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## ACCOUNTABILITY OF STATE AND NON-STATE ACTORS FOR HUMAN RIGHTS ABUSES IN THE “WAR ON TERROR”

Laura A. Dickinson<sup>†</sup>

As our panelists have discussed and as Dean Koh mentioned in his lecture last night, the decisions regarding detainees in the so-called “war on terror” – *Hamdi*,<sup>1</sup> *Padilla*,<sup>2</sup> and *Rasul*<sup>3</sup> – leave a number of questions unresolved. Such questions include: (1) What substantive rights do the different categories of detainees actually have under U.S. constitutional law? (2) What rights might they have under international law? (3) Should *Rasul*, the case involving non-citizens detained at Guantanamo, be confined to its facts? And (4) Is there something special about the status of Guantanamo that gives U.S. courts jurisdiction over what goes on there, or does the jurisdiction of U.S. courts extend to any context in which the United States has custodial power over detainees anywhere in the world? Certainly some language in the opinion supports the broader reading, but we will need to await future litigation to resolve the issue.

As Brad Berenson has noted in his presentation for this panel, the Administration is currently arguing for the most limited possible interpretation of these Supreme Court cases. Berenson defends this approach by suggesting that, in order to maintain national security, we should be very concerned about placing any check on executive authority in the war on terror.<sup>4</sup>

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† Associate Professor, University of Connecticut School of Law. This is an edited transcript of a presentation delivered as part of the 2004 University of Tulsa College of Law Symposium: *International Law and the 2003-04 Supreme Court Term: Building Bridges or Constructing Barriers Between National, Foreign, and International Law?* Marilee Corr provided research assistance in the preparation of this manuscript.

1. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

2. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

3. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

4. Bradford Berenson, *The Uncertain Legacy of Rasul v. Bush*, 12 TULSA J. COMP. & INT'L L. 39 (2004)(remarks in this issue).

Before I turn to my prepared remarks, I want to begin by taking the opposite position. I believe that we should be very concerned about our security if we do *not* place any check on executive power. When we deny detainees rights under the Geneva Convention,<sup>5</sup> for example, or when we are not perceived to be obeying international law, we put our own troops at risk if they are captured overseas. In addition, when we do not protect the minimum rights of detainees, we have greater difficulty in gathering intelligence from our allies. There are a number of countries who have refused to give us intelligence precisely because they are concerned that the information might be used as part of proceedings that lack basic rights protections. More broadly, if we are not perceived as adhering to the rule of law, we risk losing the support of our allies in the fight against terrorism.<sup>6</sup> Yet we cannot win this fight alone. We need the cooperation of other countries around the world.

In large part because of our detention policies, the standing of the United States has fallen dramatically in the world. For example, in Indonesia, where I did some work for the State Department, support for the United States was at 75% before the war on terror.<sup>7</sup> Now, in part because of concerns about infringements on rights, support for the U.S. in Indonesia has slipped dramatically.<sup>8</sup> This is significant because Indonesia is the most populous Muslim country in the world, and formerly its population strongly supported the United States. I submit that this shift should be a source of great concern. Of course, there are people who will hate us no matter what we do. But if we lose the respect of moderates around the world, it will severely hinder our ability to prosecute the war on terror.

Now, turning to my main topic this morning, I want to focus on a further unresolved question from the Supreme Court cases that has not been sufficiently discussed: What happens when terrorists are detained not by U.S. authorities, but by private contractors *hired* by U.S. authorities? This question is not merely speculative; it reflects a practice that is on the rise.

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5. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

6. See generally Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1450 (2002) (discussing the reluctance of some nations to cooperate with the United States due to their perceptions of the illegitimacy of the use of military tribunals).

7. See PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, WHAT THE WORLD THINKS IN 2002 4, (Dec. 4, 2002), available at <http://people-press.org/reports/pdf/165.pdf> (reporting that in 1999/2000 75% of Indonesians held a favorable view of the U.S.) (last visited Nov. 23, 2004).

8. See PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, VIEWS OF A CHANGING WORLD 3, (June 3, 2003), available at <http://people-press.org/reports/pdf/185.pdf> ("Since last summer, favorable ratings for the U.S. have fallen from 61% to 15% in Indonesia.") (last visited Dec. 18, 2004).

