U.S. Hypocrisy in the Treatment of Non-State Actors in the "War on Terror"

by Erin Louise Palmer

"They stripped me naked. One of them told me he would rape me. He drew a picture of a woman to my back and makes me stand in shameful position holding my buttocks…. One of them said, 'You are not getting out of here health[y], you are getting out of here handicapped. And he said to me, 'Are you married?' I said, 'Yes.' They said, 'If your wife saw you like this, she will be disappointed.' One of them said, 'But if I saw her now she would not be disappointed now because I would rape her.'" Ameen Saeed Al-Sheik, detainee No. 151362.[1]

"Then he brought a box of food and he made me stand on it with no clothing, except a blanket. Then a tall black soldier came and put electrical wires on my fingers and toes and on my penis, and I had a bag over my head." Abdou Hussain Saad Faleh, detainee No. 18170.[2]

"Now, you have people who love death just like you love life. Killing for the sake of God is their best wish, getting to your soldiers and allies are their happiest moments, and cutting the heads of the criminal infidels is implementing the orders of our lord." Speaker in video of Nick Berg's beheading.[3]

"For the mothers and wives of American soldiers, we tell you that we offered the U.S. administration to exchange this hostage for some of the detainees in Abu Ghraib, and they refused. Coffins will be arriving to you one after the other, slaughtered just like this. How can free Muslims sleep soundly as they see photographs of shame in Abu Ghraib prison?" Speaker in video of Nick Berg's beheading.[4]

Introduction

Between October and December 2003 "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees" at the U.S. detention facility at Abu Ghraib.[5] Abuse of detainees included acts involving violence or the threat of violence such as "simulat[ing] electric torture," "[t]hreatening detainees with a charged 9mm pistol," and "[b]eating detainees

[1] Scott Higham and Joe Stephens, "New Details of Prison Abuse Emerge," *Washington Post* (May 21, 2004) at A01.

[2] *Id*.

[3] Boston.com, Thanassis Cambanis, "Tape shows beheading of US engineer; Militants vow to kill 2 others held in Iraq," http://www.boston.com/news/world/articles/2004/09/21/tape_shows_beheading_of_us_engineer/?rss_id=Boston%20Globe%20--%20Front%20Page (Sept. 21, 2004).

[4] USATODAY.com, Bill Nichols, "Video shows beheading of American captive," http://www.usatoday.com/news/world/iraq/2004-05-11-iraq-beheading_x.htm (last updated May 12, 2004).

[5] Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade 18, 16 (2004).

with a broom handle and a chair."[6] In addition, detainees suffered sexually degrading acts such as "[f]orcing groups of male detainees to masturbate themselves while being photographed and videotaped" and "[p]lacing a dog chain or strap around a naked detainee's neck and having a female Soldier pose for a picture."[7] Some of the more explicit alleged sexual degradations included stretching a detainee's penis with a rope and beating it with a stick, forcing a detainee to masturbate and ejaculate into a plastic cup and pouring the semen on his head, and forcing detainees to lay on top of eachother naked.[8]

Despite the involvement of members of privately contracted military companies (PMCs) in these abusive interrogations,[9] no prosecutions of members of PMCs have taken place.[10] According to one government source, the Department of Justice has received 19 cases of abuse implicating military contractors, 17 of which are still under review nearly three years later.[11] An Amnesty International Report argues that "the U.S. Department of Justice should act immediately to finalize investigations and where warranted initiate prosecution of the 17 pending cases of detainee abuse involving employees or contractors of private military firms."[12] Despite calls for prosecution, it appears that the punishment these individuals will face will be limited to termination of their

[6] *Id*. at 16-17.

[7] *Id*.

[8] Second Am. Compl., *Saleh v. Titan Corporation*, Case No. 04 CV 1143 R (NLS), 2004 WL 1881616 (S.D. Cal. July 30, 2004).

[9] *See* AmnestyUSA.org, "Annual Report: Outsourcing Facilitating Human Rights Violations," http://www.amnestyusa.org/annualreport/2006/overview.html (accessed Dec. 2, 2006) (noting that "at least 20 cases [involving civilians working for PMCs] were forwarded by the Department of Defense and the CIA to the Department of Justice since the beginning of the conflict in Afghanistan…. There have been at least four deaths in custody, two each in Iraq and Afghanistan, involving civilian contractors.").

[10] CorpWatch, Pratap Chatterjee and A.C. Thompson, "Private Contractors and Torture at Abu Ghraib," http://www.corpwatch.org/article.php?id=11285&printsafe=1 (May 7, 2004). Colonel Christopher Mayer, Chief of Staff of the Reconstruction Support Office of the Pentagon, has argued that the lack of prosecution is to avoid having these cases dismissed because of insufficient investigation. "Modern Mercenaries? The humanitarian implications of using the private sector in conflict/peacekeeping operations," American University (Nov. 8, 2006).

[11] "Privatizing the War on Terror," *Voice of America*, Press Release (June 14, 2006).

[12] "Amnesty Report," *supra* note 9.

employment and stripping of their security clearances.[13] Private contractors have also been implicated in other questionable practices, such as the death of four individuals in U.S. custody, without facing prosecution.[14] According to Amnesty International, "[t]he sole civilian indictment involved CIA contractor David Passaro, indicted for assault in the case of Abdul Wali, an Afghan detainee beaten to death in eastern Afghanistan in June 2003."[15]

These scandals part of a larger scheme of U.S. privatization of its military capabilities. Privatization of U.S. military activities has expanded drastically since September 11, 2001. U.S. military efforts in Iraq are the "biggest U.S. military commitment in a generation" and "the biggest marketplace in the short history of the privatized military industry."[16] For example, there are "approximately 20,000 private military contractors in Iraq"[17] and the ratio of private contractors to troops is one in ten.[18] In addition to an increase in the number of private military contractors, "the Abu Ghraib prison scandal revealed that even such sensitive tasks as military interrogations have been privatized."[19]

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[13] U.S. Representative Dennis J. Kucinich (D-OH), U.S. Representative Christopher Shays (R-CT) Holds a Hearing on Private Security Firms in Iraq, FDCH CAP. TRANSCRIPTS (June 13, 2006) (stating, "We all know about Private Lynndie England and Specialist Charles Graner's role in the abuse of detainees at Abu Ghraib prison. But many of the interpreters and interrogators present during the abuses were private contractors hired by the firms Titan and CACI. Many of them have yet to be prosecuted or jailed like their military counterparts. Instead, a few may have their security clearances stripped away – that's it.").

[14] "Annual Report," *supra* note 9.

[15] *Id*.

[16] Salon.com, Peter W. Singer, "Warriors for Hire in Iraq," http://www.brookings.edu/views/articles/fellows/singer20040415.htm (Apr. 15, 2004).

[17] Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, 47 Wm. & Mary L. Rev. 135, 138-39 (Oct. 2005)

[18] *Id*. at 149. This figure is compared to a ration of one in a hundred during the first Gulf War. *Id*.

[19] Dickinson, *supra* note 16, at 138-39 (noting that the military functions of contracted employees include "not only support services such as constructing weapons and building barracks, but also core activities such as training the military, gathering intelligence, providing security services, and even conducting combat-related missions.").

The assignment of traditionally state-sponsored military tasks to private companies raises ambiguities with regard to the rights and obligations of individuals carrying out these tasks. Because employees of PMCs are not official government actors it is questionable what limitations apply to their behavior and what role the government should play in holding them accountable.[20] Unlike official government actions that are subject to public scrutiny, the actions of PMCs are often far removed from the public sphere, diminishing the likelihood of calls for regulatory measures to govern PMCs and ensure accountability.[21] And unlike the United States' willingness to prosecute at least some of the military officials implicated in the abuses at Abu Ghraib,[22] no single PMC employee has faced official sanction.[23]

International humanitarian law provides the relevant legal guidelines during armed conflict and arguably applies to the "war on terror." Under international humanitarian law, which traditionally applies to state actors,[24] the state's sovereign power to use force extends to members of the armed forces and certain other organized armed groups that act with state authority.[25] Difficulties arise when non-state actors participate directly[26] in armed conflict. The United States

[20] *Id*. at 151 (recognizing that "individuals employed by PMCs "have engaged in activities that have raised questions about the willingness of their employees to abide by international law standards that normally would apply to governmental actors, as well as about the difficulty of holding these employees accountable for any violations.").

[21] *See* Singer, *supra* note 18 (arguing that "[u]ntil Fallujah, the private military industry was largely hidden behind the headlines, present in the world's hot spots but never fully acknowledged" and citing a number of military incidents involving employees of PMCs).

[22] Peter W. Singer, "The Contract the Military Needs to Break," *Washington Post* (Sept. 12, 2004).

[23] "Privatizing the War on Terror," *supra* note 11.

[24] Saad Gul, *The Secretary Will Deny all Knowledge of your Actions: The Use of Private Military Contractors and the Implications for State and Political Accountability*, 20 Lewis & Clark L. Rev. 287, 311 (Summer 2006) ("The system [of respect for state sovereignty] is premised on a state monopoly on lawful force – a premise reflected in both the United Nations Charter and the Geneva Conventions.").

[25] Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [Third Geneva Convention].

[26] *See* Robert Kogod Goldman, "International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts," 9 Am. U. J. Int'l L. & Pol'y 49, 71 (1993) (recognizing that legal scholars have concluded that direct participation in hostilities means "personally assuming the role of a combatant" and "pos[ing] and immediate threat of actual harm to the adverse party," but determining whether an enemy combatant has satisfied these criteria is difficult); *see also* Kristen Fricchione, *Casualties in Evolving Warfare: Impact of Private Military Firms' Proliferation on the International Community*, 23 Wis. Int'l L.J. 731, 764-65 (Fall 2005) (noting the

has claimed that non-state actors in the "war on terror" are not entitled to the protections of the laws of war.[27] Despite its claim that non-state actors such as members of Al-Qaeda are so-called "enemy combatants," the United States fails to recognize, or chooses to ignore, that other non-state actors are involved in the fight against terrorism. PMCs, for example, are also non-state actors employed by the United States to participate directly in the "war on terror."

