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# PRIVATE MILITARY CONTRACTOR LIABILITY AND ACCOUNTABILITY AFTER ABU GHRAIB

MARK W. BINA\*

## I. INTRODUCTION

During the months he was stationed in Iraq, thirty-five year-old Todd Drobnick endured multiple violent attacks from Iraqi insurgents armed with a variety of lethal weapons.<sup>1</sup> Tragically, Drobnick was killed on November 23, 2003 in Mosul, Iraq when the vehicle he was driving collided with a petroleum truck.<sup>2</sup> The Department of Defense provided him with an official military burial and awarded him a Purple Heart and a Bronze Star.<sup>3</sup>

Months later, however, the U.S. Army revoked both of his awards.<sup>4</sup> As it turned out, Drobnick was not a member of the U.S. military; rather, he was an employee of Titan Corp., a private military contractor providing Arabic-language translation services to U.S. forces in Iraq.<sup>5</sup>

Drobnick's situation is representative of the nebulous line separating enlisted soldiers and private contractors in the current war in Iraq. But while the vast majority of military contractors like Drobnick have served honorably beside U.S. forces in Iraq, a handful have not.<sup>6</sup> In fact, a small number of

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1. Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A1.

2. Ronald D. White, *For Titan, Deaths Hit Close to Home*, L.A. TIMES, April 19, 2004, at C1.

3. *Id.*

4. Cha & Merle, *supra* note 1.

5. White, *supra* note 2. Drobnick's case was not an aberration. The Department of Defense has mistakenly awarded military commendations to numerous private contractors. See *Medal Confusion*, DALLAS MORNING NEWS, Aug. 1, 2004, at A27 (noting that Titan Corp. employees "have received more than 100 commendations for their actions during the [Iraq] conflict"). While not eligible for a Bronze Star or a Purple Heart, military contractors can receive the "Defense of Freedom Medal" for their service. *Id.*

6. See *infra* Section II, Part D.

private military contractors are implicated in what has been called “arguably the worst military scandal in a generation.”<sup>7</sup>

When a U.S. soldier engages in wrongful conduct, federal law provides for the criminal punishment of offenders and for compensation to victims.<sup>8</sup> Similarly, when private military contractors commit these wrongs, there are some measures of criminal accountability.<sup>9</sup> Currently, however, there are no formal procedures for compensating wartime victims injured by the wrongs of civilian contractors.<sup>10</sup> Nevertheless, some victims of wrongful military conduct are using largely untested and creative legal theories to pursue traditional civil remedies.<sup>11</sup>

This Comment uses the Abu Ghraib prison scandal<sup>12</sup> as a model to analyze the complexities of criminal and civil accountability of private military contractors and discusses the various options available to compensate wartime victims of wrongful conduct. Part II of this comment briefly addresses the history of military contractors, considers their proliferation, and examines their roles in the Abu Ghraib prison scandal in Iraq. Part III analyzes whether the U.S. government can hold military contractors criminally liable and whether private plaintiffs can hold them civilly liable for wrongful conduct. This analysis will discuss current federal laws, international laws, and cases relevant to the Abu Ghraib scandal.

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7. P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B3. See also Bruce V. Bigelow, *Army Investigation Implicates Titan Contractors in Iraq Abuse*, SAN DIEGO UNION-TRIB., Aug. 26, 2004, at A16 (noting that recent Army investigations have “implicated five unnamed civilian contractors”).

8. See, e.g., Pauline Jelinek, *Rumsfeld Downplays Detainee Mistreatment*, WASH. POST, Sept. 11, 2004, at A4 (noting that forty-five soldiers have been “referred for court martial and [twenty-three] soldiers [have been] administratively separated from the service”). See also, e.g., Captain Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander’s Emergency Response Program*, 2004 ARMY LAW. 39, 40-41 (2004) (discussing the Foreign Claims Act, 10 U.S.C. § 2734 (2000) and its application in compensating tort claimants for injuries incurred during wartime action); Jeffrey Gettleman, *For Iraqis in Harm’s Way, \$5,000 and ‘I’m Sorry’*, N.Y. TIMES, March 17, 2004, at A1 (reporting that the U.S. Army limits “sympathy payments” to civilian victims at “\$1,000 per injury” and “\$2,500 per life”).

9. See Prepared Remarks of Attorney General John Ashcroft, Passaro Indictment Announcement (June 17, 2004), available at <http://www.usdoj.gov/ag/speeches/2004/ag061704.htm> (last visited Oct. 9, 2005) (announcing the criminal indictment of C.I.A. contractor David A. Passaro for the abuse of a prisoner on a U.S. military base in Afghanistan and charging him with two counts of “assault with a dangerous weapon” and two counts of “assault resulting in serious bodily injury”). See also Joanne Mariner, *Private Contractors Who Torture*, CNN.COM, June 17, 2004, <http://edition.cnn.com/2004/LAW/06/17/mariner.contractors/index.html> (last visited October 8, 2005) (discussing the complexities and routes available to prosecutors seeking criminal charges against contractors).

10. See Shannon O’Leary, *Iraq Prison-Abuse Suit Targets U.S. Companies*, CORP. LEGAL TIMES, September, 2004, at 82 (discussing the challenges and uncertainties facing Abu Ghraib torture victims who filed suit against private contractors).

11. See *id.* (noting the novelty and difficulty of using the federal RICO statute as a theory of recovery).

12. See generally *infra* Section II, Part C.

Lastly, Part IV proposes various legal and policy adjustments to establish viable accountability measures over private military contractors and considers supplementary methods of compensating victims of torture or mistreatment.

## II. U.S. MILITARY CONTRACTORS AND THEIR ROLE IN ABU GHRAIB

### A. Contractor Prevalence in "Operation Iraqi Freedom"

President Bush ordered the beginning of "Operation Iraqi Freedom" on March 19, 2003 with a surgical air strike intended to "shock and awe" Saddam Hussein's regime.<sup>13</sup> In the aftermath of this military operation, U.S. and coalition forces have relied on private military contractors to provide a multitude of substantive and mission-critical services.<sup>14</sup> For example, the United States military is almost entirely dependent on private contractors for translation services because of a severe shortage of Arabic speaking personnel.<sup>15</sup> The U.S. also employs contractors for such sensitive work as

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13. *Bombs Over Baghdad*, THE N.Y. POST, March 22, 2003, at 26; Craig Nelson and Larry Kaplow, *U.S. Strikes at Saddam: 'Opening Stages' of War Target Iraqi Leaders*, ATLANTA J. CONST., March 20, 2003, at 1A. Operation Iraqi Freedom was a pre-emptive strike intended to "disarm Iraq of weapons of mass destruction" and "to liberate the Iraqi people." Anne E. Komblut & Susan Milligan, *Washington Strategy Banned Weapons: Emphasis Shifts to Liberating Iraqis*, BOSTON GLOBE, April 3, 2003, at A31.

The Bush Administration's "War on Terror" has been the subject of legal criticism from various perspectives. See, e.g., Jordan J. Paust, *The Changing Laws of War: Do We Need A New Legal Regime After September 11?*, 79 NOTRE DAME L. REV. 1335, 1340-42 (2004) (criticizing the Bush Administration's legal responses to, and characterization of, the new paradigm as a literal "War on Terror"); Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KY. L.J. 849, 853 (2004) (highlighting the concerns arising from the use of "stress and duress" interrogation styles).

14. Cha & Merle, *supra* note 1. Contractors used in Iraq include major construction firms charged with helping to rebuild Iraq's crumbling roads, buildings, and other structures. *Id.* Contractors now serve as "security guards" for Afghanistan President Hamid Karzai and U.S. Ambassador Zalmay Khalizad. Hamida Ghafour, *Afghans Are Fed Up With Security Firm*, L.A. TIMES, Sept. 27, 2004, at A3. Other contractors, like Halliburton's subsidiary Kellogg Brown & Root, Inc. (KBR), are responsible for duties ranging from "repairing tanks" to preparing meals for the troops. Cha & Merle, *supra* note 1. See also Ariana Eunjung Cha, *\$1.9 Billion of Iraq's Money Goes to U.S. Contractors*, WASH. POST, Aug. 4, 2004, at A1 (describing the no-bid contract awarded to Halliburton's KBR subsidiary to repair oil pipelines and provide other services).

Additionally, the U.S. military hired a division of contractor Northrop Grumman to train the nascent Iraqi armed forces. James R. Coleman, *Constraining Modern Mercenarism*, 55 HASTINGS L.J. 1493, 1503 (2004). The U.S. military uses numerous other private contractor companies to secure the Baghdad's airport, instruct Iraq's domestic police forces, and provide many other critical tasks. *Id.* at 1503-04.

15. See Cha & Merle, *supra* note 1 (reporting that reliance on private contractors for translations became prevalent after Sept. 11, 2001 when the government realized its personnel did not have the language skills necessary to understand or analyze Arabic terrorist groups).

gathering and analyzing intelligence and interrogating detainees.<sup>16</sup> Accordingly, some have suggested that but for the assistance from contractors, Operation Iraqi Freedom simply “could not function.”<sup>17</sup>

The work that some private contractors perform is often “interchangeable” with the work done by active duty soldiers.<sup>18</sup> Many contractors wear the same camouflage uniforms worn by soldiers, except that instead of having their name on their left breast pocket, their identification reads “US CONTRACTOR” or “DOD [Department of Defense] CIVILIAN.”<sup>19</sup> Though their work and uniforms can be identical, the benefits soldiers and contractors receive are not.<sup>20</sup> The work in Iraq attracts contractors because some can command six-figure salaries, enjoy regular paid leaves-of-absence, and live in “hotel-like accommodations.”<sup>21</sup> Not surprisingly, because of the high pay and excellent benefits, the U.S. military is dealing with a “brain drain” phenomenon where Special Forces personnel leave the service to seek more profitable contract work as civilians.<sup>22</sup>

Contractors seeking these high rewards must also accept high risks. Since September 2004, over 100 private military contractor employees have been killed in Iraq — a casualty statistic second only to the U.S. military and more than all other coalition forces.<sup>23</sup>

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16. Ellen McCarthy, *CACI Contract: From Supplies to Interrogation*, WASH. POST, May 17, 2004, at E1 (reporting that military contractor CACI International Inc. was awarded a \$500 million “blanket-purchase agreement” to assist the Army in “inventory control,” “information technology services,” and “[prisoner] interrogation and intelligence gathering”).