In the domestic context, we have a very large amount of literature on the subject of privatization; increasingly, prisons, schools, healthcare, and welfare programs are being run by private companies. One of the concerns raised by this privatization is the degree to which privatization results in reduced accountability.<sup>9</sup> Legal realist arguments notwithstanding, constitutional scrutiny typically applies only against state actors. Thus, privatization often threatens to remove historically public functions from constitutional oversight.

In the international sphere, we are likewise seeing an increasing turn to private contractors performing what we might think of as core governmental functions. For example, even within the military, private actors are performing more and more military functions.<sup>10</sup> In the Abu Ghraib prison, in Iraq, where detainees were tortured and abused, the individuals involved in the torture included not only members of the military, but private contractors hired from the private sector to do the interrogation and translation.<sup>11</sup> If we see the principles of *Rasul* applied so that there is U.S. judicial review of governmental detention facilities anywhere in the world, I think it is not far-fetched to think that we might see an increasing turn to privately run detention facilities using private contractors for supervision and interrogation in order to avoid U.S. constitutional oversight.

Accordingly, I think it is vital to consider to what extent private actors involved in the treatment of detainees in the war on terror can be held accountable for their actions. One thing I think we learn is that accountability is actually very difficult to achieve under international law with respect to *either* state *or* private actors. Thus, although in the domestic context many scholars argue that privatization leads to a dramatically reduced scope of accountability, we may not be able to translate that conclusion to the international sphere because the baseline is different. Accountability for state actors is not nearly as robust in the international realm as in the domestic realm; therefore, you do not lose quite as much when you turn to private actors. Moreover, although there are not many avenues to hold private actors accountable, there are some possibilities, which I will discuss. In particular, I would like to suggest that human rights lawyers and scholars should consider not only accountability through the vehicle of suits to enforce international law norms, but also suits to enforce ordinary municipal law.

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9. Jack M. Beermann, *Privatization and Political Accountability*, 28 *FORDHAM URB. L.J.* 1507, 1508 (2001).

10. See P.W. Singer, *The Contract the Military Needs to Break*, *WASH. POST*, Sept. 12, 2004, at B03 (“More than 20,000 private contractors are working for the U.S. government in Iraq, performing a wide range of military functions.”).

11. *Id.* (“Sixteen of the 44 incidents of abuse the Army’s latest reports say happened at Abu Ghraib involved private contractors outside the domain of both the U.S. military and the U.S. government.”).

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As I just mentioned, in the domestic context when we see privatization taking place, we see a reduction in accountability. This is because domestically, many of our most cherished rights are conceived of as rights against the state. Accordingly, when functions that were previously performed by state actors are turned over to private actors, it is unclear whether those rights against the state run against private actors as well. Thus, in a privately run prison or welfare program where officials have a great deal of discretion in running the program, it is not at all clear that those officials will be subject to constitutional or federal civil rights scrutiny. You have to show a nexus to state action,<sup>12</sup> and the trend has been to make it more difficult to establish such a nexus. There are some exceptions,<sup>13</sup> but generally you have to show very specific links to state actors, so the more discretion that private actors have in running the program, the more difficult it is to establish state action.

In the international context, the baseline is different. Here, although many norms protect the rights of individuals against state actors (and there are increasing avenues for enforcing these norms), the enforcement mechanisms are not nearly as robust as in the U.S. domestic context. To illustrate this point, I will take the torture and abuse that occurred at Abu Ghraib, as an example. I will briefly look at the avenues of accountability for the state actors and then look at what the avenues of accountability might be for private actors.

For state actors, you might think that you could bring either a criminal or civil case in Iraqi courts. However, the U.S. Coalition Provisional Authority (CPA) granted immunity to U.S. and other foreign actors in Iraq.<sup>14</sup> There is an open question, of course, as to whether such an immunity provision can truly shield individuals from accusations of gross human rights violations. But in any event, the Iraqi legal system is not in any condition to consider those kinds of cases. In addition, there is no international tribunal with jurisdiction, so the best options are really domestic. Indeed, we have actually seen *some* accountability within the U.S. military justice system. Charges have been brought against eight

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12. See *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (explaining the presumption that one must be acting under the color of law in order to violate the law of nations); see also Alien Tort Claims Act, 28 U.S.C. § 1350 (2004).

