If Virginia Law Governs, The Non-Federal Claims In Sa’adoon Should Be Dismissed.**

Plaintiffs do not dispute that even if Virginia law governs, the non-federal claims in the *Sa’adoon* case must be dismissed, because the IC alleged to have perpetrated the shooting was not acting within the scope of his employment at the time it occurred. Def. Mem. 35-37.

**VI. THE NEGLIGENT HIRING AND SUPERVISION CLAIMS ARE BARRED FOR ADDITIONAL REASONS.**

**A. The Government Contractor Defense Bars These Claims.**

Plaintiffs contend that the Court may not dismiss their Complaints on the basis of the Government Contractor Defense “until Plaintiffs have had an opportunity to conduct discovery.” Pl. Opp. 58. This is incorrect as a matter of law. A complaint may be dismissed on the basis of an affirmative defense if the defense “clearly appears on the face of the complaint.” *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993). In evaluating the defense, the court may consider the “facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference.” *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991). Here, the Court need only consider the WPPS

contracts—which were explicitly referenced in Plaintiffs’ Complaints (*e.g.*, Abtan Compl. ¶¶ 44, 46, 58-60; Albazzaz Compl. ¶ 15-16, 26-27; Sa’adoon Compl. ¶ 30; Hassoon Compl. ¶ 86)—to conclude that the Government Contractor Defense bars Plaintiffs’ claims. *See* Def. Mem. 37-39.

Plaintiffs contend that they “are entitled to discover whether Mr. Prince and his men ignored the United States’ interests and served only their own motives.” Pl. Opp. 58. The Government Contractor Defense, however, takes into account only the contractual provisions and the contractor’s compliance therewith—which are amply described in Defendants’ opening brief—not the contractor’s “motives.” *See* Def. Mem. 37-38; *see also Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (setting forth the elements of the defense). Plaintiffs do not allege, either in their Complaints or in their Opposition, that Defendants failed to comply with the exceedingly detailed hiring and training specifications set forth by the State Department. Consequently, their claims of negligent hiring and training are barred by the Government Contractor Defense.

**B. The Doctrine Of Absolute Immunity Bars These Claims.**

The negligent hiring and training claims are also barred by the doctrine of derivative absolute immunity applied in *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996).

Plaintiffs do not dispute that Defendants were performing delegated functions incident to the protection of U.S. officials in a war zone that otherwise would have been performed by the government. Nor do they dispute that that the scope of employment under USTC’s contract with the State Department includes the hiring and training of ICs. Instead, Plaintiffs assert that (i) consideration of Defendants’ absolute immunity argument is “premature” on a motion to dismiss, (ii) *Mangold* is limited to the government investigation or “financial intermediary” context, and (iii) immunity should not be extended to Defendants because of supposed “public

benefit” considerations. Pl. Opp. 59-61. These arguments ignore the relevant case law and should be rejected.

Defendants’ “concession” that the Court cannot rule on the immunity argument until the Court rules on Defendants’ government contractor defense is nothing of the sort. Pl. Opp. 61. Defendants simply argued that *if* they are deemed to have retained discretion in hiring and training, *then* it would necessarily follow that they were entitled to derivative absolute immunity under *Mangold*. Parties are “certainly . . . permitted to make alternative arguments” (*Wheatley v. Wicomico County*, 390 F.3d 328, 335 (4th Cir. 2004)), and Plaintiffs “cannot be allowed to turn [Defendants’] alternative argument . . . into an admission” (*Vanguard Fire & Supply Co., Inc. v. NLRB*, 468 F.3d 952, 959 (6th Cir. 2006)). Whether a contractor is performing a “discretionary function” can readily be decided on a motion to dismiss, as courts granting dismissal on the basis of derivative absolute immunity have done. *See, e.g., TWI d/b/a Servco Solutions v. CACI Int’l, Inc.*, No. 1:07cv908, 2007 WL 3376661 (E.D. Va. Nov. 9, 2007); *Russell v. Gennari*, No. 1:07cv793, 2007 WL 3389998 (E.D. Va. Nov. 8, 2007).

Plaintiffs’ next argument is premised on a misreading of *Mangold* that is inconsistent with *Mangold* itself and the Fourth Circuit’s subsequent derivative sovereign immunity decision in *Butters v. Vance International, Inc.*, 225 F.3d 462 (4th Cir. 2000). Plaintiffs assert that *Mangold* should essentially be limited to its facts, which involved a government contractor that provided “statements and information . . . in response to queries by government investigators engaged in an official investigation.” 77 F.3d at 1449. But that ignores the *Mangold* court’s rationale, which was that if “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. The government’s absolute

immunity therefore derivatively attaches to any “discretionary governmental function which has been delegated to the private sector.” *Id.* at 1448.