17. Cha & Merle, *supra* note 1.

18. *Id.* (quoting Mel Goudie, the director of the Baghdad Police Academy who supervised a team comprised of soldiers and contractors, as saying “the military role and the civilian-contractor role are exactly the same”).

19. Cha & Merle, *supra* note 1.

20. *Id.*

21. *Id.* (noting that “[s]oldiers earn much less, work a year or longer without a break and must rest in sleeping bags in common areas that accommodate dozens”); *but see* Jackie Spinner, *For One Contractor, A Road Too Hard*, WASH. POST, Jan. 17, 2005, at A1 (describing the financial and mental-health difficulties that one KBR contractor experienced after expecting pay ranging from \$8,000-\$12,000 per month but in fact only receiving between \$2,000-\$4,000 per month for driving a supply truck).

22. Michael N. Schmitt, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 515 (2005).

23. *Id.*

### B. The Rise of the "Corporate Warrior"<sup>24</sup>

Governments around the world have used private military contractors for many years,<sup>25</sup> but never before have they been used so extensively.<sup>26</sup> One reason for their emergence is the post-Cold War objective of reducing defense costs.<sup>27</sup> With fewer active duty soldiers available for deployment, the military has increasingly relied on contractors to provide services growing in breadth, sensitivity, and complexity.<sup>28</sup> Indeed, critics of this practice have cautioned that continued reliance on the use of contractors has developed into outright dependence on their services.<sup>29</sup>

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24. For additional political, economic, and policy analysis of the recent phenomenon of private military contractors working on the front lines of U.S. military actions around the world, see generally PETER W. SINGER, *CORPORATE WARRIORS* (2003); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic and Strategic Problems With Privatizing War*, 82 WASH. U. L.Q. 1001 (2004); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549 (2005).

25. SINGER, *supra* note 24, at 19. Currently, private military contractors are active around the world, ranging from the richest industrialized nations to the poorest third-world countries. *Id.* at 9. See also GENERAL ACCOUNTING OFFICE, CONTINGENCY OPERATIONS: ARMY SHOULD DO MORE TO CONTROL CONTRACT COST IN THE BALKANS 3, GAO/NSIAD-00-225 (2000) [hereinafter G.A.O. REPORT] ("The U.S. military has relied on contractors to provide supplies and services in support of major contingencies since the Revolutionary War."); Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 7 (2001) ("In all countries engaged in war, experience has sooner or later pointed out that contracts with private men of substance and understanding are necessary for the subsistence, covering, clothing, and moving of an Army." (quoting Robert Morris, U.S. Superintendent of Finance in 1781)); Coleman, *supra* note 14, at 1496 (dating the use of contractors back to the Peloponnesian War in 413 B.C.).

26. Some contractors, such as Lockheed Martin, have integrated themselves deeply into the fabric of U.S. governmental operations. See, e.g., Tim Weiner, *Lockheed and the Future of Warfare*, N.Y. TIMES, November 28, 2004, at 3-1 (describing the numerous services Lockheed provides and its role in the modernization of warfare). Although best known for building warplanes and weapons systems, Lockheed also sorts mail for the U.S. Postal Service, computes taxes for the Internal Revenue Service, prints checks for the Social Security Administration, counts citizens for the U.S. Census Bureau, administers space flights for the National Aeronautics and Space Administration (N.A.S.A.), and monitors the air traffic for the Federal Aviation Administration (F.A.A.). *Id.*

27. See Major Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 111 (2001) (noting the marked contraction of active-duty U.S. military forces from 2,174,200 to 1,385,700 in the ten-year period between 1989 and 1999 to decrease military costs).

28. *Id.* at 111-12. Political scientist Peter Singer has classified private military contractors into three major categories: supporters, consultants, and providers. SINGER, *supra* note 24, at 93. Supporters provide "non-lethal aid and assistance" to the military, with duties ranging from logistics, supply, transport of cargo, and technical support. *Id.* at 97. Consultants provide "advisory and training services," often on complex strategic and tactical projects, but do not engage in work on the battlefield. *Id.* at 95-96. Providers are the most controversial of all military contractors because they implement and administer a variety of services on the battlefield by serving as "force-multipliers." Some countries employ provider contractors to fly as combat pilots or direct "command and control of field units." *Id.* at 92-94. Accordingly, providers are on the front lines of the battlefield, often working side-by-side with military personnel in combat. *Id.*

29. Guillory, *supra* note 27, at 111.

During the 1991 Gulf War, private military contractors accounted for approximately 1.5 percent of the total military manpower in the Middle East.<sup>30</sup> In the current Iraqi conflict, there are more than 20,000 military contractors, accounting for approximately ten percent of the total U.S. force.<sup>31</sup>

The U.S. Department of Defense uses contractors because it “saves money, allows the military to tap the private sector for skills it lacks and forces it to concentrate on its core mission of protecting the country.”<sup>32</sup> Others dispute that using contractors results in any cost-savings<sup>33</sup> and instead focus on the dearth of legal or bureaucratic accountability measures over modern private contractors.<sup>34</sup> Additionally, scholars are troubled by the “perverse incentives” contractors use to extend a mission or the war for their own financial interests.<sup>35</sup>

With regard to accountability, it is surprising to learn that, unlike a soldier, a commanding military officer has no legal control over a private military contractor.<sup>36</sup> A military supervisor lacks even the legal authority to order a contractor to do those services he or she was hired to perform.<sup>37</sup> Rather, the duty of disciplining contractors falls squarely on the contractors’ corporate employer.<sup>38</sup>

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30. Deborah Avant, *What Are Those Contractors Doing in Iraq?*, WASH. POST, May 9, 2004, at B1 (observing that in 1991, the military employed one private contractor in Iraq for every sixty active-duty military personnel, whereas in 2003, the ratio jumped to approximately one in ten).

31. *Id.* See also SINGER, *supra* note 7 (arguing that using more than 20,000 private military contractors makes it difficult to maintain accountability).

32. Cha & Merle, *supra* note 1. Others have noted that using contractors frees the President from having to formally report to, and be held accountable by, Congress when conducting military operations. Michaels, *supra* note 24, at 1065-68.

33. See SINGER, *supra* note 24, at 157 (noting a RAND report that concluded the privatization of military education programs yielded no net savings). Others note that the use of contractors saves money, despite the large salaries, because the military need not pay for training, certain benefits, and the “extensive support structure” provided for military personnel such as “commissaries, housing, dining halls, recreational and fitness facilities, hospitals, [and] off-duty education. . . .” Schmitt, *supra* note 22, at 517-18.

34. See SINGER, *supra* note 7 (noting the lack of accountability imposed on military contractors and the confusion over the punishment of contractors under current U.S. law). See also Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75, 77 (1998) (discussing the concern over the lack of accountability for private security companies).

35. See Michaels, *supra* note 24, at 1098-99 (discussing the “Iraq Gold Mine” and contractors’ “perverse incentives” to “skew the aims of the mission”). See also Zarate, *supra* note 34, at 147 (discussing African Union private security companies’ close ties to collateral industries and concerns of contractor corruption); SINGER, *supra* note 24, at 151 (discussing the complex principal-agent relationship of governments and military contractors and the dilemma contractors face in serving dual masters: their contracting principal’s interest of operational success versus their corporate shareholders’ interest of “profit maximization”).

36. Turner & Norton, *supra* note 25, at 36.

37. *Id.*

38. Schmitt, *supra* note 19, at 516.

Accordingly, U.S. military lawyers have sounded the clarion warning that contractors must not be placed in mission-critical positions.<sup>39</sup> Heeding this advice, however, may be impractical. With so much of the United States' complex financial, political, and military infrastructure founded on efficiency and cost-saving, it is unlikely that the use of contractors will diminish any time soon.

Since the issues of accountability attendant to the proliferation and use of civilian contractors transcend mere dollars and cents, the best way to further understand the issue is to examine the events of personnel misconduct and prisoner abuse at Abu Ghraib prison in Iraq.<sup>40</sup>

### C. Abu Ghraib Prison: A Symbol of Scandal

Abu Ghraib is a vast prison compound located twenty miles outside of Baghdad, Iraq.<sup>41</sup> It was the largest of seventeen prison facilities used by U.S. forces in Iraq.<sup>42</sup> Immediately after the U.S. occupation began in March 2003, Abu Ghraib was primarily used as a storehouse for common criminals.<sup>43</sup> As the Iraqi insurgency strengthened in the subsequent months, the U.S. military began rounding up thousands of Iraqis and transferring them to Abu Ghraib for interrogation.<sup>44</sup> As the number of Iraqi prisoners grew, the number of military staff responsible for managing Abu Ghraib

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39. Turner & Norton, *supra* note 25, at 41.

40. The incidents described herein were not isolated events. See, e.g., JAMES R. SCHLESINGER, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 12 (2004) [hereinafter SCHLESINGER REPORT], available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> (last visited Oct. 9, 2005) (noting approximately 300 separate allegations of detainee abuse in Iraq, Afghanistan, and Cuba). Of those approximately 300 allegations, 155 were fully investigated and yielded 66 confirmed instances of detainee abuse. *Id.* See also Dan Eggen and R. Jeffrey Smith, *FBI Agents Allege Abuse of Detainees at Guantanamo Bay*, WASH. POST, December 21, 2004, at A1 (reporting that an FBI agent at Guantanamo Bay witnessed detainees being subjected to abuse, including being "shackled to the floor in fetal positions" for days at a time, deprived of food and water, and left "to defecate on themselves").

41. Ian Fisher, *The Struggle for Iraq: Inmate; Iraqi Recounts Hours of Abuse By U.S. Troops*, N.Y. TIMES, May 5, 2004, at A1. Prior to the U.S. invasion of Iraq, Saddam Hussein used Abu Ghraib as a location to inflict torture and inhumane treatment on Iraqi prisoners and his political enemies. See, e.g., U.S. Department of State, Past Repression and Atrocities by Saddam Hussein's Regime, April 4, 2003, available at <http://www.state.gov/s/wci/fs/19352.htm> (alleging that, *inter alia*, Hussein executed over 4,000 prisoners at Abu Ghraib in 1984).