This paper begins by discussing various classifications of individuals under international humanitarian law, such as combatants, civilians, and mercenaries, in an attempt to determine which classification is appropriate for non-state actors involved in the "war on terror." Part II of this paper details the classification of members of Al-Qaeda under international humanitarian law. Although the term "enemy combatant" does not appear within the Geneva Conventions, the classification of certain individuals as "enemy combatants" is evidence of the limitations of the traditional law of war paradigm. The United States has relied on the ambiguous rights and responsibilities of non-states actors under international humanitarian law to argue that "enemy combatants" do not fall within the scope of the Geneva Conventions.[28] Part III of this paper analyzes the classification of employees of PMCs under international humanitarian law and concludes that employees of PMCs are non-state actors engaged in armed combat. Part IV of this paper details methods of holding employees of PMCs accountable under U.S. law for human rights violations and Part V analyzes the difficulties in ensuring liability. Although laws exist in the United States to prosecute employees of PMCs, the United States has failed to prosecute any of these individuals, implying that the government is contracting legal services to shield its own illegal actions.

"debate over the qualification of direct participation.").

[27] *See* Draft Memorandum for the President from Alberto Gonzales, "Decision Re Application of the Geneva Convention on Prisoner of War to the Conflict with Al Qaeda and the Taliban" (Jan. 25, 2002) (arguing that the Geneva Conventions apply only to "High Contracting Parties").

[28] *Id.*

This paper concludes that the United States' treatment of members of Al-Qaeda and employees of PMCs is hypocritical. By claiming that members of Al-Qaeda are non-state actors who are not entitled to the protections of the laws of war, the government can engage in questionable interrogation practices that are otherwise prohibited. Meanwhile, the United States contracts private companies that are non-state actors to conduct its sometimes-illegal military activities abroad because these companies distance the United States from direct liability. In addition, the United States fails to prosecute these individuals based on various legal loopholes and a lack of willpower, implying that such prosecutions would reveal U.S. involvement in illegal action.

I. Classifications under International Humanitarian Law

The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Third Geneva Convention)[29] details the rights and obligations of individuals classified as combatants, and the Geneva Convention Relative to the Protection of Civilians in Time of War of August 12, 1949 (Fourth Geneva Convention)[30] details the rights and obligations of individuals classified as civilians. Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) of 8 June 1977 defines mercenaries and the rights to which they are not entitled.[31] The status of non-state actors under international humanitarian law determines their rights and duties, as well as modes for accountability.

Combatant Status

Combatants are defined as members of the armed forces of a party to an armed conflict.[32]

[29] Third Geneva Convention, *supra* note 25.

[30] Third Geneva Convention, *supra* note 25; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [Fourth Geneva Convention].

[31] Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, Dec. 12, 1977, 1125 U.N.T.S. 3 [Additional Protocol I].

Although the Geneva Conventions do not expressly recognize a combatant's immunity to prosecution for legitimate acts of war, immunity for combatants is embodied in customary international law. Combatant immunity is implicitly recognized by Article 87 of the Third Geneva Convention, which states that "[p]risoners of war may not be sentenced … to any penalties except those provided for in respect of members of the armed forces of the said power who have committed the same acts."[33] Combatants are therefore entitled to commit lawful acts of war, such as murder, which would not otherwise be permissible under either international or domestic criminal systems. Upon capture, combatants are classified as prisoners of war and are entitled to all of the rights and privileges granted to the captor's own forces, as well as certain protections during detention,[34] including humane treatment[35] and freedom from coercive interrogation tactics.[36] Under Article 102 of the Third Geneva Convention, a valid sentence for a prisoner of war must be from "the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power."[37]

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[32] Int'l Comm. of the Red Cross, *Basic Rules of the Geneva Conventions and their Additional Protocols* 21 (ICRC 1983).

[33] Robert K. Goldman and Brian D. Tittemore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status Under International Humanitarian and Human Rights Law," American Society for International Law, Task Force on Terrorism (2003), *available at* http://asil.org/taskforce/goldman.pdf (*citing* Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 Am. U. L. Rev. 53, 59 (1983)).

[34] *See also* Marco Sassóli, *Use and Abuse of the Laws of War In the "War on Terrorism*," 22 Law & Ineq. 195, 205 (2004) ("While in detention, prisoners of war benefit however from a detailed regime of treatment ensuring that they are treated not only humanely, but also not as prison inmates, unless they are prosecuted or sentenced"); John Fitzpatrick, S*overeignty, Territoriality, and the Rule of Law*, 25 Hastings Int'l & Comp. L. Rev. 303, 321 (2002) ("The most pertinent aspects of POW treatment are exemption from punishment for lawful acts of war; humane treatment; limits on interrogation; trial rights equivalent to those afforded soldiers of the detaining power; housing equivalent to soldiers of the detaining power; and repatriation at the conclusion of active hostilities, unless the POW has been charged with or convicted of crimes under criminal processes consistent with the Convention").

[35] *See* Third Geneva Convention, *supra* note 25, at art. 13 ("Prisoners of war must at all times be humanely treated…. [P]risoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.").

[36] *Id*. at art. 99 (No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.").

[37] *Id*. at art. 102.

Various provisions stipulate the requirements necessary to achieve combatant status, such as being subject to an internal disciplinary system that enforces compliance with the rules of international law that apply during armed conflict, as well as carrying arms openly "during each military engagement, and during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."[38] Generally, combatant status and all of its privileges and duties apply to those individuals who have authorization from their state to participate in an armed conflict, i.e., a state's armed forces.

Members of irregular groups[39] are entitled to prisoner of war status only if they satisfy the requirements of Article 4A(2) of the Third Geneva Convention:

> (1) they must belong to an organized group;
> (2) the group must belong to a Party to the conflict;
> (3) the group must be commanded by a person responsible for his subordinates;
> (4) the group must ensure that its members have a fixed, distinctive sign recognizable from a distance;
> (5) the group must ensure that its members carry their arms openly; and
> (6) the group must ensure that its members conduct their operations in accordance with the laws and customs of war.[40]

As Professors Goldman and Tittemore have noted, "Most of the requirements of Article 4A(2) of the Third Convention have proved over time to be extremely difficult if not, in fact, impossible for irregulars to comply with without jeopardizing their military operations."[41] Wearing a uniform and carrying arms openly threaten to expose irregulars and challenge the security of their operations.

Members of Al-Qaeda and employees of PMCs likely do not satisfy the Third Geneva Convention's requirements that entitle individuals to lawful combatant status. Neither group

[38] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts arts. 43, 44, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 [Additional Protocol II].

[39] *See* Third Geneva Convention, *supra* note 25, at art. 4A(2) (defining when prisoner of war status applies for "[m]embers of other militias and members of other volunteer corps").

[40] Goldman and Tittmeore, *supra* note 33, at 13.

[41] *Id*. at 16.

constitutes the armed forces of a party to the conflict,[42] nor is either group likely to satisfy the requirements of Article 4A(2), especially in light of conduct that violates the laws and customs of war.[43]

CIVILIAN STATUS

Civilians are defined in Article 4 of the Fourth Geneva Convention as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[44] Article 50 of Additional Protocol I further defines civilians as "any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1); (2), (3) and (6) of the third Geneva Convention and Article 43 of this protocol."[45] Because of the importance that the Geneva Conventions place on the protection of civilians, "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."[46]

The Fourth Geneva Convention relates specifically to the protections afforded to civilians, which are distinct from the protections afforded to combatants. Whereas members of the armed forces are considered lawful targets of attack under the Geneva Conventions, civilians are not lawful targets of attack and are specifically protected from "[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture."[47] Civilians are also

[42] *See* Third Geneva Convention, *supra* note 25, at art. 4A(1) (providing prisoner of war status for "[m]embers of the armed forces of a Party to the conflict").

[43] Allegations of inhumane treatment against both parties constitute violations of the laws and customs of war. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S 31 [First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [Second Geneva Convention];Third Geneva Convention, *supra* note 25, at art. 3; Fourth Geneva Convention, *supra* note 30, at art. 3 [Common Article 3].

[44] Fourth Geneva Convention, *supra* note 30, at art. 4.

[45] Additional Protocol I, *supra* note 31.

[46] *Id*.

[47] Fourth Geneva Convention, *supra* note 30, at art. 3.

protected from "(b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[48] Civilians are protected unless they take direct part in hostilities.

Additional Protocol I to the Geneva Conventions further elucidates the protections afforded to civilians by detailing civilian distinction, whereby the parties to a conflict should make every attempt to distinguish civilians and exclude them from military attacks.[49] Although the United States has not ratified Additional Protocol I, customary international law embodies the protections afforded to civilians, which are therefore binding on the actions of the United States.[50] In addition, the United States supported Article 48 of Additional Protocol I, which addresses protections afforded to civilians, such as their immunity from attack.[51] U.S. support for the protection of civilians is further evidence of the customary nature of these norms.

Article 4 of the Fourth Geneva Convention, however, expressly precludes application of the Convention to "[n]ationals of a State which is not bound by the Convention and are not protected by it."[52] The Fourth Geneva Convention also excludes "[n]ationals of a neutral State who find

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[48] *Id*.

[49] *See* Additional Protocol I, *supra* note 31, at art. 50 (stating that "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives").

[50] *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l L. & Pol'y 419, 421, 427 (1987) (recognizing that "certain provisions of Protocol I reflect customary international law or are positive new developments, which should in time become part of the law" and supporting "the fundamental guarantees contained in article 75); *see also* Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 517 (2003) (asserting that the 1949 Geneva Conventions form a part of customary international law).

[51] *See* H. Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions* 164 (Oceana Publications 1980) (commenting that the U.S. delegation voted to approve civilian protections espoused in Additional Protocol I); S. Treaty Doc. No. 100-2, 100th Cong., 2d Sess. (1987) (stating, "the civilian population as such, as well as individual civilians, shall not be the object of attack").

[52] Fourth Geneva Convention, *supra* note 30, at art. 4.

themselves in the territory of a belligerent State, and nationals of a co-belligerent State … while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."[53] These drastic limitations mean that any national of a state that is not a party to the Geneva Conventions, that is neutral, or that is co-belligerent with normal diplomatic representation in the detaining state is not a civilian under the Geneva Conventions.

