WHAT REMEDY FOR ABUSED IRAQI DETAINEES?

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If we do not maintain Justice, Justice will not maintain us.[1]
Justice cannot be for one side alone, but must be for both.[2]

I. Introduction

Both United States and international law prohibit murder, torture, and any degrading or inhumane treatment of any person detained by U.S. personnel.[3] It appears that U.S. servicemembers and other persons

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[1] Francis Bacon, World of Quotes, http://www.worldofquotes.com/author/Francis-Bacon/2/index.html (last visited Mar. 16, 2006).

[2] Eleanor Roosevelt, World of Quotes, http://www.worldofquotes.com/author/Eleanor-Roosevelt/1/index.html (last visited Mar. 16, 2006).

[3] *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287 [hereinafter GCIV]; Sosa v. Alvarez-Machain, 542 U.S. 692

accompanying the force in Iraq may have violated these prohibitions in their treatment of some detainees in Iraq;[4] indeed, several U.S. service members have been convicted of crimes relating to the abuse of Iraqi detainees.[5] The appropriate remedy for breaches of these prohibitions by United States persons, whether service members or contractor personnel accompanying the force, is more problematic than simply recognizing that a breach occurred. Criminal prosecution is available under various U.S. federal statutes, including the Uniform Code of Military Justice (UCMJ).[6] Although prosecution is important, it is unlikely to provide any

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(2004); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 701, 711 (1987) [hereinafter RESTATEMENT (THIRD)].

4 *See, e.g.*, Major General Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade 17–18 (n.d.), http://www.npr.org/iraq/2004/prisonabuse_ report.pdf (last visited Mar. 16, 2006) (reporting abuses alleged by detainees in paragraph eight) http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.htm1#FNopinion1.11 (stating "although the Taguba Report is marked *Secret/No Foreign Dissemination*, it has been widely distributed, and made available to the public worldwide since at least the week of May 2, 2004)) [hereinafter Taguba Report]; Douglas Jehl, *Senate May Open Inquiry Into CIA's Handling of Suspects*, N.Y. TIMES, Feb. 13, 2005, § 1, at 15.

5 *See, e.g.*, Susan Candiotti & Jim Polk, *Abuse 'Ringleader' Awaits Sentence*, Jan. 18, 2005, CNN.com, http://www.cnn.com/2005/LAW/01/14/graner.court.martial/; Steven C. Welsh, *Abu Ghraib Court Martial: Staff Sergeant Ivan Frederick*, CENTER FOR DEF. INFO (Oct. 26, 2004), http://www.cdi.org/news/law/abu-ghraib-courts-martial-frederick.cfm.

6 *See, e.g.*, UCMJ arts. 93, 118, 119, 120, 124, 125, 128 (2005). Similarly, the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) provides that any member of the military forces or any person accompanying the force who engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, may be punished for that offense, although it was committed outside the United States. 18 U.S.C.S § 3261(a) (LEXIS 2006). The United States has in fact convicted various service members under the UCMJ for crimes stemming from prisoner abuse in Iraq. *See supra* note 5 and accompanying text. In addition, six contract employees were referred to the Department of Justice for prosecution for their involvement in detainee abuse at Abu Ghraib. Renae Merle & Ellen McCarthy, *6 Employees From CACI International, Titan Referred for Prosecution*, WASH. POST, Aug. 26, 2004, at A18, *available at* http://www.washingtonpost.com/wp-dyn/articles/A33834-2004Aug25.html. Various authors have explored a state's obligations under international law regarding criminal prosecution for violations of international humanitarian and human rights law. *See, e.g.*, M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 25–28 (1996) (discussing the requirement for states to achieve criminal and civil accountability for international human rights violations committed during armed conflicts); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451, 452 (1990) (arguing for the recognition of an affirmative international law obligation on states to investigate "grave human rights violations").

compensation to the abused person and, as noted below, may be insufficient to meet international law obligations.

In a purely domestic context, civil suits for damages provide a remedy that fills the holes left by criminal prosecution. Civil suits compensate the injured, re-apportion the burden of the injury, and, perhaps most significantly in this article's context, help the alleged wrongdoer repair reputation and relational damage.[7] United States law provides various civil remedies to compensate those who have been injured by U.S. service members or contractors.[8] In fact, several persons alleging abuse at the hands of U.S. service members or contractors while detained in Iraq have filed administrative claims against the United States.[9] In addition, a number of detainees filed lawsuits in federal court against Secretary of Defense Donald Rumsfeld and members of the U.S. Army alleging torture and mistreatment.[10] Several more have filed a

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[7] *See* Beth Stephens, *Conceptualizing Violence: Present and Future Developments in International Law: Panel I: Human Rights & Civil Wrongs at Home and Abroad: Old Problems and New Paradigms: Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 579–94 (1997) (comparing domestic criminal and tort law with similar international law concepts and considering the applicability of tort concepts to international wrongs).

[8] *See, e.g.*, Federal Tort Claims Act, 28 U.S.C.S §§ 2671–80 (LEXIS 2006) [hereinafter FTCA]; Foreign Claims Act, 10 U.S.C.S § 2734 (LEXIS 2006) [hereinafter FCA]; Alien Tort Claims Act, 28 U.S.C.S § 1350 (LEXIS 2006) [hereinafter ATCA].

[9] Telephone Interview with Lieutenant Colonel (LTC) Charlotte Herring, Chief, Foreign Torts Branch, U.S. Army Claims Service (Feb. 28, 2005) [hereinafter Herring Interview] (explaining that twelve abuse claims have already been filed).

[10] *See* American Civil Liberties Union, ACLU and Human Rights First Sue Defense Secretary Rumsfeld Over U.S. Torture Policy, Mar. 1, 2005, http://www.aclu.org/safe-free/general/17594prs20050301.html (noting that Rear Admiral John D. Hutson (Ret. USN), former Judge Advocate General of the Navy; and Brigadier General (BG) James Cullen (Ret. USA), former Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals, are serving pro bono as co-counsel on the lawsuit); Faye Bowers, *Lawsuit Lays Blame for Torture at the Top* (Mar. 2, 2005), http://www.csmoniotr.com/2005/0302/p04s-01-usju.html.

lawsuit against U.S. contractors.[11] These cases may be just the proverbial tip of the iceberg.[12]

As this article explains, many factors make it unlikely that recourse to current U.S. law will result in efficient, just, or politically palatable outcomes in these cases.[13] In spite of such difficulties, Secretary Rumsfeld hinted during an interview at the height of the Abu Ghraib scandal that the United States indeed may compensate Iraqi detainees who were abused by U.S. personnel.[14] Moreover, the United States has obligations arising from treaty provisions to ensure an adequate remedy is available to those whose protections under such treaties have been violated.[15] The question then becomes how the United States can accomplish this obligation if current law is legally, practically, or politically inadequate.

The international law concept of espousal, a mechanism through which one government adopts, or "espouses," and then settles the claims

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[11] Second Amended Complaint, Saleh v. Titan, No. 04-CV-1143 (S.D. Ca. filed July 30, 2004), *available at* http://www.ccr-ny.org/v2/legal/docs/Saleh%20v%/20%Titan%20 Corp%20Second%20Amended%20Complaint.pdf. This lawsuit alleges that U.S. servicemembers and contractor personnel murdered, raped, tortured, and unlawfully detained numerous persons in Iraq. *Id.* at 23–37. Plaintiffs seek class certification and damages, *id.* at 60–61, under numerous legal theories, including the ATCA, *id.* at 44–51; the Racketeering Influenced and Corrupt Organizations (RICO) Act, *id.* at 41–44; the Geneva Conventions and other treaties and international agreements, *id.* at 51; and various state common law torts. *Id.* at 55–59.

[12] *See Weekend All Things Considered: Prison-Abuse Scandals Prompt Lawsuits* (National Public Radio broadcast July 31, 2004), http://www.npr.org/templates/story/php ?storyId=3807438.

[13] *See infra* Part III (describing potential remedies for international law violations).

[14] *Good Morning America: Diane Sawyer Interview of Secretary of Defense Donald Rumsfeld* (ABC television broadcast May 5, 2004), *available at* U.S. Department of Defense News Transcript, *Secretary Rumsfeld on ABC's Today Show with Diane Sawyer* (May 5, 2004), http://www.defenselink.mil/transcripts/2004/ tr20040505-ecdef0703.html (In response to the question, "[S]hould there be financial compensation to these [abused] persons?", Secretary Rumsfeld replied, "[F]rom time to time various types of compensation and assistance have been provided to people in Iraq whose circumstances were altered infairly."); Jim Garamone, *Prison Abuse 'Unacceptable, Un-American,' Rumsfeld Says,* AM. FORCES INFORMATION SERV., May 5, 2004, http://www.defenselink.mil/news/May2004/n05052004_200405051.html.

[15] *See* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict art. 91, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Katherine Shirey, *The Duty to Compensate Victims of Torture Under Customary International Law,* 14 INT'L LEGAL PERSP. 30, 38–40 (2004) (arguing that customary international law recognizes a duty to provide compensation to individual victims of torture).

of its nationals against another government,[16] may provide a feasible solution. This treaty-based solution offers the prime advantage of holistically dealing with such claims in the process of restoring peace and creating a new relationship between Iraq and the United States in the aftermath of Saddam Hussein's regime.[17] In addition, such a solution precludes costly and piecemeal litigation of such claims in U.S. courts, while providing compensation to legitimate claimants in accordance with local norms and laws.

This article first examines and analyzes the duties the United States and any of its agents owed to detained Iraqis under the provisions of the law of armed conflict, also called international humanitarian law. Then, looking at the development of customary and treaty-based international law, the article explores the current state of the law regarding the obligation to provide an adequate remedy to victims of violations of international humanitarian law, including whether a right to compensation exists in current international law. Both customary and treaty-based international law include a right to reparations when a state or its agents violate the protections of humanitarian law. Significantly, however, this right of reparation is distinct from an individual's right to compensation.

Because U.S. law provides avenues through which individual Iraqis may bring claims against their alleged abusers, the article then explores those avenues and demonstrates that those alternatives are legally, practically, or politically inadequate to offer a remedy to Iraqi detainees. The article then describes the development, use, advantages, and limitations of espousal, and suggests the parameters of a treaty-based solution for claims of detainee abuse in Iraq.

II. Obligations and Breaches: The Geneva Conventions

Of course, as in any personal injury case, whether the United States or any other party must compensate a detainee alleging wrongful injury turns first on the traditional tenets of tort law: duty, breach, proximate

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[16] Antolok v. United States, 873 F.2d 369, 375 (D.C. Cir. 1989).

[17] Rudolf Dolzer, *The Settlement of War Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945*, 20 BERKELEY J. INT'L L. 296, 338–41 (2002).

cause, and damages.[18] Tort law in the United States is almost exclusively the province of state law,[19] and the majority rule provides that the law of the place where the injury occurred provides the substantive law of the case.[20] In the case of Iraqi detainees, however, the allegedly wrongful conduct and injuries arose in a foreign country during a time of armed conflict, and the alleged wrongdoers were U.S. federal employees, including service members and contractors.[21] Domestic state law—even Iraqi law—does not alone provide the substantive law by which to judge such acts.[22] The definitions of who owed what duties to whom, what constitutes a breach of those duties, and what remedies may be available may also reside, if at all, in federal and

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[18] RESTATEMENT (SECOND) OF TORTS § 281 (1965).

[19] Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). In *Erie*, the Supreme Court stated:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts.

Id.
It follows that a federal district court sitting pursuant to diversity jurisdiction applies the substantive law of the state in which it sits. Suzik v. Sea-Land Corp., 89 F.3d 345, 348 (7th Cir. 1996). Similarly, in tort cases brought against the United States, the FTCA requires the application of the law of the place in which the wrongful act or omission occurred, rather than referring to a federal common law of torts. 28 U.S.C.S. § 2672 (LEXIS 2006).

[20] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (describing the general rule that the state law of the place where the injury was suffered is applied in tort actions). This general rule likewise applies to international cases. *Id.* § 10. With respect to tort suits against the United States, courts apply the choice of law principles of the state in which the alleged acts or omissions occurred. Richards v. United States, 369 U.S. 1, 11 (1962). Torts "arising in a foreign country" are expressly excluded by the FTCA from the subject matter of the federal courts; accordingly, such a suit brought against the United States under the FTCA would be dismissed for lack of subject matter jurisdiction. 28 U.S.C.S. § 2680(k) (LEXIS 2006).

[21] *See supra* notes 4–6 and accompanying text.