42. SCHLESINGER REPORT, *supra* note 40, at 11. In total, U.S. forces have imprisoned over 50,000 people at its detention facilities in Iraq, Afghanistan, and at the U.S. Naval Base in Guantanamo Bay, Cuba. *Id.*

43. *Id.* Ultimately, Abu Ghraib held a variety of detainees, including "Iraqi and foreign terrorists as well as a mix of Enemy Prisoners of War, other security detainees, criminals and undoubtedly some accused as a result of factional rivalries." *Id.*

44. *Id.* at 10-11.

stagnated.<sup>45</sup> In October 2003, a total of ninety military and contractor personnel were responsible for over 7,000 prisoners in Abu Ghraib.<sup>46</sup>

### 1. Contractors at Abu Ghraib

In addition to the military personnel stationed at Abu Ghraib, the U.S. Army employed a number of private contractors to augment its interrogation and intelligence workforce.<sup>47</sup> The Army hired employees of CACI International Inc.<sup>48</sup> (“CACI”) to interrogate prisoners and analyze military intelligence, and hired employees of Titan Corp. (“Titan”)<sup>49</sup> to provide

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45. *Id.* at 10-11, 28-29. See also Scott Higham et al., *A Prison on the Brink: Usual Military Checks and Balances Went Missing*, WASH. POST, May 9, 2004, at A1 (reporting that during the abuse, there was one battalion of soldiers guarding approximately 7,000 prisoners, whereas “Army doctrine calls for one battalion per 4,000 enemy soldiers”). The conditions at Abu Ghraib in October, 2003 have been described as “seriously overcrowded, under-resourced, and under continual attack.” SCHLESINGER REPORT, *supra* note 40, at 11.

46. Higham et al., *supra* note 45. See also Jonathan Eig, *Inside Abu Ghraib: Missed Red Flags, Team Under Stress*, WALL ST. J., Nov. 23, 2004, at A1 (chronicling the difficult work conditions at Abu Ghraib, the background of the alleged ringleader, Cpl. Charles Graner, and examples of abuse).

47. See Cha & Merle, *supra* note 1 (noting that four CACI interrogators and numerous Titan translators worked at Abu Ghraib).

48. CACI International, Inc. is headquartered in Arlington, Va., and specializes in information technology deployment and “systems integration” solutions. CACI employs approximately 9,500 people in more than 100 offices in the United States and Europe, and had revenues of \$1.62 billion in 2005. CACI Int’l Inc., CACI’s Profile, <http://www.caci.com/about/profile.shtml> (last visited Oct. 9, 2005).

Some critics pointed out that the U.S. military awarded CACI’s Abu Ghraib contract in secret and that the contract involves a startling expansion of duties falling outside of the scope of CACI’s original contract. See, e.g., McCarthy, *supra* note 16 (reporting that the U.S. Department of the Interior administers CACI’s contract for interrogation services at Abu Ghraib and that the contract was originally intended to provide only “routine services” for the Army, such as “inventory control”). A congressional investigation of CACI’s contracts conducted by the General Accounting Office found major flaws in “monitoring performance or controlling costs” and confirmed that CACI’s employees “performed jobs that went far beyond the initial contract terms.” Griff Witte, *Contractors Were Poorly Monitored, GAO Says; Report Contends CACI Performed Jobs in Iraq Meant for Government*, WASH. POST, April 30, 2005, at E1.

Approximately eight months after the Abu Ghraib abuse first became known, the U.S. Army awarded CACI a new six-month, \$23 million contract to continue providing “interrogation services” in Iraq. Ellen McCarthy, *Changes Behind the Barbed Wire*, WASH. POST, December 13, 2004, at E1. Recently, however, CACI announced its plans to discontinue providing interrogation services to the Army once its contract expires. Ellen McCarthy, *CACI Plans to Drop Interrogation Work*, WASH. POST, Sept. 15, 2005, at D4.

49. Titan Corp. was recently purchased by L-3 Communications, a major defense contractor, for \$2.65 billion. Dave Liedtka, *L-3 Communications Agrees to Acquire Titan for \$2.65 Billion*, BLOOMBERG NEWS, June 3, 2005. The new L-3 subsidiary, L-3 Communications Titan, is headquartered in San Diego, Ca., and provides “comprehensive information and communications products, solutions, and services for National Security and the Security of our Homeland.” Titan Corp., About The Titan Corporation, <http://www.titan.com/about> (last visited Oct. 9, 2005). L-3 Communications Titan employs approximately 12,500 people and has yearly sales approaching \$2.5 billion. *Id.*

translation services for all segments of Operation Iraqi Freedom.<sup>50</sup> Alarming, many Titan translators are “artists, grocery baggers, recent college graduates and others with no background in translating. . . .”<sup>51</sup> Equally troubling is the fact that prior to working in Iraq, more than a third of these contractors “did not receive formal training in military interrogation techniques, policy, or doctrine.”<sup>52</sup> Those translators that did receive training attended a one-week program at Fort Benning, Georgia to learn basic military protocol, self-defense, and the human-rights requirements of the Geneva Conventions.<sup>53</sup>

## 2. *Abu Ghraib Torture and the Aftermath*

Throughout the fall and early winter of 2003, several prisoners at Abu Ghraib endured a variety of heinous<sup>54</sup> mental, physical, and sexual torture.<sup>55</sup> The acts included repeated beatings, sexual humiliation, rape, sodomy, and an array of food, sleep, and sensory deprivations.<sup>56</sup> Army investigators

50. Cha & Merle, *supra* note 1.

51. *Id.*

52. SCHLESINGER REPORT, *supra* note 40, at 69.

53. Cha & Merle, *supra* note 1.

54. See MAJOR GENERAL ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 50 (2004) [hereinafter TAGUBA REPORT] (concluding that numerous U.S. military personnel “have committed egregious acts and grave breaches of international law at Abu Ghraib and Camp Bucca, Iraq”). The Taguba Report also implicates CACI and Titan employees for participating in the abuse. *Id.* at 48.

55. Torture is universally prohibited by both custom and law. See Winston P. Nagen and Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 91-92 (2001) (analyzing the universal prohibition on torture and discussing torture’s role in international law). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (outlining the legal prohibition on torture). In keeping with these standards, the United States has outlawed torture in various forms. Treaty/International Law: Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948). This document is considered the “foundation” for other international laws pertaining to torture. Addicott, *supra* note 13 at 858.

56. TAGUBA REPORT, *supra* note 54, at 15-20. Taguba’s investigation and findings used sworn statements of witnesses, including soldiers, private contractors from Titan and CACI, and Abu Ghraib prisoners. *Id.* at 18-19. A sampling of the abuses noted in the report include pouring phosphoric liquid from broken chemical lights on detainees, threatening detainees with a loaded gun, beating detainees with a chair and a broom handle, threatening the detainees with rape, pouring cold water on detainees, and sodomizing a detainee with various objects. *Id.* at 17.

The Taguba Report also detailed the following conduct against detainees: punching, slapping, and kicking; jumping on appendages; taking videos and photographs of detainees in the nude; placing naked detainees in sexually explicit positions; keeping detainees nude for several consecutive days; forcing male detainees to masturbate while being videotaped and photographed; placing hoods and sandbags on detainees heads; attaching wires to a detainee’s “fingers, toes, and penis to simulate electric torture”; engaging in sexual intercourse between a male soldier and a female detainee; and scores of additional sexual, mental, and physical abuse. *Id.* at 16-17. See also U.S. Army Criminal Investigation Division, *Investigation and Depositions Relating to Abu Ghraib Abuses* 6, (2004), available at <http://www.publicintegrity.org/docs/AbuGhraib/Abu11.pdf> (last visited Oct. 9, 2005) (compiling from depositions and sworn statements by witnesses a host of

concluded that the parties responsible for these acts were U.S. soldiers, military police, military intelligence personnel, and private contractors that Titan and CACI employed.<sup>57</sup>

On January 13, 2004, Specialist Joseph Darby, a soldier stationed at Abu Ghraib who witnessed some of the abuse, provided Army investigators with some disturbing information.<sup>58</sup> He gave the investigators a compact disc that contained digital photographs depicting various forms of abuse.<sup>59</sup> But for the courageous actions of Specialist Darby, the atrocities of Abu Ghraib may never have been discovered.<sup>60</sup> Days later, Lieutenant General Ricardo Sanchez ordered an investigation into the abuses.<sup>61</sup> By April, the story and a handful of pictures of the Abu Ghraib abuses were publicized around the world.<sup>62</sup> The U.S. government has not released all the videographic and photographic evidence of the abuse due to the ongoing investigation.<sup>63</sup>

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extremely graphic abuses that a group of ten soldiers and private military contractors committed); Neil A. Lewis and David Johnston, *FBI Memos Detail Abuse of Detainees*, CHI. TRIB., December 21, 2004, § 1, at 13 (reporting that FBI agents witnessed detainee abuse that included “strangulation, beatings, placement of lit cigarettes into the detainees’ ear openings and unauthorized interrogations” and ultimately circulated “Urgent Report” memos to a variety of U.S. officials detailing the abuse).

57. TAGUBA REPORT, *supra* note 54, at 44–48.

58. SCHLESINGER REPORT, *supra* note 40, at 39.

59. *Id.*

60. *Id.* Indeed, U.S. Army and FBI memos later indicated that U.S. Special Forces personnel threatened Defense Intelligence Agency witnesses of the abuse to not report the mistreatment. Neil A. Lewis, *Memos Say 2 Officials Who Saw Prison Abuse Were Threatened*, N.Y. TIMES, December 7, 2004 at A19. One memo indicated that some detainees had “burn marks on their backs,” bruises, and “some complained of kidney pain.” *Id.*

61. TAGUBA REPORT, *supra* note 54, at 6.

62. Seymour M. Hersh, *Torture At Abu Ghraib*, THE NEW YORKER, May 10, 2004, available at [http://www.newyorker.com/fact/content/?040510fa\\_fact](http://www.newyorker.com/fact/content/?040510fa_fact) (last visited Oct. 9, 2005). See also, e.g., Seymour M. Hersh, *Chain of Command*, THE NEW YORKER, May 17, 2004, available at [http://www.newyorker.com/fact/content/?040517fa\\_fact2](http://www.newyorker.com/fact/content/?040517fa_fact2) (last visited Oct. 9, 2005) (describing how the images of abuse were first published by the CBS program “60 Minutes II” on April 28, 2004); The Memory Hole, Photos of Iraqis Being Abused by U.S. Personnel, [http://www.thememoryhole.org/war/iraqis\\_tortured/index2.htm](http://www.thememoryhole.org/war/iraqis_tortured/index2.htm) (last visited Oct. 9, 2005) (displaying one set of twenty-eight photographs of abuse and torture at Abu Ghraib prison).