Article 5 of the Fourth Geneva Convention also provides a loophole for excluding individuals from the protections afforded by the Convention by allowing for numerous derogations.[54] Article 5 explains that individuals who engage in "activity hostile to the security of the State" and individuals who are a "spy or saboteur" are not entitled to claim certain rights and privileges under the Fourth Geneva Convention.[55] The Fourth Geneva Convention limits the rights and privileges afforded to these individuals if the exercise of these rights and privileges would "be prejudicial to the security of such State."[56]

Ultimately, the Fourth Geneva Convention applies to a small class of individuals who are not precluded from the Convention's protections by Article 4 or Article 5. Members of Al-Qaeda and employees of PMCs may not satisfy the nationality requirements of Article 4 to ensure civilian protections. In addition, both groups engage in actions that may threaten the security of the detaining state to the extent that they cannot receive the protections of the Fourth Geneva Convention under Article 5.

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[53] *Id.*

[54] Article 5 of the Fourth Geneva Convention, *supra* note 30, states, "Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State. Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention."

[55] *Id.*

[56] *Id.*

MERCENARY STATUS

The use of mercenaries is not a new or unique phenomenon: early nation-states such as Egypt, ancient Greece, and Rome used mercenary forces.[57] Initial formalizations of the laws of war, such as the Hague Conventions and the Geneva Conventions, did not prohibit mercenary activities as long as these individuals did not attempt to engage in combat and claim the protections of their neutral home state, and as long as they were part of the "legally defined armed force."[58] Regulation over mercenary activity began in the latter half of the twentieth century and increased during the Cold War.[59] Prompted by difficulties in post-colonial Africa, the international community condemned mercenaries.[60] International regulations initially took the form of aspirational declarations, such as the UN the Declaration on the Granting of Independence to Colonial Countries and Peoples and the Organization of African Unity Resolution on the Activities of Mercenaries.[61]

Enacted in 1977, Additional Protocol I provided the first formal definition of mercenary under the laws of war. Additional Protocol I narrowly defines a mercenary as

> any person who:
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> (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
> (b) Does, in fact, take a direct part in the hostilities;
> (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of

[57] Kristen Fricchione, *supra* note 26, at 735; Major Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 Military L. Rev. 1, 2 (June 2003).

[58] *See* P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 Colum. J. Transnat'l L. 521, 526-37 (2004).

[59] Milliard, *supra* note 57, at 3.

[60] *See* Gul, *supra* note 24, at 293-94 (detailing the international response to the post-colonial African experience, including the UN Security Council's condemnation of mercenary activity "prompted by the situation in the Congo").

[61] *See* Milliard, *supra* note 57, at 4 (*citing* G.A. Res. 2465, U.N. GAOR, 23d Sess., Supp. No. 18, at 4, U.N. doc. A/7218 (1968); O.A.U. Doc. AHG/Res. 49 (IV) (1967)).

that Party;

(d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) Is not a member of the armed forces of a Party to the conflict; and

(f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[62]

The 1989 International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries includes an almost identical definition.[63] The United States has not ratified either Additional Protocol I or the Convention and contests the status of Article 47 of Additional Protocol I as customary international law.[64]

Additional Protocol I and the Convention fail to provide guidelines for the regulation of mercenaries, merely "determin[ing] who is and who is not a mercenary."[65] These regulations are not necessarily relevant to current activities because they "were designed not to prohibit trade in military services, but only to regulate it."[66] Historically, these regulations applied to the use of mercenaries engaged in activities against sovereign states as opposed to their activities on behalf of sovereign states.[67] Because of the military nature of their activities and a lack of accountability under international law, "Nothing prevents mercenaries, for payment, from taking part in the

[62] Additional Protocol I, *supra* note 31, at art. 47.

[63] *Opened for signature* Dec. 4, 1989, 2163 U.N.T.S. 96.

[64] *See* Matheson, *supra* note 50, at 426 (stating, "We do not favor the provisions of article 47 on mercenaries, which among other things introduce political factors that do not belong in international humanitarian law, and do not consider the provisions of article 47 to be part of current customary law."); Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements: Remarks of Abraham D. Sofaer, Legal Adviser, United States Department of State, January 22, 1987*, 2 Am. U. J. Int'l L. & Pol'y 419, 479 (1987) (stating that article 47 "was included in the Protocol not for humanitarian reasons, but purely to make the political point that mercenary activity in the Third World is unwelcome. In doing so, this article disregards one of the fundamental principles of international humanitarian law by defining the right to combatant status, at least in part, on the basis of the personal or political motivations of the individual in question. This politicizing of the rules of warfare is contrary to Western interests and the interests of humanitarian law itself.").

[65] U.N. Econ. & Soc. Council, Comm'n on Human Rights, "The Right of Peoples to Self-Determination and Its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation, ¶ 38, U.N. Doc. E/CN.4/2005/14 (Dec. 8, 2004).

[66] Singer, *supra* note 58, at 524.

[67] *See* Milliard, *supra* note 57, at 5.

commission of a terrorist act, understood as a criminal act committed for ideological reasons with claims of political legitimacy, and with the aim of promoting collective terror."[68]

Additional Protocol I denies combatant status and its concomitant prisoner of war privileges to individuals classified as mercenaries.[69] Although humanitarian law generally "endeavours to extend the protection of the Third Convention to new categories of combatants or to new situations, and not to refuse this protection," Additional Protocol I denies mercenaries of the protections of the Third Geneva Convention because of "the shameful character of mercenary activity."[70] In addition, mercenaries likely fall within Article 5 of the Fourth Geneva Convention, as detailed above, which limits protections afforded to individuals based on a state's security needs.[71]

The regulations governing mercenaries likely do not apply to members of Al-Qaeda or employees of PMCs. Additional Protocol I only applies to international conflicts.[72] The "war on terror" is arguably a non-international armed conflict because Al-Qaeda is a non-state actor. The U.S. government has argued that the "war on terror" is not a conflict of an international character in an attempt to limit the application of Article III Common to the Geneva Conventions to "enemy combatants."[73] Such a classification precludes application of Additional Protocol I.

[68] "The Right of Peoples to Self-Determination," *supra* note 65, at ¶ 35.

[69] Additional Protocol I, *supra* note 31, at art. 47.

[70] *See* Int'l Comm. of the Red Cross, Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 47, at 1794, available at http://www.icrc.org/ihl.nsf/COM/470-750057?OpenDocument (accessed Nov. 30, 2006).

[71] *See id*. at 1797 ("Deprived of the status of combatant and prisoner of war, a mercenary is a civilian who would fall under article 5 of the fourth Convention.").

[72] *See* Additional Protocol I, *supra* note 31, at art. 1 ("This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions."). *But see* Commentary to Additional Protocol I, *supra* note 70, at art. 47 (stating, "the presence of 'mercenaries' is frequently noted precisely in armed conflicts with a non-international character. In case of capture, these mercenaries undeniably benefit from the protection of Article 3 of the Conventions, and the corresponding provisions of Protocol II").

[73] *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006) ("The conflict with al Qaeda is not, according to the Government, a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply

Ultimately, certain non-state actors are not properly classified as combatants, civilians, or mercenaries, opening the door to varying interpretations and applications of the laws of war. As the treatment of members of Al-Qaeda and employees of PMCs shows, "the existing laws do not adequately deal with the full variety of private military actors."[74]

UNIVERSAL PROTECTION

It is worth noting that certain protections apply to non-state actors regardless of how they are classified within the framework of the Geneva Conventions.[75] The Geneva Conventions, for example, mandate a minimum level of humane treatment. Common Article 3 proscribes violations to life and person, such as torture and outrages upon personal dignity.[76] In addition, Article 75 of Additional Protocol I prohibits murder, physical and mental torture, corporal punishment, outrages upon personal dignity, collective punishments, and threats to commit any of these acts.[77] Article 45(3) of Additional Protocol I recognizes that Article 75 applies to non-state actors. In relevant part, it states: "Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol."[78]

Non-state actors are also entitled to certain protections under international human rights law. The Universal Declaration of Human Rights, as well as the Convention against Torture and

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because Article 2 of those Conventions (which appears in all four Conventions) renders the full protections applicable only to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.' Since Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a 'High Contracting Party' – *i.e.,* a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan.") (internal citations omitted).

[74] Singer, *supra* note 58, at 531.

[75] *See generally* Goldman and Tittemore, *supra* note 33.

[76] Common Article 3, *supra* note 43.

[77] Additional Protocol I, *supra* note 31, at art. 75.

[78] *Id*. at art. 45(3).

Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights, universally prohibit the use of torture and cruel, inhuman, or degrading treatment or punishment.[79] Although these international agreements are non self-executing treaties and the United States has issued various reservations to the terms of the agreements and their implementation,[80] the United States is bound insofar as these principles constitute customary international law. Some of these standards may even rise to the level of *jus cogens* norms[81] from which no state may derogate at any point in time.

II. Classification of Members of Al-Qaeda as So-Called "Enemy Combatants"

The Geneva Conventions apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[82] It is questionable whether the "war on terror" satisfies the requirements of the Geneva Conventions, thereby challenging the applicability of the rights and obligations of the Geneva Conventions to non-state actors. Because terrorism does not involve members of armed forces fighting on a recognized battlefield, determining the extent of an

[79] *See* Universal Declaration of Human Rights art. 5, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984); International Covenant on Civil and Political Rights art. 7, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Mar. 23, 1976) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation").

[80] U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Amend No 3200-3203, 101st Cong, 2d Sess (Oct 27, 1990), in 136 Cong. Rec. S 17486 (Oct. 27, 1990) ("That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing"). U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992) ("That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing").

[81] *Jus cogens* norms are commonly defined as norms from which no state may derogate. *See* Restatement (Third) of Foreign Relations, § 102 cmt. k (1987) ("Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character").