[22] It is beyond the scope of this article to analyze whether U.S. personnel or contactors may be subject to tort actions in Iraqi courts or under Iraqi law; however, Iraqi detainees alleging abuse may bring an action in federal court alleging violations of international law. *See infra* notes 25, 220–35 and accompanying text (describing scope of the Alien Tort Claims Act (ATCA) after *Sosa*). Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

international law.[23] In this case, the applicable law includes obligations arising under international humanitarian law treaties to which the United States is a party, and obligations arising under principles of customary international law that are binding on the United States.

International humanitarian law establishes clear obligations with regard to the treatment of Iraqi detainees held by the United States. The 1949 Geneva Conventions are the most prominent example of treaties that bind the United States to a particular course of conduct with respect to Iraqi detainees.[24] Like all international humanitarian law, the Geneva Conventions are designed to limit the effects of war by protecting those not—or no longer—participating in hostilities.[25] The Conventions

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[23] *See, e.g.*, *Sosa*, 542 U.S. at 692, 712 (finding that under the ATCA, plaintiffs may bring lawsuits alleging damages resulting from a limited number of breaches of international law).

[24] It is beyond the scope of this article to determine all the possible international agreements and elements of customary international law that might prohibit the abuse of Iraqi detainees. Instead, the article is confined to the Geneva Conventions, for they are the most prominent source of international humanitarian law and were applicable to the United States during the invasion and occupation of Iraq. *See* discussion *infra* Parts II.A.1–2. In addition to the Geneva Conventions, other sources of international humanitarian law, such as the Hague Regulations, also applied. *See* Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, Oct. 18, 1907, 36 Stat. 2277, *available at* http://www.icrc.org/ih.nsf/0/1d1726425f6955aec125641e0038bfd6?-OpenDocument [hereinafter Hague IV Regulations]. There is also ongoing debate in the international law community regarding the role of human rights law in armed conflicts. Contrary to the traditional view that international human rights law applies only within the territory of a contracting party, many commentators now argue that international human rights law, such as the International Convention on Civil and Political Rights and the Torture Convention, likewise applied to the United States in Iraq. *See* Steven R. Ratner, *The Schizophrenia of International Criminal Law*, 33 TEX. INT'L L.J. 237, 249 (1998) (arguing that human rights treaties apply during periods of armed conflict as well as in the domestic sphere); *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 25 (July 8) (asserting that human rights treaties apply in armed conflict and not just in the domestic context), http://www.icj-cij.org/icjwww/icases/iunan/iunan_judgment_advisory%20opinion_19960708/iunan_ijudgment_19960708_Advisory%20Opinion.htm. Allegations of detainee abuse in Iraq, especially those of civilians allegedly abused during the occupation when the United States essentially served as the domestic civil authority in Iraq, will no doubt fuel that debate.

[25] *See* INT'L COMMITTEE OF THE RED CROSS ADVISORY SERVICE ON INT'L HUMANITARIAN LAW, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004), http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JNXM/$FILE//What_is_IHL.pdf; *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 2 (18 July 1956) [hereinafter FM 27-10] (describing the U.S. Army's view of the application and purpose of international humanitarian law).

consist of four separate instruments that define the manner in which the contracting parties must treat those protected under each specific convention.[26] Most significant to an analysis of U.S. obligations toward Iraqi detainees are the Convention Relative to the Treatment of Prisoners of War (GCIII), the Convention Relative to the Protection of Civilian Persons in Time of War (GCIV), and the 1977 Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). As is explored below, GCIII defines who qualifies as a prisoner of war (POW) and outlines the protections that High Contracting Parties to the Conventions must provide to those who qualify.[27] Geneva Convention IV establishes categories of civilians and defines protections the High Contracting Parties must provide to persons in these categories. Protocol I supplements all the Geneva Conventions when contracting parties are engaged in an international armed conflict. While the United States is not a party to Protocol I, as noted below, it accepts many of Protocol I's provisions to be binding customary international law.[28]

Before describing the specific manner in which the Geneva Conventions obligate the United States with respect to the Iraqi detainees, it is significant to note that by their terms, the Conventions have broad application. Common Article 1[29] of the Conventions states "The High Contracting Parties undertake to respect and to ensure respect

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[26] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362 [hereinafter GCI]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363 [hereinafter GCII]; GCIII, *supra* note 3; GCIV, *supra* note 3.

[27] *See infra* Part II.A.1.

[28] 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, 420–29 (1987).

[29] The four Geneva Conventions contain a certain number of "common" articles, the language of which is identical in each of the conventions. Pictet's Commentaries state:

> Each of the four draft texts prepared by the International Committee of the Red Cross began with the principal provisions of a general character, in particular those which enunciated fundamental principles and so should, by rights, be repeated in the various Conventions. Most of the Articles in this Part are accordingly to be found in identical, or slightly modified, form in the other three Conventions.

COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR art. 1 (Jean S. Pictet ed., 1960) [hereinafter PICTET'S COMMENTARIES TO GCIII].

for the present Convention in *all circumstances*."[30] In addition, Common Article 2 expressly states,

> Although one of the Powers in a conflict may not be a party to the present Convention, the Powers who are parties thereto remain bound by it in their mutual relations. They shall furthermore be bound by it in relation to the said Power, if the latter accepts and applies the provisions thereof.[31]

Unlike previous attempts to regulate the conduct of war,[32] these provisions mean that a contracting party must follow the requirements of the Conventions regardless of whether its rival is a party to the Convention.[33] Moreover, although the language of Common Article 2 might seem to limit a contracting party's obligations to those "Powers" who in fact observe the protections of the Conventions, Pictet's Commentaries indicate that a contracting party must comply with its obligations regardless of whether its foe complies. Pictet states that the contracting parties agreed that the Conventions are:

> not merely an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations "vis-à-vis" itself and at the same time "vis-à-vis" the others. This motive

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[30] GCIII, *supra* note 3, art. 1 (emphasis added).

[31] *Id.* art. 2.

[32] The 1929 version of the Geneva Conventions did not contain a requirement to regulate one's conduct in accordance with the laws of war when the opposing party was not bound by the same requirements. *See* Convention Relative to the Treatment of Prisoners of War art. 82, July 27, 1929, 47 Stat. 2021, 2059. As a result, during World War II the parties' treatment of prisoners captured from different enemies varied dramatically. For example, Germany, the United States, and the United Kingdom were contracting parties to the 1929 POW Convention, but the Soviets and the Japanese were not. Tracy Fisher, Note, *At Risk in No-Man's Land: United States Peacekeepers, Prisoners of "War," and the Convention on the Safety of United Nations and Associated Personnel*, 85 MINN. L. REV. 663, 670 (2000). Accordingly, Germany extended POW treatment only to the soldiers of other signatories, and Japan generally did not conform its treatment of prisoners to the requirements of the 1929 Conventions at all. *Id.*

[33] *See* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 4 (1990) (asserting that the Geneva Conventions of 1949 "renounce any dependency on reciprocity").

> of the Convention is so essential for the maintenance of civilization that the need is felt for its assertion, as much out of respect for it on the part of the signatory State itself as in the expectation of such respect from all parties.[34]

Here, both Iraq and the United States are contracting parties to the Geneva Conventions and are therefore bound to the Conventions' terms.[35] Although there are allegations that Iraq did not always observe its obligations,[36] the United States nevertheless remains obligated to provide the protections required by the Conventions pursuant to Common Article 2[37]

Before crafting an appropriate strategy for cases of abuse of Iraqi detainees in U.S. custody, one must first determine about whose obligations and breaches the U.S. must be concerned. Allegations of abuse have been raised against both U.S. government employees and U.S. contractors.[38] The United States obviously must address allegations of abuse brought against service members in their official capacity.[39]

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[34] PICTET'S COMMENTARIES TO GCIII, *supra* note 29, art. 1.

[35] INT'L COMMITTEE OF THE RED CROSS, ANNUAL REPORT 2003: STATE PARTIES TO THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS, http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/622MGD/$FILE/icrc_ar_03_Map_conven_A4.pdf [hereinafter STATE PARTIES].

[36] *See, e.g.*, *Contemporary Practice of the U.S. Relating to International Law: Use of Military Force to Disarm Iraq* (Sean D. Murphy, ed.), 97 A.J.I.L. 419, 429 (2003) [hereinafter *Military Force*] (documenting episodes in which the Iraqi Army failed to comply with its humanitarian law obligations).

[37] *See also* Vienna Convention on the Law of Treaties art. 60(5), May 23, 1969, 1155 U.N.T.S. 331 (entry into force Jan. 27, 1980) (requiring that its provisions for termination or suspension of the operation of a treaty as a consequence of a breach do not apply to "provisions relating to the protection of the human person contained in treaties of a humanitarian character"). The United States signed but has not ratified the Vienna Convention; however, at least one commentator asserts that the provisions of Article 60 are reflective of customary international law in U.S. foreign relations. *See* John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881, 893 (1999); *see also* RESTATEMENT (THIRD), *supra* note 3, § 335 cmt. c.

[38] *See* Second Amended Complaint at 23–60, Saleh v. Titan, No. 04- CV-1143 (S.D. Ca. July 30, 2004), *available at* http://www.ccr-ny.org/v2/legal/docs/Saleh%20v%20Titan%-20Corp%20Second%20Amended%20Complaint.pdf; American Civil Liberties Union, *supra* note 10; Bowers, *supra* note 10.

[39] *See* 28 U.S.C.S § 2679(b) (LEXIS 2006). This provision, known as the Westfall Act, makes a suit against the United States the exclusive remedy for any person alleging negligence or wrongful acts by an employee of the United States acting in the scope of his or her federal employment. *Id.* § 2679(b)(1). After certifying that an employee was

The conduct of federal employees and U.S. contractors, however, was deeply intertwined, and contractors face liability for acts they apparently undertook pursuant to their contractual obligations.[40] As a result, the United States must also be concerned about any duties and potential breaches of its contractors.[41] Accordingly, this section will focus first on the United States and its employees and will then examine when the actions of U.S. contractors may be attributable to the United States.

A. The United States and its Employees

According to Section 207 of the Restatement (Third) of the Foreign Relations Law of the United States:

> A state is responsible for any violation of its obligations under international law resulting from action or inaction by (a) the government of the state, (b) the government or authorities of any political subdivision of the state, or (c) any organ, agency, official, *employee*, or other agent of a

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acting in the scope of his federal employment, the Attorney General must act to substitute the United States for any individually named defendant, remove the suit to the appropriate federal court, and defend the suit. *Id.* § 2679(d)(1). Of course, if the employee's alleged negligent or wrongful acts were done outside the scope of his employment, the United States is not substituted, and the Attorney General does not defend the case. Moreover, a person alleging negligence or wrongful acts by a federal employee must first submit and have denied a claim for money damages to the appropriate federal agency before he can bring a suit in court. *Id.* § 2675(a). The United States is therefore involved in administrative proceedings regarding such allegations well in advance of any actual lawsuit. *See also* Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 374 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999) (finding that "state actors, and not merely the state itself" can be held liable for violations of the law of nations).

[40] LTG ANTHONY R. JONES & MG GEORGE R. FAY, ARMY REGULATION 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 47–52 (2004), http://news.findlaw.com/nytimes/docs/dod/fay82-504rpt.pdf [hereinafter FAY-JONES REPORT]; Second Amended Complaint at 14–60, Saleh v. Titan, No. 04-CV-1143 (S.D. Cal. July 30, 2004), *available at* http://www.ccr-ny.org/v2/legal/docs/Saleh%20v%20Titan%20Corp%20Second%20Amended%20Complaint.pdf.

[41] *See* Kadic v. Karadic, 70 F.3d 232, 245 (2d Cir. 1995) (noting that a private actor can violate international law when acting under color of state authority and using the color of law jurisprudence under 42 U.S.C. § 1983 as a "relevant guide"); Villeda Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1305 (S. D. Fla. 2003) (applying *Kadic* and determining that a finding of "under color of state authority" requires more than "conclusory allegations").

> government or of any political subdivision, acting within the scope of authority or under color of such authority.[42]

Accordingly, if the United States, through its service members or other federal employees acting within the scope of their authority, violated international law with respect to treatment of Iraqi detainees, the United States is responsible for those acts. The analysis must then turn to the Geneva Conventions and to what duties the United States had with respect to these detainees.

In addition to the broad divisions established among the Conventions themselves,[43] the protections contained in each of the Conventions differ depending on whether the armed conflict is "international"[44] or "internal"[45] in character. Section 1 below explores the extensive protections that the United States owed to Iraqi detainees during periods of international armed conflict and occupation in Iraq. Section 2 follows

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[42] RESTATEMENT (THIRD), *supra* note 3, § 207 (emphasis added).

[43] *See supra* note 26 and accompanying text.

[44] Common Article 2 describes an international armed conflict as one that "may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." GCIII, *supra* note 3, art. 2.