63. At a U.S. Senate hearing on the subject of the Abu Ghraib abuses, Secretary of Defense Donald H. Rumsfeld warned Senators that Army investigators had additional videos and pictures of “sadistic, cruel and inhuman” treatment of prisoners, and that “[i]t’s going to get still more terrible, I’m afraid.” Thom Shanker & Eric Schmitt, *Rumsfeld Accepts Blame and Offers Apology in Abuse*, N.Y. TIMES, May 8, 2004, at A1. After viewing the evidence in question, Senator Lindsey Graham (R-S.C.) told reporters, “We’re not just talking about giving people a humiliating experience — we’re talking about rape and murder and some very serious charges.” *Id.* (emphasis added).

D. Investigating "The Worst Military Scandal in a Generation"<sup>64</sup>

The Department of Defense panel in charge of investigating the Abu Ghraib torture interviewed over 170 witnesses and reviewed over 9,000 documents.<sup>65</sup> In total, their investigation found that twenty-three military intelligence personnel and four private contractors were directly responsible for the torture and abuse at Abu Ghraib prison.<sup>66</sup> Additionally, eight military intelligence personnel and two private contractors were identified as witnessing, yet failing to report, the abuses.<sup>67</sup>

In all, there were forty-four confirmed incidents of abuse at Abu Ghraib prison.<sup>68</sup> Army investigators allege employees of Titan and CACI were involved in no fewer than sixteen of the incidents.<sup>69</sup> The panel investigating the abuses found that "a preponderance of evidence supports" findings that a number of CACI and Titan employees actively engaged in the abuse or failed to report abuses.<sup>70</sup> As a result, the investigators recommended referring many of the implicated contractors and soldiers to the U.S. Department of Justice for potential criminal prosecution.<sup>71</sup> Despite these horrible abuses,

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64. SINGER, *supra* note 7.

65. General Paul Kern et al., Special Defense Department Briefing on Results of Investigation of Military Intelligence Activities at Abu Ghraib Prison Facility, (2004) [hereinafter *DOD Briefing*] available at <http://www.defenselink.mil/transcripts/2004/tr20040825-1224.html> (last visited Oct. 9, 2005); U.S. Department of Defense, Accompanying Slides to Special Defense Department Briefing on Results of Investigation of Military Intelligence Activities at Abu Ghraib Prison Facility, (2005) [hereinafter *DOD Accompanying Slides*], available at <http://www.defenselink.mil/news/Aug2004/d20040826slides.pdf> (last visited Oct. 9, 2004).

Since the initial investigation began, the Department of Defense has opened eight separate inquiries that have interviewed over 950 witnesses and reviewed over 15,000 documents. Jess Bravin, *Ghraib Ex-Inmates Seek Investigation of U.S. Officials*, WALL ST. J., November 30, 2004, at A6.

66. DOD Accompanying Slides, *supra* note 65.

67. *Id.*

68. SINGER, *supra* note 7.

69. *Id.*

70. Master General George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* 130-34, August, 23, 2004 [hereinafter *Fay Report*], available at [http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/26\\_08\\_04\\_fayreport.pdf](http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/26_08_04_fayreport.pdf) (last visited Oct. 9, 2005).

Examples of contractors' abuse and insubordinate activity at Abu Ghraib run the gamut from simple insubordination to egregious violations of military and international law. The first CACI employee identified is implicated in battering a detainee, consuming alcohol while on duty, and being insubordinate to a commanding military officer who questioned his interrogation techniques. *Id.* The second CACI interrogator identified in the Fay Report used a dog to threaten a detainee with physical harm, engaged in various physical abuses, and failed to report or prevent other personnel from abusing prisoners. *Id.* The third contractor implicated, a Titan employee, witnessed, but failed to report, prisoner abuse and partook in translating many of the verbal threats against detainees. *Id.* Another Titan employee was found to be an active participant in the abuse. *Id.* This contractor photographed naked detainees, beat a detainee with such force as to require stitches, and allegedly raped a young male detainee. *Id.* The remaining contractor implicated in the Fay Report engaged in similar abusive behavior. *Id.*

71. *Id.*

intelligence officers estimate that approximately eighty-five percent of Abu Ghraib detainees “were of no intelligence value. . . .”<sup>72</sup> Indeed, some of this torture was done purely for sadistic pleasure.<sup>73</sup>

Thus far, the U.S. soldiers implicated in the Abu Ghraib scandal have faced a variety of criminal punishments.<sup>74</sup> Yet, unlike their military co-workers, the employees of Titan and CACI have not yet been charged with any crimes.<sup>75</sup> However, both Titan and CACI are facing civil lawsuits for their alleged roles in the Abu Ghraib scandal.<sup>76</sup>

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72. See *id.* (citing the estimate of Sergeant Jose Garcia, an Abu Ghraib Detainee Assessment Board member, that between 85%-90% of Abu Ghraib detainees “were of no intelligence value”).

73. See James Schlesinger, *The Truth About Our Soldiers*, WALL ST. J., Sept. 9, 2004, at A16 (“We did it for the fun of it.” (quoting a soldier involved in the abuse)). Although some soldiers did it for fun, others thought it was just business as usual. See Peter Slevin, *U.S. Pledges Not to Torture Terror Suspects*, WASH. POST, June 27, 2004, at A1 (“If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.” (quoting a supervisor of military interrogators)).

The attorney for Charles Graner, a soldier charged with, *inter alia*, orchestrating the placement and photography of nude prisoners in a human pyramid, contends his client’s actions were “no big deal” because “[c]heerleaders all across America form pyramids every day, and it doesn’t hurt people. . . . I think everything that was done [in Abu Ghraib] was perfectly lawful.” Eig, *supra* note 46 at A16. At Graner’s court-martial trial, Graner’s attorney argued that he was ordered to “soften up” the detainees and that the resulting abuse was ultimately intended to secure Iraq’s freedom. See Kate Zernike, *Jury Takes Five Hours to Reach Verdict in Abu Ghraib Case*, N.Y. TIMES, January 15, 2005, at A1 (reporting on Graner’s convictions and quoting Graner’s attorney that “[s]ometimes, when you make an omelet, you have to break some eggs. . .”). Ultimately, Graner was sentenced to ten years in prison, received a reduction in rank, and will receive a dishonorable discharge upon his release. *Graner Gets 10 Years for Abu Ghraib Abuse*, MSNBC.COM, January 15, 2005, <http://www.msnbc.msn.com/id/6795956>.

74. See, e.g., *130 GIs Have Been Cited for POW Abuse*, CHI. TRIB., December 16, 2004, at A17 (reporting that 130 troops have been charged or punished in abuse cases in Iraq, Afghanistan, or Guantanamo Bay). See also Eig, *supra* note 46, at A16 (noting six soldiers’ punishments, ranging from suspension and reprimands to jail time, and that four soldiers are still awaiting trial); Alex Rodriguez, *GI Pleads Guilty in Prison Abuse*, CHI. TRIB., Oct. 21, 2004, at A1 (reporting that Staff Sergeant Ivan Frederick was sentenced to eight years in prison after pleading guilty to charges including forcing a prisoner to stand on a box and “wrap[ing] wires on his fingers and toes to make him think he was about to be electrocuted”). But see Douglas Jehl, *Pentagon Will Not Try 17 G.I.’s Implicated in Prisoners’ Deaths*, N.Y. TIMES, March 26, 2005, at A1 (noting that none of the seventeen U.S. soldiers identified by Army investigators as having a role in the deaths of three detainees would face prosecution).

75. Mariner, *supra* note 9.

76. See Marty Logan, *Victims’ Lawyers Say Abu Ghraib Reports Help Their Case*, INTER PRESS SERVICE (MONTREAL), August 31, 2004 (noting multiple lawsuits filed against Titan and CACI).

### III. ANALYSIS: CRIMINAL AND CIVIL LIABILITY OF MILITARY CONTRACTORS

When military personnel commit crimes, they are prosecuted under the Uniform Code of Military Justice (“UCMJ”).<sup>77</sup> But when it comes to private military contractors, the filing of criminal charges is a relatively rare and protracted occasion.<sup>78</sup> Likewise, because U.S. law precludes plaintiffs from holding military personnel civilly liable,<sup>79</sup> the manner in which plaintiffs can sue private military contractors remains uncertain. This section will discuss the options available to prosecutors and torture victims seeking to hold private military contractors accountable for wrongful conduct.

#### A. Criminal Liability for Military Contractors

##### 1. Establishing Jurisdiction: The Military Extraterritorial Jurisdiction Act

Until recently, private military contractors enjoyed a loophole in federal law that shielded them from criminal liability for their actions occurring overseas.<sup>80</sup> Contractors that violated U.S. law abroad could essentially avoid court-martial jurisdiction and most criminal jurisdictions in U.S. federal courts.<sup>81</sup>

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77. See 10 U.S.C. § 805 (2000) (applying military jurisdiction around the world and subjecting U.S. military personnel to UCMJ jurisdiction). See also 10 U.S.C. 802(a)(10) (subjecting certain civilians who serve “with or accompany[] an armed force in the field” or during a war to UCMJ jurisdiction). This section, however, does not apply to civilians, like contractors, that “have no status in peacetime.” ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON INTERNATIONAL HUMAN RIGHTS COMMITTEE ON MILITARY AFFAIRS AND JUSTICE, HUMAN RIGHTS STANDARDS APPLICABLE TO THE UNITED STATES’ INTERROGATION OF DETAINEES 33 [hereinafter ABCNY COMMITTEE] available at <http://www.abcny.org/pdf/HUMANRIGHTS.pdf> (last visited Oct. 9, 2005). Thus, the UCMJ does not provide jurisdiction over private military contractors. See also *Robb v. United States*, 456 F.2d 768 (holding that the UCMJ does not apply to a civilian engineer working for the Navy in Vietnam).

