Holding Private Military Contractors Accountable for Human Rights Violations: The Alien Torts Claims Act and the Quest for Regulation

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The current unmitigated growth of private corporations has led to an imbalance between the legal obligations and legal rights of these companies. Viewed as legal individuals, but with reach and influence approaching that of states, multinational corporations pose significant social, economic, and legal challenges for the future. Among the most complex of these challenges is how to legally regard corporations that contract with state governments. Private military contractors (PMCs), those that work most closely with state militaries, pose a unique problem amidst the debate on corporate accountability. Recent allegations against private military contractors for crimes, including torture, war crimes, and crimes against humanity, are the result of the outsourcing of certain government functions to these contractors who do not have the same legal obligations as the States that hire them. The case law of the past three decades elucidates the legal obstacles of prosecuting private entities for international crimes.

While we recognize that it is not the only method of redress and is unsustainable in the long run, the focus of this paper will be directed at the Alien Torts Claims Act (ATCA) because it is the most actively utilized statute for suits against PMCs. The dearth of applicable case law outside of the ATCA is undoubtedly due to how recently the explosion of contractors working in military settings has occurred. During the Gulf War, private military contractors comprised only ten percent of the U.S. force deployed. Previous percentages had been as low as two percent. In stark comparison, PMCs now comprise roughly half of the total force deployed in Iraq, with 129,000 total contractors; 4,600 of whom are estimated to be performing combat roles for the United States Military (Jordon 313).

The first part of this paper outlines how the Alien Torts Claims Act emerged as an avenue for prosecuting human rights violations. Following that, an analysis of case law will show the evolution of the ATCA and its continual re-interpretation up to its present-day standing. We will look at the Government Contractor Defense (GCD) as a major obstacle in prosecuting PMCs, and will examine the Federal Tort Claims Act (FTCA) as an alternative method of redress. We will conclude with an analysis of the inability of both domestic and international law to define and deal with PMCs, as well as propose changes in both spheres that would promote more effective regulation and redress.

The Alien Tort Claims Act, also known as the Alien Tort Statute (ATS), was introduced as a part of the first judiciary act of the United States in 1789, but remained dormant for almost two centuries. It reads: "The 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." There are three dominant theories argued by scholars about the original intent of the ATCA. The denial of justice theory suggests that the drafters were attempting to create a "vent" for tensions between the United States and foreign nations out of the fear that a civil wrong could escalate into an international conflict (Micallef 1382). Proponents of the diplomatic safety theory argue a narrower version of the denial of justice theory, saying that the act was intended specifically for foreign diplomats (1382). The theory most reflected by recent case law is of international duty, which states that the act arose out of a "higher sense of international duty" toward both other nations and to individuals by allowing them access to redress in domestic courts (1384).

The original purpose of the ATCA, however, is less significant than the more recent interpretations which have re-awakened this long dormant statute (Hufbauer and Mitrokostas 2).

The ATCA provides aliens access to U.S. federal courts as long as their case fits the accepted criteria; a non-U.S. citizen must allege a tort committed in violation of the law of nations or a U.S. treaty. The ATCA's prolonged inactivity ended in 1980 when the Supreme Court ruling on the *Filartiga v. Peña-Irala* case provided a path through which international human rights violations committed against the law of nations or U.S. treaties could be adjudicated in U.S. Courts, even when the offense occurred outside the U.S.' usual jurisdiction.

ATCA: PROGRESSION OF INTERPRETATION

Filartiga v. Pena Irala

Américo Norberto Peña-Irala, a Paraguayan citizen and police officer, tortured Dr. Joel Filartiga's son to death in Paraguay in 1976. Four years later, Filartiga (who was not a US citizen) was able to successfully sue Peña-Irala in United States courts using the ATCA. The U.S. Supreme Court sought to determine whether the ATCA could be applied to the suit on two levels. The first question was of whether the allegations against Peña-Irala were in violation of the law of nations. The second was whether it would be constitutional for a U.S. Court to hear a case regarding a violation of international law. The Court determined that Peña-Irala's crime was a violation of the law of nations, and that it was indeed constitutional for the case to be heard in a U.S. court. Torture is universally condemned by the international community and is banned by international law. Because torture is expressly outlawed internationally and because Filartiga was a Paraguayan citizen, the case met the ATCA's requirement that a non-U.S. citizen must allege a tort committed in the violation of the law of nations or a U.S. treaty. The Court's decision that constitutionality was upheld relied upon the reasoning that United States' law already incorporated, and hence was partly based in, international law, and that the ATCA was

not conferring new rights to aliens, but merely "opening the federal courts for adjudication of the rights already recognized by international law" (Filartiga 124). The decision was significant in that the Court recognized that the ATCA could be used by aliens to redress any wrong by a State actor that violated established international law.

This recognition opened up the ATCA as a statute that could be used by non-U.S. citizens to seek redress for human rights violations when other avenues (such as domestic remedy) were unsuccessful. The *Filartiga* ruling created the possibility of using the ATCA as a means of adjudicating human rights violations committed against aliens in U.S. courts. Since then, the ATCA has become the most utilized legislative device for litigating human rights abuses (Catera 631). Numerous cases have continued to advance the interpretation of the ATCA. The first of these which is relevant to the scope of our inquiry is the case of *Tel-Oren v. Libyan Arab Republic*.

The 1981 case of *Tel-Oren v. Libyan Arab Republic* upheld the jurisdictional precedent set by *Filartiga*, but disallowed the expansion of the ATCA to non-state actors. The plaintiffs were survivors and representatives of Israeli citizens murdered in an armed attack on a civilian bus by the Libyan Arab Republic. The plaintiffs attempted to invoke the ATCA and bring the case to United States courts because of the alleged violations of human rights. The case was dismissed due to two conflicting theories of individual liability. The first interpretation was the well-known principle of holding individuals accountable for their actions while acting under the color of law, as seen in *Filartiga*. The second was the unexplored notion of individual liability outside of state authority. The United States Court of Appeals for the District of Columbia Circuit opted not to favor the second interpretation in *Tel-Oren*, choosing instead a strict interpretation of the law of nations. The Court argued that

> To hold individuals liable under the international law in this situation would be to venture out of the comfortable realm of established international law…in which states are the actors…requiring an assessment of the extent to which international law imposes not only rights but also obligations on individuals. (Tel-Oren 75)

The *Tel-Oren* decision thus reinforced the jurisdictional precedent set in *Filartiga*, but failed to advance the notion of individual liability under the ATCA, which appeared again in later cases. While individuals outside the color of law could not yet be held liable under the ATCA, the establishment of private right of action in *Sosa v. Alvarez-Machain* solidified individuals' ability to bring cases under the act.