[45] Common Article 3 does not specifically define an internal armed conflict, other than to say that its provisions apply to an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . ." *Id.* art. 3. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) attempts a more comprehensive definition. Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Protocol II]. Article 1 of Protocol II states that Protocol II applies in cases of armed conflict not covered by Protocol I, and

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Id.

Article 1 further states that Protocol II does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts." *Id.* The United States is not a party to Protocol II, and although it views much of the Protocol as binding customary international law, the United States objects to this provision in Article 1. Matheson, *supra* note 28, at 420–29.

with a discussion of the more limited duties owed by the United States in any period of internal armed conflict in Iraq.

1. Common Article 2: International Armed Conflict or Occupation

Common Article 2 of the Geneva Conventions states "the present Conventions shall 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 . . . [and] to all cases of partial or total occupation of the territory of a High Contracting party . . . ."[46] Accordingly, the vast majority of the protections, such as status as a POW under GCIII[47] and status as a "protected person" under GCIV,[48] apply only during international armed conflict (armed conflict between two or more High Contracting Parties) or occupation.[49] Here, both Iraq and the United States are High Contracting Parties.[50] Accordingly, although neither side issued a formal declaration of war, from 19 March 2003, when President

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[46] GCIII, *supra* note 3, art. 2.

[47] *Id.* art. 4.

[48] GCIV, *supra* note 3, art. 4.

[49] Territory is considered occupied "when it is actually placed under the authority of a hostile army." Hague IV Regulations, *supra* note 24, art. 42. The *Operational Law Handbook* produced by the U.S. Army Judge Advocate General's Legal Center and School indicates that various dates have been offered regarding the commencement of occupation by coalition forces in Iraq. U.S. DEP'T OF THE ARMY, INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK 272 (2005). The Commander, United States Central Command (CENTCOM), issued "Instructions to the Iraqi People" on 16 April 2003 that spelled out controls he was implementing as the Coalition Force Commander. *Id.* The Instructions included notice of sanctions if the instructions were violated. President Bush issued Executive Order 13315 on 28 August 2003. *Id.* "Section 4(d) [of EO 13315] defines the 'former Iraqi regime' to mean the Saddam Hussein regime that governed Iraq until on or about 1 May 2003." *Id*. The Handbook further notes that "at some point in time, arguably 16 April 03, the coalition forces representing the Occupying Powers began to have certain obligations, to wit, authority under the Hague Regulations and the Geneva Conventions (IV) Relative to the Protection of Civilians in Time of War." *Id*. Moreover, the United Nations Security Council recognized in a resolution on 22 May 2003 that occupation law applied by the coalition forces was in effect in Iraq. S.C. Res. 1483, U.N. Doc. S/Res/1483 (May 22, 2003), *available at* http://daccessdds.un.org/doc/UNDOC/-GEN/N03/368/53/PDF/N0336853.pdf.

[50] STATE PARTIES, *supra* note 35.

George Bush announced that armed conflict against Iraq had begun,[51] until at least 28 June 2004, when official occupation ended with the establishment of the Iraqi provisional government,[52] Common Article 2 and the protections it triggers created duties for the United States with respect to Iraqi detainees.

More specifically, those detainees who qualified as POWs[53] were entitled to the full protections of GCIII. Part II of GCIII outlines those protections in detail. For example, Article 13 requires that "[p]risoners of war must at all times be humanely treated."[54] Article 13 also prohibits any "unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody" and regards such acts or omissions as "serious breach[es] of the present Convention."[55] Article 13 further requires that "prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity."[56] Article 17 states that "[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any

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[51] The White House, President Bush Addresses the Nation (Mar. 19, 2003), http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html; *see also Military Force*, *supra* note 36, at 429.

[52] The White House, President Bush Discusses Early Transfer of Iraqi Sovereignty, Remarks by President Bush and Prime Minister Blair on Transfer of Iraqi Sovereignty, (June 28, 2004), http://www.whitehouse.gov/news/releases/2004/06/20040628-9.html. The Department of Defense Office of the General Counsel (DOD OGC), however, asserts that international armed conflict continues in Iraq, even as of the time of writing. Interview with Major Sean Watts, Professor, International and Operational Law Department, The Judge Advocate General's Legal Center and School, U.S. Army, in Charlottesville, Virginia (Feb. 24, 2005) [hereinafter Watts Interview]. Assuming, arguendo, that the DOD OGC's determination is incorrect, it is essential to fix an end date for the applicability of Common Article 2 and the rest of the Geneva Conventions.

[53] It is beyond the scope of this article to analyze whether any particular detainees are prisoners of war under Article 4 of GCIII. The following groups qualify for POW status under GCIII: members of armed forces of a Party to the conflict; members of certain militias and resistance movements belonging to a Party to the conflict; members of the armed forces of an authority not recognized by the detaining powers; certain persons who accompany the armed forces; members of crews of the merchant marine and civil aircraft of Parties to the conflict; and inhabitants of non-occupied territory who spontaneously take up arms to resist invading forces. GCIII, *supra* note 3, art. 4. News reports indicate, however, that at least some of the allegedly abused detainees were members of the regular Iraqi military forces at the time of their capture. *See, e.g.*, Miles Moffeit, *Brutal Interrogation in Iraq, Five Detainees Deaths Probed*, DENVER POST, May 19, 2004, at A1.

[54] GCIII, *supra* note 3, art. 13.

[55] *Id.*

[56] *Id.*

kind whatsoever. Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."[57] Article 118 requires that after the cessation of active hostilities, prisoners of war shall be "released and repatriated without delay."[58] The Convention contains no provision whereby a prisoner of war may be detained because he may possess intelligence of value to the detaining party, or because he is deemed likely to engage in future hostilities.[59] In fact, subsequent articles allow the detaining party to delay repatriation after the cessation of hostilities only where criminal proceedings are pending or where delay is necessary for the completion of adjudged punishment.[60]

Significantly, Article 130 of GCIII specifically defines willful killing, torture, inhumane treatment, and willfully causing great suffering or serious injury to the body or health of a POW as "grave breaches" of the Convention.[61] Finally, GCIII Article 131 states, "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in [Article 130]."[62]

For detainees who do not qualify as POWs under GCIII, the provisions of GCIV apply.[63] Article 50 of Protocol I, accepted by the United States as an accurate reflection of customary law,[64] defines a civilian as anyone who does not qualify for protection as a prisoner of war under Article 4(A)(1), (2), (3), and (6) of GCIII.[65] Field Manual 27-10 specifically explains that GCIV protects "all persons who have engaged in hostile belligerent conduct but who are not entitled to

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[57] *Id.* art. 17.
[58] *Id.* art. 118.
[59] Indeed, POW status is predicated on the detainee's prior status as a combatant. It is presumed that if released prior to the cessation of hostilities, the POW would return to combat. From the perspective of the U.S. Armed Forces, this concept is contained in the U.S. Code of Conduct. *See* Donna Miles, *Code of Conduct Guided U.S. POWs in Iraq*, AM. FORCES INFORMATION SERV., July 16, 2004, http://www.defenselink.mil.news/Jul-2004/ n07162004_2004071605.html.
[60] GCIII, *supra* note 3, art. 119.
[61] *Id.* art. 130.
[62] *Id.* art. 131.
[63] GCIV, *supra* note 3, art. 4; *see* Protocol I, *supra* note 15, art. 50; FM 27-10, *supra* note 25, para. 247 b.
[64] *See* Matheson, *supra* note 28, at 426.
[65] Protocol I, *supra* note 15, art. 50.

treatment as prisoners of war."[66] Article 4 of GCIV provides that "[p]ersons protected by the Convention are those who, in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[67] Pursuant to Article 5 of GCIV, even if a civilian is "detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power," that person does not lose his status as a civilian protected under GCIV, but merely loses "rights of communications under the present Convention."[68]

Collectively, these provisions require that during the period of international armed conflict and occupation in Iraq,[69] any Iraqi detained by the United States who did not qualify as a POW was a GCIV "protected person" entitled to the protections of GCIV,[70] including respect for one's person, dignity, and honor; humane treatment; and protection from acts or threats of violence and from insults or public curiosity.[71] Article 31 of GCIV specifically prohibits physical or moral coercion to obtain information from a person protected under GCIV.[72] Perhaps most significantly for this analysis, Article 32 states,

> The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder [and] torture . . . but also to *any other measures of brutality* whether applied by civilian or military agents.[73]

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[66] FM 27-10, *supra* note 25, para. 247b.
[67] GCIV, *supra* note 3, art. 4.
[68] *Id.* art. 5. Pictet notes that these rights are quite limited and generally include only the right to communicate with the outside world, such as sending and receiving correspondence. COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR art. 5 (Jean S. Pictet ed., 1960) [hereinafter PICTET COMMENTARY TO GCIV].
[69] *See supra* notes 49–52 and accompanying text.
[70] *See generally* David J. Scheffer, *Agora (Continued:) Future Implications of the Iraq Conflict: Beyond Occupation Law,* 97 A.J.I.L. 842, 856–59 (2003) (describing the responsibilities and future liabilities of the United States and the United Kingdom as occupying powers in Iraq).
[71] GCIV, *supra* note 3, art. 27.
[72] *Id.* art. 31.
[73] *Id.* art. 32 (emphasis added).

In addition to these extensive obligations, Protocol I also adds a layer of protection.[74] Article 75 of Protocol I, which the United States views as binding customary international law, is one such provision.[75] Under Article 75, civilian and military agents of contracting parties are prohibited from committing violence to the life, health, or physical or mental well-being of protected persons, including murder; torture of all kinds, whether physical or mental; corporal punishment; mutilation; outrages upon personal dignity, in particular humiliating and degrading treatment; and threats to commit any of these acts.[76]

2. *Common Article 3: Internal Armed Conflict*

As noted above, as long as the United States occupied Iraq or was engaged in international armed conflict there, the protections triggered by Common Article 2 applied to Iraqi detainees in U.S. custody.[77] On June 28, 2004, however, the Iraqi provisional government took power.[78] From that point on, the United States remained in Iraq at the invitation of the Iraqi provisional government, and the United States was arguably no longer either occupying Iraq or engaged in international armed conflict.[79]

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[74] Protocol I, *supra* note 15, art. 75(2).
[75] *See* Matheson, *supra* note 28, at 427.
[76] Protocol I, *supra* note 15, art. 75(2).
[77] *See supra* notes 49–52 and accompanying text.
[78] *See supra* note 52 and accompanying text.
[79] As noted previously, however, the DOD OGC asserts that international armed conflict continues in Iraq. *See supra* note 53 and accompanying text. In any case, Pictet notes certain criteria in his Commentaries by which the contracting parties may determine if an internal armed conflict exists. PICTET'S COMMENTARIES TO GCIII, *supra* note 29, art. 3. Specifically, he states that an armed conflict exists under the following circumstances:

> (1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
> (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
> (3) (a) That the de jure Government has recognized the insurgents as belligerents; or (b) That it has claimed for itself the rights of a belligerent; or (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a

Still, as is obvious from daily news reports, armed conflict continues in Iraq. Pursuant to Common Article 3 of the Geneva Conventions, when armed conflict not of an international nature occurs in the territory of a High Contracting Party, such as Iraq, only the provisions of Common Article 3 apply.[80] Accordingly, even if the United States is no longer fighting an international armed conflict in or occupying Iraq, the United States must afford the protections contained in Common Article 3 to any detainees under its control.[81]

Common Article 3 is sometimes known as a "convention in miniature" because it contains the most basic protections that must be afforded by the contracting parties in times of an internal armed conflict.[82] More specifically, Common Article 3 requires that "[p]ersons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . ."[83] Common Article 3 also forbids, "at any time and in any place whatsoever, 'violence to life, in particular murder of all kinds, mutilation, cruel treatment, and torture'"

> threat to international peace, a breach of the peace, or an act of aggression.
> (4) (a) That the insurgents have an organization purporting to have the characteristics of a State. (b) That the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory. (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war. (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

Id.
Pictet further asks "Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of the above conditions? We do not subscribe to this view. We think, on the contrary, that the scope of application of the Article must be as wide as possible." *Id.* By this definition, it is difficult to argue with the proposition that the war in Iraq now constitutes at least internal armed conflict.

[80] *See, e.g.*, GCIV, *supra* note 3, art. 3.

[81] Of course, under the DOD OGC's analysis that international armed conflict continues in Iraq, Common Article 2 and the protections it triggers still apply in Iraq. *See supra* notes 49–52 and accompanying text.

[82] PICTET'S COMMENTARIES TO GCIII, *supra* note 29, art. 3.