78. See, e.g., *United States v. Passaro*, Indictment, No. 5:04-CR-211-1 (E.D.N.C. 2004), available at <http://news.findlaw.com/hdocs/docs/torture/usp Passaro61704ind2.html> (last visited Oct. 9, 2005) (indicting contractor David Passaro more than one year after he beat a detainee with his hands, feet, and a large flashlight during a C.I.A. interrogation that took place in Afghanistan on June 19 and 20, 2003). As a result of the beatings, the detainee died in his cell the next day. *Id.* Jurisdiction was established under the “special maritime and territorial jurisdiction of the United States” as provided by 18 U.S.C. § 7(9)(a) because the alleged beatings occurred on a U.S. Army Base in Afghanistan. *Id.* See also *Mariner*, *supra* note 9 (noting that criminal charges have not been filed against contractors implicated in Abu Ghraib abuse).

79. See CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 5 (1973) (discussing the history and concept of sovereign immunity as later applied by the United States in connection with Blackstone’s maxim that “the king can do no wrong”). See also *The Federal Tort Claims Act*, 28 U.S.C. 2680(j) (2000) (listing members of the U.S. military as exempt from liability).

80. Major Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 MIL. L. REV. 92, 93 (2001).

81. *Id.*

Congress closed this loophole in 2000 with the passage of the Military Extraterritorial Jurisdiction Act (MEJA).<sup>82</sup> Under the MEJA, many U.S. criminal laws extend to certain locations, such as military bases in other countries.<sup>83</sup> The MEJA also broadens these laws to include civilian and contractor personnel accompanying U.S. forces abroad.<sup>84</sup>

One uncertainty for the U.S. Department of Justice in using the MEJA against a military contractor is that such a prosecution is literally unprecedented.<sup>85</sup> Congress passed the MEJA with the understanding that the U.S. Department of Defense would provide guidance on how it should apply to private contractors.<sup>86</sup> Nearly five years after the MEJA's passage, the U.S. Department of Defense has yet to complete this task.<sup>87</sup> Moreover, the MEJA applies only to U.S. military installations overseas. It does not apply to locations occupied by U.S. forces, such as Abu Ghraib prison.<sup>88</sup>

Therefore, while federal prosecutors and courts ostensibly have the power to establish criminal jurisdiction over private military contractors who work on military installations in Iraq, it is unclear exactly how such a case might proceed. Assuming a case filed under the MEJA has proper jurisdiction, the next consideration is the choice of federal law to prosecute military contractors charged with detainee abuse.

## 2. Federal Criminal Laws Relating to Torture

### a. The War Crimes Act – 18 U.S.C. § 2441

The first option available to prosecute private military contractors is the War Crimes Act of 1996 (WCA).<sup>89</sup> This statute criminally penalizes any U.S. soldier or U.S. national for committing a war crime, regardless of where the crime was committed.<sup>90</sup> A defendant found guilty under the WCA faces punishment that could include fines, prison, or the death penalty.<sup>91</sup>

82. 18 U.S.C. §§ 3261-3267 (2000). Despite implementation of the MEJA and its subsequent amendments, some have argued that other loopholes still exist. See Frederick A. Stein, *Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act*, 27 HOUS. J. INT'L L. 579, 606 (2005) (identifying at least five major MEJA loopholes and calling for additional amendments).

83. Major Tyler J. Harder, *Recent Developments in Jurisdiction: Is This the Dawn of the Year of Jurisdiction?*, 2001 ARMY LAW. 2, 12 (2001) (detailing the MEJA's implementation and coverage).

84. 18 U.S.C. § 3261.

85. Kathleen Cahill, *Outside Contractors, Outside Military Law*, WASH. POST, May 9, 2004, at B5.

86. *Id.* Section 3266(a) of the MEJA provides that the Secretary of Defense "shall prescribe regulations governing the apprehension, detention, delivery, and removal of persons under this chapter. . . ."

87. Cahill, *supra* note 85.

88. SINGER, *supra* note 24, at 240.

89. 18 U.S.C. § 2441 (2000).

90. 18 U.S.C. § 2441(a).

91. *Id.*

The WCA defines a “war crime” as any “grave breach” of the Geneva Conventions or any other treaty to which the United States is a party.<sup>92</sup> Implemented in 1949, the Geneva Conventions outlaw, *inter alia*, torture and inhumane treatment.<sup>93</sup> Furthermore, Common Article 3 of the Geneva Conventions prohibits “outrages upon personal dignity,” such as “humiliating and degrading treatment.”<sup>94</sup>

The U.S. Army investigation of the Abu Ghraib abuses has already concluded that those responsible for the torture have met this threshold.<sup>95</sup> Therefore, absent any jurisdictional difficulties, there should be no substantive legal obstacles to the criminal prosecution of a military contractor found to be responsible for detainee torture.

b. The Torture Statute – 18 U.S.C. § 2340

The second option available to federal prosecutors, 18 U.S.C. § 2340 (“Torture Statute”), is a relatively new law.<sup>96</sup> The Torture Statute makes it a crime for any U.S. national to commit, or attempt to commit, torture.<sup>97</sup> For a defendant to be criminally liable, the torture itself must be committed “outside the United States.”<sup>98</sup> If found guilty under the Torture Statute, a defendant faces punishment commensurate with the level of abuse, ranging from fines, prison, and death.<sup>99</sup>

Under this statute, “torture” is defined as an act “specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control. . . .”<sup>100</sup> The employees of Titan and

92. 18 U.S.C. § 2441(c).

93. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 3538, 75 U.N.T.S. 287, 308 [hereinafter *Geneva Conventions*]. For a brief discussion of the Geneva Conventions and a critical analysis of the Bush administration’s post-September 11 legal response, see Paust, *supra* note 13. For a more expansive discussion of the Geneva Conventions with regard to military contractors, see Schmitt, *supra* note 22, at 519.

94. Geneva Conventions art. 3(1)(c), *supra* note 93, 6 U.S.T. at 3520, 75 U.N.T.S. at 290.

95. TAGUBA REPORT, *supra* note 54, at 50 (concluding that numerous U.S. soldiers have committed “grave breaches of international law at Abu Ghraib/BCCF and Camp Bucca, Iraq”).

96. The Torture Statute became effective on April 30, 1994. P.L. 103-236, Title V, Part A, § 506(a), 108 Stat. 463 (codified as amended at 18 U.S.C. § 2340 (2000)). Section 2340 was enacted to satisfy the requirements of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/708 (1984) (*reprinted in* 23 I.L.M. 1027 (Feb. 4, 1985)) [hereinafter CAT]. See S. REP. NO. 107-44, at 4 (2002) (recognizing that section 2340 applies to CAT and to the Torture Victim Protection Act). See also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison*, 98 AM. J. INT’L L. 591, 592 (2004) (discussing the CAT and the United States’ duties thereunder).

97. The Torture Statute P.L. 103-236, 108 Stat. 463.

98. 18 U.S.C. § 2340A.

99. *Id.*

100. 18 U.S.C. § 2340(1). Congress further defined “severe mental pain or suffering” as “the prolonged mental harm caused by or resulting from . . . the intentional infliction or

CACI found to be involved in the Abu Ghraib abuse would face criminal liability under even the narrowest reading of this statute.

Although many potential targets have emerged in the ten years since this law was codified, the Department of Justice has yet to prosecute anyone under the Torture Statute.<sup>101</sup> Consequently, human rights advocates have suggested that this failure to prosecute is tantamount to the United States being a “safe haven” for torturers.<sup>102</sup> Perhaps more alarming to critics is the Department of Justice General Counsel’s determination that the Torture Statute is constitutionally inapplicable to all interrogations ordered by President Bush.<sup>103</sup> In 2002, the U.S. Department of Justice concluded that torture occurs only where the physical pain endured is the type that accompanies “death or organ failure.”<sup>104</sup>

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threatened infliction of severe physical pain or suffering . . . or the threat of imminent death. . . .” *Id.*

101. See WILLIAM J. ACEVES, UNITED STATES OF AMERICA: A SAFE HAVEN FOR TORTURERS 50-54 (2002), available at <http://www.amnestyusa.org/stoptorture/safehaven.pdf>, (last visited Oct. 9, 2005) (noting the U.S. Department of Justice’s failure to prosecute under § 2340).

102. *Id.*

103. UNITED STATES, WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS 21 (Apr. 4, 2003), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf> (last visited Oct. 9, 2005) (concluding that applying the strictures of section 2340A to interrogations of suspected terrorists in Iraq may be an unconstitutional abridgement of the President’s powers). This memorandum couches its reasoning in the President’s inherent powers as Commander-in-Chief: “In order to respect the President’s inherent constitutional authority to manage a military campaign, 18 U.S.C. § 2340A . . . must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority.” *Id.* at 21.

104. See Memorandum from Assistant Attorney General Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, Regarding the Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A 46 (Aug. 1, 2002) [hereinafter D.O.J. Bybee Memo], available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (last visited Oct. 29, 2005) (concluding that torture under sections 2340-2340A involves only “extreme acts” that “must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure” and noting that some acts that may be “cruel, inhuman, or degrading treatment” do not constitute torture).

The Bush Administration “disavowed” Bybee’s memorandum in June 2004, and the Department of Justice worked for seven months to revise its contents to provide the Department of Defense and CIA with updated legal guidance pertaining to the use of torture in detainee interrogations. Jess Bravin, *Interrogation Policy Proves Elusive*, WALL ST. J., December 13, 2004, at A4. The latest revision of this memorandum backed down from the controversial definition of torture and retreated from its prior contention that authorizing torture is within the purview of presidential power. Memorandum from Daniel Levin, Acting Assistant Attorney General to James B. Comey, Deputy Attorney General, regarding Legal Standards Applicable Under 18 U.S.C. § 2340-2340A, available at <http://www.usdoj.gov/olc/dagmemo.pdf> (last visited Oct. 14, 2005). See also Jess Bravin, *U.S. Revamps Policy on Torture Of War Prisoners*, WALL ST. J., December 31, 2004, at A1 (reporting on the latest revision and the internal administration struggles to define torture). The latest memo, however, continues to assert that the interrogation methods previously authorized by the Department of Justice are legally acceptable. *Id.*

It remains to be seen how federal prosecutors and courts will apply and interpret the Torture Statute. Moreover, it is unclear whether this interpretation extends to private military contractors.