13. See *Kadic*, 70 F.3d at 239 (“[W]e hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”).

14. See COALITION PROVISIONAL AUTHORITY, ORDER 17, STATUS OF THE COALITION PROVISIONAL AUTHORITY, MNF, CERTAIN MISSIONS AND PERSONNEL IN IRAQ, § 2, para. 1, available at [http://www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf) (“Unless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.”).

of the military personnel involved in the abuse, and four have been convicted. However, these are fairly low-level actors. Although the military has conducted some informal investigations, we haven't seen very much in the form of accountability at higher levels, even though some of the reporting suggests that responsibility may go much further up the chain of command. Congress has held some hearings, but probably not as many as it should have. In addition, we have seen very few informal sanctions, such as the firing or demotion of those implicated in the abuses. Finally, thus far no criminal or civil cases have been brought in U.S. civilian courts, though such options may be available.

I now turn to the avenues available to hold private actors accountable. At Abu Ghraib, there were private companies whose employees were involved in the abuse. These are companies whose employees served as interrogators and translators and who, according to reports, directly committed abuses.<sup>15</sup> As in the case of the state actors, the Iraqi courts provide few if any options, due to the CPA grant of immunity. Again, even if there is an exception to the immunity for serious human rights violations, the courts there are not in any shape to consider such cases. Also as with the state actors, there is no international criminal tribunal with jurisdiction. Thus, although there is some precedent for criminally prosecuting private actors in international courts for violations of international law, in this situation there is no international forum available.

With regard to domestic options, the U.S. military courts are not available for cases against private actors. In a series of decisions from the late 1950s and early 1960s, the U.S. Supreme Court has prohibited military trials of civilians absent a declaration of war.<sup>16</sup> The only plausible existing options are in the U.S. civilian courts. In that regard, there are several statutes that essentially incorporate international criminal categories into domestic law. For example, there is a statute that makes torture committed outside the United States a crime,<sup>17</sup> and there is also a statute that makes war crimes – wherever they are committed – a crime.<sup>18</sup> It is therefore conceivable that private actors could be

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15. See Singer, *supra* note 10.

16. See *Reid v. Covert*, 354 U.S. 1 (1957) (holding that civilian dependents accompanying the armed forces overseas in time of peace are not triable by court-martial for capital offenses); see also *Kinsella v. Singleton*, 361 U.S. 234 (1960) (prohibiting military jurisdiction over civilian dependents in time of peace, regardless of whether the offense was capital or noncapital); *Grisham v. Hagan*, 361 U.S. 278 (1960) (holding civilian employees committing capital offenses not amenable to military jurisdiction); *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (expanding *Grisham* to include non-capital offenses).

17. The Torture Act of 2000, 18 U.S.C.A. §§ 2340, 2340A, & 2340B. Note, however, that 18 U.S.C. § 2340(3) was amended by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, sec. 1089, Pub. L. No. 108-375, 118 Stat 1811, 2067 to redefine the "United States" as "the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States."

18. The War Crimes Act of 1996, 18 U.S.C. § 2441 (2000).

prosecuted under these statutes. However, because such prosecutions would require the Bush Administration to initiate proceedings, they are unlikely to take place. This is particularly true given the Administration's reluctance both to characterize what happened at Abu Ghraib as torture and to acknowledge that the detainees even have rights under the Geneva Conventions such that what took place at Abu Ghraib could be classified as war crimes. In these cases, there is also the added hurdle of state action because, for example, the right to be free from torture is conceived of as a right only against official misconduct and is therefore analogous to some of our domestic constitutional rights. Likewise, state action may also be a hurdle in making out a case for war crimes.

However, there are options for bringing criminal cases under *domestic* criminal law categories. For example, the Military Extraterritorial Jurisdiction Act allows for criminal charges to be brought against U.S. contractors working for the Defense Department.<sup>19</sup> Congress enacted this statute precisely because U.S. military courts are not an option for private actors.<sup>20</sup> Nevertheless, one of the limitations to this avenue is that it only applies to contractors of the Defense Department.<sup>21</sup> Many of the contractors in Iraq, however, are operating under contracts with the CIA or with the Department of Interior,<sup>22</sup> so the statute would not apply.

To get around this difficulty, it is worth noting that the U.S.A. Patriot Act<sup>23</sup> actually extends something called the Special Maritime and Territorial Jurisdiction (SMTJ) of federal courts to include facilities run by the United States overseas.<sup>24</sup> Thus, a prosecutor might bring charges against private actors mistreating detainees overseas if the abuse constitutes a crime and is therefore prohibited in the special maritime and territorial jurisdiction. In fact, one case has been brought against a private contractor who had been working for the CIA and was implicated in detainee abuse not in Iraq, but in Afghanistan.<sup>25</sup> He has been indicted in the United States for assault committed within the U.S. SMTJ.<sup>26</sup>

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19. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 18 U.S.C. §§ 3261-67 (2000).