[83] *See, e.g.,* GCIV, *supra* note 3, art. 3. *Hors de combat* is a French term meaning "out of the fight; disabled; no longer able to fight." RANDOM HOUSE COLLEGE DICTIONARY 639 (Jess Stein ed., 1975).

as well as "outrages upon personal dignity, in particular humiliating and degrading treatment . . . ."[84]

It follows that under the Geneva Conventions, whether in time of international or internal armed conflict, the United States owed an obligation to Iraqis detained by the United States to refrain from torture, murder, and cruel, humiliating, or degrading treatment. More importantly, during the time period in which Common Article 2 was triggered, the United States was bound by the higher standards of treatment of GCs III and IV.

Unfortunately, U.S. forces apparently failed to provide the required protections to Iraqi detainees "at all times" and in "any place whatsoever."[85] The Fay-Jones Report demonstrates that, at a minimum, the United States used improper coercion to extract information from detainees.[86] Even if the methods employed to extract information did not amount to torture and even if the detainees were not entitled to protection as POWs or as civilians, the use of improper coercive techniques violates U.S. obligations under Common Article 3. Likewise, the photos taken at Abu Ghraib and made public in many fora depict humiliating and degrading treatment of Iraqi detainees by U.S. service members.[87] Again, whether those detainees were entitled to GCIII protections as POWs or GCIV protections as civilian protected persons, the treatment visited on the detainees, as exhibited in the photos, violates U.S. obligations under those Conventions. Indeed, it appears that U.S. Soldiers may have murdered some Iraqi detainees, some of whom likely qualified as POWs.[88] As Article 130 of GCIII and Article 147 of GCIV provide, these killings are grave breaches of the Conventions from which the United States, a "High Contracting Party," may not "absolve itself."[89]

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[84] *Id.*

[85] *E.g.,* GCIV, *supra* note 3, art. 3.

[86] FAY-JONES REPORT, *supra* note 40, at 135.

[87] *See supra* note 5 and accompanying text; U.S. Dep't. of Defense, DD Form 458, Charge Sheet (May 2000) [hereinafter DD Form 458], http://news/findlaw.com/hdocs/iraq/graner51404chrg.html (Mar. 20, 2004) (charge sheet for Corporal (CPL) Charles Graner); *id.* http://news/findlaw.com/hdocs/docs/iraq/sivits50504chrg.html (Mar. 20, 2004) (charge sheet for Specialist (SPC) Jeremy Sivits); *id.* http://news/findlaw.com/hdocs/docs/iraq/ifred32004chrg.html (Mar. 20, 2004) (charge sheet for Staff Sergeant (SSG) Ivan Frederick); *id.* http://news/findlaw.com/hdocs/docs/iraq/ davis42804chrg.html (Mar. 20, 2004) (charge sheet for Sergeant (SGT) Javal Davis).

[88] Moffeit, *supra* note 53, at A1.

[89] GCIII, *supra* note 3, arts. 131 (defining grave breaches of GCIII), 131 (forbidding state absolution of responsibility for grave breaches); GCIV, *supra* note 3, arts. 147

B. Contractors of the United States and Their Employees

Unfortunately, United States responsibility for abuse inflicted on Iraqi detainees may not stop with the acts of U.S. employees and service members. *Saleh v. Titan*[90] and the Fay-Jones Report[91] assert that U.S. contract interrogators and translators participated with U.S. employees in conduct that violated the Geneva Conventions. As further explained below, if those contractors were U.S. agents or were acting under color of U.S. authority when they committed any such acts, that conduct may be attributable to the United States under both international and federal law.

1. Responsibility for Private Actors Under International Standards

a. The International Court of Justice

The International Court of Justice (ICJ) faced the question of when a government could be liable for the action of private individuals in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States v. Iran*).[92] This case arose from the seizures in November 1979 of the U.S. Embassy and other consular properties and personnel in Iran.[93] In its discussion of the facts, the ICJ noted that armed groups of militant students overran and occupied the U.S. Embassy in Tehran and the consulates in Tabriz and Shiraz, took hostages at the Embassy, and seized and destroyed property in all three locations.[94] The court noted that to reach a decision on the merits, it must first "determine how far, legally, the acts in question may be regarded as imputable to the Iranian State."[95] The court then stated that there was no evidence "that the militants, when they executed their attacks on the Embassy, had any

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(defining grave breaches of GCIV), 148 (forbidding state absolution of responsibility for grave breaches).

[90] Second Amended Complaint, Saleh v. Titan, No. 04-CV-1143 (S.D. Cal. July 30, 2004), *available at* http://www.ccr-ny.org/v2/legal/docs/Saleh%20v%20Titan%20Corp%20Second%20Amended%20Complaint.pdf.

[91] FAY-JONES REPORT, *supra* note 40, at 47–52.

[92] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24), *available at* http://www.icj-cij.org/icjwww/icases/isuir/iusir_ijudgment/iusir_iJudgment_19800524.pdf.

[93] *Id.* at 12.

[94] *Id.* at 12–15.

[95] *Id.* at 29.

form of official status as recognized 'agents' or organs of the Iranian State," and that their actions against the United States could not, therefore, be imputed to Iran on that basis.[96] Accordingly, the court concluded that the conduct of the militant students could be directly imputed to the Iranian State "only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation."[97]

The court then found that just days before the attacks, the religious leader of Iran, the Ayatollah Khomeini, "declared that it was 'up to the dear pupils, students, and theological students to expand with all their might their attacks against the United States,'" and that in a statement after the attacks, a spokesman for the militants referred to this message to explain their actions.[98] The court, however, concluded that "it would be going too far to interpret such general declarations of the Ayatollah Khomeini to the people or students of Iran as amounting to an authorization from the State to undertake the specific operation of invading and seizing the United States Embassy."[99] Likewise, the court viewed congratulations conveyed after the seizures from various parts of the Iranian government to the militants as insufficient to impute the attacks on the Embassy to the State of Iran.[100]

Nevertheless, the ICJ still held that Iran was liable to the United States.[101] Although the attacks themselves could not be considered imputable to the Iranian State, Iran failed either to prevent the attacks or to secure the release of the hostages and return of the seized properties following the attacks.[102] The court noted that the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular

[96] *Id.* The International Court of Justice (ICJ) offers no authority or explanation for its conclusion that a state may be responsible under international law for the actions of private individuals recognized as agents of the state, but this conclusion is in accord with Restatement Third of the Foreign Relations of the United States § 207, which states, in part, that a State may be held responsible for any violations of international law by "any organ, agency, official, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority." RESTATEMENT (THIRD), *supra* note 3, § 207.
[97] *Iran*, 1980 I.C.J. at 29.
[98] *Id*.
[99] *Id*. at 30.
[100] *Id*.
[101] *Id.* at 31–35.
[102] *Id.* at 31–33.

Relations of 1963 placed Iran "under the most categorical obligations . . . to take appropriate steps to ensure the protection of the United States Embassy and Consulates . . . ."[103] The court found that Iran failed to even attempt to take such steps.[104] In contrast to the initial acts of the militants, moreover, the court found that Iran made it clear that the militants enjoyed the full support of the Iranian State for their takeover of the Embassy and detention of the U.S. personnel.[105] As the court held,

> The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated the continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailors of the hostages, had now become agents of the Iranian State, for whose acts the State itself was internationally responsible.[106]

The ICJ, then, seems to establish two rules through which a state may be responsible under international law for the acts of private individuals. First, a state may be liable if the private actor is an "agent" of the state "charged by some competent organ of the [s]tate to carry out a specific operation."[107] Second, a state may be liable if it ratifies the actions of private individuals either by failing to take steps required under international law to prevent or stop the violative acts or by subsequently endorsing those acts.[108] Unlike Iran, the United States of course did not ratify the violative conduct of the private individuals who abused Iraqi detainees by failing to take preventive steps to stop the abuse or by endorsing such abuse as its express policy. Accordingly, the court's ratification test does not apply in the circumstances under analysis here. As for the court's "agency" test, the Tehran Embassy Case unfortunately does not provide any insight into its elements. Indeed, some commentators note that criteria for what constitutes state agency for the

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[103] *Id.* at 30.
[104] *Id.* at 31.
[105] *Id.* at 34.
[106] *Id.* at 35.
[107] *Id.* at 30.
[108] *Id.* at 35.

purposes of international law have never been clearly articulated and that international law has largely failed to address the question.[109]

Professor Claire Finckelstein, however, offers a definition for state agency gleaned from ICJ and U.S. federal court opinions.[110] Traditionally, "[w]hat law there is on the question of state agency focuses on the *nature of the offense*, rather than on the *status of the offender*."[111] More specifically, she posits that under what she terms the "act-by-act" approach, international law has traditionally held that

> if the perpetrator decides to perform the act on his own initiative, the act cannot be shown to be an act of the state, even if the actor is generally authorized to act for the state. On an act-by-act test, then, the actor must display little or no independence of judgment in order for the individual to be considered a state actor with respect to the act. In most cases, this will mean that the individual must have been acting under orders to commit the crime.[112]

Professor Finckelstein notes that the ICJ explicitly endorsed this "act-by-act" approach in its opinion in *Nicaragua v. United States*.[113] In that case, Nicaragua claimed that the actions of the contras, U.S.-backed rebels fighting against the Nicaraguan government, could be attributed to the United States because the United States was organizing, funding, commanding, and recruiting contra members.[114] Professor Finckelstein further notes that the court disagreed, stating:

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[109] *E.g.*, Claire Finckelstein, *Changing Notions of State Agency in International Law: The Case of Paul Touvier*, 30 TEX. INT'L L.J. 261, 271 (1995).

[110] *Id.* at 270–75 (analyzing the 1992 conviction by a French domestic court of Paul Touvier, a Vichy official, for crimes against humanity). Professor Finckelstein explains that Paul Touvier was the head of a division of the *Milice*, the military police organization of the Vichy government in occupied France in World War II. *Id.* at 264. Touvier played a role in the execution of seven Jewish hostages at a cemetery in Rillieux-la-Pape, on 29 June 1944. *Id.* "The killings occurred the day after members of the resistance had assassinated Philippe Henriot, the Minister of Information of Vichy." *Id.* at 264–65. The killings at Rillieux were in retaliation for Henriot's assassination. *Id.* at 265. Touvier was also responsible for detaining Jewish and political prisoners. *Id.*

[111] *Id.* at 271 (emphasis added).

[112] *Id.*

[113] *Id.* at 274.

[114] Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 64 (June 27), *available at* http://www.icj-cij.org/icjwww/icases/inus/inus_ijudgment/inus_iJudgment_19860627.pdf.

> [F]or this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that State had effective control of the military or paramilitary operations *in the course of which the alleged violations were committed*." Although the Court did not elaborate its view of the agency relation, Judge Ago articulated the Court's approach to state agency in a concurrence, saying that state agency can only be imputed "in cases where certain members of [the *Contras*] happened to have been *specifically charged by United States authorities to commit a particular act, or carry out a particular task of some kind* on behalf of the United States.[115]

Pursuant to this analysis, likewise hinted at in the ICJ's Tehran Embassy opinion,[116] the United States is responsible for the international law violations of its contractors under the agency theory if U.S. authorities instructed the contractors to commit those violations. It would not be sufficient, however, to demonstrate only that the contractors were engaged in the execution of their contract when they allegedly abused detainees.[117] But if U.S. government officials directed, supervised, or conspired with civilian contractors in conduct violative of U.S. obligations under the Geneva Conventions, or if U.S. authorities authorized or instructed contractors to engage in conduct that constituted torture, acts by the contractors in compliance with those orders or instructions would likely be imputable to the United States.[118]

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[115] Finckelstein, *supra* note 109, at 274 (quoting *id.* at 188–89 (separate opinion of Judge Ago)) (emphasis added).
[116] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 30 (May 24), *available at* http://www.icj-cij.org/icjwww/icases/isuir/iusir_ijudgment/iusir_iJudgment_19800524.pdf.
[117] *Id.*
[118] According to the *Schlesinger Report,* interrogators at Abu Ghraib used interrogation techniques that had been approved for use on detainees at Guantanamo Bay, who were not entitled to the protections of the Geneva Conventions. JAMES R. SCHLESINGER, ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 14 (2004), http://www.defenselink.mil/news/Aug2004/ d20040824finalreport.pdf [hereinafter SCHLESINGER REPORT]. It was improper, however, to use these techniques on detainees at Abu Ghraib, who were entitled to Geneva Convention protections. *Id.*

b. Common Article 1 of the Geneva Conventions

Common Article 1 of the Geneva Conventions may provide another avenue under international law by which the United States may bear responsibility for the actions of its contractors.[119] Common Article 1 requires that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."[120] As Pictet explained in his Commentaries to GCIII, for a state to meet its Common Article 1 obligations, "it would not be enough for a Government to give orders or directions and leave the military authorities to arrange as they pleased for their detailed execution. It is for the Government to supervise the execution of the orders it gives."[121] Pictet's Commentaries to GCIV regarding Common Article 1 are even more explicit:

> The Contracting Parties do not undertake merely to respect the Convention, but also to "ensure respect" for it. The wording may seem redundant. When a State contracts an engagement, the engagement extends *eo ipso* to all those over whom it has authority, as well as to the representatives of its authority; and it is under an obligation to issue the necessary orders. The use in all four Conventions of the words "and to ensure respect for" was, however, deliberate: they were intended to emphasize the responsibility of the Contracting Parties.[122]

The contractors the United States hired to interrogate Iraqi detainees were certainly persons over whom the United States had authority, especially in the context of the work the contractors were hired to perform. It almost goes without saying that the United States does not meet its obligations to ensure respect for the Conventions if it fails to supervise its contractors who, in the course of executing their contract,

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[119] Watts Interview, *supra* note 52; *see also* Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 136–37 (2003) (asserting that nations who do not ensure that other parties respect the protections of GCIV are in breach of Common Article 1).