Moreover, *Butters* squarely forecloses Plaintiffs’ strained reading of *Mangold*.<sup>19</sup> There, a female security guard claimed that her former employer, a security contractor retained by Saudi Arabia to provide security services to a member of the Saudi royal family, had discriminated against her on the basis of gender. *Butters*, 225 F.3d at 464. The Fourth Circuit concluded that the company was immune from suit based on principles of derivative sovereign immunity, because it was carrying out governmental functions on behalf an employer (Saudi Arabia) that was entitled to sovereign immunity in its own right. As the court explained, it is “well-settled that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity.” *Id.* at 466. By the same token, “the private agents of foreign governments” are entitled to partake derivatively in the foreign sovereigns’ immunity when they offer aid in “conducting [the foreign sovereigns’] governmental functions.” *Id.*

*Butters* is controlling here even though the underlying source of sovereign immunity is different.<sup>20</sup> The negligent hiring and training claims are barred under *Mangold* and *Butters* because Defendants are entitled to the same immunity that the United States would enjoy had the State Department itself performed the contracted-for functions.

Lastly, Plaintiffs incorrectly frame the immunity analysis when they submit that Defendants should be denied immunity “in the present context” because the opposite course

---

<sup>19</sup> *Al Shimari* adopted Plaintiffs’ narrow reading of *Mangold* (*see slip. op.* at 30-32), but the import of *Butters* was not brought to the court’s attention in that case.

<sup>20</sup> Whereas Saudi Arabia was immune from suit under the Foreign Sovereign Immunity Act, the United States (had it been sued directly by Plaintiffs) may be able to assert sovereign immunity under the Federal Tort Claims Act. *See* 28 U.S.C. § 2680.

would (so they say) “chill government-sponsored investigatory and adjudicatory efforts” and therefore not produce a “significant public benefit.” Pl. Opp. 60. The question is not whether on a case-by-case basis immunizing a contractor from suit would have “negative consequences.” Pl. Opp. 60. Rather, as the Fourth Circuit and the Supreme Court have made clear, the scope of the government’s immunity—and therefore the immunity derivatively extended to private contractors—“is defined by the nature of the *function* being performed.” *Mangold*, 77 F.3d at 1447; *see also Butters*, 225 F.3d at 466 (“Sovereign immunity exists because it is in the public interest to protect the exercise of certain governmental *functions*.”) (emphasis added). The cost-benefit “balance” must be assessed on this functional level. Plaintiffs do not (and cannot) gainsay the compelling public interest in promoting the effective performance of the *function* relevant here, the hiring and training of the individuals who protect U.S. officials in a foreign war zone. Because Defendants were carrying out that delegated governmental function, they are entitled to derivative absolute immunity.

## **VII. CERTAIN PLAINTIFFS’ CLAIMS MUST BE DISMISSED.**

### **A. The Claims Of The Estate Plaintiffs Must Be Dismissed.**

Plaintiffs’ claim that an administrator has been appointed in Virginia to represent the estates (Pl. Opp. 68 & n.29) fails to establish the Estate Plaintiffs’ capacity to sue for at least three reasons. *First*, nothing permits Plaintiffs to satisfy an obligation of Iraqi probate law by having an administrator appointed in another jurisdiction. Plaintiffs do not assert that the purported Virginia administrator has or could fulfill the *qassam shar’i* requirements. *Second*, as Professor Hamoudi explains, “it would be impossible for a foreign court, such as the Circuit Court in Alexandria, to make the requisite determinations [of a *qassam shar’i*], given the necessity of applying not only the Islamic legal principles of division, but also determining through examination of the relevant national records who the relevant heirs are and their

apportionments.” Hamoudi Supp. Decl. ¶ 18. *Finally*, the Virginia administrator is not named as a plaintiff. The estates themselves, which *are* named, are not legal entities (*see Arnold v. Groobey*, 77 S.E.2d 382, 386 (Va. 1953)) and lack the capacity to sue or be sued (*see, e.g., Zaboth v. Beall*, 26 Va. Cir. 269, 1992 WL 884464, at \*1 (Va. Cir. Ct. Jan. 29, 1992)). At minimum, amendment of the Complaints is required.

**B. Other Plaintiffs’ Claims Are Time-Barred.**

Plaintiffs’ suggestion that discovery is needed to determine the applicable statute of limitations is another attempt to stave off the inevitable. It is beyond dispute that Virginia’s two-year statute of limitations governs their personal injury and wrongful death claims, and no discovery could change that conclusion. *See* Def. Mem. 42-44.