Sosa v. Alvarez-Machain

In 1985, a DEA special agent was kidnapped and murdered by a Mexican drug cartel. A DEA investigation found that Dr. Humberto Alvarez-Machain had participated in the DEA agent's murder. Following the investigation, a warrant was released for the arrest of Dr. Machain. When the Mexican government refused to arrest and extradite Dr. Machain to the United States, the DEA hired Mexican nationals to kidnap the suspect and transfer him to American territory. Upon being transferred to American soil, Dr. Machain was arrested immediately. Following a trial that eventually reached the U.S. Supreme Court, Machain was finally found not guilty due to lack of evidence. Upon returning to Mexico, Machain filed suit for damages against the United States government under the FTCA, and against Jose Francisco Sosa (a Mexican national in charge of his kidnapping) under the ATCA for violation of the law of nations (D'Amore 606).

While the defense argued that the ATCA did not allow for private right of action, the Ninth Circuit Court held that it established jurisdiction in federal courts for alien torts and

established "a cause of action for an alleged violation of the law of nations" (Sosa 25). The district court of California held that Alvarez's apprehension in Mexico, including state-sponsored abduction and arbitrary detention, violated customary international law, thus permitting suit under the ATCA. Aside from establishing private right of action, the lasting impact of the *Sosa* case was the ambiguity of the higher court's decision, which left discretion to lower courts regarding the interpretation of the law of nations. The Court actively chose not to adhere to a conservative interpretation, which would include only piracy, violation of safe conducts, and infringement on the rights of ambassadors as legitimate violations of the law of nations under the ATCA. The Court also declined to interpret and define the modern day interpretation of law of nations, noting that:

> The determination of whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts. (D'Amore 616)

The Supreme Court thus decided neither to definitively widen the scope of the ATCA nor to ground it in its most literal sense. The Court based its findings on "historical antecedents" which left a "certain amount of discretion to the lower courts" regarding their future decisions (D'Amore 616). By basing the standard for ATCA applicability on historical antecedents, the Court allowed for its future interpretation and evolution. This progression continued as the precedent set by *Tel-Oren* was revisited in the 1993 case of *Kadic v. Karadzic.*

Kadic v. Karadzic

In 1993, Croat and Muslim citizens of the former Republic of Yugoslavia brought "Srpska" President Radovan Karadzic to Court under the ATCA. Karadzic was President of the

self-proclaimed Bosnian-Serb Republic within Bosnia-Herzegovina**.** The crimes for which Karadzic was accused consisted of genocide, war crimes, and crimes against humanity including rape, brutality, forced impregnation, torture, forced prostitution and summary execution (Garmon 341). The defense stated that international law binds States and State officials but *not* individuals. Karadzic (being the leader of an unrecognized government) would therefore be outside the jurisdiction of international law and the ATCA (Kadic 17). The Second Circuit Court, however, emphasized that certain actions are "so heinous that state authority is not necessary for international law to address them" (Kadic 17). The U.S. State Department outlined that individuals acting outside the color of law could be brought to Court under the ATCA for acts of genocide, war crimes, and other violations of international humanitarian law (Kadic 94.3). Furthermore, while individual acts of rape, unofficial torture, and murder are generally not considered within the jurisdiction of international law, they could be included under the ATCA if committed in "furtherance of genocide or war crimes" (Garmon 341). This was a departure from the interpretation found in *Tel-Oren*, which clarified that an individual could be prosecuted under international law if the acts committed were severe enough to be considered genocide, war crimes or a violation of *jus cogens*.

The next step in the progression of ATCA interpretation involved the question of whether or not individual liability would be restricted to natural persons or would include organizations and collective entities. The Court in *Kadic* noted that States were no longer the only entities capable of committing mass atrocities and collective entities should be included as juridical individuals and held liable for violations of international law (Garmon 342).

The inclusion of multi-national corporations (MNCs) and other collective entities was a watershed moment in the evolution of the ATCA. Nevertheless, obstacles still remained

regarding how to legally hold MNCs accountable for their actions. Considering MNCs as private, juridical individuals acting outside the color of law and bringing them to court would only be effective if the plaintiff could prove a corporation's actions consisted of genocide, war crimes, or other severe violations of international law. Through rulings on cases brought against MNCs under the ATCA, the concepts of joint action theory and aiding and abetting emerged.

Wiwa v. Royal Dutch Petroleum Co.

The joint action test provided a framework through which human rights abuses not severe enough to be considered genocide or war crimes could still provoke legal action against a private entity. In 1996, three Nigerian citizens brought an ATCA suit to the United States District Court for the Southern District of New York against the subsidiary of Royal Dutch Petroleum, Dutch/Shell and Shell's subsidiary, Shell Nigeria (referred to collectively as Shell). The plaintiffs argued that Shell, in pursuit of oil exploration, armed and financially supported Nigerian military forces that tortured, raped and conducted deadly raids against the resident Ogoni population. In consideration of the case's dismissal, the Court noted that the alleged actions did not constitute genocide, war crimes or violations of *jus cogens* (all cases which would not necessitate proof of state action) (Dahl 128). Therefore, since Shell was a private entity, state action would be required in order to prosecute the company under the ATCA. In order to prove state action, the joint action test was applied.

The joint action test states that "private actors are *considered state actors* if they are willful participants in joint action with the State or its agents" (Wiwa 46). Two theories of joint action arose from this definition. First, if there was a substantial degree of cooperation between the individual and the State, the individual would be considered a State actor. Second, if an individual and the State engaged in significant cooperative action accompanied by knowledge of

the State's conduct on the part of the individual, the individual could be held liable as a State actor (Garmon 350). Regarding the former interpretation, the defendants argued that joint action necessitated "in-concert" cooperation with a state in order to hold the individual accountable (Garmon 350). The Court, however, ruled differently, stating that the plaintiffs "demonstrated sufficient collaboration to show state action" and so Shell could be held accountable as a state actor. In finding the joint action test applicable under its former interpretation, the Court decided not to address the latter interpretation. Given the success of the ruling in *Wiwa v. Royal Dutch Petroleum*, the joint action theory has emerged as a possible way of holding individuals and private entities accountable for violations of human rights under the ATCA. The principle of aiding and abetting, as elucidated in *Doe v. Unocal* created yet another method of holding PMCs legally accountable for human rights abuses.