[82] First Geneva Convention, *supra* note 43, at art. 2; Second Geneva Convention, *supra* note 43, at art. 2; Third Geneva Convention, *supra* note 25, at art. 2; Fourth Geneva Convention, *supra* note 30, at art. 2 [Common Article 2].

individual's direct involvement in hostilities and whether that individual is participating in a recognized situation of armed conflict poses difficulties in determining the applicability of the Geneva Conventions.

It is necessary to consider the definition of war under the Geneva Conventions, as well as international and domestic interpretations[83] of active military operations, to determine whether the "war on terror" is a situation of armed conflict embodied by the Geneva Conventions. Although the Geneva Conventions recognize declared wars, it is not required that the parties to a conflict officially declare war to implicate the rights and obligations imposed by the Geneva Conventions.[84] The International Criminal Tribunal for the Former Yugoslavia defined armed conflict as "whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."[85] The United States Supreme Court in *Hamdi* held that Yaser Hamdi's capture in Afghanistan for taking up arms with the Taliban was proper because of the presence of active military operations in Afghanistan.[86] Thus, a state of armed conflict is increasingly determined from factual circumstances as opposed to official declarations of war.

Although it appears that the definition of war under the Geneva Conventions and modern judicial interpretations do not apply to the conflict with Al-Qaeda insofar as members of Al-Qaeda

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[83] *See generally* Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 Case W. Res. J. Int'l L. 325 (2004) (discussing the contours of "armed conflict" and "active military operations").

[84] *See* Derek Jinks, *The Applicability of the Geneva Conventions to the "Global War on Terrorism,"* 46 Va. J. Int'l L. 165, 167 (Fall 2005) (stating, "The problem was that, by the mid-twentieth century, the existence of a 'state of war' no longer played an important role in international law – so states had no incentive to declare war – and international law prohibited 'war' except in narrow circumstances – providing states with an disincentive to declare war. In the wake of World War II, it was clear that the applicability of humanitarian rules, such as those embodied in the Geneva Conventions, should not turn on whether the belligerents formally recognized a state of war.").

[85] *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

[86] *Hamdi v. Rumsfeld*, 542 U.S. 507, 521-22 (2004) ("If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the [Authorization for Use of Military Force]") (internal citations omitted).

are not affiliated with the Taliban or another state-sponsored military group and are not engaged in active military combat, many commentators argue that the United States is at war with Al-Qaeda.[87] The attacks of September 11, 2001, provide evidence ofimpetus for this so-called war:

> America is at war against al Qaeda and the Taliban. This is not a metaphorical war. This war is as tangible as the dust and rubble that littered the streets of New York City on September 11, 2001. The Taliban and al Qaeda waged a campaign of terror that started well before the 9/11 attacks. The events of 9/11 brought forth the recognition that these groups were engaged in a well-funded, long-term, organized, and systematic campaign to destroy the United States and its allies – the very abilities necessary to characterizetheir actions as acts of war.[88]

Al-Qaeda *fatwas*[89] against the United States, as well as attacks against U.S. embassies in Kenya and Tanzania that resulted in over 200 deaths and 2,000 injuries, are possible indications that the United States is engaged in a war against terrorism.[90]

Admittedly, the war on terror is a global effort,[91] but the scope of the war and the applicability of the Geneva Conventions to those involved are ill-defined and nebulous.[92] One

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[87] Classification of the conflict with Al-Qaeda as a war has serious implications for individuals fighting this war: "If the Bush Administration is serious when it states that we are engaged in a war on terrorism, it logically follows that captured enemies should be dealt with as combatants rather than criminal defendants." A. John Radsan, *The Moussaoui Case: The Mess from Minnesota*, 31 Wm. Mitchell L. Rev. 1417, 1451 (2005).

[88] Brigadier General Thomas L. Hemingway, *Wartime Detention of Enemy Combatants: What if there were a War and no one Could be Detained Without an Attorney?*, 34 Denv. J. Int'l L. & Pol'y 63, 68 (2005).

[89] *Id*. at 68 (*citing* Osama bin Laden, Fatwa, Al Quds Al Arabi (Feb. 23, 1998)), *available at* http://www.mideastweb.org/osamabinladen2.htm (describing the *fatwa* as "[t]he ruling to kill the Americans and their allies – civilians and military – is an individual duty for every Muslim who can do it in any country in which it is possible to do it").

[90] *Id*.

[91] *See* Radsan, *supra* note 87, at 1452 ("Hardly anyone can doubt that our counter-terrorism efforts are global; it follows that in a global war we may find and capture illegal combatants inside and outside the United States").

[92] *See also* Fitzpatrick, *supra* note 34, at 306 ("It remains unclear whether the asserted war is to be regarded as an international armed conflict against all international terrorists; an international armed conflict against Al Qaeda; an international armed conflict against the former de facto Taliban regime in Afghanistan; or the long-standing internal armed conflict in Afghanistan, which appears to have been resolved with the establishment of an interim government in December 2001"). *See generally* President George W. Bush, "Address to a Joint Session of Congress and the American People" (Sept. 20, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html (stating that the war on terror "will not end until every terrorist group of global reach has been found, stopped and defeated"). *But see* Peter Margulies, *Judging Terror in the 'Zone of Twilight': Exigency, Institutional Equity, and Procedure after September 11*, 84 B.U. L. Rev. 383, 438 (2004) ("Individuals such as the September 11 hijackers, who concealed their identities and intentions to facilitate the killing of innocents on behalf of a transnational network, qualify as 'enemy belligerents' not materially different from the Nazi saboteurs whose trial before a

problem with applying the Geneva Conventions to the "war on terror" is that the Geneva Conventions permit lawful acts of war. Therefore, "to the extent that al Qaeda is treated as an enemy state that is 'at war' with the United States, it would follow that its attacks on military targets, such as the U.S.S. Cole and even the Pentagon, were arguably lawful."[93] The United States may claim that members of Al-Qaeda are not protected under the Geneva Conventions in attempting to prohibit potentially lawful acts of war committed by these individuals.

The current administration argues that the Geneva Conventions do not apply to Al-Qaeda because it is not a High Contracting Party. The United States, however, cannot maintain that the conflict with Al-Qaeda is a "war" while arguing that individuals fighting on the other side of the war are not protected under certain provisions of the Geneva Conventions, such as Common Article 3. This position "begs the question whether, for the very reason that Al Qaeda is not a state, international armed conflict against it is simply a legal impossibility."[94]

The United States has placed the conflict with Al-Qaeda within the law of war paradigm to receive certain benefits in the fight against terrorism. For example, denying "enemy combatants" of the full rights accorded to prisoners of war may allow for more effective intelligence gathering,[95] prevent members of Al-Qaeda from manipulating the criminal justice system to their benefit,[96] and prevent use of the criminal justice forum as a platform for propaganda.[97] Trials of "enemy

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military tribunal the Supreme Court authorized in Quirin").

[93] Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 Wash. U. Global Stud. L. Rev. 135, 142 (2004).

[94] Fitzpatrick, *supra* note 34, at 317-18 ("The Administration's views appear to envision an international armed conflict in which all of the 'combatants' as defined by the Third Geneva Convention are on one side – that of the United States and its allies").

[95] Radsan, *supra* note 88, at 1431 (noting the "many areas of separation and disconnect" between law enforcement and intelligence agencies).

[96] *Id*. at 1428 (arguing that "disinformation missions are more effective within the legal process when the United States Government treats Al Qaeda members as law enforcement problems rather than military problems.").

[97] *Id*. at 1445 ("Another reason to choose a military tribunal over a federal district court is to deprive Moussaoui, as much as constitutional, of a platform for his propaganda.").

combatants" under the laws of war may also prevent the dissemination of classified information essential to the protection of national security.[98] The government therefore risks the potential exposure of national security information if these individuals face trials under the domestic criminal system of the United States.[99]

Applying a law of war paradigm also allows the United States to target and kill terrorists without the limitations imposed by the traditional law enforcement paradigm. Under the laws of war, the United States may target and kill an "enemy combatant" because he is a party to the armed conflict.[100] In addition, the United States could arguably hold an "enemy combatant" indefinitely because he is not entitled to prisoner of war status.[101] In an attempt to limit challenges to "enemy combatant" status determinations, the United States has argued that an "enemy combatant" is not entitled to Article 5 status determinations or trial by regularly constituted courts.[102] The United States can therefore impose "enemy combatant" status on detainees to hold them indefinitely without trial.

The conflict with Al-Qaeda has been classified as a "new reality"[103] subject to a "new

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[98] *Id*. at 1432 ("Moussaoui's lawyers have been somewhat successful in convincing the court that Moussaoui has some right to the classified information in the case").

[99] *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

[100] *See* Goldman and Tittemore, *supra* note 33.

[101] *See* Third Geneva Convention, *supra* note 25, at art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").

[102] *See* Draft Memorandum for the President, *supra* note 27 (advising the president that "Geneva Convention III on the Treatment of Prisoners of War (GPW) does not apply to the conflict with al Qaeda.").

[103] Paul Rosenzweig, *On Liberty and Terror in the Post-9/11 World: A Response to Professor Chemerinsky*, 45 Washburn L.J. 29, 44-45 (2005) ("The traditional law enforcement model is highly protective of civil liberty in preference to physical security. The post-9/11 world changes this calculus, principally by changing the costs from a mistake. Whatever the costs of failing to collect information regarding organized crime boss John Gotti might be, they are considerably less than the potentially horrific costs of failing to stop the next al Qaeda assault. Thus, the theoretical rights-protective construct under which our law enforcement system operates must, of necessity, be modified to meet the new reality.").

intelligence paradigm."[104] The United States has seized upon this sentiment to try members of Al-Qaeda according to whichever legal paradigm best suits its interests. For example, U.S. agents arrested José Padilla, a U.S. citizen accused of terrorist activities, and detained him as an "enemy combatant."[105] Nonetheless, the United States places other detainees, such as John Walker Lindh, a U.S. citizen who joined the Taliban and was captured in Afghanistan, before federal courts.[106] The U.S. determination of whether to apply the laws of war or other rules to "enemy combatants" follows no readily discernible pattern, evidencing the difficulties in classifying non-state actors under the Geneva Conventions. Allowing the United States to cherry pick which laws apply in the "war on terror" allows the government to evade the requirements of the Geneva Conventions.