[120] GCIII, *supra* note 3, art. 1.

[121] PICTET'S COMMENTARIES TO GCIII, *supra* note 29, art. 1.

[122] COMMENTARY TO THE GENEVA CONVENTIONS RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR art 1 (Jean S. Pictet ed., 1958), *available at* http://www.icrc.org [hereinafter PICTET'S COMMENTARIES TO GCIV].

breach the Conventions.[123] It would seem to render meaningless the obligation to ensure respect for the Conventions if a High Contracting Party could simply hire contractors to breach the Conventions on its behalf.

United States investigations into incidents of detainee abuse are highly critical of the role played by contract interrogators and translators. In fact, the Schlesinger Report found that contract interrogators were sometimes considered more effective than less experienced service members, but that oversight of contractor personnel was not sufficient to ensure their activities fell within the requirements of the law.[124] The Taguba Report likewise found that at least two contractor personnel violated the law in the conduct of their duties.[125] In sum, while international law sets the "agency" standard high,[126] the risk is significant that either through application of the ICJ test or through a Common Article 1 analysis, the United States could be found responsible under international law for the actions of its contractors.

2. *Responsibility for Private Actors Under U.S. Law*

United States federal courts apply a different standard than that recognized by the ICJ in determining when the actions of private

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[123] It is interesting to note that "supply contractors" are included in the GCIII, Article 4 definition of prisoners of war, and are therefore entitled to the GCIII protections if captured. GCIII, *supra* note 3, art. 4. Whether "supply contractor" extends to the myriad of contractors on the battlefield today is beyond the scope of this paper. Nevertheless, it seems incongruent that a government who captures a contractor is obligated to provide POW protections to that person but would not be responsible to ensure that contractors hired to interrogate POWs respect the POWs' protections.

[124] SCHLESINGER REPORT, *supra* note 118, at 69.

[125] Taguba Report, *supra* note 4, at 48.

[126] Professor Finkelstein proposes that the Touvier case demonstrates that a lower, more flexible approach based on the status of the actor, rather than the "act-by-act" approach, is more appropriate to international law agency issues. Finckelstein, *supra* note 109, at 276–82. She argues that the Touvier court applies an analysis similar to that described in § 207 of the Restatement (Third) of the Foreign Relations Law of the United States and applied by U.S. courts in similar cases. *Id.*; *see also* Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts arts. 5, 8, 9 (Nov. 2001), http://www.un.org/law/ilc/texts/State_responsibility/ responsibility_articles(e).pdf [hereinafter State Responsibility Draft Articles] (asserting that a state is responsible for the internationally wrongful acts of an individual when, the individual actually exercises governmental authority, acts under the instruction or direction of the State authorities, or exercises authority in the absence or default of the actual authority).

individuals in violation of international law may be attributable to the State. United States foreign relations law recognizes that a state may be liable for the acts that violate international law of any "agent . . . acting within the scope of authority or under color of such authority . . . ."[127] To determine whether an act of a private individual was done under the color of state authority, "one must consider all the circumstances, including whether the affected parties reasonably considered the action to be official, whether the action was for a public purpose or for private gain, and whether the person acting wore official uniforms or used official equipment."[128]

Federal courts have also drawn analogies to similar provisions in federal law to determine when the actions of a private individual may be attributable to a state for the purposes of proving a violation of international law. In *Kadic v. Karadzic*,[129] victims of atrocities committed in Bosnia sued Radovan Karadzic, a private individual who was recognized as the putative president of the Bosnian Serbs and leader of the Bosnian Serb forces.[130] On appeal, the Court of Appeals for the Second Circuit analogized the "color of law" jurisprudence of 42 U.S.C. § 1983, explaining that § 1983 served as a "relevant guide" to determine whether a private individual had engaged in official acts that violated international law.[131] Accordingly, the court found that "[a] private individual acts under color of law . . . when he acts together with state officials or with significant state aid."[132]

The U.S. District Court for the Eastern District of Louisiana followed *Kadic* in *Beanal v. Freeport-McMoran, Inc*.[133] Beanal, a resident of Irian-Jaya, Indonesia, sued Freeport-McMoran, the corporate owner of a

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[127] RESTATEMENT (THIRD), *supra* note 3, § 207.
[128] *Id*. § 207 cmt. d.
[129] Kadic v. Karadic, 70 F.3d. 232, 245 (2d Cir. 1995).
[130] *Id.*
[131] *Id.* Section 1983 of Title 42, United States Code, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.S. § 1983 (LEXIS 2006).
[132] *Kadic*, 70 F.3d at 245.
[133] Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 365 (E.D. La. 1997).

gold mine in Indonesia, for numerous violations of international human rights laws.[134] Following the lead of the Second Circuit, the court noted that it had to consider the test for state action contained in *Restatement* section 207 and the "under color of law" jurisprudence of 42 U.S.C. § 1983.[135] The court then observed that Beanal could meet the requirement to show state action by demonstrating, for example, that Freeport-McMoran's actions constituted or appeared to constitute official acts of the Indonesian government; that Freeport-McMoran was carrying out a public purpose in its activities; that the presence of Indonesian military or governmental officials lent an air of authority to Freeport-McMoran's actions; that Freeport-McMoran "acted in concert with a foreign state;" or that Freeport-McMoran was "conspiring in, aiding, or abetting official acts."[136]

Under these federal court precedents, the United States is likely responsible for the actions of its contractors who participated in abuse of detainees.[137] The Taguba Report indicates that contractor personnel sometimes wore military uniforms,[138] and further finds that contract personnel "allowed and/or instructed [military police], who were not trained in interrogation techniques, to facilitate interrogations by 'setting conditions' which were neither authorized and in accordance with applicable regulations/policy"[139] and that contractor personnel "clearly knew [the] instructions [provided to MPs] equated to physical abuse."[140] Contractors then acted "together with state officials."[141] Arguably, contractors could also have been "acting in concert" with the United States government and "aiding or abetting official acts" with respect to detainee treatment.[142] Under either test, the acts of United States contractors are attributable to the United States as official state action.

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[134] *Id.*
[135] *Id.* at 374.
[136] *Id.* at 375.
[137] *See generally* Gregory G.A. Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad,* 30 COLUM. HUM. RTS. L. REV. 359, 388–93 (synthesizing situations when private corporations or individuals may be held liable for violations of international law with situations when state action is necessary).
[138] Taguba Report, *supra* note 4, at 26.
[139] *Id.* at 48.
[140] *Id.*
[141] Kadic v. Karadic, 70 F.3d 232, 245 (2d Cir. 1995).
[142] Beanal v. Freeport-McMoran, Inc., 969 F.Supp 362, 375 (E.D. La. 1997).

3. Why It Matters

Allowing a contractor to be cloaked with government authority by acting as an "agent" of the government or by acting under the color of state authority has two important consequences when analyzing the remedies available for abused Iraqi detainees. First, under the international law "act-by-act" agency standard articulated by the ICJ in *Nicaragua v. United States* and explained by Professor Finckelstein, a government may be responsible for the actions of private individuals, when a state authority directs the private individual to commit those acts.[143] Even if the relationship between the state and the private individual does not rise to the level required by the ICJ, the United States' failure to properly instruct or supervise the contractors may have breached its obligations under Common Article 1 to ensure respect for the Conventions.[144] In the case of abused Iraqi detainees, this alleged breach could lead to claims from the Iraqi government that the United States, through its employees and contractors, owes Iraq state-to-state reparations.[145]

Second, as U.S. courts recognized in *Kadic* and *Beanal*, when an individual acts under the color of state authority, that individual becomes open to suit under various United States statutes, including the Alien Tort Claims Act, for violations of international law.[146] While it is unlikely that these suits against private individuals would result in judgments against the United States,[147] the plaintiffs must prove both the connection between the private individual and the State and the private individual's violations of international law.[148] The result could be extensive third party discovery involving the United States and U.S. personnel, an undesirable development under any circumstances.

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[143] *See supra* notes 92–117 and accompanying text (describing International Court of Justice decisions concerning, respectively, the Iranian hostage episode in 1979 and U.S. military involvement with the Nicaraguan *Contras)*.
[144] *See supra* notes 118–21 and accompanying text.
[145] *See infra* notes 156–65 and accompanying text.
[146] *See generally* Sosa v. Alvarez-Machain, 542 U.S. 692, 710–34 (2004) (determining generally the scope of the ATCA and examining other sources of law as they related to tort-like suits for damages in U.S. federal courts).
[147] *See infra* Parts III.B, C.
[148] Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 365 (E.D. La. 1997).

III. Remedies for International Law Violations

As the preceding sections have explained, the U.S. government must be concerned about the risk and cost it faces for acts of abuse in violation of international humanitarian law against Iraqi detainees by both U.S. personnel and contractors. This section will demonstrate, however, that international humanitarian law is generally ill-equipped to address claims of individual victims alleging injuries because of a state's violation of international law.[149] As a result, especially given the political overtones inherent in any such case, it is quite likely that additional Iraqi detainees alleging abuse will seek redress under U.S. domestic law and in the federal courts. As argued below, this avenue will likely result in protracted litigation without bringing relief to those abused and is not in the best interests of the United States.

At the outset, "[u]nder international law, the breach of an international obligation, whether deriving from customary international law or from international agreement, gives rise to *international* remedies against the violating state."[150] These international remedies include traditional state-to-state diplomatic protection and demands for reparations, as well as any additional remedies provided for in an international agreement relevant to the claims.[151] An international agreement may provide remedies for individual victims of international law obligations. Modern international human rights agreements sometimes provide individual victims access to international forums and allow individual victims to present petitions without requiring sponsorship of the petition by a state party.[152]

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[149] *See* Scheffer, *supra* note 70, at 856–59.

[150] RESTATEMENT (THIRD), *supra* note 3, § 703 cmt. a (emphasis added); *see* Dolzer, *supra* note 17, at 296–97.

[151] *See* RESTATEMENT (THIRD), *supra* note 3, § 703.

[152] *See* RESTATEMENT (THIRD), *supra* note 3, § 703 cmt. c (stating that international human rights agreements usually require state parties to provide remedies for violations in domestic law), § 906 cmt. a (stating that some human rights agreements allow individuals to present petitions to certain international forums); Chante Lasco, *Repairing the Irreparable: Current and Future Approaches to Reparations*, 10 HUM. RTS. BR. 18, 18–20 (2003) (analyzing current reparations law and suggesting future parameters that could better meet individual victim's needs); Roht-Arriaza, *supra* note 6, at 479–83 (describing remedies available to individuals for violations of international human rights laws); Christian Tomuschat, *Restitution for Victims of Grave Human Rights Violations*, 10 TUL. J. INT'L & COMP. L. 157, 157–59 (2002) (providing historical analysis for settling claims of international human rights violations..

In the case of international humanitarian law, however, the remedial framework is markedly different. As discussed below, international humanitarian law agreements seldom allow individuals to access international forums and rarely contain specific requirements with regard to individual remedies against violating states. More frequently, international humanitarian law agreements require states to enact legislation designed to ensure victims an effective remedy in the event of a treaty violation.[153] One difficulty with this approach is a lack of guidance within the agreements about what "remedy" is effective. Another problem is the rarity of specific mechanisms to directly compensate victims, especially in older agreements.[154] Indeed, Pictet's Commentaries to Article 148 of GCIV state:

> As regards material compensation for breaches of the Convention, it is inconceivable, at least as the law stands today, that claimants should be able to bring a direct action for damages against the State in whose service the person committing the breach was working. Only a State can make such claims on another State, and they form part, in general, of what is called "war reparations." It would seem unjust for individuals to be punished while the State in whose name or on whose instructions they acted was released from all liability.[155]

Nevertheless, as explored below, individual victims may pursue remedies in the domestic courts of their own state or the violating state, pursuant to domestic law.[156] The process is frequently long and expensive. Even worse, the recent United States Supreme Court decision

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[153] *See, e.g.*, GCIV, *supra* note 3, art. 146; RESTATEMENT (THIRD), *supra* note 3, § 703 cmt. c.