Doe v. Unocal

In 1993, the United States Court of Appeals for the Ninth Circuit accepted the aiding and abetting principle as a legitimate form of prosecution against private entities in *Doe v. Unocal*. In 1992, the Myanmar military established a state owned company named Myanmar Oil and Gas Enterprise (MOGE). MOGE leased a French corporation named Total S.A. to "produce, sell and extract natural gas" from Myanmar. Total in turn set up a subsidiary named Total Myanmar Exploration and Production to enter into the Myanmar contract. The contract was a lease agreement that Total split into two joint ventures: gas production and gas transportation. In the same year, an American corporation named Unocal Oil Company set up two subsidiaries named the Unocal Myanmar Offshore Company and the Unocal International Pipeline Corporation to each respectively acquire a twenty-eight percent stake in Total's gas production and transportation joint-ventures. The government of Myanmar at this time was suffering from

violent opposition in different regions of the country. One area of violence was the Tenasserim region where a section of pipeline was being built for MOGE and Total's oil venture. At the request of Total and its assignees (the Unocal subsidiaries), the Myanmar government provided military security during the construction of the Tenasserim pipeline. The connection and support of the Myanmar military by Unocal and Total is where the aiding and abetting principle becomes significant.

Evidence produced during the case proved that not only was Unocal aware of the Myanmar military presence in the Tenasserim region during construction, but of its practice of forced labor and other human rights violations (Garmon 347). Once brought to court, the judges approved the theory of liability created in *Kadic* that juridical individuals could be held liable for certain crimes under international law. The Court then assessed the theory of aiding and abetting, and whether it pertained to Unocal's involvement. The Court defined aiding and abetting as "knowing, practical assistance or encouragement that has a substantial effect on the perpetration of the crime" (Doe 23). The Court concluded that any fact finder would be able to prove that Unocal met this requirement.

Unocal settled out of Court before a verdict could be reached. While a final ruling could have helped to further progress the interpretation of the ATCA, *Doe v. Unocal* stands as a critical case because it was the first instance where a multinational corporation compensated individuals for human rights violations on foreign soil. The plaintiffs alleged that "negligence, joint venture, recklessness and agency" all added to the defendants' guilt under secondary liability. The Court did not see any reason to address these additional claims since they felt confident in the defendants' guilt under the aiding and abetting principle. Nevertheless, the acknowledgment that aiding and abetting fell under the scope of secondary liability and that the additional claims were

not only relevant but may have been even more appropriate than aiding and abetting helped widen the margin of accountability for private entities and may, in the future, lay precedent for further evolution of the ATCA.

Torture Victim Protection Act

Just as the aforementioned case law contributed to the broadening of the ATCA's applicability, so has ATCA legislation. The creation of the Torture Victim Protection Act (TVPA) in 1993 both broadened and increased the application of the ATCA. The TVPA is a statute of the ATCA that allows civil suits in U.S. Courts against individuals who have committed torture or extrajudicial killing in an official capacity. Whereas the ATCA is reserved for suits brought by aliens, U.S. citizens may bring suit using the TVPA. In order to successfully invoke the TVPA, exhaustion of domestic remedy in the state where the act occurred is necessary (Engle 510). The TVPA has been used to sue individuals as well as foreign states, including Iraq and Iran. The TVPA specifies a ten-year statute of limitations which has been applied to the ATCA as well, even though the original Act does not specify a statute of limitations itself. The TVPA has changed how the ATCA can be used, opening it up to U.S. citizens as well as dictating a statute of limitations. With each development in case law and legislation, the door to redress for victims of human rights abuses is opened slightly further. Past case law and the TVPA have significantly contributed to the current interpretation of the ATCA. This interpretation is being used currently in the case of *Atban v. Blackwater*, and which will likely be further developed as the case progresses.

Atban v. Blackwater

By implementing the progression of interpretation found in previous ATCA cases, an analysis of the ongoing case of *Atban, et al. v. Blackwater* may prove how significant these cases

have actually been. Blackwater is one of many private military corporations currently contracted by the U.S. around the world. Recent publications of questionable behavior by its employees have drawn much unwanted attention to the lack of regulations for private military contractor operations. In *Atban v. Blackwater*, the plaintiffs' suit arises from the actions of Blackwater on September 16, 2007 in Baghdad's al-Nisoor Square. The complaint contends that "heavily armed Blackwater personnel opened fire on innocent civilians in al-Nisoor Square resulting in multiple deaths and injuries" (Dahl 131). While the alleged actions are still currently under investigation, an internal report included in a memorandum to the House Committee on Oversight and Government Reform documented 195 shooting incidents in 2005 alone; Blackwater personnel fired first in 163 of those cases. Furthermore, the report suggested that Blackwater contractors were responsible for as many as sixteen Iraqi civilian casualties and 162 incidents in which property of Iraqi civilians was damaged (122). Lastly, one particularly disturbing report recounted the actions of an inebriated Blackwater employee who shot and killed a bodyguard of the Iraqi vice-president (122).

In this case, creating a successful prosecution under the ATCA presents numerous obstacles. The first avenue that Atban could pursue is to consider Blackwater a juridical individual acting independent of state action. For this case to continue, the alleged crimes against Blackwater must constitute genocide, war crimes or another severe violation of *jus cogens.* In analysis of Blackwater's actions, the allegations of war crimes seem the most credible. Certain articles of the Geneva Conventions, which are accepted as customary international law, may pertain to the case against Blackwater. Regarding the 162 incidents where Iraqi civilian property was damaged, Protocol 1 to the Geneva Conventions of 12 August 1949, Article 52 states that "Civilian objects shall not be the object of attack or of reprisals." In

response to the alleged sixteen civilian casualties and the murder of the Iraqi vice-president's bodyguard, Article 75(2b) states that murder is strictly prohibited. Furthermore, both murder and destruction of civilian property are considered to be "grave breaches" of the Geneva Conventions under section 2 Article 85. Article 85(5) of the Conventions states that "grave breaches of these instruments shall be regarded as war crimes." By applying the Geneva Conventions, which stands as international customary law, the allegation that Blackwater's actions constitute war crimes could theoretically allow for them to be held accountable under the ATCA regardless of their status as a private entity.

If the court does not view the alleged actions as war crimes or other violations of the law of nations, further state cooperation will have to be proven for the case to continue. It is possible that aiding and abetting or the joint action test could provide a workable framework for considering Blackwater a state-actor. In regards to the joint action test, the dynamic between Blackwater and the United States is opposite of that found in the case of *Wiwa v. Royal Dutch Petroleum*, which set the joint action precedent. While there is substantial proof of cooperation between the U.S. State Department and Blackwater, instead of a private entity influencing the actions of a state actor, Blackwater is under contract with the United States. Whether or not this dynamic would influence the Court's decision in an attempted invocation of joint action is open to conjecture. Nevertheless, its application could potentially play an important role in a furtherance of the definition and application of the joint action test.

Finally, while aiding and abetting may be plausible, the Court in *Doe v. Unocal* acknowledged that the plaintiffs' additional claims of "agency, negligence, recklessness and joint venture" could potentially be more relevant in future ATCA cases than the issues of aiding and abetting. The concept of agency is particularly relevant, as it provides the defense with the

opportunity to introduce the Government Contractor Defense (GCD), which if successful would alleviate Blackwater of any legal accountability for the alleged violations.