Even if the "war on terror" is an armed conflict of the type detailed in the Geneva Conventions, it is questionable how members of Al-Qaeda should be classified under the Conventions. The current administration's emphasis on classifying individuals as "enemy combatants," "unlawful combatants," and "unprivileged combatants" is not based on a formal reading of the Geneva Conventions. Although these terms do not appear within the text of the Geneva Conventions, scholars and jurists have classified individuals as "enemy combatants" throughout the Twentieth and Twenty-First Centuries.[107] "Enemy combatant" refers specifically to

[104] *See* Radsan, *supra* note 87, at 1426-27 ("[A]t no time did American officials have the opportunity to interrogate Moussaoui in the aggressive fashion that is being used on KSM and other Al Qaeda cohorts whom we treat as terrorists rather than criminals. These other terrorists are correctly being treated under what could be described as a new intelligence paradigm").

[105] *See Padilla v. Hanft*, 423 F.3d 386, 390-91 (4th Cir. 2005) (holding that the Authorization for Use of Military Force authorized the President's detention of an "enemy combatant").

[106] *See United States v. Lindh*, 227 F.Supp.2d 565 (E.D. Va. 2002) (imposing a 20 year sentence for the supply of services to the Taliban government of Afghanistan); *see also* Kenneth Roth, Human Rights Watch, "Drawing the Line: War Rules and Law Enforcement Rules in the Fight against Terrorism," *available at* http://hrw.org/wr2k4/9.htm (accessed Sept. 1, 2006) (detailing the detention of Ali Saleh Kahlah al-Marri, a student from Qatar who was arrested in Illinois as an "inactive accomplice who could be activated to help others launch terrorist attacks").

[107] *See Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (implicitly accepting the potential applicability of enemy combatants status); *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942) ("By universal agreement and practice the law of war draws a distinction … between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which

those individuals who are not entitled to the combatant's privilege, but who nonetheless participate directly or actively in armed conflict.[108]

Applying the Geneva Conventions to "enemy combatants" is difficult because they do not fit clearly within the combatant or civilian classifications. Members of the Taliban arguably satisfy the criteria necessary to achieve combatant status based on authority granted from armed forces of Afghanistan, a "Party to the conflict," as detailed in Article 4 of the Third Geneva Convention.[109] The status of members of Al-Qaeda is more difficult to determine based on the questionable nature of their allegiance to Taliban forces. As members of the Taliban's regular forces, these individuals would receive the protections associated with the combatant's privilege.[110] If, however, members of Al-Qaeda, fought as units independent from the Taliban's regular forces, they would be protected only insofar as they complied with Article 4A(2) of the Third Geneva Convention, as detailed above.[111]

It is also unlikely that members of Al-Qaeda who are not fighting with the regular armed forces of the Taliban could satisfy the conditions of Article 4A(2) for irregular forces. Members of Al-Qaeda fail to adhere to the requirement that irregular forces abide by the laws and customs of war when they engage in terrorist activities. Because the final three requirements of Article 4A(2)

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render their belligerency unlawful") (internal citations omitted).

[108] *See generally* Goldman and Tittemore, *supra* note 33, at 4.

[109] *See* Int'l Comm. for the Red Cross, *The Geneva Conventions of August 12, 1949: Preliminary Remarks* (ICRC 1949) (acknowledging that Afghanistan signed the Final Act at the closing meeting of the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War).

[110] *See id*. at 29 (noting that Article 4A(1) and (3) of the Third Geneva Convention are not limited by nationality; therefore, prisoner of war status applies to members of a State Party's regular armed forces regardless of nationality).

[111] For this reason, Article 5 status determinations are extremely important. Under Article 5 of the Third Geneva Convention, *supra* note 25, "Should any doubt arise … such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." The current administration has claimed that there is no doubt as to the enemy combatant status of individuals held at Guantánamo. Nonetheless, a formal status determination complies with the Geneva Conventions and lends credibility to an enemy combatant status determination.

are applicable to the individual members of the irregular group, "if a *majority* of the members of the group fail to meet, for whatever reason, *all* or *any* of the last three conditions *at any time,* then all members of the group will not qualify for privileged combatant and POW status upon capture."[112] Therefore, the actions of a small number of individuals may deprive the entire group of its eligibility for combatant status.

Many members of Al-Qaeda are also precluded from the protections afforded to civilians by the Fourth Geneva Convention. Individuals who are nationals of Pakistan, Saudi Arabia, the United Kingdom, Australia, Spain, among other countries, which are either neutral or coalition partners, fall within the limitations imposed by Article 4 of the Fourth Geneva Convention.[113] Therefore, the Fourth Geneva Convention provides little guidance on the protections afforded to members of Al-Qaeda who are not entitled to prisoner of war status under the Third Geneva Convention.

Members of Al-Qaeda likely do not satisfy the requirements necessary to be considered combatants or civilians. The United States has seized upon their questionable status to re-interpret the Geneva Conventions so that they afford no cognizable protections to these individuals.[114] In an attempt to evade the rule of law, the United States has erroneously imposed the law of war paradigm on a conflict that is difficult to characterize as a war in the traditional sense and has further denied any and all protections afforded under these rules to members of Al-Qaeda. The United States similarly manipulates the laws of war when faced with its own privately contracted military companies.

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[112] Crimes of War Project, *The War in Iraq*, Robert Kogod Goldman, "The Legal Status of Iraqi and Foreign Combatants Captured by Coalition Armed Forces, http://www.crimesofwar.org/special/Iraq/news-iraq4.html (Apr. 7, 2003).

[113] *See generally* Fox News, "Status of Major Al Qaeda Members" (Mar. 1, 2003), *available at* http://www.foxnews.com/story/0,2933,79986,00.html (listing a large number of high-level members of Al-Qaeda and their nationalities, including Saudi Arabian, Egyptian, Kuwaiti, Palestinian, Yemeni, Jordanian , and Canadian).

[114] *See* Draft Memorandum for the President, *supra* note 27.

III. Status of PMCs under International Humanitarian Law

The appeal in using PMCs is market based: they are "better, faster, and cheaper."[115] States have a desire to use PMCs "to secure efficient and cost-effective solutions to defense problems" and strong states traditionally hire PMCs for operations abroad.[116] States are thereby able to fill a deficit in supply of military personnel while removing the political costs of military action from the public eye. Privatization of a state's military capabilities "signals a major move away from the concept of the sovereign nation-state's monopoly on the use of deadly force."[117]

PMCs offer a variety of services and can be classified as military providers, military consultants, or military support firms.[118] Armed contractors are not commonly used in such a way that they are involved directly in conflict.[119] The United Kingdom's Foreign and Commonwealth Office's recent report on PMCs concluded that most of their services involved advice, training, logistic support, supply of personnel for peacekeeping and monitoring roles, and demining.[120] Nonetheless, some PMCs in the military support sector provide services in actual combat operations.[121]

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[115] Doug Brooks, President, International Peace Operations Association, "Modern Mercenaries? The humanitarian implications of using the private sector in conflict/peacekeeping operations," American University (Nov. 8, 2006).

[116] Virginia Newell and Benedict Sheehy, *Corporate Militaries and States: Actors, Interactions, and Reactions*, 41 Tex. Int'l L.J. 67, 73 (Winter 2006).

[117] Fricchione, *supra* note 26, at 738.

[118] P.W. Singer, *Corporate Warriors* 91 (2003).

[119] Mayer, *supra* note 10.

[120] U.K. Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation*, ¶ 10 (Feb. 12, 2002).

[121] *See* Heather Carney, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 Geo. Wash. L. Rev. 317, 322 (Feb. 2006) (recognizing that "[m]ilitary providers, such as the former Executive Outcomes and Sandline International, generally are at the forefront of a battle, as they are involved in actual combat operations.").

The Geneva Conventions' "applicability to non-state actors is ambiguous."[122] It is questionable whether employees of PMCs can be classified appropriately as state actors who are entitled to combatant status. Part of the difficulty in classifying employees of PMCs stems from the nature of their activities: "no function of government is deemed more quintessentially a 'state' function than the military protection of the state itself."[123] Although the degree of cooperation and coordination with military and public officials further blurs the line between state and non-state action,[124] formal military commanders have no command control over "civilian employees, contractors, or non-affiliated persons."[125]

Employees of PMCs may not be state actors because they are not complying with stated U.S. policy. The United States has announced definitively that the government does not and never has supported a policy of torture. Condoleezza Rice has stated that "[t]he United States Government does not authorize or condone torture…. Torture, and conspiracy to commit torture, are crimes under U.S. law, wherever they may occur in the world."[126] President Bush has also

[122] Dickinson, *supra* note 16, at 152.

[123] *Id*. at 147. The Chief of Staff of the Reconstruction Support Office at the Pentagon has recognized that "combat is an inherently governmental function." Mayer, *supra* note 10.

[124] Gul, *supra* note 24, at 305 (arguing that military contractors have a significant nexus to the state because "[m]any contractors command credibility and thus clientele in the international security market precisely because their employees are retired high ranking national security officials…. U.S. government operations seem to be inextricably intertwined with the conduct of many PMCs…. They have also been the recipients of government largesse.").

[125] Lisa L. Turner and Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. Rev. 1, 34-35 (2001) (stating that "[c]ivilians are not subject to the [Uniform Code of Military Justice] except in time of [congressionally] declared war.").

[126] Condoleezza Rice, U.S. Sec'y of State, *Remarks Upon her Departure for Europe* (Dec. 5, 2005), *available at* http://www.state.gov/secretary/rm/2005/57602.htm.

claimed on numerous occasions that the U.S. does not torture.[127] The U.S. official report to the United Nations Committee Against Torture confirmed U.S. policy against torture:

> Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority…. No official of the government, federal, state or local, civilian or military is authorized to commit or to instruct anyone to commit torture. Nor may any official condone or tolerate torture in any form.[128]

Congressional legislation reaffirms the United States' prohibition against torture.[129] Employees of PMCs who commit egregious human rights violations may not be state actors because they are not complying with stated U.S. policy.