Because Congress drafted the Torture Statute to provide only a criminal cause of action,<sup>105</sup> a victim of torture must look elsewhere to find a legal right to bring a civil cause of action.

### B. Civil Liability for Private Contractors

In addition to holding private military contractors criminally accountable, another concern is how the victims of torture, war crimes, or other wrongs are compensated for their injuries. This section explores the various methods available to plaintiffs seeking damages against private military contractors.

#### 1. The Alien Tort Claims Act

The first and oldest law a torture victim can sue under is the Alien Tort Claims Act (ATCA).<sup>106</sup> First adopted in 1789,<sup>107</sup> the ATCA provides that federal district courts have “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>108</sup> The ATCA was rarely used during the first 191 years of its existence.<sup>109</sup> Then, in 1980, the Second Circuit breathed new life into the ATCA when it decided the landmark international human rights case, *Filartiga v. Peña-Irala*.<sup>110</sup>

In *Filartiga*, the plaintiff, Dr. Filartiga, sued Peña-Irala, a Paraguayan national, for torturing and killing Dr. Filartiga’s seventeen year-old son in 1976.<sup>111</sup> The court held that personal jurisdiction was established when Filartiga served process on Peña-Irala, who was within the territorial borders of the United States at the time of service.<sup>112</sup> However, the court noted that

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105. 18 U.S.C. § 2340B.

106. 28 U.S.C. § 1350 (2000). For an excellent discussion of the ATCA’s role in the laws of nations, and in particular its application to U.S. case law, see Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. PA. J. INT’L ECON. L. 193 (2005).

107. John Haberstroh, *The Alien Tort Claims Act & Doe v. Unocal: A Paquete Habana Approach to the Rescue*, 32 DENV. J. INT’L L. & POL’Y 231, 236 (2004).

108. 28 U.S.C. § 1350.

109. See Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Claims Statute*, 18 N.Y.U. J. INT’L L. & POL. 1, 4-5 n.15 (1985) (noting the ATCA had been used only twenty-one times from its inception in 1789 until 1980). One reason for the ATCA’s infrequent use could be scholars’ and courts’ struggles to interpret its few cases, mysterious origins, and complete lack of legislative history. Eric Engle, *The Torture Victim’s Protection Act, The Alien Tort Claims Act, and Foucault’s Archaeology of Knowledge*, 67 ALB. L. REV. 501, 502 (noting the ATCA’s origins and its dormancy until 1980). Judge Friendly once remarked that “although [the ATCA] has been with us since the first Judiciary Act . . . no one seems to know whence it came.” Haberstroh, *supra* note 107, 236 n.30.

110. 630 F.2d 876 (2d Cir. 1980).

111. *Id.* at 878. The torture and murder occurred in Paraguay. *Id.*

112. *Id.* at 879.

jurisdiction under the ATCA is proper only if the alleged torture violates a specific treaty or the more general “law of nations.”<sup>113</sup>

The *Filartiga* court found that “an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.”<sup>114</sup> Consequently, torture victims from around the world have successfully sued under the ATCA for compensation for their injuries.<sup>115</sup>

When *Filartiga* opened the door to new litigation, it also ignited a debate over the nature of the ATCA’s contemporary usage.<sup>116</sup> Specifically, the debate turned on whether the ATCA was strictly a jurisdictional statute or whether it imparts an independent cause of action for violations of international law-based norms.<sup>117</sup> Fortunately, the Supreme Court recently handed down a definitive answer to this question.<sup>118</sup>

## 2. *The ATCA, Sosa, and International Legal Norms*

The Supreme Court recently clarified the mysteries of the ATCA with its decision in *Sosa v. Alvarez-Machain*.<sup>119</sup> In *Sosa*, both parties were Mexican nationals.<sup>120</sup> The plaintiff, Alvarez-Machain, sued Sosa under the ATCA and Federal Tort Claims Act<sup>121</sup> for injuries he received after Sosa

113. *Id.* at 880.

114. *Id.* at 880. In coming to this conclusion, the court relied upon a litany of international law instruments, Supreme Court law, and related authority. *Id.* at 880-86.

115. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) (holding that “universally accepted norms of international law” prohibit torture and that the TVPA extends that prohibition to summary execution); *Xuncax v. Gramajo*, 886 F.Supp. 162, 170 (D. Mass. 1995) (holding that subjecting prisoners to fourteen hour-long interrogations constituted torture); *Tachiona v. Mugabe*, 234 F.Supp.2d 401, 420-23 (S.D.N.Y. 2002) (finding that the beating of a detainee with hands constitutes torture); *Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189, 1191, 1196 (S.D.N.Y. 1996) (denying defendant’s motion to dismiss plaintiff’s complaint of torture involving beatings and electric shocks to the genitals); *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (holding that threatening a detainee with death constitutes torture).

116. See Gregory G. Garre, *Coded Message; Lower Courts Must Decipher Supreme Court Ruling on Resurrected Alien Tort Statute*, LEGAL TIMES, September 6, 2004, at 52 (discussing the legal debate over the ATCA’s jurisdictional nature prior to *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004)).

117. *Id.*

118. *Id.* In *Sosa*, the Court ruled that the ATCA was merely jurisdictional in nature and did not create a statutory cause of action. *Sosa*, 124 S. Ct. at 2761.

119. 124 S. Ct. 2739. For an exhaustive and well-researched analysis of *Sosa*, see Ashley Wright Baker, *Forcible Transborder Abduction: Defensive Versus Offensive Remedies for Alvarez-Machain*, 48 ST. LOUIS U. L.J. 1373 (2004). See also Benjamin Berkowitz, *Sosa v. Alvarez-Machain: United States Courts as Forums for Human Rights Cases and the New Incorporation Debate*, 40 HARV. C.R.-C.L. L. REV. 289 (2005) (discussing the “new incorporation debate” with respect to *Sosa* and comparing it to the incorporation battles of applying the Bill of Rights to the States through the Fourteenth Amendment).

120. 124 S.Ct. at 2746.

121. 28 U.S.C. § 2680(k) (2000). The Federal Tort Claims Act (“FTCA”) provides that the United States cannot be held civilly liable for claims that arise in foreign countries. *Id.* See also William P. Kratzke, *Some Recommendations Concerning Tort Liability of*

abducted him and delivered him into the custody of the U.S. Drug Enforcement Administration in Texas.<sup>122</sup> At issue was whether Alvarez-Machain's illegal seizure and detainment constituted a "violation of the law of nations or a treaty of the United States."<sup>123</sup> The Court held that the facts of Alvarez-Machain's seizure and brief detainment<sup>124</sup> did not rise to such a level, and reversed the appellate court's decision.<sup>125</sup>

In its reasoning, the Court unanimously concluded that the ATCA did not create any new cause of action and that, at its core, it is nothing more than a jurisdictional statute.<sup>126</sup> Then, by a 6-3 majority, the Court went one step further, recognizing that "residual common law discretion" exists under the ATCA.<sup>127</sup> This discretion permits federal courts to consider and adjudicate violations of the law of nations in all cases filed under the ATCA.<sup>128</sup> The Court noted, however, that such violations of international law must be universally condemned and prohibited by criminal law.<sup>129</sup> Torture is one crime that meets this standard.<sup>130</sup> Accordingly, for the victims of torture at Abu Ghraib, current and forthcoming suits against private contractors involved in the abuse should not face any jurisdictional barriers under the ATCA.

Recent cases decided after *Sosa* have reiterated these standards. For example, in *Jama v. Esmor*, the plaintiffs were immigrants detained in the United States who were allegedly abused by a private prison contractor.<sup>131</sup> The trial court refused to grant summary judgment to the defendant corporation that had contracted with the U.S. Immigration and Naturalization

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*Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1123 (1996) (providing an overview of the FTCA and the foreign country exception's confusing applications).

122. See *Sosa*, 124 S.Ct. at 2746 (describing how the U.S. Drug Enforcement Administration hired "Mexican nationals to seize Alvarez and bring him to the United States for trial" and how *Sosa* was involved with abducting Alvarez from his home, holding Alvarez in a motel overnight, and ultimately bringing him by a chartered plane to El Paso, Texas where federal agents arrested Alvarez).

123. *Sosa*, 124 S.Ct. at 2747 (quoting 28 U.S.C. § 1350). The second issue the Court considered was the scope of the FTCA. *Id.* The Court held that Alvarez could not recover under the FTCA. *Id.*

124. The majority characterized Alvarez's injuries as "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment. . . ." *Id.* at 2769. With no evidence of torture or other abuse, the Court found no violation of international law. *Id.*

125. *Id.*

126. *Id.* at 2761, 2764.

127. *Id.* at 2769.

128. Garre, *supra* note 116.

129. *Sosa*, 124 S. Ct. at 2766 ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory." (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994))).

130. *Id.* at 2765-66 ("For purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind." (quoting *Filartiga*, 630 F.2d at 890)).

131. *Jama v. U.S. I.N.S.*, No. 97-3093, 2004 U.S. Dist. LEXIS 22697, \*51-52 (Dist. N.J. 2004).

Service (“INS”) to provide prison services for INS detainees.<sup>132</sup> Relying on *Sosa*, the trial court found that, in view of the internationally recognized prohibition on the contractor’s alleged conduct, the plaintiff’s evidence of abuse raised a sufficient question of material fact to proceed to trial.<sup>133</sup>

As *Jama* demonstrates, the ATCA will be central to any civil suit filed by foreign nationals against persons and entities responsible for torture. However, it is not the only statute under which plaintiffs may recover.<sup>134</sup>

### 3. The Torture Victims Protection Act

The Torture Victims Protection Act (TVPA) provides a civil remedy to U.S. victims of torture or “extrajudicial killing” against any individual perpetrator who was acting “under actual or apparent authority, or color of law, of any foreign nation.”<sup>135</sup> Congress created the TVPA to carry out the requirements of the U.N. Charter and other related human rights agreements.<sup>136</sup> When used in conjunction with the ATCA, however, the TVPA also provides non-citizens with a substantive cause of action for injuries resulting from their torture.<sup>137</sup> Several cases following *Sosa* have reaffirmed this proposition and noted that such actions may proceed regardless of the proximity of a U.S. connection to the torture.<sup>138</sup>

The TVPA defines torture as an act in which “severe pain or suffering . . . whether physical or mental, is intentionally inflicted on [an] individual for such purposes as obtaining from that individual or a third person information or a confession. . . .”<sup>139</sup> The TVPA also requires plaintiffs to exhaust all administrative remedies<sup>140</sup> before filing suit and creates a ten-year statute of limitations from the time the cause of action

132. The abuses alleged by the plaintiff detainees were remarkably similar to the abuses at Abu Ghraib. The court noted that “[d]etainees were beaten, confined without cause to solitary confinement and sexually abused and humiliated on repeated occasions.” *Id.* at \*28. The plaintiffs also allege they were subjected to filthy living conditions, harsh temperatures, sleep deprivation, and an array of similar physical and mental abuses. *Id.* at \*26-27.