20. See Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad – Problem Solved?*, ARMY LAW. (Dec. 2000).

21. 18 U.S.C. § 3267.

22. Richard A. Serrano, *The Conflict in Iraq: Pentagon Cites Widespread Involvement in Prison Abuses*, LOS ANGELES TIMES, Aug. 26, 2004, at A1.

23. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub. L. No. 107-56, 115 Stat. 272-402 (codified in various amended sections of the U.S. Code).

24. 18 U.S.C.A. § 7(9) (2000).

25. See Farah Stockman, *CIA Contractor is Charged in Beating of Afghan Detainee*, BOSTON GLOBE, June 18, 2004, at A1.

26. See *id.*

On the civil side, we have the possibility of suits under the Alien Tort Claims Act (ATCA).<sup>27</sup> We will be hearing more about the ATCA later on this morning, but, as Dean Koh mentioned last night, the statute provides what is essentially a *Bivens* claim in U.S. courts for international law violations.<sup>28</sup> There are a number of issues that remain to be litigated about the scope of this statute in the wake of the U.S. Supreme Court's decision in *Sosa* last term.<sup>29</sup> Lawyers have already brought suit against the contractors involved in the Abu Ghraib abuse under the ATCA.<sup>30</sup> As with potential criminal prosecutions for torture or war crimes, the corresponding claims under the ATCA pose significant state action problems because many of the international law violations that give rise to claims under the ATCA are conceived of as rights against the state.<sup>31</sup> Perhaps not surprisingly, U.S. courts, in interpreting these international law claims under the Alien Tort Claims Act, have looked to the domestic law of state action to determine how much of a nexus there must be between the state and the private actor implicated in the alleged abuse.<sup>32</sup> However, what is a bit surprising in ATCA cases is that courts have applied the state action doctrine in a much broader way than in domestic cases, requiring a far less specific connection between the private actor and the state than is usually required in the domestic context.<sup>33</sup> There is definitely a real possibility that a plaintiff could establish a sufficient nexus to the state to proceed against a private contractor under the ATCA.

Finally, I think it is important to consider the possibility of ordinary municipal law claims, such as tort claims that might be brought either domestically or transnationally (that is, suits that might be brought in the United States for actions taken outside the United States). In the human rights field, there is a growing amount of literature on corporate responsibility.<sup>34</sup> Scholars and practitioners have begun to grapple with the problem that corporations have increasing power around the world and are in some cases committing human

27. 28 U.S.C.A. § 1350.

28. Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, the 2004 Term: The Supreme Court Meets International Law*, 12 TULSA COMP. & INT'L L. J. 1 (2004) (remarks in this issue); see also *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

29. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

30. See T. Christian Miller, *Ex-Detainees Sue 2 U.S. Contractors*, L.A. TIMES, June 10, 2004, at A9.

31. See *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1140 (2002).

32. *Id.*

33. *Id.* at 1145.

34. See generally Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001); see also Beth Stevens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002).

rights violations. Because many (though not all) of those that are committing human rights violations are non-state actors, many scholars have sought to expand the categories of international human rights so as to encompass these non-governmental entities. This is certainly one approach, but I think that an under-explored avenue is the extent to which ordinary municipal law, such as the law of tort, might provide norms that could be used to address the same underlying conduct. For example, assault or battery in the law of many countries would cover the same conduct that would give rise to a torture claim. As transnational tort cases can sometimes be brought in areas such as products liability, so too human rights suits might also take the form of a transnational tort. In any event, I suggest it as a possible area worthy of further research and work.

I would like to conclude with three points. First, privatization in the international realm is a serious issue that is under-explored and that raises unique challenges for international law. Increasingly, functions that we think of as core governmental functions, such as military functions, are being performed by private actors. Second, when privatization takes place, the impact on accountability may not be as dramatic as in the domestic law setting because of the fact that there is a different baseline. Finally, I think we need to pay attention to the possibility that ordinary municipal law claims might be brought transnationally to impose some measure of accountability in these circumstances. Thank you very much.