PMCs may also not fall within the civilian classification because of the exception for individuals from a neutral or co-belligerent state under Article 4 of the Fourth Geneva Convention, as stated above.[130] It is also inconsistent to claim that individuals acting at the behest of the state in military operations are entitled to civilian status because based on "'[t]he close connection between these civilians and military operations, and the often consensual nature of their involvement in the form of contracts, it is not all clear that contractors deserve the same level of protection as

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[127] BBC News, *U.S. Does Not Torture, Bush Insists*, (Nov. 7, 2005) *available at* http://news.bbc.co.uk/2/hi/americas/4415132.stm (acknowledging that President Bush has claimed that the United States does not torture); President George W. Bush, United Nations International Day in Support of Victims of Torture (June 26, 2003) (stating, "The United States is committed to the worldwide elimination of torture and we are leading the fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment.").

[128] U.S. Dep't of State, Initial Report of the United States of America to the U.N. Committee Against Torture (1999).

[129] *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (*codified at* 28 U.S.C. § 1350 (note) (2006)); 18 U.S.C. §§ 2340-2340A (2006) [Torture Statute] (codifying the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1001-1003, 119 Stat. 2680, 2739-40 [McCain Amendment].

[130] Fourth Geneva Convention, *supra* note 30.

uninvolved civilians."[131] The use of PMCs to perform tasks typically reserved for the military "blurred lines of authority and obscured the differences between civilian and military tasks."[132]

In addition, "broad gaps in the definition of 'mercenary' leave most types of work by private military companies outside the treaties' prohibitions."[133] Difficulties in determining the personal motive requirement of Article 47 of Additional Protocol I, as well as nationality and compensation, prevent classification of most employees of PMCs as mercenaries. Employees of PMCs may be distinct from mercenaries because they are not necessarily operating for direct personal gain, but rather for legal corporations providing services on an open market.[134] One commentator argues that "the refined marketing, sophisticated lobbying, and professional business practices of modern [private military firms] lends them credibility and encourages states to treat them differently from mercenaries."[135] PMCs involved in the "war on terror," however, have faced less than fair market conditions[136] and may still operate for their personal pecuniary gain or that of their corporation.

Recognition of the utility and necessity of PMCs is evidence that the international community does not and should not prohibit PMCs universally. History has shown that "a stark disparity exists between the international emphasis on prohibiting mercenary activity and the reality of vigorous and expanding professional [private military firm] industry that provides a full

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[131] Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 Int'l Law. 733 (2005) (*citing* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 Am. J. Int'l L. 1, 16 (2004)).

[132] Singer, *supra* note 22.

[133] Dickinson, *supra* note 16, at 152.

[134] Brooks, *supra* note 115.

[135] Newell and Sheehy, *supra* note 116, at 71.

[136] *See* "Annual Report," *supra* note 9 (citing research from the Center for Public Integrity that "examined contracts totaling $900 billion in authorized expenditures over the six-year period from FY98 through FY03" and found that "only 40 percent of Pentagon contracts were awarded under full and open competition during the period.").

range of defense services."[137] Nonetheless, the use of PMCs allows the United States to remove certain actions from the public sphere and displace blame if and when human rights violations occur.[138] The United States uses the ambiguous status of PMCs under the Geneva Conventions to distance itself from the actions of these companies. At the same time, the United States has failed to prosecute individuals implicated in human rights abuses committed abroad.[139]

The unclear nature of the "war on terror" is evidence of the inherent difficulties in applying the Geneva Conventions to the conflict with Al-Qaeda and the broader war against terrorism. The Geneva Conventions apply ambiguously to non-state actors, including both members of Al-Qaeda and employees of PMCs. In both situations the United States has seized upon ambiguities within the law of war paradigm to its own benefit. According to the U.S. government, Al-Qaeda is not a "High Contracting Party" and fails to comply with the laws and customs of war; therefore, members of Al-Qaeda are outside of the scope of the Geneva Conventions. At the same time, employees of PMCs are non-state actors who are nonetheless contracted for and paid by the U.S. government. The United States uses a legal paradigm that may not be appropriate for the "war on terror" to remove its enemy from the scope of the law while simultaneously blurring its connection to and liability for actors committing atrocities abroad at the behest of the U.S. government.

IV. Ensuring Accountability for Human Rights Violations Committed by PMCs

Both domestic and international law impose liability on individuals for human rights violations that are actionable within U.S. courts. Market measures may also place checks on the actions of non-state actors, such as PMCs. Despite the existence measures to hold human rights

[137] Newell and Sheehy, *supra* note 117, at 72.

[138] *See id*. at 88 (recognizing that "[f]rom a state's perspective, one of the key advantages of using [private military firm] contractors extraterritorially to further foreign policy objectives is that when something goes wrong the state can disavow responsibility for the problem by turning the blame onto the [private military firm].").

[139] *See generally* Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction Over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U. L. Rev. 367, 373 (2006).

violators accountable, judicially created doctrines limit the potential for liability in U.S. courts. In addition, the U.S. government lacks the willpower to prosecute employees of PMCs implicated in human rights abuses.

Liability for Non-State Actors under U.S. Law

U.S. legislation provides for civil liability of non-state actors committing human rights abuses. The Alien Tort Claims Act (ATCA) states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[140] Although many courts have argued that the ATCA is a mere jurisdictional grant,[141] the Supreme Court of the United States has recognized that a private right of action exists under federal common law in certain instances.[142] The ATCA opens the door for conspiracy or aiding and abetting claims even when private actors are involved.

The Torture Victim Protection Act of 1991 (TVPA) permits civil suits in the United States against individuals who act under color of foreign law to perpetrate acts of torture.[143] The TVPA is often used as a grant of a private right of action under the ATCA's jurisdictional grant.[144] The TVPA and the ATCA allow victims of human rights violations to bring civil claims in U.S. courts against employees of PMCs.

U.S. legislation also addresses criminal liability for non-state actors. For example, the

[140] 28 U.S.C. § 1350 (2006).

[141] *See Enahoro v. Abubakar*, 408 F.3d 877, 885 (7th Cir. 2005) (concluding that the ATCA cannot provide a cause of action for torture claims); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1277 (N.D. Cal. 2004) (holding that the ATCA is purely jurisdictional); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.C. Cir. 2004) (concluding that the ATCA cannot be violated).

[142] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (stating, "we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATCA] was enacted.").

[143] 28 U.S.C. § 1350 (note).

[144] *See Sosa*, *supra* note 142, at 728 (concluding that the TVPA "'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing") (internal citations omitted); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1153-56 (11th Cir. 2005) (permitting equitable tolling for claims under the TVPA against a former Chilean military officer); *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (condemning acts of torture as violations of non-derogable international norms); *see also Sarei v. Rio Tinto*, *PLC*., 456 F.3d 1069, 1078 (9th Cir. 2006) (holding that claims of "war crimes, violations of the laws of war, [and] racial discrimination … all implicate 'specific, universal and obligatory norm[s] of international law' that properly form the basis for ATCA claims") (internal citations omitted); *Arce v. Garcia*, 434 F.3d 1254, 1256 (11th Cir. 2006) (affirming a $54,600,000 judgment for Salvadoran refugees who brought suit under the TVPA and the ATCA alleging claims of torture against former Salvadoran military officials).

Torture Statute, the implementing legislation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, creates criminal liability for acts of torture committed by U.S. nationals outside of the United States.[145] The McCain Amendment[146] addressed attempts by the United States to limit the geographical applicability of the UN Convention's prohibition of torture. In addition, the War Crimes Act criminalizes acts committed by or against nationals of the United States that violate the laws of war.[147] Under the War Crimes Act the United States can prosecute U.S. nationals or members of the armed forces who commit war crimes inside or outside of the United States.[148] The USA PATRIOT ACT also imposes liability for offenses by or against U.S. nationals by extending special maritime and territorial jurisdiction to U.S. military missions or entities in foreign states.[149]

The Military Extraterritorial Jurisdiction Act of 2000 (MEJA) addresses specifically the danger presented by PMCs.[150] MEJA allows the military to detain U.S. citizens accompanying the armed forces and bring them to the United States for a federal trial for crimes amounting to felonies under U.S. law.[151] Congress amended MEJA in 2004 to include civilian employees of

[145] 18 U.S.C. §§ 2340-2340A (2006).

[146] Detainee Treatment Act of 2005, Pub. L. No. 109-148 § 1001, 119 Stat. 2739 ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").

[147] War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (*codified at* 18 U.S.C. § 2441 (2006)) (*amended by* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600) (defining a war crime as any conduct that "constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949").

[148] *Id*.

[149] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. No. 107- 56, 115 Stat. 272 (2001) (*codified at* 18 U.S.C. § 7(9) (2006)).

[150] Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-778.523, 114 Stat. 2488 (*codified at* 18 U.S.C. § 3261 (2000))

[151] *Id*. ("(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States – (1) while employed by or accompanying the Armed Forces outside the United States; or (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.").

"any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas."[152] The legislation applies to limited locations, such as U.S. military bases in other countries, but not including locations occupied by U.S. military forces, such as the Abu Ghraib prison.[153] In addition, federal prosecutors have not used MEJA to charge any civilian contractor misconduct during U.S. intervention in Iraq.[154]

ACCOUNTABILITY UNDER INTERNATIONAL LAW

Certain protections apply to non-state actors regardless of how they are classified within the framework of the Geneva Conventions. U.S. courts have enforced treaty rights under Common Article 3, which prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture"[155] and "outrages upon personal dignity."[156] In *Hamdan v. Rumsfeld*, the Supreme Court concluded that "Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless."[157] To an arguable degree, the Geneva Conventions impose treaty obligations that are enforceable in U.S. court.[158]

U.S. courts have also enforced customary international law norms as a part of the federal

[152] *Id*. The amendment rewrote paragraph A, which previously included individuals "employed as a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department), as a Department of Defense contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier)." *Id*.

[153] *Id*.

[154] Peters, *supra* note 139, at 391.

[155] Common Article 3, *supra* note 43.

[156] *Id*.

[157] *Hamdan*, *supra* note 73, at 2798.