OBSTACLES TO ACCOUNTABILITY

Government Contractor Defense

The government contractor defense (GCD or "the defense") is a federal common law judicial doctrine that protects contractor-defendants from liability when the federal government controlled its actions, thus extending sovereign immunity to those who act as agents of the government. Agency and sovereign immunity are the foundational principles of the defense, the function of which is to protect government autonomy in procuring goods through contractors under the reasoning that suits against contractors would increase contractor costs, which would lead to increased costs for the government. The GCD employs the rationale that if the government enjoys sovereign immunity and a contractor is executing the will of the government, they, too should benefit from immunity (Micallef 1399-1401).

The defense was created during the 1988 case of *Boyle v. United Technology Corp*., during which the company was sued by the family of David Boyle, a United States Marine helicopter co-pilot who drowned during a crash due to the defectively designed emergency escape-hatch system of the helicopter. While the Virginia District Court found for the petitioner, the Court of Appeals reversed the decision holding that, as a matter of federal law, the company could not be held liable for the alleged defects because it satisfied the requirements of the government contractor defense. Though the petitioners contended that in the absence of federal legislation specifically immunizing contractors federal law could not shield contractors from liability for design defects in military equipment, the Court held that in certain areas involving

"uniquely federal interests," state-law is pre-empted and replaced, where necessary, "by federal law of a content prescribed by the Courts" (Boyle 500). As the procurement of equipment was seen to be an area of uniquely federal interest and one in which a conflict between state and federal law was present, the Court determined that state law that imposes liability for design defects in military equipment is displaced in the presence of the three conditions—specification, conformance, and disclosure—which together preclude liability. Specification is established if the U.S. approved reasonably precise specifications in a contract, conformance is present if the equipment conformed to those specifications, and disclosure exists where the supplier warned the United States about the dangers in the use of equipment that were known to them but not the government. In *Boyle*, the three conditions were found to exist and as such, the contractor was not held liable (501).

With the creation and elucidation of the GCD, *Boyle* set the precedent for protection of private military contractors for acts done in compliance with government specifications while under contract with the United States. This affirmative defense, in which contractors carry the burden of proving existing contracts that include agreement to perform acts complained of, evolved in *Hudgens v. Bell Helicopters/Textron*, to include service contracts. In Hudgens, the service contractor DynCorp was sued by the victims of a helicopter crash for negligent maintenance. The Court held that, as in *Boyle*, subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest, and determined that the government contractor defense was applicable to the service contract. This set precedent for the Court's analysis in *Boyle* to apply in the case of service contracts, which is particularly relevant for current cases being brought under the ATCA[1].

[1] See Ibrahim v. Titan, 391 F.Supp.2d 10 (D.D.C. 2005); Saleh et al. v. Titan 436 F.Supp.2d 55 (D.D.C. 2006)

While the ATCA has become a more common tool for redressing human rights abuses committed by private military contractors, the government contractor defense threatens the efficacy of the ATCA by granting contractors immunity. The defense extends the sovereign immunity of the United States government to contractors who are acting on behalf of the government, thus protecting them from liability for illegal acts committed. As explained by Micallef, the Defense greatly hinders the effectiveness of the ATCA as a human rights tool by allowing "liability laundering," a means by which the government can use private contractors to diffuse and even eliminate accountability for violations of international law committed under the supervision of the government (1408). Continued success in using the Defense means that contractors could potentially be used as a means of doing the government's dirty work; that is, committing acts that violate international law without legal repercussions. The lack of a means of redress directly defies the *ubi jus, ibi remedium* principle of law which states that where there is a right, there must be a remedy. When the GCD is successful, there is no remedy under the ATCA for the rights violated. This is one of the main legal problems with using the ATCA to prosecute rights violations by PMCs. The defense's success is currently a seemingly impenetrable hindrance to ATCA effectiveness. As such, we will examine another option for redress that may be pursued if the defense prevents suit under the ATCA.

Federal Tort Claims Act

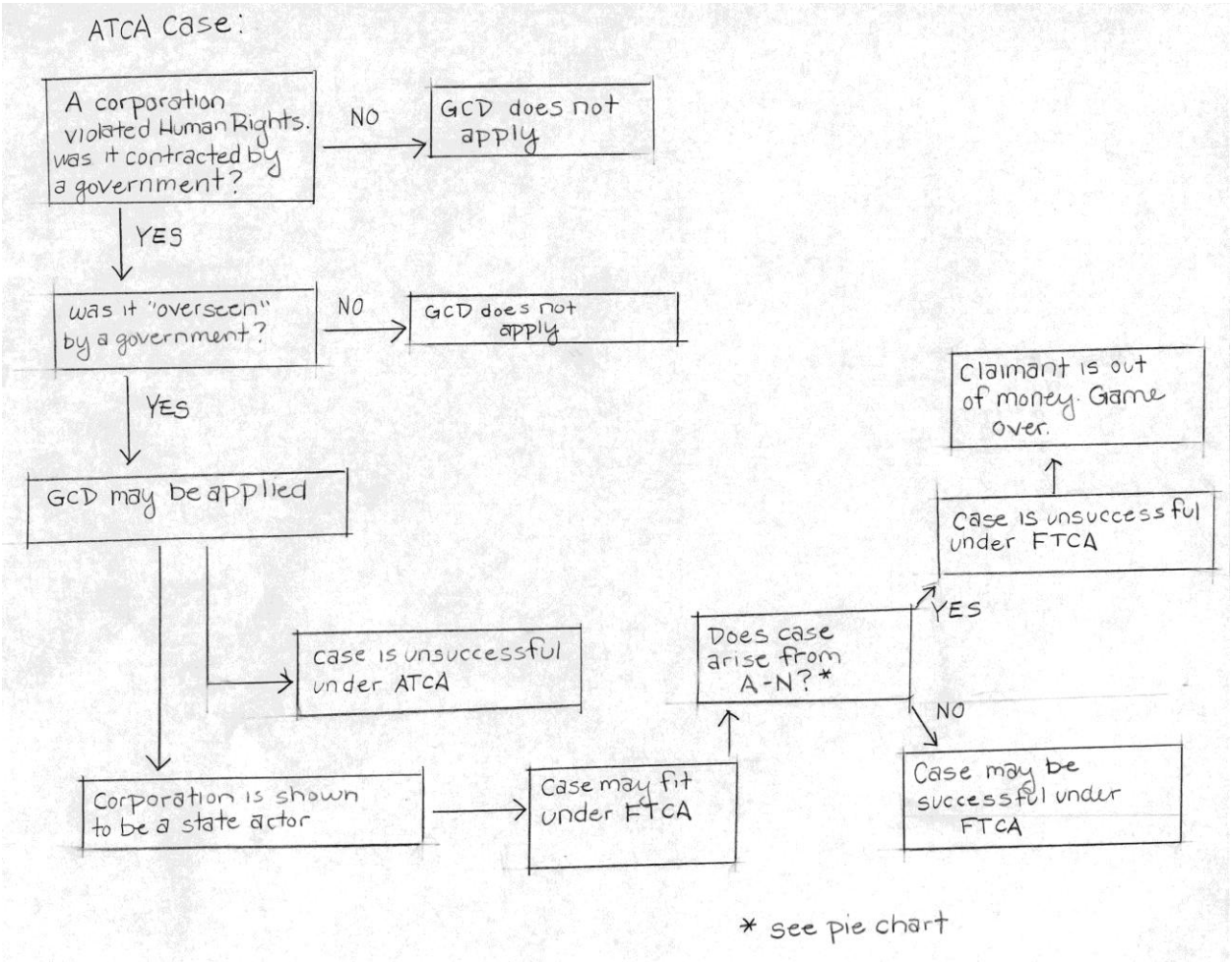
Another possibility for redress of violations by corporations is the Federal Tort Claims Act (FTCA), a statute by which the United States waives its sovereign immunity and authorizes tort suits to be brought against the federal government. It makes the United States liable for injuries caused by the negligent or wrongful acts or omissions of any federal employee acting within the scope of his employment by allowing lawsuits against the federal government under

"circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. § 1346(b) (2000). The FTCA differentiates between parties acting as "agents" and "independent contractors" and applies only when the party in question is considered an agent of the government. Agency, as established by the Supreme Court in *United States v. Orleans*, is present when the government supervises the day-to-day operations of a contractor (808). Thus, when a contractor is considered an agent of the government, a claimant may sue the United States under the FTCA for injuries caused by the agent.

Because the government contractor defense "protects a government contractor from liability for acts done by him while complying with the government specifications during executing of the performance of a contract with the United States," PMCs wishing to apply the Defense must show that their actions were taken in conformance with a contract under the direct supervision of the United States. By showing that they acted directly under government supervision, PMCs also show the conditions necessary for the establishment of agent status under the FTCA. As explained by Charles, contractors who establish that the GCD applies have, by definition, established that their actions were subject to United States supervision (617). If their argument establishing the conditions for the use of the GCD prevails, the Court has implicitly recognized the agent status of the contractor and thus, the conditions necessary for the suit to be brought under the FTCA. In this way, the GCD as used in ATCA cases can actually function to support suits under the FTCA. Though when the GCD prevails the contractor escapes liability, it also establishes the existence of the agent status needed to hold the government liable under the FTCA. As such, claimants who fail under the ATCA because of the GCD should be able to then sue the government under the FTCA and prevail. Still, this is an

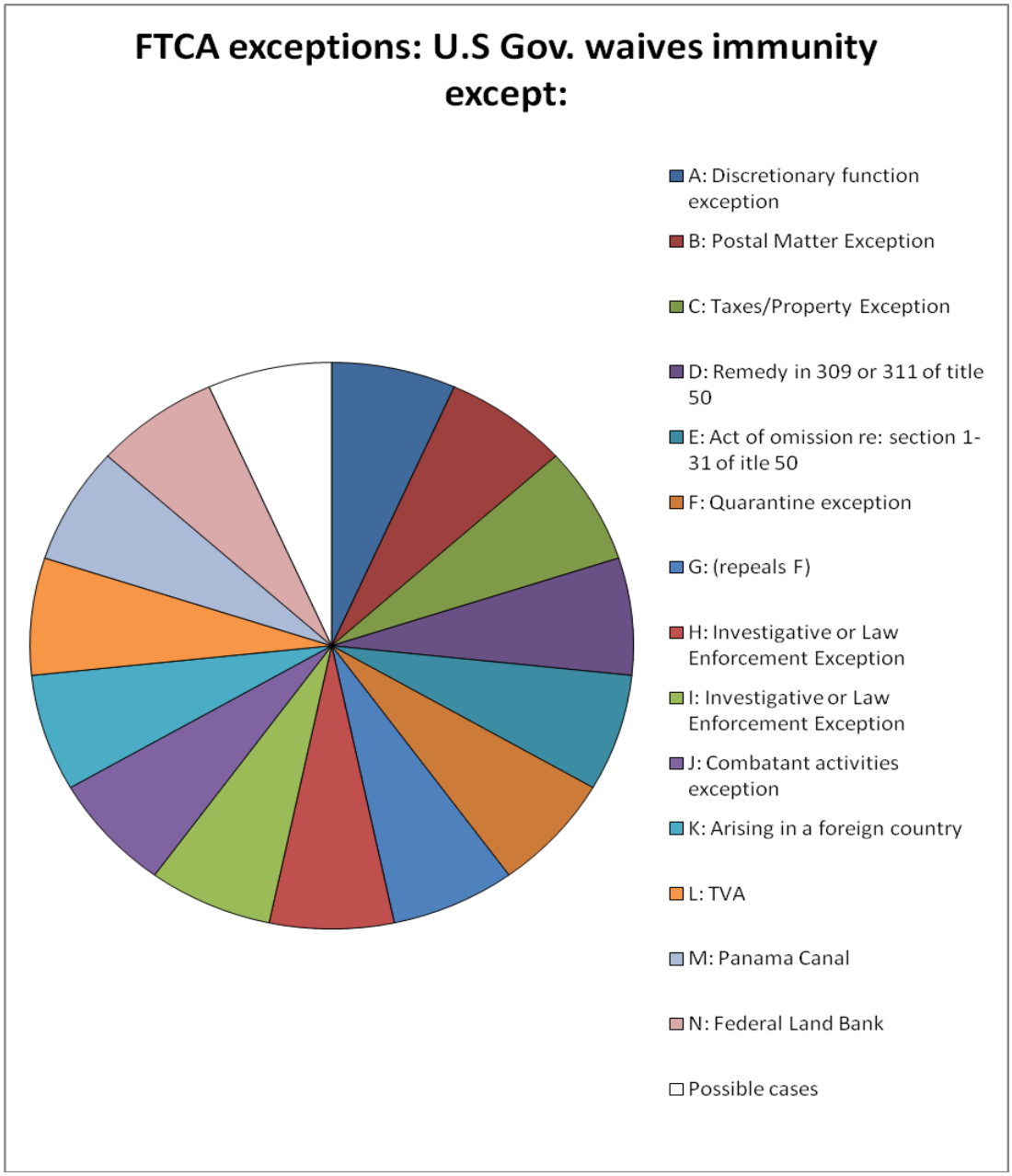
impractical solution for attaining redress for violations of international law in that it disallows accountability of contractors under one of the only potential mechanisms for redress (the ATCA) and it requires the plaintiff to pursue not one, but two lengthy lawsuits. The relationship of the ATCA and the GCD to the FTCA is clarified in figure 1.