[154] *Compare* GCIII, *supra* note 3, arts. 130–32 (describing grave breaches, stating no party may absolve itself from responsibility for violations that constitute grave breaches, and providing for "enquiry" in the event a party believes another party has breached the convention) *with* International Convention on Civil and Political Rights, Dec. 19, 1996, 999 U.N.T.S. 71 (providing rights to compensation in two specific instances and requiring state parties to enact necessary domestic legislation) *and* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (providing that each state party must enact an enforceable right through which victims of torture can obtain redress and compensation). *See generally* Tomuschat, *supra* note 152, at 161–73 (discussing debate in the international community over the meaning of the word "remedy" in international agreements).

[155] *See* PICTET'S COMMENTARIES TO GC IV, *supra* note 122 art. 148.

[156] *See* RESTATEMENT (THIRD), *supra* note 3, § 906 cmt. b.

in *Sosa v. Alvarez-Machain* made successful federal litigation significantly more difficult for victims of international law violations.[157] Unfortunately, current U.S. claims laws and the lack of clear alternatives in the international system usually make U.S. federal courts the best solution. Significantly, this choice is also the least attractive for the U.S. government and for the individual defendants who are accused of abuse.

A. States' Obligation to Make Reparations

While more recent international humanitarian law agreements invariably seem to contain a requirement that states enact laws to prosecute violators of the most important provisions of international humanitarian law,[158] the agreements are generally silent regarding what "civil" remedies the victims may claim in the event of a violation.[159] Customary international law, as evidenced by the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts,[160] specifically notes, however, that a state responsible for an internationally wrongful act[161] is under an obligation

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[157] Sosa v. Alvarez-Machain, 542 U.S. 692, 710–34 (2004) (narrowing the scope of the Alien Tort Claims Act relative to prior interpretations in lower courts and examining other sources of law as they related to tort-like suits for damages in U.S. federal courts).

[158] *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide art.5, Dec. 9, 1948, 78 U.N.T.S. 277; GCIII, *supra* note 3, art. 129. *See generally* Bassiouni, *supra* note 6, at 9 (discussing in detail the need and requirement to prosecute offenders of serious violations in international humanitarian law).

[159] For example, GCIII provides only a means through which states may mediate or consult regarding suspected violations, but it contains no specific consequences or remedies if a violation occurs. *See* GCIII, *supra* note 3, art. 132.

[160] *See* Chairman of Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001) delivered to the General Assembly*, 29–365,U.N. Doc. Supp. No. 10, A/56/10 (2001), *available at* http://www.un.org/law/ilc/reports/2001/2001report.htm; *see also* United States Department of State, Draft Articles on State Responsibility: Comments of the Government of the United States of America (Oct. 22, 1997), *available at* http://lcil.law.cam.ac.uk/projects/state_document_collection.php#5 [hereinafter U.S. 1997 Comments to Draft Articles] (acknowledging that many of the draft articles constitute customary international law); Marco Sassoli, *State Responsibility for Violations of International Humanitarian Law*, INT'L REV. OF THE RED CROSS, June 2002, at 401.

[161] State Responsibility Draft Articles, *supra* note 126, art. 2 ("There is an internationally wrongful act of a State when conduct consisting of an act or omission: (a) Is attributable to a State under international law; and (b) constitutes a breach of an international obligation of the State."). *See generally* Sassoli, *supra* note 160, at 401 (discussing application of the Draft Articles to international humanitarian law).

to make reparations for the injury caused by that act.[162] Reparations[163] include restitution, re-establishment of "the situation which existed before the wrongful act was committed;"[164] compensation, including "financially assessable damage" to the extent "such damage is not made good through restitution;"[165] and satisfaction, utilizing other measures necessary to correct the injury, such as an apology or an expression of regret.[166]

Significant for the analysis here, the United States noted in its Comments on the Draft Articles that the articles on reparations represent customary international law, except to the extent that some of their provisions tend to "undermine the well-established principle of 'full reparation.'"[167] In sum, under customary international law, Iraq may demand, and the United States would owe, reparations for violations of international humanitarian law that were committed against Iraqi nationals and are attributable to the United States. Although the United States likely owes reparations to Iraq under customary international law, abused Iraqi detainees do not have corresponding individual rights to compensation for the abuse they suffered at the hands of U.S. employees and contractors.

B. No Direct Remedy Through International Humanitarian Law

Recall that the obligations of the Geneva Conventions and of customary international law are owed from one state to another. They are obligations of the State either because the states are parties to an international agreement or, in the case of customary international law, because the states are part of the international community. Significantly, as the earlier discussion indicates, international law obligations are generally not the obligations of the individuals charged to carry them out,[168] and the obligations do not run to individuals.[169] International

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[162] State Responsibility Draft Articles, *supra* note 126, art. 31.
[163] *Id.* art. 34 (listing types of reparations as restitution, compensation, and satisfaction, "either singly or in combination.").
[164] *Id.* art. 35.
[165] *Id.* art. 36.
[166] *Id.* art. 37.
[167] U.S. 1997 Comments to Draft Articles, *supra* note 160.
[168] *See supra* notes 92–117 and accompanying text. Of course, individuals can be held both criminally and civilly liable if sufficient domestic or international law exists. Even when this is the case, as the above analysis demonstrated, individual liability for

agreements, "even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts . . . ."[170] Indeed, most commentators conclude that no private right to compensation exists outside of a limited number of provisions in certain human rights treaties that specifically create a mechanism through which individual claimants may bring their grievances.[171]

More specifically, as Professor Christian Tomuschat notes, a set of draft rules pertaining to "the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms" has been pending before the United Nations Commission on Human Rights for several years.[172] This document, which is based on the recently adopted *Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts*, would grant victims "all conceivable rights,"[173] including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[174] Professor Tomuschat points out, however, that "states are quite reluctant to accept such a regime,"[175] and despite requests by the U.N. Commission on Human Rights, few states have even commented on the draft articles.[176] Accordingly, Professor Tomuschat concludes that rules that seek to endow victims of international

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violations of international law rests on tying the individual's actions to the responsibilities of the state.

[169] *See* Dolzer, *supra* note 17, at 306.

[170] RESTATEMENT (THIRD), *supra* note 3, § 907 cmt. a. With respect to U.S. law, courts have recognized that treaties such as the International Convention on Civil and Political Rights are not privately enforceable, as they are not self-executing, but instead require implementing legislation to give them direct force in U.S. law. *See* Sosa v. Alvarez-Machain, 542 U.S. 682, 735 (2004); Hamdan v. Rumsfeld, 415 F.3d 33, 38-40 (D.C. Cir. 2005). One U.S. court, however, has determined that the portions of the Geneva Conventions designed to create individual protections are self-executing, and, therefore, potentially enforceable by individuals. United States v. Noriega, 808 F. Supp. 791, 794 (S.D. Fla. 1992), *cert. denied*, 523 U.S. 1060 (1998). *But see* Tel-Oran v. Libyan Arab Republic, 726 F.2d 774, 809 (D.C. Cir. 1984) (concurring opinion noted that Geneva Conventions are not self-executing).

[171] *See* Tomuschat, *supra* note 152, at 157–59 (providing historical setting for claims of international human rights violations); *see also* Dolzer, *supra* note 17, at 297 (describing the classical approach to resolving war-related claims); Lasco, *supra* note 152, at 18 (providing analysis of current and historical reparations matters).

[172] Tomuschat, *supra* note 152, at 160.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

wrongdoing with individual rights to restitution or compensation, outside of those limited rights specifically enshrined in certain international human rights agreements,[177] "do not, as of yet, enjoy the support of the international community."[178]

This observation has particular significance with respect to international humanitarian law agreements. Significantly, as Professor Rudolf Dolzer notes:

> [T]he classic view of individual war claims as being covered by the process of negotiating and exacting reparations is based on the difference in the status of war and of peace in international law . . . . Wars, as understood in international law, exist between states, not within states and not between states and persons.[179]

It follows from this line of reasoning that war claims, whether arising from battle damage or from violations of international humanitarian law, are unique from other international personal injury or property claims brought during peacetime. Indeed, as Professor Dolzer argues,

> From a perspective of pure legal logic, it is possible to consider the extension of the concept of human rights to the area of [war] claims settlement in the sense of replacing the rules of diplomatic protection to granting direct standing to an individual to raise a claim against a foreign government. In practice, however, the international community has refrained from drawing such a conclusion, as is evident in every textbook of international law. As far as the specific rules of humanitarian law are concerned, no changes have been introduced in the post-war period which would indicate the will of the international community to alter the general lack of standing of individuals to raise a claim, even though this body of law was revisited by the states on several occasions.[180]

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[177] *Id.* at 161–73.
[178] *Id.* at 161.
[179] Dolzer, *supra* note 17, at 300.
[180] *Id.* at 336.

The text of the major international humanitarian law agreements likewise supports the conclusion that individual victims of war do not have a private right of action to seek compensation or redress. For example, GCIII, which covers the protection of POWs, contains minimal explanation of the consequences for violating its terms and does not provide for individual claims by prisoners who have been victims of such violations. Specifically, only four articles, Articles 129 through 132, deal specifically with violations of the Convention. Article 129 requires state parties "to enact any legislation necessary to provide *effective penal sanctions* for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in [Article 130]."[181] No mention is made of providing compensation or restitution for the victim of that grave breach. Similarly, Article 132 provides:

> At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed. Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.[182]

Thus, Article 132 also fails to mention remedies for victims. Instead, remedies for any violations of the terms of the Convention will be the result of state-to-state procedures, helped along, if necessary, by an "umpire."[183]

Perhaps the closest GCIII comes to providing some recourse for victims is found in Article 131, which provides that "[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in [Article 130]."[184]

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[181] GCIII, *supra* note 3, art. 129 (emphasis added).
[182] *Id.* art. 132.
[183] It is interesting that in its final sentence, Article 132 could be read to limit the consequences of violations to putting an end to the violative actions. Read in light of the customary law, state-to-state remedies outlined *supra*, however, it is likely best read as not limiting other avenues for the aggrieved party. *See* discussion *supra* Part III.A.
[184] GCIII, *supra* note 3, art. 131.

As state parties themselves are not amenable to penal sanctions, and Article 131 uses the term "liability," a term closely associated with civil damages, Article 131 would appear to allow—if not require—a state party who suffered a grave breach to demand some form of civil compensation. Nevertheless, Article 131 does not mention individual victims and creates no right to or expectation of compensation for the victims themselves.[185]

Similarly, GCIV, relevant to the protection of civilians in time of war, contains no provisions through which an individual victim may claim compensation for a breach of its terms. Indeed, it contains enforcement provisions virtually identical to those in GCIII: penal sanctions against persons who commit grave breaches of the Convention; inter-state dispute resolution; and a prohibition against states absolving themselves of responsibility for grave breaches of the Convention.[186] Accordingly, civilians who suffer breaches of GCIV cannot rely on its terms to provide an avenue to compensation.

In contrast, Protocol I, which supplements the Geneva Conventions in times of international armed conflicts, does contain a provision requiring that a party that violates the terms of the Conventions is liable to pay compensation.[187] Unfortunately, it does not specify to whom compensation is owed, nor does it provide a mechanism for individual victims to present such a claim.[188]

The statutes of international criminal tribunals similarly support the conclusion that individual victims of international law violations during international armed conflicts do not have a private right of action to seek compensation or redress. The Statute of the International Criminal Tribunal for the Former Yugoslavia limits punishment for convicted offenders to imprisonment and the return of seized property to its rightful owners.[189] It offers no mechanism, however, whereby individuals may

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[185] *See supra* notes 179-181 and accompanying text. Pictet's Commentaries contain identical language. PICTET'S COMMENTARIES TO GCIII, *supra* note 29, art. 131.

[186] *See* GCIV, *supra* note 3, arts. 146 (penal sanctions for grave breaches), 148 (forbidding states from absolving themselves of responsibility for grave breaches), 149 (providing for an interstate dispute resolution mechanism).

[187] Protocol I, *supra* note 15, art. 91.

[188] Protocol II, which supplements the Geneva Conventions in times of internal armed conflicts contains no similar provision. Protocol II, *supra* note 45.