[158] *See id*. at 2793-98 (rejecting the lower court's holding that the Geneva Conventions did not create a private right of action).

common law of the United States.[159] Although courts are reluctant to expand causes of action under the federal common law[160] or to invoke these causes of action at all,[161] customary international law arguably allows courts to adjudicate whether a non-state actor's actions are legal. Common Article 3 and Article 75 of Additional Protocol I, which prohibit murder, physical and mental torture, corporal punishment, outrages upon personal dignity, collective punishments, and the threat to commit any of these acts, are considered customary international law,[162] thereby binding the United States to their requirements of humane treatment.

Although U.S. courts may enforce international standards as part of the treaty law of the United States or customary international law, the likelihood of such action is questionable given a general distaste for applying international law in U.S. courts.[163] Some students argue for international liability through the International Criminal Court, which was designed to "prosecute war crimes against humanity, particularly when there is a lack of domestic enforcement."[164] Unfortunately, U.S. distaste for international law extends to international enforcement bodies. Although the statute for the ICC was adopted in 1998, the United States has not ratified that statute and has signed numerous bilateral treaties with other countries preventing the delivery of U.S.

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[159] *See The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination").

[160] *See Sosa*, *supra* note 142, at 732.

[161] *See supra* note 141.

[162] *See* Matheson, *supra* note 50; Paust, *supra* note 50, at 517.

[163] *See* Hadar Harris, *"We are the World" – Or are we? The United States' Conflicting Views on the Use of International Law and Foreign Legal Decisions*, 12 No. 3 Hum. Rts. Brief 5, 6 (Spring 2005) (quoting Justice Scalia as stating, "what does the opinion of a wise Zimbabwean judge or a wise member of the House of Lords law committee, what does that have to do with what Americans believe, unless you really think it's been given to you [as a judge] to make this moral judgment, a very difficult moral judgment? And so in making it for yourself and for the whole country, you consult whatever authorities you want. Unless you have that philosophy, I don't see how [foreign law] is relevant at all."). *But see Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) (recognizing that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty").

[164] Carney, *supra* note 121, at 336.

nationals to the ICC.[165] The United States is not alone in its opposition to the ICC: China, Russia, Israel, and India have also expressed opposition based on sovereignty concerns.[166]

Market Measures to Ensure Accountability

Because PMCs arguably operate in a free market scheme, it may be possible to regulate their activity through common market initiatives. Doug Brooks, President of International Peace Operations Association, stated that PMCs are businesses and it makes business sense to operate professionally and ethically.[167] Drawing on the corporate accountability and the desire to appease shareholders,[168] PMCs could build accountability into their contractual agreements, such as provisions mandating prosecution for human rights violations in domestic or international courts. Contracts could also require compliance with certain standards or codes of conduct, mandatory training, and monitoring mechanisms. Transparency initiatives and institutional oversight are also important elements that PMCscould build into their contractual agreements.[169]

This argument ultimately fails because there is no third party forcing PMCs to agree to these initiatives or ensuring their compliance. As one commentator notes, "if it is left to the private standard-setting bodies to give content to the applicable norms, the process could both dilute the norms and reduce public participation in their development."[170] In practice market forces have failed to sanction PMCs allegedly engaged in human rights violations: the Army recently awarded

[165] *See* James C. Kraska, *The International Criminal Court, National Security, and Compliance With International Law*, 9 ILSA J. Int'l & Comp. L. 407, 410 (2003) ("The United States approach to the ICC has been to seek agreements with other nations that exempt United States nationals from the jurisdiction of the treaty.").

[166] *See generally* International Criminal Court, "Assembly of State Parties," http://www.icc-cpi.int/statesparties.html (accessed Nov. 28, 2006).

[167] *Supra* note 115.

[168] *But see* Rebecca Dewinter, Steering Amnesty International, "Modern Mercenaries? The humanitarian implications of using the private sector in conflict/peacekeeping operations," American University (Nov. 8, 2006). Ms. Dewinter argues that most of these companies are privately traded and only 40 percent of contracts with PMCs are awarded in conditions of full and open competition.

[169] *See* Dickinson, *supra* note 16, at 168-182.

[170] *Id*. at 178.

a $23 million extension to CACI, a PMC implicated in the Abu Ghraib prison scandal, before investigations regarding any wrongdoing have been completed.[171]

V. Difficulties in Ensuring PMC Accountability

Despite domestic legislation, international norms, and market forces designed to prevent human rights abuses and ensure accountability, the United States has failed to prosecute employees of PMCs implicated in human rights abuses. Judicially created doctrines extending governmental immunity to these non-state actors prevents successful actions on the part of individual claimants in U.S. courts. In addition, the United States' failure to take action in the realm of criminal prosecution implies complicity in these illegal actions.

Judicial Hurdles

Although the avenues may exist for prosecution of PMCs implicated in human rights abuses, judicially created doctrines preclude liability in many circumstances. The judicially-created government contractor defense, for example, is an extension of sovereign immunity that applies as long as the contractor is complying with government specifications.[172] The Supreme Court solidified the government contractor defense in *Boyle v. United Technologies*, where it held that a contracted employee was not liable for a defective helicopter based on an extended application of the Federal Tort Claims Act, which exempts governmental discretionary action.[173] A subsequent case, *Koohi v. United States*, extended *Boyle* to by applying the FTCA provision barring suits against the federal government for combatant activities because the purpose of the exception "is to recognize that during wartime encounters no duty of reasonable care is owed to

[171] Singer, *supra* note 22.

[172] *See* Ryan Micallef, *Liability Laundering and Denial of Justice: Conflicts Between the Alien Tort Statute and the Government Contractor Defense*, 71 Brook. L. Rev. 1375, 1399 (Spring 2006) (recognizing that the basis for the defense is that "if the government is immune and a contractor is merely executing the will of the government, the contractor should be immune.").

[173] 487 U.S. 500, 511 (1988) ("We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of [the FTCA].").

those against whom force is directed as a result of authorized military action."[174]

Cases following *Boyle* and *Koohi* have limited the defense for claims involving intentional torts.[175] Despite attempts to limit the government contractor defense, the Department of Homeland Security issued interim regulations to implement the SAFETY Act, which create a rebuttable presumption that all "legal and factual requirements for establishment of the government contractor defense by a government contractor"[176] have been met. The regulations reiterate that the government contractor defense does not encompass subsequent case law.

The government contractor defense is evidence of U.S. hypocrisy in its classification of PMCs. Although employees of PMCs are dissociated from the policy and conduct of the United States, they are granted an extended form of governmental immunity. The United States provides employees of PMCs the protections of governmental immunity while using these individuals to distance the government's liability for human rights violations committed abroad.

U.S. Complicity in Illegal Acts of PMCs

The United States has effectively blocked the possibility of prosecution for human rights abuses in Iraq. A June 2003 Order of the Coalition Provisional Authority provides, "Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto."[177] In addition, any certification by the "Sending State," i.e., the state that contracts the employees, may definitively certify that a

[174] 976 F.2d 1328, 1337 (9th Cir. 2002).

[175] *See Ibrahim v. Titan Corp.*, 391 F.Supp.2d 10, 17 (D.C. Cir. 2005) (refusing to extend *Boyle*'s limitations on Liability beyond *Koohi*'s negligence and product liability claims); *Carmichael v. Kellogg, Brown & Root Svcs., Inc.*, 450 F.Supp.2d 1373, 1376 (N.D. Ga. 2006) (refusing to hold nonjusticiable plaintiff's claims alleging contractors' negligence based on limited discovery); *Fisher v. Halliburton*, 390 F.Supp.2d 610, 616 (S.D. Tex. 2005) (concluding that "extension of the government contractor defense beyond its current boundaries is unwarranted").

[176] Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 68 Fed. Reg. 59,684, 59,690 (Oct. 16, 2003) (*to be codified at* 6 C.F.R. pt. 25).

[177] Coalition Provisional Authority Order Number 17 (Revised), "Status of the Coalition Provisional Authority, MNF – Iraq, Certain Missions and Personnel in Iraq" (June 17, 2004).

contractor has acted pursuant to the terms and conditions of the Contract.[178] The "Effective Period" for the order extends until "the departure of the final element of the [Multinational Force authorized by UN Security Resolutions 1511 and 1546] from Iraq."[179] The United States thereby forecloses the potential for prosecutions of employees of PMCs who commit human rights violations by restricting prosecutions in Iraq and failing to prosecute in the United States.

The presence of non-U.S. citizen employees within PMCs further complicates the possibilities for prosecution. Whereas contractors who are U.S. citizens are subject to U.S. jurisdiction, foreign nationals are shielded from prosecution within the United States and abroad.[180] The United States hires PMCs with employees from third party countries with regularity[181] and may do so to further remove PMC activity from public scrutiny and preclude liability for U.S. action abroad.

In cases where international humanitarian law does not apply directly, a state's domestic criminal law must fill the void to ensure accountability.[182] As the UN Special Rapporteur on the use of mercenaries noted,

> International law and domestic legislation in States must regulate the activities of these companies and establish oversight and monitoring mechanisms that clearly differentiate military consultancy services from participation in armed conflicts and

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[178] *Id*.

[179] *Id*.

[180] *See* Ruth Jamieson and Kieran McEvoy, *State Crime by Proxy and Juridical Othering*, 45 Brit. J. Crimonology 504, 513 (July 2005) ("Contractors who are American nationals can be tried under US extraterritorial jurisdiction, but non-national contractors cannot be and they 'fall into the same gray area as unlawful combatants in Guantánamo Bay.' Private military contractors do not fit the existing definition of mercenaries and have an ambiguous legal status as a basis for enforcing accountability. The employees of private military companies are accountable as individuals, as are their superiors in some cases. But attributing responsibility to a private company is much more difficult and, in any case, [private military firms] as corporate entities do not come under the jurisdiction of the ICC.") (internal citations omitted).

[181] Singer, *supra* note 18 (recognizing that "PMFs that employ private soldiers of more than 30 nationalities [have] been able to assemble an international coalition of sorts in Iraq.").

[182] Milliard, *supra* note 57, at 69 (noting that "[u]nlawful mercenary activities by … unaffiliated individuals may be enforced only by domestic courts in countries that enact legislation implementing the offenses contained in the UN Mercenary Convention" or other domestic prohibitions of mercenary activity).