133. *Id.* at \*51-52.

134. See generally Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433 (2002) (explaining the various methods of recovery available to individuals in international human rights litigation).

135. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1991) (codified as amended at 28 U.S.C. 1350 (2000)).

136. See S. REP. NO. 107-44, at 4 (2002) (describing the TVPA’s implementation of U.N. treaty obligations).

137. Engle, *supra* note 109, at 503-04.

138. See, e.g., *Mohammad v. Hilal bin Tarraf*, 114 Fed. Appx. 417, 418-19 (2d Cir. 2004) (vacating the district court’s dismissal of plaintiff’s torture claims and granting him leave to amend his complaint); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104-06 (2d Cir. 2000) (reversing the lower court’s dismissal on grounds of *forum non conveniens* in ATCA and TVPA torture case, noting, “Congress has expressed a policy of U.S. law favoring the adjudication of such [ATCA] suits in U.S. courts”).

139. Torture Victim Protection Act of 1991, Pub. L. No. 102-256(3)(b)(1), 106 Stat. 73.

140. See, e.g., 10 U.S.C. § 2734 (2000) (providing for the administrative payment of claims for persons or property by the United States).

arises.<sup>141</sup> Based on the egregious nature of the abuse at Abu Ghraib and its relation to interrogations seeking “information or a confession,”<sup>142</sup> such conduct plainly qualifies as torture under the TVPA.<sup>143</sup>

What remains unclear is whether foreign torture victims will be successful in suing corporations, such as private military contractors, under the TVPA.<sup>144</sup> Furthermore, beyond the challenge of navigating uncharted legal territories, scholars have identified a number of additional obstacles facing torture victims suing under the ATCA and TVPA.<sup>145</sup> Even in the face of these challenges, many individuals alleging they were tortured at Abu Ghraib have filed suit against private contractors.<sup>146</sup>

#### IV. AUGMENTING CONTRACTOR ACCOUNTABILITY AND COMPENSATING TORTURE VICTIMS

If anything is to be learned from the Abu Ghraib abuses, it is that substantive steps must be taken to prevent such atrocities from reoccurring.<sup>147</sup> It is also important that torture victims receive appropriate

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141. Torture Victim Protection Act of 1991, Pub. L. No. 102-256(2)(b)&(c), 106 Stat. 73.

142. *Id.*

143. See generally TAGUBA REPORT, *supra* note 54 (detailing the abuse at Abu Ghraib prison and its role in detainee interrogations).

144. Engle, *supra* note 109, at 503-04. The TVPA references only an “individual,” so it remains to be seen how courts will apply this section to corporations. *Id.*

145. See *id.* at 504-14 (noting major obstacles facing ATCA/TVPA litigants, including meeting jurisdiction requirements, exhausting local remedies, managing comity with other nations, defending *forum non conveniens* motions, avoiding the state action doctrine, dodging the political question doctrine, overcoming sovereign immunity, and meeting the requisite burdens of proof). While it would seem logical to sue the U.S. government and military under a theory of *respondeat superior*, such a claim is precluded by the doctrine of sovereign immunity. See, e.g., THOMAS M. FRANCK, POLITICAL QUESTIONS / JUDICIAL ANSWERS (2001) 101-02 (tracing the history of sovereign immunity in the United States).

146. See, e.g., Kathy Benz, *Lawsuit Targets Abu Ghraib Contractors*, CNN.COM, July 27, 2004, <http://edition.cnn.com/2004/LAW/07/27/abu.ghraib.lawsuit/index.html> (last visited Oct. 3, 2005) (reporting on a lawsuit that victims of Abu Ghraib torture filed against Titan and CACI). See also, e.g., Logan, *supra* note 76 (noting that a plaintiff’s attorney believes the Fay and Taguba reports bolster their cases against CACI and Titan employees).

147. Although this Comment will discuss only those changes relating to strengthening contractor liability, it is important to note that the U.S. military has already made numerous changes to U.S. Army policy relating to interrogation of detainees. See, e.g., Mark Mazzetti, *Reforms in Place at Abu Ghraib*, L.A. TIMES, September 4, 2004, at A3 (reporting on the numerous institutional and operational changes implemented at Abu Ghraib pertaining to detainment and interrogation). These changes include banning the use of dogs, sleep deprivation, hooding, and forced nakedness. *Id.* Soldiers, military police, and contractors involved in interrogations now must receive an initial and regular weekly training session. *Id.* See also McCarthy, *supra* note 48, at E1. (reporting on the numerous operational changes involving contractors at Abu Ghraib). Congress has also been active in attempting to prohibit the use of “extreme interrogation” methods by U.S. forces and contractors. Douglas Jehl & David Johnston, *White House Fought New Curbs on Interrogations, Officials Say*, N.Y. TIMES, January 13, 2005, at A1 (reporting that the U.S. Senate approved by a margin of 96-2 intelligence reform legislation, which included prohibition of certain “extreme interrogation” methods). However, congressional leaders

compensation for their injuries. This section proposes various changes to law and policy that will increase the accountability of private military contractors and provide compensation to torture victims.

### A. Military Contractor Regulation

The prevailing criticism of private military contractors is the lack of accountability and “checks and balances” over their conduct.<sup>148</sup> One possible response to this problem is to implement a comprehensive governmental regulation of military contractors.<sup>149</sup>

#### 1. The Benefits of Regulating Military Contractors

The benefits of regulation are twofold. First, licensure would establish industry-wide best-practices guidelines, thereby giving contractors a meaningful operational procedure to minimize the organizational, authoritarian, and legal challenges they currently face.<sup>150</sup> Second, licensure would legitimize<sup>151</sup> an industry that many believe is operating in the shadows of the global economy with for-hire mercenaries.<sup>152</sup> Licensure could also further expand the growth of an industry that employs thousands around the world in an otherwise lethargic economy.<sup>153</sup>

Ideally, a federal<sup>154</sup> or international body would administer the regulation and define baseline requirements of competence, accountability,<sup>155</sup>

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later deleted this prohibition from the final version of the bill after numerous Bush Administration officials expressed opposition to the measure. *Id.*

148. See SINGER, *supra* note 24, at 220 (discussing the lack of legal and operational accountability of contractors).

149. To remain politically and administratively viable, any proposed regulation should entail some form of licensure, certification, or similar framework. See generally SINGER, *supra* note 24, at 238-40. The likelihood of implementing other changes, such as “passing a constitutional amendment limiting the rights of overseas military contractors” so as to solidify their jurisdiction with military personnel, appears to be politically improbable. Schmidt, *supra* note 22, at 1124.

150. See UNITED KINGDOM FOREIGN AND COMMONWEALTH OFFICE GREEN PAPER, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION 2001-02, 21 (2002), available at [http://www.sandline.com/home/Green\\_Paper\\_12-2-02.pdf](http://www.sandline.com/home/Green_Paper_12-2-02.pdf) (providing an in-depth examination of the options available to the UK government for regulating private military contractors). See also Sandline International, *Private Military Companies - Independent or Regulated?*, *Sandline International* March 28, 1998, at 2-3, available at <http://www.sandline.com/white/regulation.doc> (last visited Oct. 2, 2005)(discussing the various advantages to licensing contractors).

151. *Id.*

152. See, e.g., Coleman, *supra* note 14 at 1493.

153. *Id.*

154. The United States already requires contractors that engage in arms exportation to acquire a license. SINGER, *supra* note 24, at 238. Specifically, certain U.S. military contractors that export arms “must seek licenses under the International Traffic in Arms Regulations.” *Id.* However, this licensing procedure is “idiosyncratic” to both the United States and the contractors, and its efficacy is unclear. *Id.*

155. One component of this accountability must be a more substantive review process once a contract is granted. Such a review process, ideally functioning on a regular basis, “should include factors such as the level and efficiency of services,” identify potential problem areas, and work with relevant stakeholders to prevent or manage these problems.

and related traits. Such regulations would ensure contractor companies and their employees are properly screened before they are granted licensure. Conversely, in the event that a licensed contractor corporation engages in wrongful or illegal conduct, their license would be at risk of probation, suspension, or revocation. The most serious of these punishments, revocation, would be the death-knell to an incompetent or reckless contractor that sustains itself on a market-based economy. Individualized licensure of contractor employees would also work to ensure that only the most qualified and competent contractors work in the industry.

## 2. *The Obstacles Facing Contractor Regulation*

Regulating military contractors does have some drawbacks. First, as with any major bureaucratic endeavor, the cost of implementing and administering this regulation could be prohibitive.<sup>156</sup> Moreover, the inefficiencies of the bureaucratic model could thwart the goals of strengthening accountability.<sup>157</sup> With governmental budgets strained worldwide, the peacetime operating budget of such an agency could be slashed mercilessly. Such a result would effectively negate any accountability benefit realized and could render this regulatory model ineffective.

The second major concern with a regulatory model is the effectiveness of licensure.<sup>158</sup> Because many contractors work overseas, often in dangerous and remote locations, compliance with the licensure requirements or standards of conduct would be difficult to monitor.<sup>159</sup>

Another potential problem with licensure is that a corporate or individual contractor, with whom the United States refuses to do business, may easily find a market for their services in another, more legally hospitable, country.<sup>160</sup> This problem underscores the need for a consistent, international model of contractor regulation.<sup>161</sup>

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*Id.* See also G.A.O. REPORT, *supra* note 25, at 25 (recommending various changes to training and operations of Army supervision of military contractors working in the Balkans to more effectively manage costs and maintain accountability).

156. G.A.O. REPORT, *supra* note 25, at 21-22.

157. *Id.* See also *Wyman v. James*, 400 U.S. 309, 335 (1971) (Jackson, J., dissenting) (“The bureaucracy of modern government is not only slow, lumbering, and oppressive; it is omnipresent”).