Figure 1: The relationship of the ATCA, GCD and FTCA.



Additionally, there are exceptions to the FTCA which prevent redress by allowing the government's immunity to be upheld. There are fourteen such exceptions, which are listed an illustrated in figure 2. Four of these are particularly relevant to PMCs, these four are detailed in the following section.

Figure 2. The 14 FTCA exceptions and possible cases.



The discretionary functions exception (A) precludes liability for

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. (28 U.S.C. § 2680[a])

This exception essentially protects government employees (including contractors) from being sued based on decisions they make in the course of executing a statute or regulation. The exception exists to shield individual employees from litigation based on their making poor (but technically legal) decisions, or from failing to make a decision when one was needed. This is beneficial to government employees because it allows them to use their discretion in their work without being paralyzed by fear that someone will disagree with their decision and sue them. It is dangerous though, for this same reason; it insulates individual government employees from having to be responsible legally for the long-term results of their decisions.

The investigative or law enforcement officer's exception (E) says that the FTCA waiver shall not apply to

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, that, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso,

> out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law. (28 U.S.C. § 2680[h])

As of the date of the enactment of this proviso, investigative or law enforcement officers are no longer immune to torts arising from all the offensive behaviors listed in the exception. This is applicable to PMCs in that there is debate as to whether contractors can be considered Investigative or Law Enforcement Officials or not (Charles 9). Were it decided that contractors can be considered investigative or law enforcement officials for the purpose of this exception, then "the United States is not immune to lawsuits arising out of their actions" (Charles 9). This would not only give the same power that the government and military have to non-military contractors, but also absolve both parties of all responsibility for the actions of the contractors.

The combatant activities exception (J) to the FTCA precludes "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war" (28 U.S.C. § 2680[j]). While it appears as though the exception only applies to government forces acting during combatant activities and not private contractors, the Court in *Koohi v. United States* determined that the action against the weapons manufacturer was precluded by the combatant activities exception and that the term "time of war" does not expressly require a declaration of war for the exception to apply. Thus, the exception applied even when the actors were private because they were carried out during what was considered a time of war. The United States government retained immunity because of this exception, which was expanded in

Koohi to encompass the actions of private contractors whose acts were done "for the purpose of furthering our military objectives or of defending lives, property, or other interests" (20).

The foreign country exception (K) nullifies "any claim arising in a foreign country" (28 U.S.C. § 2680[k]). The driving force behind this exception is the same one as drives the requirement for exhaustion of domestic remedy in international law. The idea is that the U.S. Courts ought not to deprive the domestic courts of other sovereign nations of the ability to rule on human rights abuses in their own jurisdiction. This is a concept that arises time and again in international law, and it will be especially pertinent to the discourse surrounding universal jurisdiction. Charles argues that this case law would not support immunity for PMCs "when the purpose of the action in question does not support our military objectives nor defense of American life" and explains that the recent torture employed by contracted Titan and CACI[2] employees "fail to support our military objectives and directly oppose clear federal interests" (619). This, however, is highly arguable and could even be supported by executive statements to the contrary, as in various memoranda written during the Bush administration. The *Koohi* Court explained that the "nature of the act" and not the "manner of performance" is relevant in determining whether the exception applies and that "it simply does not matter for purposes of the [combatant activities] exception whether the military makes or executes its decisions carefully or negligently, properly or improperly" (20). As it has already been shown that private contractors are included with military forces under the exception, the issue involved is the "nature of the act" and whether or not it furthered military objectives. As evidenced in the vast and ongoing debate about the effectiveness of torture in advancing military objectives, there is not enough definitive proof to support Charles' argument and so the door is left open for the combatant activities

[2] Saleh et al. v. Titan 436 F.Supp.2d 55 (D.D.C. 2006)

exception to apply and for both the government and PMCs to remain immune from liability during times of war.

With regard to the FTCA, this exception is important to claims of torture at Abu Ghraib. The interpretation of the foreign country exception is pivotal to the current *Saleh* case. One possible interpretation of the exception for this case is that because Iraq was not a sovereign nation, but controlled by the U.S. at the time of the atrocities, the exception should not apply. No domestic Court was available, and so the case did fall under the jurisdiction of the U.S. Courts (Charles 9). This would be a rare case where the exception would not apply. Only because Iraq was seen as essentially the U.S. at the time can the U.S. Courts rule on the case. Were the same atrocities to take place in a recognized sovereign nation, the Court would be within its rights to turn the case down.

This exception is particularly preclusive of FTCA cases that were once ATCA cases. In order to fill the requirements to be an ATCA case, the violation can have occurred anywhere in the world. This is the great strength of the ATCA that makes it key for litigating cases that might not otherwise be seen by a Court. However, a case that is turned down under the ATCA because the corporation involved is determined to be a government actor, though the next possible recourse is the FTCA, would also likely be turned down under the FTCA if it occurred in a sovereign state outside the U.S. This was seen in *Alvarez-Machain* when the foreign country exception protected the U.S. government from liability.

WORKING TOWARD SOLUTIONS

Domestic Law

The first step toward holding military contractors legally accountable is to address the government contractor defense loophole. One proposed solution proposed by Micallef is to disallow the GCD except under very specific circumstances. This would limit the defense to "case-by-case exceptions for executive orders specifically granting immunity" (1406). Judicially, Micallef proposes that federal Courts follow the *Sosa* precedent and disallow the defense on grounds that "the defense cannot nullify the [ATCA's] purpose" (1415). Legislatively, he argues that Congress should enact legislation, perhaps as an amendment to the ATCA, which would disallow the GCD's power to nullify ATCA suits. Instead, the only exceptions would come in the form of executive orders that would grant immunity for contractors in special circumstances. Executive officers would therefore bear the burden of responsibility for any violations committed under immunities granted. He explains that

> Disallowance of the Defense would change the focus of litigation from the application of the Defense (i.e. determining the degree of government oversight of the contractor-defendant) to human rights enforcement (i.e. whether the action was a tort and whether it was in violation of international law. (1413)

Many scholars disagree, arguing that the GCD is necessary due to the mixed military/civilian nature of PMCs, and contend that it provides "qualified" immunity for contractors (Joseph 713). The argument rests on the contention that the issue lies not in disallowing the defense but in properly regulating PMCs in the first place. Wilson, for example, argues that Congress' extension of the Uniform Code of Military Justice (UCMJ) to military contractors in 2006 was appropriate because PMCs are essentially "hybrid entities, neither military nor civilian," often performing the exact same tasks as military personal (261). While holding military contractors and the U.S. military to the same standards in comparable battle

situations is logical, the issue is complicated when one takes into consideration the plethora of other roles PMC civilians assume.