> from anything that could be considered intervention in matters of public order and security that are the exclusive responsibility of the State.[183]

The United States' failure to prosecute employees of PMCs involved in human rights abuses confirms that "the real extent of accountability by PMCs may depend on who is employing them"[184] and who is willing and able to hold them accountable. With regard to Abu Ghraib, "while the military has moved against uniformed personnel implicated in the abuses, the contractors who directed them have remained untouched, and many even remain at their jobs."[185] Although former Attorney General John D. Ashcroft has stated that the Department of Justice has jurisdiction to prosecute civilian contractors for abuses in Iraq,[186] it has failed to initiate any prosecutions and has left investigation efforts to the Pentagon.[187] A military policeman released photos detailing abusive conduct at Abu Ghraib to investigators on January 13, 2004;[188] yet for approximately three years the United States has taken no action to prosecute any civilian contractors implicated in these abuses.

The International Court of Justice (ICJ) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have detailed when states are responsible for the actions of non-state

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[183] "The Right of Peoples to Self-Determination," *supra* note 68, at ¶ 31.

[184] U.K. Foreign and Commonwealth Office, *supra* note 121, at ¶ 34.

[185] Gul, *supra* note 24, at 304.

[186] Boston.com, Charlie Savage, "Justice Dept. can target war crime; Scholars cite way to punish abuse of Iraqis," http://www.boston.com/news/world/articles/2004/05/12/justice_dept_can_target_war_crime/ (May 12, 2004) (stating, "There are areas in which the Justice Department has jurisdiction, and those areas are defined by law…. For individuals who are not in the military, for example, and not under military jurisdiction, the Justice Department can have jurisdiction.").

[187] *See* Joanne Mariner, "Private Contractors who Torture," http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/mariner/20040510.html (May 10, 2004) ("Rather than sending FBI agents to Iraq to investigate the crimes, Ashcroft has said that federal prosecutors would await the result of the Pentagon's investigation. But while the military investigators may be expert in gathering evidence for court-martial proceedings, it is the FBI's job to respond to civilian war crimes.").

[188] Cbc.ca, *Indepth: Iraq*, "Abu Ghraib Timeline," http://www.cbc.ca/news/background/iraq/abughraib_timeline.html (Feb. 18, 2005).

actors.[189] These decisions help to "determine when the acts of non-state actors will be attributed to a State for the purpose of invoking international obligations (primary norms) governing the conduct of that State."[190] In the *Nicaragua* case, the ICJ concluded that U.S. participation in the "financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation" were insufficient to establish "effective control," thereby precluding U.S. responsibility.[191] The ICJ recognized that a determination of state responsibility hinges upon the state's knowledge, support, and ratification of certain activities rather than "conduct related to the acts of [individuals]."[192] In *Tadic*, the ICTY relaxed the "effective control" standard to "*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations."[193]

In the *Iran Hostages* case, the ICJ extended state responsibility based on a state's inaction. Faced with attacks on various U.S. embassies in Iran, the Iranian government failed to take any protective measures. The ICJ concluded that Iranian authorities were "fully aware of their obligations" under international conventions, "fully aware … of the urgent need for action on their part" to address the situation, "had the means at their disposal" to comply with their obligations, and "completely failed to comply with these obligations."[194] The *Iran Hostages* decision expanded the notion of state responsibility beyond illegal actions committed by the state. As the

[189] *See Case Concerning the Military and Paramilitary Activities in and Against Nicaragua* (*Nicar. v. U.S.*), 1986 ICJ 14, 25 I.L.M. 1023 (1986) (Judgment of 27 June 1986); *United States Diplomatic and Consular Staff in Tehran* (*U.S. v. Iran*), 1980 ICJ 3, 19 I.L.M. 553 (1980) (Judgment of 24 May 1980); *The Prosecutor v. Dusko Tadic*, IT-94-1-A, ICTY Appeals Chamber, 38 I.L.M. 1518 (1999) (Judgment of 15 July 1999) (Merits).

[190] ASIL, Jonathan Somer, "Acts of Non-State Armed Groups and the Law Governing Armed Conflict," 10 ASIL Insight 21, http://www.asil.org/insights/2006/08/insights060824.html (Aug. 24, 2006).

[191] *Nicar. v. U.S.*, *supra* note 190, at ¶ 115.

[192] *Id*. at ¶ 116.

[193] *Tadic*, *supra* note 190, at ¶ 145.

[194] *U.S. v. Iran*, *supra* note 190, at ¶ 68.

International Law Commission has recognized, state responsibility extends to "action[s] or omission[s]" and includes both conduct directed or controlled by a state and conduct acknowledged and adopted by astate as its own.[195]

The United States may have requisite "effective control" or "overall control" over PMCs to implicate state responsibility. Although the multiple layers of contracting and subcontracting complicate the situation,[196] the United States hires these PMCs and is ultimately responsible for their conduct. The United States may also be subject to state responsibility based on its inaction. The U.S. government's contracting of PMCs and failure to prosecute employees of PMCs implicated in human rights abuses arguably amounts to approval of those abuses.

Government actions that attempt to distance the United States from the illegal conduct of PMCs complicate the situation but should not blind the public and the legal community to the potential complicity of the U.S. government.[197] This "state crime by proxy"[198] warrants severe scrutiny into the actions of the U.S. government.

CONCLUSION

The United States has used the uncertain status of non-state actors under the laws of war to create a situation favorable to its desire to interrogate and detain members of Al-Qaeda without limitation and to take action against terrorists without liability. Although Al-Qaeda is not a party to the Geneva Conventions, the United States is not entitled to declare that no laws whatsoever apply

[195] Draft Articles on State Responsibility art. 2, ILC Report to the General Assembly, UN Doc. A/51/10, 159. Conduct directed or controlled by a state includes "[t]he conduct of a person or group of persons … if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." *Id*. at art. 8. Conduct acknowledged and adopted by a state as its own includes "conduct which is not attributable to a State … if and to the extent that the State acknowledges and adopts the conduct in question as its own." *Id*. at art. 11.

[196] Singer, *supra* note 18 (stating that "it is important to note that Halliburton often acts as a middle man, meaning the U.S. military outsources tasks to a firm that outsources them further.").

[197] Jamieson and McEvoy, *supra* note 181, at 514 ("State agencies divest themselves of responsibility for abuses through a remarkable array of horizontal and vertical distancing techniques, which are designed precisely to obstruct the potential for public knowledge and lawful accountability.").

[198] *Id*. at 513

to the detention and treatment of detainees. This argument does nothing more than expose weaknesses in the U.S. government's claim that the "war on terror" is properly classified as an armed conflict under the Geneva Conventions.

The United States has also used PMCs in a manner that attempts to prevent U.S. liability for human rights abuses committed abroad or, at the least, in a manner that attempts to shield such illegal activity from public scrutiny. U.S. complicity in human rights violations is questionable given the close link between PMCs and U.S. government action. PMCs are non-state actors that can nonetheless "function[] as an instrument of US policy."[199] Despite their connection to the U.S. government, PMCs can escape liability under U.S. law through judicially created doctrines for actions taken in the name of U.S. causes, such as the "war on terror."

Although little definitive evidence exists regarding governmental involvement in PMCs illegal activity, "[t]he fact that PMCs usually include former members of the armed services lends some plausibility for those who like conspiracy theories."[200] Investigation into due diligence measures on the part of the U.S. government in the hiring of PMCs, as well as investigations into the level of knowledge of senior U.S. officials regarding the actions of PMCs, would provide evidence of U.S. complicity in egregious human rights violations abroad. Continued employment of military firms that have been implicated in scandals abroad could provide further evidence of U.S. complicity in and ratification of illegal acts.[201]

Preliminary statements by former U.S. army Brigadier General Janis Karpinski allege that former Secretary of Defense Donald Rumsfeld played a more direct role in the Abu Ghraib prison

[199] U.K. Foreign and Commonwealth Office, *supra* note 121, at ¶ 50.

[200] *Id*. at 51.

[201] Evidence of U.S. ratification of illegal acts stems from its failure to take measures to prevent future abuse. Amnesty International notes a number of measures that the United States has not taken that could prevent future abuse: prompt investigation of abuses, reports to Congress regarding incidents involving the use of force, effective screening, and employee training in human rights and humanitarian law. "Annual Report," *supra* note 9.

scandal than previously acknowledged.[202] Recognizing the potential involvement of senior U.S. officials, a group of lawyers filed a lawsuit in Germany against Rumsfeld and other government and military officials for their alleged role in sanctioning abuse at Abu Ghraib.[203] Further investigations will reveal the full extent of U.S. involvement in the perpetration of human rights abuses in the "war on terror."

[202] *See* DemocracyNow.org, "Torture Suit Star Witness, Fmr. Abu Ghraib Head Janis Karpinski Points to Signed Rumsfeld Memo Listing Harsh Interrogation Techniques," http://www.democracynow.org/print.pl?sid=06/11/14/1517249 (Nov. 14, 2006) (alleging that a memorandum signed by former Secretary of Defense Donald Rumsfeld permitted questionable interrogation techniques, such as "prolonged standing, disruption of sleep patterns, playing loud music during – throughout the day and during the evening hours, disruption of meal plans, those types of things" along with the annotation, "Make sure this happens."); Truthout.org, Marjorie Cohn, "Janis Karpinski: Exclusive Interview," http://www.truthout.org/docs_2005/082405Z.shtml (Aug. 3, 2005) (recognizing the limitations on investigations of abuses at Abu Ghraib because "every one of those investigations is run and led by a person who can lose their job under Rumsfeld's fist.").

[203] *See* Time.com, Adam Zagorin, "Exclusive: Charges Sought Against Rumsfeld Over Prison Abuse," http://www.time.com/time/nation/article/0,8599,1557842,00.html (Nov. 10, 2006) (including a statement by Karpinski that "It was clear the knowledge and responsibility [for what happened at Abu Ghraib] goes all the way to the top of the chain of command to the Secretary of Defense Donald Rumsfeld.").