[189] Statute of the International Criminal Tribunal for the Former Yugoslavia art. 24, May 25, 1993, *available at* http://www.un.org/icty/legaldoc-e/index.htm.

present a claim for their missing or damaged property.[190] The Statute for the International Criminal Tribunal for Rwanda is virtually identical. It likewise does not provide for reparations to individual victims or allow victims to personally bring claims before the tribunal.[191] The Rome Statute, the foundational document for the International Criminal Court, in contrast, contains a provision that allows the court to award reparations to victims of crimes prosecuted before the court, including restitution, compensation, and rehabilitation.[192] In addition, it establishes a trust fund, funded by assets seized from defendants convicted by the court, to compensate certain victims of international crimes.[193] While this certainly is a step toward compensating individual victims of international crimes, like other international humanitarian law agreements, the Rome Statute does not allow individual victims either to bring claims directly before it or to make claims directly against the trust fund.[194]

C. Domestic Law Remedies

This analysis demonstrates that individual abused Iraqi detainees have no direct right to compensation through international humanitarian law. It is equally likely, however, that the United States government may be liable for reparations because of international humanitarian law violations attributed to the United States. United States domestic law, also provides several avenues that in principle seek to bridge this gap. The first part of this section will provide a short overview of the statutes that are applicable to Iraqi nationals that allow individuals to present claims against the United States.[195] As the second part notes, the statutes currently in force are inadequate to address claims brought by Iraqi detainees alleging abuse by U.S. personnel. The third part will briefly explore the Alien Tort Claims Act and its application after *Sosa v.*

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[190] *Id.*

[191] Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, *available at* http://65.18.216.88/ENGLISH/basicdocs/statute/2004.pdf.

[192] Rome Statute of the International Criminal Court art. 75, July 17, 1998, *available at* http://www.un.org/law/icc/statute/english/rome_ statute(e).pdf.

[193] *Id*. art. 79.

[194] *Id.*

[195] Other claims statutes exist, but this section will highlight those potentially most applicable to Iraqi detainees claiming abuse.

Alvarez-Machain,[196] arguing that it is not in the United States' best interests to allow Iraqi abuse claims to be litigated in U.S. federal courts.

1. Claims Statutes in U.S. Domestic Law

a. The Foreign Claims Act (FCA)

The FCA authorizes payments to inhabitants of a foreign country for personal injury, death, or damage to real or personal property attributable to the United States; damage to real property incident to its use or occupation by U.S. forces; and damage or loss of property bailed to the U.S. armed services.[197] The loss must be the result of the negligent or wrongful acts or omissions of U.S. service members or civilian employees, regardless of whether the act or omission occurred in the scope of employment.[198] In addition, losses that result from the criminal acts of U.S. service members or civilians are payable under the FCA.[199] Claims that arise directly or indirectly from the combatant activities of the U.S. armed forces, however, are not payable under the FCA,[200] and claims that apparently would otherwise fall within the terms of the statute are not payable if the claim "is presented by a national . . . of a country at war or engaged in armed conflict with the United States . . . unless . . . the claimant is, and at the time of the incident was, friendly to the United States."[201] Under the current claims procedures in Iraq, all claims of detainee abuse are forwarded through Army service channels to the Department of the Army General Counsel for final adjudication and settlement determinations.[202] Finally, because the FCA does not waive the U.S.'s sovereign immunity, recourse to U.S. domestic courts is not available if a claim is denied or a claimant is unwilling to accept the amount tendered in settlement.[203]

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[196] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[197] 10 U.S.C.S. § 2734 (LEXIS 2006); U.S. DEP'T OF THE ARMY, REG. 27-20, CLAIMS ch. 10 (1 July 2003) [hereinafter AR 27-20].
[198] AR 27-20, *supra* note 197, para. 10-3a.
[199] *Id.* para. 10-4a.
[200] *Id.* para. 2-39d(10).
[201] *Id.* para. 10-4i. The determination of whether the claimant is friendly is made by the settlement authority. *Id.*
[202] Herring Interview, *supra* note 9.
[203] 10 U.S.C.S. § 2735; AR 27-20, *supra* note 197, para. 10-6f(4).

b. Federal Tort Claims Act (FTCA)

Unlike the FCA, the FTCA provides a limited waiver of United States sovereign immunity, and it provides a basis for jurisdiction in federal courts for tort claims that arise from the negligent or wrongful acts or omissions of U.S. employees, including service members, acting in the scope of their federal employment.[204] Prior to filing suit in federal court, however, the FTCA requires that a claimant exhaust his administrative remedies with the federal agency whose employee allegedly engaged in the negligent or wrongful behavior.[205] In addition, the FTCA is the exclusive remedy for damages pled in tort against either the United States or its employees acting in the scope of their federal employment ("in-scope employees").[206] If a suit is brought against an in-scope employee in his individual capacity, the Attorney General or his designee is empowered to substitute the United States for the individually named employee, procure the dismissal of the individually named defendant, and, if necessary, remove the case to federal court.[207] The FTCA, however, specifically exempts from its waiver of sovereign immunity both torts that occur outside of the United States[208] and intentional torts, including assault and battery.[209]

c. Military Claims Act (MCA)

The MCA allows the worldwide payment of claims that arise from the wrongful acts or omissions of service members or civilian employees of the military services acting in the scope of their federal employment.[210] It also allows for the payment of claims incident to the non-combatant activities of the U.S. armed services, even in the absence of negligent or wrongful acts or omissions of U.S. personnel.[211] A tort-based claim arising in a foreign country may be settled under the MCA only if the claimant is normally a resident of the United States at the time

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[204] 28 U.S.C.S §§ 2671–80 (LEXIS 2006); AR 27-20, *supra* note 197, ch. 4.
[205] 28 U.S.C. §§ 2672 (delegating settlement authority for FTCA claims to defendant agency), 2675 (administrative exhaustion requirement).
[206] *Id.* § 2679(a).
[207] *Id.* § 2679(d).
[208] *Id.* § 2680(k).
[209] *Id.* § 2680(h). This exemption would presumably cover sexual assault as well.
[210] 10 U.S.C.S. § 2733; AR 27-20, *supra* note 197, ch. 3.
[211] AR 27-20, *supra* note 197, paras. 3-2a(2), 3-3a(2).

of the incident giving rise to the claim.[212] Like the FCA, the MCA does not waive the U.S. sovereign immunity, so recourse to U.S. federal courts is not available if a claim is denied or a claimant is unwilling to accept the amount tendered in settlement.[213]

d. Article 139 of the Uniform Code of Military Justice (UCMJ)

Article 139, UCMJ, provides an administrative mechanism through which a commander may ensure restitution is paid to a claimant who has suffered property damage as the result of certain types of wrongful acts by U.S. service members.[214] Once adjudicated, the United States pays the claimant and then recoups the payment from the wrongdoer's military pay.[215] Article 139, UCMJ, is not applicable to personal injury claims, nor can it be used to compensate claimants for the deeds of service members acting in the scope of their employment.[216] Likewise, it does not apply to damages caused by the negligent acts of service members[217]

e. Claims Under Status of Forces and Other International Agreements

When an international agreement, such as a status of forces or basing agreement, contains provisions regarding the payment of claims that are authorized by 10 U.S.C. §§ 2734a or b, the United States will pay claims in accordance with those provisions of law and the terms of the international agreement.[218] Under 10 U.S.C. § 2734a, the United States agrees to pay a portion of the losses incident to the non-combat, in-scope activities of U.S. armed forces in foreign countries.[219] Under 10 U.S.C. § 2734b, the United States agrees to pay a share of the losses incident to

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[212] *Id.* para. 3-2c.
[213] *Id.* paras. 3-6d, 3-7.
[214] 10 U.S.C.S § 9393; AR 27-20, *supra* note 197, para. 9-4 (explaining that Article 139 claims may extend to claims for property willfully damaged or wrongfully taken by a service member).
[215] AR 27-20, *supra* note 197, para. 9-7.
[216] *Id.* paras. 9-5b (personal injury), 9-5c (in-scope damages).
[217] *Id.* para. 9-5a.
[218] *Id.* para. 7-1
[219] 10 U.S.C.S. § 2734a(a).

any in-scope activity of foreign armed forces causing damages in the United States.[220] The United States currently does not have such an agreement with Iraq.

2. Current Claims Statutes Do Not Reach the Problem

The above discussion demonstrates that the United States cannot address violations of its obligations under international humanitarian law involving Iraqi detainees through existing claims statutes. The FCA, seemingly the most obvious choice, is unlikely to result in a positive adjudication because of its limitations regarding unfriendly claimants and its restrictions on claims stemming from the combatant activities of the U.S. armed services. The MCA does not specifically preclude unfriendly claimants, but it precludes payment of claims outside the United States, unless it is to a claimant who ordinarily resides in the United States. Like the FCA, the MCA also excludes claims for combat-related damages. Article 139, UCMJ does not compensate claimants for property damage caused by the misconduct of civilian employees, and it excludes claims for personal injury and claims stemming from negligence or the in-scope activities of service members. The FTCA excludes claims arising outside the United States and from intentional torts. Finally, the United States does not currently have an international agreement with Iraq that calls for the payment of claims.

In addition, the claims statutes described above provide settlement procedures only for claims specifically against the United States—in other words, for acts of U.S. service members and civilian employees. Even if they could be made applicable to claims of Iraqi detainees against the United States, the statutes do not provide a method to settle claims against U.S. contractors for violations of international law. Articles 2 and 31 of the Draft Articles make it clear that the obligations of states, including reparations, attach to all internationally wrongful acts attributable to the State under international law, not just those acts specifically committed by the State or its employees.[221]

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[220] *Id.* § 2734b(a).

[221] State Responsibility Draft Articles, *supra* note 126, arts. 2, 31. The United States offered no specific comment on this article, but noted in its comment regarding the Draft's treatment of attribution that

> Draft Article 8 provides that the conduct of a person or group of persons may be attributed to the State if 'it is established that such

3. The Alien Tort Claims Act (ATCA)

Individual Iraqis can, and indeed already have, filed lawsuits in U.S. federal court under the Alien Tort Claims Act.[222] The ATCA vests U.S. federal district courts with original jurisdiction to hear tort claims by aliens for injuries sustained as the result of violations of the law of nations or a treaty of the United States. The Supreme Court's recent decision in *Sosa v. Alvarez-Machain*, however, clarified and narrowed the scope and applicability of the ATCA.[223] In *Sosa*, the U.S. Drug Enforcement Agency (DEA) directed Mr. Sosa and others to seize Mr. Alvarez-Machain in Mexico, forcibly remove him to the United States, and subsequently turn him over to the DEA to stand trial for the torture and murder of a DEA agent.[224] Upon his acquittal and release, Alvarez-Machain sued the United States under the FTCA and sued Sosa for violations of the law of nations under the ATCA.[225]

The Supreme Court recognized, *inter alia*,[226] that the law of nations is a part of U.S. common law that evolves as circumstances change.[227] It then held that district courts may look to the modern law of nations to

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> person or group of persons was in fact acting on behalf of that State.' We agree with the basic thrust of this provision that a relationship between a person and a State may exist de facto even where it is difficult to pinpoint a precise legal relationship.

U.S. 1997 Comments to Draft Articles, *supra* note 160, at Part VI.2. Accordingly, it appears that the United States accepts the proposition that it may be responsible to make reparations for conduct attributed to the United States, as well as for its own actual conduct.

[222] 28 U.S.C.S § 1350 (LEXIS 2006) ("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.").

[223] Sosa v. Alvarez-Machain, 542 U.S. 692, 710–34 (2004).

[224] *Id.* at 698

[225] *Id.* at 697–98.

[226] The Court also issued an important clarification of the FTCA in this case. Although beyond the scope of this article, it is relevant to potential lawsuits by abused detainees that the Court overturned the so-called "headquarters tort" exception to the portion of the FTCA that excluded from its waiver of sovereign immunity acts or omissions that arose in a foreign country. *Id.* at 701. This judicially created doctrine reasoned that if the wrongful act or omission occurred in the United States, this was sufficient to vest a court with jurisdiction under the FTCA, even if the injury resulted in a foreign country. *Id.* The *Sosa* Court rejected this view, holding that the Act's exemption of torts arising in a foreign country referred to the location of the injury and not the location of the act or omissions. *Id.* at 710.

[227] *Id.* at 720–21.

find underpinnings for the private causes of action anticipated under the ATCA.[228] Given the unique nature of the law of nations, however, the Court held that district courts should "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with . . . specificity."[229] The Court noted that prohibitions against torture rise to the requisite level of specificity, but, other than analyzing the nature of the violations alleged in the suit, reserved judgment on any other specific acts.[230]

The Court held that Alvarez-Machain's actual complaints, alleging violations of international prohibitions against unlawful detention and arbitrary arrest, did not yet rise to the status of binding customary international law.[231] Moreover, the Court noted that although the International Convention on Civil and Political Rights (ICCPR), an international agreement binding on the United States, bars arbitrary arrest, it is not self-executing, and without implementing domestic legislation it does not create obligations enforceable in federal courts.[232] Accordingly, the Court held that Alvarez-Machain did not have a cause of action under the ATCA.[233]

Even after *Alvarez-Machain*, though, the ATCA might provide a viable remedial mechanism for abused Iraqi detainees. The Court noted that torture rises to the requisite level of specificity to be actionable under the ATCA.[234] In addition, unlike the ICCPR, at least one court has concluded that the Geneva Conventions are self-executing in U.S. domestic law, at least with respect to those portions specifically designed to protect individuals.[235] Accordingly, violations of GCIII and GCIV could apparently serve as the basis of a claim brought under the ATCA.