**1. Virginia’s Two-Year Statute Of Limitations Applies.**

A district court exercising jurisdiction over non-federal claims applies the choice of law rules of the forum state, which in this case is Virginia. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). Under Virginia’s choice of law rules, the court “appl[ies] the substantive law of . . . the place of the wrong[] and the procedural law of Virginia.” *Jones v. R.S. Jones & Assoc., Inc.*, 431 S.E.2d 33, 34 (Va. 1993). Statutes of limitations are considered procedural, unless the statute giving rise to the cause of action contains a limitations period “directed so specifically to the right of action . . . as to warrant saying that the limitation qualifies the right.” *Id.* at 35; *see also, e.g., Sherley v. Lotz*, 104 S.E.2d 795, 797 (1958) (“general statute of limitations” was procedural, not substantive). Plaintiffs do not dispute that Iraqi law (which is the substantive law giving rise to their claims, *see supra* pages 28-29), contains no limitations

period directed specifically to the causes of action asserted here. *See* Def. Mem. 43 n.21.<sup>21</sup> Consequently, there is no basis for applying any limitations period other than Virginia's.

Plaintiffs' argument to the contrary appears to rest on a misunderstanding of the "outcome-determinative" test announced in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). *Guaranty Trust* stands for the unremarkable proposition that the "outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Id.* at 109. A federal court should apply the choice of law regime of the forum state so that the outcome of the litigation would be the same in the Eastern District of Virginia as it would be in the Circuit Court for the City of Alexandria. When a Virginia state court would apply the Virginia limitations period, the same period applies in a Virginia federal court, "even if the forum state (and, by extension, the federal court) would apply foreign law to the underlying claim." *Fiberlink Communications Corp. v. Magarity*, 24 F. Appx. 178, 181 (4th Cir. 2001).

## 2. Plaintiff Saed Is Not Entitled To Equitable Tolling.

Plaintiff Wijdan Moshin Saed contends that she has alleged facts sufficient to equitably toll the running of Virginia's two-year statute of limitations.<sup>22</sup> Pl. Opp. 70-71. Under Virginia law, "[w]here there exists any doubt, it should be resolved in favor of the operation of the statute of limitations." *Burns v. Stafford County*, 315 S.E.2d 856, 859 (Va. 1984). Thus, tolling is available only "under certain extraordinary circumstances, wherein the positive and plain requirements of an equitable estoppel preclude [the statute of limitations'] application." *Boykins*

---

<sup>21</sup> Nor have Plaintiffs argued threlevant provisions of Virginia or North Carolina law, which they erroneously contend may govat the ern here (*see supra* pages 28-29), contain limitations periods directed specifically to the causes of action asserted here.

<sup>22</sup> Plaintiffs do not dispute that the estate plaintiff's claims in *Sa'adoon* and the non-minor plaintiffs' claims in *Hassoon* that arise out of injuries sustained before April 1, 2007 would be barred by the Virginia statute of limitations. *See* Def. Mem. 43-44.

*Corp. v. Weldon, Inc.*, 266 S.E.2d 887, 889 (Va. 1980) (internal quotation marks omitted). The plaintiff must show with “clear, precise, and unequivocal evidence” that the six elements of equitable estoppel are satisfied: “(1) A material fact was falsely represented or concealed; (2) The representation or concealment was made with knowledge of the fact; (3) The party to whom the representation was made was ignorant of the truth of the matter; (4) The representation was made with the intention that the other party should act upon it; (5) The other party was induced to act upon it; and (6) The party claiming estoppel was misled to his injury.” *Id.* at 890.

The allegations in the Complaint fail to establish any of these elements. The Complaint asserts only that Defendants “promised to compensate” Ms. Saed, that Defendants made a payment of \$20,000, and that Ms. Saed “continued to believe that additional payments would be made until earlier this year.” Sa’adoon Compl. ¶ 24. The Complaint does not allege that Defendants promised to pay Ms. Saed any more than the \$20,000 they actually paid her, or that Defendants gave Ms. Saed any reason to believe additional payments would be made. Ms. Saed has not alleged that she was “ignorant of the true state of facts” or that Defendants “lulled [her] into a false sense of security” to induced her to refrain from filing suit. *Boykins*, 266 S.E.2d at 890. Nothing Defendants are alleged to have done “conceal[ed] the Plaintiff’s cause of action; therefore, nothing [they] did negatively affected the running of the statute of limitations.” *Lockney v. Vroom*, 61 Va. Cir. 359, 2003 WL 22382577, at \*5 (Va. Cir. Ct. Mar. 21, 2003); *see also Thomas v. Renaissance Housing Corp., Inc.*, 62 Va. Cir. 151, 2003 WL 21787717, at \*2 & n.1 (Va. Cir. Ct. June 10, 2003) (misstatements must be “directed to the limitations period”).<sup>23</sup>