158. *Id.*

159. *Id.* One possible way to clear this obstacle in the United States is to initiate a tripartite oversight framework comprised of the Departments of Commerce, State, and Defense. SINGER, *supra* note 24, at 240. Having a multi-agency oversight framework is critical to ensure that the experts in their respective Executive Branch Departments cover all of the complex and “nuanced” issues. *Id.* As a practical matter, the now-familiar political and fiscal concerns in creating any such framework would likely bar any change in that direction.

160. Sandline International, *supra*, note 150, at 2.

161. See SINGER, *supra* note 24, at 239-41 for a well-reasoned analysis of the need for an international regulatory model and a discussion of the various oversight, reporting requirements, and sanctions necessary to ensure contractor accountability.

### 3. *Industry Self-Regulation: The Easy Way Out?*

Some corporate contractors oppose the idea of governmental regulation, instead preferring industry-wide self-regulation.<sup>162</sup> Under this model, contractors suggest their respective corporate “codes of ethics” alone are sufficient to prevent any improper behavior.<sup>163</sup> In the event of illegal behavior, the proponents of self-regulation suggest that current national and international laws are adequate to mete out any necessary punishment.<sup>164</sup> Allowing such an intricate, potentially destructive industry to self-regulate would be a costly mistake that the international community cannot afford to make.

#### *B. Expanding Contractor Accountability by Amending the MEJA*

The next way to expand the accountability of private military contractors involves amending the MEJA.<sup>165</sup> As enacted, the MEJA applies only to private military contractors working on “U.S. military facilities.”<sup>166</sup> Therefore, Congress must amend the MEJA to expand jurisdiction over contractors who operate beyond traditional U.S. military bases. Such locations must include overseas facilities occupied by the U.S. military, such as Abu Ghraib prison.

Moreover, Congress should amend the MEJA to include contractors working for non-military U.S. agencies such as the Central Intelligence Agency.<sup>167</sup> Other scholars have suggested Congress incorporate into federal law “crimes against humanity” and other universally recognized prohibitions to ensure that the United States can comply with the requirements of international law.<sup>168</sup> Ultimately, these changes to federal law would provide additional options and guidance to the Department of Justice in prosecuting contractors.

While changing the laws and regulatory framework of contractors is important, a larger concern is the U.S. military’s need to attract and retain the human resources necessary to complete our nation’s most sensitive and mission-critical intelligence work.<sup>169</sup> Such work must not be entrusted to private contractors unless absolutely necessary.<sup>170</sup>

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162. SANDLINE INTERNATIONAL, *supra* note 150, at 2.

163. *Id.*

164. *Id.*

165. For a discussion of the MEJA, see generally Perlak, *supra* note 80.

166. SINGER, *supra* note 24, at 240.

167. *Id.*

168. Jordan Paust, *Abuse of Iraqi Detainees at Abu Ghraib: Will Prosecution and Cashiering of a Few Soldiers Comply With International Law?*, JURIST, May 10, 2004, available at <http://jurist.law.pitt.edu/forum/paust1.php> (last visited Oct. 22, 2005).

169. SINGER, *supra* note 24, at 236.

170. *Id.* The U.S. military continues to see its reliance on contractors as a necessity. Both CACI and Titan Corp. have received subsequent multi-million dollar contracts to perform additional services for the military around the world. See William Welsh, *Navy Re-Ups CACI's Support and Training Contract*, WASH. POST, December 27, 2004, at E4 (reporting that the U.S. Navy renewed a \$16 million CACI contract to provide “logistics support and training services”); Bruce V. Bigelow, *Revenue at Titan Up 12%, But Profit*

### C. *Compensating the Torture Victims*

Beyond changing the regulatory framework of private military contractors, the United States and the international community should also establish a more substantive vehicle<sup>171</sup> to assist victims of war crimes and non-military victims of personal or property damages. The U.S. government is currently working towards establishing a unilateral, state-sponsored compensation process for the victims of the Abu Ghraib abuses, but the methodologies used to process and award the victims' claims are not yet known.<sup>172</sup> Nevertheless, to ensure an independent and fair allocation of compensation, the United States should consider using an external compensation vehicle.

An example of such a vehicle is the United Nations Compensation Commission (UNCC).<sup>173</sup> The U.N. Security Council established the UNCC after the Gulf War in 1991 in order to process claims for damages and award payments stemming from Iraq's invasion of Kuwait.<sup>174</sup> Ten years after the UNCC was created, it awarded over \$32.2 billion to the most pressing of these injuries.<sup>175</sup>

Reestablishing the UNCC during the current Iraq war would provide an independent arbiter and administrator to award damages quickly and fairly to the victims of Abu Ghraib and other wartime injuries.<sup>176</sup> Also, because the initial UNCC was a novel and successful precedent in international law,<sup>177</sup> the U.N. and its member states should not face any major legal obstacles in

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*Flat*, SAN DIEGO UNION-TRIBUNE, Oct. 28, 2004, at C1 (reporting that the U.S. Army extended Titan's \$657 million translation contract and that Titan has numerous additional pending contracts); Edmond Lococo, *U.S. Army to Extend Titan Translation Contract*, BLOOMBERG NEWS, June 28, 2005 (reporting that Titan's translation contract will be extended past its deadline and that translation work accounts for \$247 million of its total sales).

171. See cases cited *supra* note 8 (discussing the current compensation scheme available to Iraqi civilians who suffer personal or property injuries from U.S. forces).

172. See U.S. Department of Defense, Testimony as Prepared by Secretary of Defense Donald H. Rumsfeld, Before The Senate and House Armed Services Committees, (2004) available at <http://www.defenselink.mil/speeches/2004/sp20040507-secdef1042.html> (last visited Oct. 24, 2005) ("I am seeking a way to provide appropriate compensation to those detainees who suffered grievous and brutal abuse and cruelty . . . It is the right thing to do. I'm told we have the ability to do so. And so we will — one way or another.")

173. For an insightful, historical treatment of the UNCC, see Rosemary E. Libera, *Divide, Conquer, and Pay: Civil Compensation for Wartime Damages*, 24 B.C. INT'L & COMP. L. REV. 291, 295-96 (2001).

174. *Id.* at 296. Funding for the UNCC was derived primarily from sale proceeds of Iraq's oil. *Id.* Since its inception in 1991, the UNCC has received approximately 2.6 million claims seeking compensation for personal, corporate, government, and property injuries suffered during the Gulf War. The damages complained of range from hundreds of dollars to hundreds of thousands of dollars. *Id.* at 299-300. The claims were divided into six categories and were acted on "in order of humanitarian need." *Id.*

175. *Id.*

176. See *id.* at 296 (describing the UNCC's structural makeup and goals).

177. See Gregory Townsend, *The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & U.S. Remedies*, 17 LOY. L.A. INT'L & COMP. L. REV. 973, 1027 (1995) (describing the UNCC's accomplishments).

reconvening the UNCC in response to damages stemming from Operation Iraqi Freedom.<sup>178</sup> Indeed, current U.N. Secretary-General Kofi Annan has already voiced his support for a permanent reparations commission.<sup>179</sup>

The major impediments to reestablishing the UNCC are political and economic. First, due to the complex diplomatic and geo-political climate between the United States, the U.N., and other U.N. member nations, it would be difficult to recreate such a massive program.<sup>180</sup> Second, a major source of contention would be the method of funding a modern UNCC. While it may be possible to rely again on Iraqi oil revenues for funding, the ever-evolving complexities and vagaries of the nascent Iraqi government must be considered in designing any program of this magnitude.

## V. CONCLUSION

Private military contractors have long served as an integral part of the U.S. military and its operating strategy. Currently, the use of contractors continues to expand what has long been the exclusive domain of the federal government and its employees.<sup>181</sup>

Investigations into the torture of detainees at Abu Ghraib have found that both U.S. active duty military personnel and private military contractors were responsible. Although the U.S. government and military likely will not be civilly liable for their conduct, the military has already punished several soldiers with criminal sanctions. However, it is critical that the United States hold the private military contractors criminally accountable for the atrocities at Abu Ghraib. It is equally important that any torture victims obtain the right to determine whether compensation for their injuries is appropriate.

To reach these ends, Congress should amend various sections of federal law and the U.N. should consider whether implementation of a reparations program is appropriate. While the U.S. military has already made

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178. Libera, *supra* note 173, at 300-01.

179. See Thalif Deen, *U.N. Chief Backs Compensation For Civilian War Victims*, INTER PRESS SERVICE, August 23, 2004 (noting Kofi Annan's support of establishing a permanent U.N. reparations body, but quoting Professor Francis Boyle in saying, "I doubt very seriously the U.S. government would approve it or fund it, for obvious reasons"). See also U.N. SECURITY COUNCIL, THE RULE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST-CONFLICT SOCIETIES, REPORT OF THE SECRETARY-GENERAL 18 (2004) available at [http://www.undp.org/bcpr/jssr/4\\_resources/documents/UN\\_2004\\_Rule%20of%20Law.pdf](http://www.undp.org/bcpr/jssr/4_resources/documents/UN_2004_Rule%20of%20Law.pdf) (discussing the need for both tribunals and truth commissions to help vet through complaints and ensure an efficient remedial service to victims in need) (last visited Oct. 20, 2005).

180. See Deen, *supra* note 179 (quoting Professor Francis Boyle's expression of doubt as to U.S. support for another version of the UNCC). Professor Boyle's doubts stem partially from the Bush Administration's refusal to ratify the International Criminal Court. *Id.*

181. See, e.g., Wilson P. Dizard III, *DHS Eyes Outsourcing Intelligence Work*, WASH. TECH., Oct. 6, 2004, available at [http://www.wtonline.com/news/1\\_1/daily\\_news/24666-1.html](http://www.wtonline.com/news/1_1/daily_news/24666-1.html) (last visited Oct. 24, 2005) (reporting that the Department of Homeland Security is soliciting bids for eighty-four private contractors to serve as "intelligence research and operations specialists" in the DHS's Immigration and Customs Enforcement division).

substantive changes to its interrogation policies and procedures, more must be done. By implementing these changes, the United States can further strengthen accountability over military contractors and work to prevent another Abu Ghraib scandal from occurring.