PMCs are used all around the world in situations ranging from food service and manufacturing to covert intelligence missions. In light of this, Jordon questions the constitutionality of applying the UCMJ to PMCs. The 2006 amendment of Article 2 of the UCMJ technically grants jurisdiction over individuals accompanying the armed forces in the field. The amendment clarifies that this extension applies regardless of whether the acts occurred on American-controlled territory. It also applies in "both time of declared war or a contingency operation"—thus, in the undeclared wars in Iraq and Afghanistan (Morgan 230). No private contractor, however, has actually been tried for misconduct under the UCMJ as of winter 2009 and Jordon questions the courts' actual willingness to embark on the "slippery slope" toward applying military law to other civilians involved with military operations (Jordon 318). Furthermore, Jordon argues that it is unlikely that applying the UCMJ would "survive constitutional scrutiny absent explicit language to indicate otherwise" (319). With the constitutional question yet to be challenged and a continued lack of clarification of applicable PMCs, the space for loopholes remains.

Regardless of the GCD, since the events at Abu Ghraib there has been a flurry of effort to both recommend legislation and change existing laws to close legal loopholes created by PMCs. The Transparency and Accountability in Security Contracting (TASC) Act (Senate Bill 674) was introduced in 2007 by then-Senator Obama. It proposed a set of rules comparable to the Rules of Engagement within the U.S. military. It set forth two oversight mechanisms: Theater Security Contract Coordinating Officers and Theater Investigative Units, which would be operated by the FBI under the Military Extraterritorial Jurisdiction Act (Joseph 700). The TASC Act has yet to

be passed and is unlikely to be passed in its current form, as the bill does not provide specific information pertaining to contractors' reports to Congress. Specific detail in contractor reports will be immensely difficult to require due to the sensitivity of much of the information (Jordon 323). Furthermore, the Act did not directly establish extraterritorial jurisdiction to all PMCs, nor clarify steps toward enforcement, available punishments, and remedies (Jordon 323). While it is a step in the right direction, TASC still fails to address the core issues of varying PMC roles and the inevitable loopholes arising therein.

The Military Extraterritorial Jurisdiction Act (MEJA) of 2000 extended United States' jurisdiction to crimes committed by Department of Defense Contractors "'employed by or accompanying'" the U.S. Military that are punishable by more than one year in prison. Events at Abu Ghraib revealed (to some) the danger of focusing solely on the Department of Defense. The 2004 amendment (introduced as the Contractor Accountability Act) extended MEJA to non-DOD contractors working in support of DOD missions overseas. The desired effect of the amendment was to close the loophole and hold contractors under other federal entities responsible for their actions (Joseph 704). The amendment failed, therefore, to include contractors working in support of other federal agencies and departments (Jordon 319). It is still unclear as to how courts will interpret contractors "in support" of DOD missions, or how vigorously the Department of Justice will pursue these contractors (Joseph 704). Like the UCMJ, MEJA has yet to be utilized to establish jurisdiction over PMCs, and thus provides little insight into actual interpretation.

Many further amendments to MEJA could help to regulate PMCs on a domestic level assuming the legislation is actually utilized. Eliminating the fifty million dollar requirement for congressional notice of export/import contracts for "a defense article or defense service," and

disallowing the fragmentation of contracts to avoid the threshold would provide further congressional oversight of PMC activates (Joseph 701; Desai 860). A more complicated proposal involves the inclusion of a widespread federal whistle blower protection clause under MEJA that would protect whistle blowers in many contexts. Devin R. Desai models this solution after the Sarbanes-Oxley Act, suggesting that the language be worded similarly to guarantee the most ubiquitous coverage (861). With the reduction of actual oversight in DOD missions by fifty percent between 1994 and 2005, it is particularly important to protect the PMC employees on the ground from retribution for transgression disclosure (Joseph 703).

Utilization of the War Crimes Act and the Anti-Torture Statute in their current manifestations also proves ineffective in the PMC context. The War Crimes Act criminalizes actions committed by U.S. Armed Forces and U.S. nationals that would be considered a "grave breach" of the Geneva Conventions (Jordon 320). Unfortunately, many PMCs are not U.S. nationals and the processes of fact-finding and witness-gathering needed to build a proper case is unusually difficult due to the complexity of situations on the ground. This proved true in the case of *Blackwater*. Worse, perhaps, is that there is no defined procedure for investigating PMC crimes in the first place (Jordon 321). This combination of factors renders the Act useless. The Anti-Torture Statute also proves inefficient. The Statute can be applied anywhere outside of the U.S. and criminalizes both the intent to commit torture by a U.S. citizen and torture itself. Like the War Crimes Act, the Anti-Torture Statute cannot apply to PMCs from other countries, and because its conception of torture is limited to physical pain accompanied by "death or organ failure," its application is quite narrow. Amendments to these acts to specify PMC jurisdiction as well as provisions for non-U.S. citizens employed by U.S. PMCs could help to regulate PMCs in a more effective manner.

Perhaps the most promising option is to clearly regulate PMC contracts. Desai proposes a congressional mandate requiring the inclusion of specific regulations in every U.S. service contract. Every PMC and its employees would have to agree to abide by and submit to the jurisdiction of the United States "regardless of where the services are performed" (858). The government mandate would further stipulate the necessity for human rights and local law training, which would have to meet certain criteria and procedural standards (858). Furthermore, Desai argues that the government could stipulate that corporations must provide on-site lawyers (through groups such as Lawyers without Borders) to provide insight and, inevitably, oversight. He specifies that these attorneys must come from independent firms in order to avoid corruption and manipulation (859). The "government's prosecutorial discretion would remain intact" but would "reduce the government's ability to offer facile reasons as to why is has not acted when it ought to have" (860). Regulating PMCs through specific contract stipulations would allow room for more nuanced provisions for different types of contractors. Unfortunately, many PMCs defy categorization, thus once again raising the problem of loopholes.

Freeing the ATCA from the GCD to allow for more successful ATCA cases and restructuring U.S. domestic laws to cover U.S. PMCs is not a sustainable solution to redressing human rights violations committed by PMCs. More ATCA cases would ultimately give the United States too much global power in setting the precedents for PMC human rights case law. Correcting U.S. laws to hold PMCs accountable from the onset are difficult to craft, often perpetuate loopholes and, of course, do nothing to regulate PMCs from other countries apart from set an example. Domestic laws must therefore work in conjunction with international law to adequately acknowledge the chameleon nature of PMCs. To this end,

> Adoption of a norm of incorporation—either through reference to existing international law, a new treaty regime, or evolving customary international law—draws on the strengths of both systems: international legal and diplomatic consensus centered on a shared norm of state responsibility dovetailed with the functional capabilities of domestic legal regimes. (Morgan 244-5)

In order to conceive of workable possibilities of dovetailing domestic and international law, an investigation of current international and human rights law as it relates to PMCs is vital.