---

<sup>23</sup> Compare *Luddeke v. Amana Refrigeration, Inc.*, 387 S.E.2d 502, 505 (Va. 1990) (denying equitable tolling because the only evidence showing that the defendants had lulled the plaintiff into inaction were statements that “they were working on taking care of the problem” and would likely “replace the system”); *Westminster Invest Corp. v. Lamps Unlimited*, 379 S.E.2d 316, 317 (Va. 1989) (similarly denying equitable tolling when landlord gave “continued assurances that it

### **VIII. CERTAIN DEFENDANTS MUST BE DISMISSED.**

#### **A. All Claims Against Mr. Prince Must Be Dismissed.**

Plaintiffs tacitly concede that the allegations in their Complaints are insufficient to sustain claims against Mr. Prince personally—they point to the factual assertions in the illegitimate declarations to justify their claim veil-piercing. *See* Pl. Opp. 15-17. Because the Court is confined to the pleadings and “may not consider additional allegations when ruling on a motion to dismiss,” *Davis v. Cole*, 999 F. Supp. 809, 813 (E.D. Va 1998), Plaintiffs’ belated efforts to bolster their Complaints must be disregarded.

The allegations *in the Complaints* boil down to three things: (1) Mr. Prince wholly owned the defendant companies; (2) Mr. Prince personally controlled the defendant companies; and (3) the companies were formed “merely to reduce legal exposures and do not operate as independent companies.” *See* Def. Mem. 41-42. These allegations are plainly insufficient under Virginia law, which allows veil-piercing only when the shareholder has “used the corporation to evade a personal obligation, to perpetrate fraud or a crime, to commit an injustice, or to gain an unfair advantage.” *O’Hazza v. Exec. Credit Corp.*, 431 S.E.2d 318, 320 (Va. 1993)<sup>24</sup>; *see also, e.g., Cheatle v. Rudd’s Swimming Pool Supply Co.*, 360 S.E.2d 828, 831 (Va. 1987) (proponent of

---

would take appropriate measures” to correct continuing breaches of lease), *with Overstreet v. Kentucky Cent. Life Ins. Co.*, 950 F.2d 931, 938-41 (4th Cir. 1991) (applying equitable estoppel where insurance carrier was alleged to have breached its “duty to furnish information about a policy to a potential beneficiary unless the company has reasonable grounds for withholding the information,” refused to cooperate in investigation based on “privacy laws” that it confabulated, and paid hush money to party later convicted of procuring insured’s murder); *City of Bedford v. James Leffel & Co.*, 558 F.2d 216, 218 (4th Cir. 1977) (applying equitable estoppel where “defendant coupled its remedial efforts with comments calculated to induce plaintiff to refrain from bringing suit,” such as entreaties that “legalities will not settle a matter like this”).

<sup>24</sup> Plaintiffs state that the court held “that corporate veils *must* be pierced” when the shareholder has used the corporation in this manner. Pl. Opp. 17. In fact, the court held that “one who seeks to disregard the corporate entity *must show*” that the shareholder used the corporation in this manner. *O’Hazza*, 431 S.E.2d at 320 (emphasis added).

veil-piercing must demonstrate that corporate entity “was a device or sham used to disguise wrongs, obscure fraud, or conceal crime”).

The Complaints do not allege that Mr. Prince used any of the Defendant companies in this manner. The closest they come is alleging that the companies were formed “to reduce legal exposures,” which is not improper. It is wishful thinking, at best, when Plaintiffs contend: “The Complaints allege Defendant Prince ...used the companies to avoid detection of his wrongdoing.” Pl. Opp. 17-18. The paragraphs Plaintiffs cite contain no such allegation. *See, e.g.,* Abtan Compl. ¶ 33 (Mr. Prince “owns and controls” various Xe entities); Hassoon Compl. ¶ 27 (entities “were formed merely to reduce legal exposures and do not operate as individual and independent companies outside the control of Erik Prince”). Consequently, there is no basis for maintaining claims against Mr. Prince.

**B. Corporate Defendants Other Than USTC Must Be Dismissed.**

Finally, the claims against all corporate defendants other than USTC must be dismissed for the same reason. *See* Def. Mem. 42. Plaintiffs do not dispute that they have not alleged any wrongful conduct by any company other than USTC. *See* Pl. Opp. 14-18. Nor have they stated a plausible basis for disregarding the corporate forms. *See supra* pages 43-44. Consequently, these defendants should be dismissed.

**CONCLUSION**

For the foregoing reasons, and the reasons stated in Defendants’ opening memorandum, the Complaints should be dismissed.

Respectfully submitted,

/s/

---

Peter H. White (Va. Bar. No. 32310)

pwhite@mayerbrown.com

Andrew J. Pincus (*pro hac vice*)

Michael E. Lackey, Jr. (*pro hac vice*)

Mayer Brown LLP

1909 K Street, N.W.

Washington, DC 20006-1101

Telephone: (202) 263-3000

Facsimile: (202) 263-3300

*Counsel for Defendants*