International Law

States have a clear duty under international law to protect against human rights violations regardless of the status of the offender. Older human rights conventions like the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on All Forms of Racial Discrimination (ICERD) do not specifically address state duties regarding businesses but do "ensure the enjoyment of rights and prevent nonstate abuse" (Ruggie 828). Many include rights that businesses effect—employment, health and indigenous communities. Later Conventions and General Comments within the UN have begun to include phrases directly pertaining to corporations, such as General Comment No. 31 by the Human Rights Committee which clarifies that states can breach the ICCPR by failing to "'take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by private persons or entities'" (from ICCPR, qtd in Ruggie 829). More recent documents like the report of the Indigenous Peoples' Border Summit of Americas II call upon both state and non-state actors, including private contractors and government agents to uphold human rights. Holding businesses in general—not even taking into consideration the role of businesses contracted with

governments—is hugely disputed within the international community. John Ruggie, the UN's Secretary-General's Special Representative for Business and Human Rights (SRSG) has argued that pursuing legally binding norms for MNCs (such as the Sub-committee on Human Rights proposed Draft Norms in 2003) is ineffective due primarily to the inherent problems of imbuing undemocratic, profit-seeking corporations with the responsibilities of the states whose duty it is to promote and uphold human rights (826).

More relevant even than how to hold corporations in general accountable is the unique problem of companies under governmental contract is the global debate on mercenaries. There have been many attempts to articulate the differences between "legitimate" mercenaries—essentially PMCs—and those banned under international laws such as the Convention Against the Recruitment, Use, Financing and Training of Mercenaries ("the UN Convention") and the OAU Convention for the for the Elimination of Mercenarism in Africa, and General Assembly Resolution 2465 which explicitly deems mercenary activity criminal. Davis, for example, provides a list of seven criteria that legitimate mercenaries would meet including "that the candidate must be seen to recognize and conduct himself by the Laws of War, the Geneva Conventions and the International Declaration of Human Rights and Freedoms" (Davis qtd. in Desai 841). The very idea of a "legitimate mercenary" is highly controversial in itself given the widespread condemnation of mercenaries within these international and regional agreements.

PMCs are able to avoid mercenary status under the specific definitions of mercenaries under Article 47 of the First Additional Protocol of 1997 to the Geneva Convention and the UN Convention. Article 47 requires a cumulative definition of a mercenary rendering it impossible to hold PMCs accountable to every criterion at all times. The UN Convention defines mercenaries as those who are attempting to overthrow a legitimate government. This

automatically excludes most current PMCs on a global scale (Scheimer 629, 631). The Special Rapporteur and the Working Group on mercenaries offer a distinction between so-called legitimate PMCs and mercenaries by emphasizing the criminal factor in mercenary activity. PMCs are therefore legitimate largely because they "provide military and security assistance openly to recognized state parties. The PMC gains its legitimacy from the hiring party as long as the hiring party is sending the PMC on a legitimate mission" (Scheimer 637). Problems arise when the specifics of a PMC's mission cannot be disclosed due to its military nature, therefore making the distinction between legitimate and illegitimate missions difficult to gage before they are carried out.

Scheimer argues that PMCs should be categorized as legitimate mercenaries and held under a new convention that would require an international licensing system. Desai disputes this idea, claiming that the creation of international or country specific licensing and regulation schemes would simply lead to the creation of an international court to which many of the countries most fraught with PMC human rights abuses would simply refuse to submit (852-854). This reasoning stems from the United States' refusal to submit to International Criminal Court (ICC) jurisdiction, thus rendering the possibility for extending the ICC Statute to PMCs in July of 2009 rather useless (Choudhury 59). The potential lack of jurisdiction over states would pose a severe problem in implementing an overarching regulation scheme, though as with many international treaties, the power of moral suasion within the international community should not be underestimated.

There is no easy solution to the problem of PMC accountability for violations of human rights. Some combination of international and domestic measures must converge to create strong regulations for and legal mandates for PMCs. Before they can be effectively addressed in any

legal system, they must first be clearly defined. A unique system that accounts for the varied scope of PMC functions and relationships with States is necessary to fully address the human rights abuses, both before (prevention) and after (legal remedy) they occur. For this, political will is required. As explained Merrick Hoben of the Consensus Building Institute, both governments and corporations are greatly affected by public opinion and collective desire for change. Governmental and corporate action toward effectively controlling PMCs must be coupled with public pressure to carry out these claims in a successful way. Public pressure is dependent upon awareness of the abuses committed by PMCs. As such, a legislative or judicial mandate to increase access to knowledge could be implemented. We propose that PMCs who are found guilty of human rights violations be required, in the awarding of damages, to pay a vast sum of money for the creation of a public ad campaign expressly stating the abuses proven in court. In this way, public awareness as well as pressure would increase, and corporations would have greater incentives to regulate themselves. It would be particularly effective if stockholders received reports with this information in it as well, and acted upon it, as they are the driving force of corporations (Bond). The government hiring guilty contractors would also face pressure to choose ones for effective and accordant performance, thus also increasing PMCs incentive to act lawfully.

Legally, the disallowance of the government contractor defense would be a big step towards increasing ATCA effectiveness in adjudicating alleged abuses by PMCs, which, though not a panacea, would allow the Act to function as intended and regulate breaches of the law of nations. The FTCA provides yet another challenging avenue for redress. While the ATCA and FTCA are vital in helping to progress the interpretation of PMC actions and functions under the law, they are inadequate in their ability to fully regulate and adjudicate the great scope of issues

involved therein. Widespread use of private military corporations is a new and complex issue, and as such, presents many challenges for both legal and domestic law. While various types of interventions and remedies have been proposed by legal and political scholars, they are, as yet, ineffective in addressing the unique shape and scope of the PMC problem. The legal issues in creating accountability mechanisms for PMCs are vital to both understanding and correcting the problem, however, the law alone is not equipped to deal with this issue. Some combination of legal, economic, political, and social measures, in both domestic and international spheres, is necessary to effectively remedy the issue of the human rights violations of PMCs. PMCs have, with the help of governments and a deft use of the law, managed to define (or rather not define) themselves outside of legal reach. With careful national and international planning, the global community can define the scope of legal PMC activity and begin to close this gap in human rights enforcement.

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