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[228] *Id.* at 724–25.
[229] *Id.* at 725.
[230] *Id.* at 732.
[231] *Id.* at 733–38.
[232] *Id.* at 735.
[233] *Id.* at 738.
[234] *Id.*
[235] *See* U.S. v. Noriega, 808 F. Supp. 791, 794 (S.D. Fla. 1992), *cert. denied*, 523 U.S. 1060 (1998). *But see* Tel-Oran v. Libyan Arab Republic, 726 F.2d 774, 809 (D.C. Cir. 1984) (concurring opinion noted that Geneva Conventions are not self-executing); Hamdan v. Rumsfeld, 415 F.3d 33, 38-40 (D.C. Cir. 2005) (concluding that the Geneva Conventions are not directly actionable in federal courts). It is also significant to note, however, that in *Hamdi v. Rumsfeld*, the Supreme Court apparently rejected the Fourth Circuit's determination that the GCIII is not self-executing. Hamdi v. Rumsfeld, 542 U.S. 507, 515 (2004). While the Court did not expressly find that GCIII was self-

The ATCA, however, does not waive the United States' sovereign immunity,[236] and individual U.S. employees and service members acting in the scope of their federal employment who are sued pursuant to the ATCA retain their Westfall Act immunity.[237] The United States would, therefore, be substituted for any such individually named defendant. As a result, any suit brought directly against the United States or against a U.S. employee acting in the scope of his employment would likely be dismissed for lack of subject matter jurisdiction.[238] Those employees found not to be acting in the scope of their employment, however, would remain subject to suit as individual defendants, as would any contractor or its employees. While it is unlikely that the United States would be found liable in a domestic court setting for the actions of these individuals, such a suit opens the door to extensive third party discovery involving the United States.

Pursuit of remedies in U.S. domestic courts is undesirable for other reasons as well. Unlike standard private torts, claims based on destruction, injury, and damage caused during a time of armed conflict have meaning outside of the dispute between the victim and the wrongdoer. Recognizing that ending hostilities involves more than simply stopping the fighting, "international practice has almost invariably resorted to a method of global settlement when formally putting an end to armed conflict by treaty arrangement."[239] As Professor Dolzer explains:

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executing, it specifically applied the principles of GCIII in concluding that Hamdi could no longer be held indefinitely in detention. *Id.* at 520–22. On remand from the Supreme Court, the Fourth Circuit further remanded the case to the Eastern District of Virginia for further consideration. Hamdi v. Rumsfeld, 378 F.3d 426 (4th Cir. 2004).

[236] Industria Panificadora, S.A. v. United States, 957 F.2d 886, 886 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 908 (1992); Bieregu v. Ashcroft, 259 F. Supp. 2d 342, 354 (D. N.J. 2003).

[237] *See supra* note 39 and accompanying text.

[238] One commentator raises the interesting point that several exceptions the United States normally relies upon to counter mixed ATCA/FTCA claims might not be applicable during the occupation of Iraq. *See* Scheffer, *supra* note 70, at 857–58. Professor Scheffer suggests that application of occupation law in Iraq undermines application of the discretionary function exception. *Id.* at 858. The independent contractor exception is likewise undermined by the day-to-day supervision and control of many of the contractors by the United States, particularly in the unique circumstances presented in Iraq during the occupation. *Id.* Finally, Professor Scheffer argues that as there was no sovereign authority in Iraq other than the U.S. occupation authority, application of the foreign country exception is weakened. *Id.*

[239] Tomuschat, *supra* note 152, at 180.

> [The objective of peace treaties is to] end the hostilities, and establish the basis for durable accommodation and reconciliation, and to contribute to a new order of stability and security. These integrated goals are typically promoted by the inclusion of territorial, political, economic, financial and juridical parts, which in their entirety form the conditions under which both sides anticipate that a new order will be possible and desirable. Obviously, the various elements amount to a "package deal" in which negotiated compromises are embodied not just for their individual components, but as a whole. Indeed, peace treaties are permeated by the necessity of negotiated political compromise in order to allow adjustment and stabilization on both sides. [240]
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> . . . .

In contrast, individual suits do not offer the same broad-based restructuring of the relations of the warring parties.[241]

For example, individual jury awards based on individual proof of damages cannot holistically take into consideration the ability of a potentially war-ravaged wrongdoer to pay.[242] Perhaps more to the point here, claimants in a war-ravaged country may not realistically have access to U.S. federal courts. Moreover, the interest of the individual claimant in gaining compensation for the wrong suffered is not necessarily the same as his government's interest in creating a stable, secure post-war environment. [243]

Recourse to individual domestic litigation also ignores the fact that the duties created in international law run between states, and the obligation to make good on those violations is the requirement of the wrongdoing state.[244] While this usually will include the responsibility to

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[240] Dolzer, *supra* note 17, at 300.
[241] *Id.* at 302.
[242] Tomuschat, *supra* note 152, at 180.
[243] One commentator notes, for example, that it is conceivable that an Iraqi victim could bring a suit under the ATCA against the U.K. for abuses that occurred during the occupation, a result that would certainly be unwelcome to U.S. authorities, and perhaps to the Iraqi authorities as well. Scheffer, *supra* note 70, at 858.
[244] This is not to say that individual responsibility for wrongful acts committed during armed conflict should go unpunished. Rather, care must be taken to recall that it is

punish the actual perpetrators, it also includes the obligation to make reparations to injured States, as discussed above. Given the current state of the law, including the procedural barriers that stand in the way of a lawsuit against the United States brought by an abused Iraqi detainee, it is unlikely that such a suit would be successful. If this remains the only avenue through which such claims may be addressed, it is exceedingly unlikely that individual suits will serve to ensure that the United States meets its international law obligations.

IV. The Doctrine of Espousal

As the preceding sections show, international humanitarian law provides no direct avenue for addressing allegations of abuse of Iraqi detainees. Furthermore, U.S. domestic law solutions are inadequate to compensate abused detainees, regulate the United States' failures to meet its international law obligations, and restructure the relationship between the United States and Iraq. The answer, instead, is a treaty-based solution through which the United States and Iraq may address the contours of their post-Saddam relationship, including any claims of international humanitarian law violations by U.S. actors against Iraqi citizens.

A. Settlement of War-Related Claims

More specifically, the doctrine of espousal is a mechanism through which one government adopts, or espouses, and then settles the claims of its nationals against another government and its agents or nationals.[245] Espousal is generally incorporated into an overall treaty that sets the parameters for the parties' future relations.

The United States has used this technique to settle claims in a variety of other settings. For example, in 1951 the United States signed an agreement with France regarding settlement of claims by French POWs held by the United States during World War II.[246] According to the

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insufficient to ignore the responsibility of the state—often significantly harder to pursue domestically and internationally—and focus solely on the easier to procure punishment of an individual wrongdoer.

[245] *See* Antolok v. United States., 873 F.2d 369, 375 (D.C. Cir. 1989).

[246] Agreement between the United States of America and France, Settlement of Claims of French Prisoners of War, Feb. 2, 1952, T.I.A.S. 2951, 5 U.S.T. 622 [hereinafter U.S.-

agreement, the United States acknowledged that it had obligations to the French POWs stemming primarily from Military Payment Orders and Certificates of Credit Balances issued under the 1929 Geneva Convention on Prisoners of War.[247] The United States further agreed that after the French authorities collected claims from former prisoners, the United States and France would negotiate a settlement of the claims "to relieve the United States of all obligations arising out of claims" by "nationals of France who were formerly prisoners of war in the custody of the United States . . . ."[248] The United States would then satisfy its obligations to the French government under the terms of other agreements between the U.S. and France, including a $50 million line of credit the United States made available to France following the war, rather than through direct payment to France.[249]

France then agreed, in return for this settlement, to "assume the responsibility of satisfying" all such claims of French nationals to discharge and hold harmless the United States from further liability to the ex-POWs.[250] In other words, rather than paying the money owed directly to the ex-prisoners, the United States paid France a negotiated amount. France then agreed to espouse the claims of its citizens against the United States and settle them, holding the United States harmless.

France Agreement]. France, of course, was not actually at war with the United States during World War II. It was, however, partially occupied by Germany, and the remaining unoccupied portion was ruled by a French administration located in the town of Vichy. THE MILITARY HISTORY OF WORLD WAR II 18–28 (Barrie Pitt ed. 1986). French nationals from France itself and from its territories—especially, as the notes accompanying the Agreement state, persons from the Alsace and the Moselle regions of France—fought on the side of the Germans. Undated Note from the French Ministry of Foreign Affairs, Office of the Director of Administrative and Social Affairs Unions, to the Embassy of the United States in France, *appended to* U.S.-France Agreement, *supra*.

[247] U.S.-France Agreement, *supra* note 246, pmbl.

[248] *Id.* para. 5.

[249] *Id.* para. 6 (explaining that the United States would pay its obligations to France from

> [F]rancs accruing to the United States by the terms of any agreement between the Government of the United States and the Government of France, such as the Economic Cooperation Agreement of July 10, 1948 and the exchange of letters of December 6, 1947 between the French Minister of Finance and the Central Field Commissioner for Europe, Office of the Foreign Liquidation Commissioner, Department of State in connection with the fifty million dollar credit extended to the French Government on that date.).

[250] *Id.* para. 7.

B. Jurisdiction Stripping Provisions

The U.S.-France Agreement[251] illustrates well the concept of espousal and the manner in which settlement of individual war-related claims is incorporated into the overall arrangements for peace between two states.[252] As noted below, in other circumstances, such agreements have also included provisions that strip U.S. courts of jurisdiction to hear suits involving the espoused claims.

Following World War II, the United States assumed a UN trusteeship for the Pacific Island Trust Territories, including the Marshall Islands, the Mariana Islands, and the Caroline Islands.[253] During its trusteeship, the U. S. conducted nuclear testing on some of the islands that resulted in numerous lawsuits for property damage and personal injury against the United States and the contractors who worked on the testing.[254] In the 1960s, the Pacific Island Trust Territories became four independent states:[255] the Federated States of Micronesia, the Republic of Palau, the Commonwealth of the Northern Mariana Islands, and the Republic of the Marshall Islands.[256] These states entered into Compacts of Free Association with the United States, parts of which consisted of agreements for the settlement of claims related to nuclear testing.[257]

To the Marshall Islands, the United States agreed to make a grant of $150 million for payment and distribution under a separate agreement for settlement of the nuclear claims, the so-called "Section 177

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[251] Interestingly, this agreement was effected by an "exchange of notes" rather than by an official treaty. U.S.-France Agreement, *supra* note 246, para. 6. Some commentators object to this technique, arguing that it usurps the constitutional authority of the Senate to ratify treaties. *See* Ingrid Brunk Wuerth, *The Dangers of Deference: International Claims Settlement by the President*, 44 HARV. INT'L L.J. 1 (2003). The argument has more resonance when the agreement strips the jurisdiction of the federal courts to hear the claims with which the agreement is concerned. *See infra* notes 250–59 and accompanying text. The United States did submit the Agreements with the former Pacific Trust Territories to the Congress, discussed *infra*, which passed a statute ratifying the Compacts of Free Association and the accompanying settlement agreements. *See* Juda v. United States 13 Cl. Ct. 667, 673 (Cl. Ct. 1987). This factor was of great significance to the courts that later determined the validity of the jurisdiction stripping provisions. *Id.*

[252] *See supra* notes 242–47 and accompanying text.

[253] Antolok v. United States, 873 F.2d 369, 370 (D.C. Cir. 1989).

[254] *Id*.

[255] *Id.*

[256] *Id.*

[257] *Id.* at 371.

Agreement."[258] Article X of the Section 177 Agreement, entitled "Espousal," states that the agreement "constitutes full settlement of all the nuclear testing claims, including any then pending or later filed in any court or other judicial or administrative forum, including . . . the courts of the United States and its political subdivisions."[259] In addition, Article XI contained an indemnification provision whereby the government of the Marshall Islands agreed to hold harmless "the United States, its agents, employees, contractors, civilians, and nationals from all claims set forth in Article X and any later claims arising out of the same nuclear testing program."[260]

More importantly, Article XII of the Section 177 Agreement stated, "[a]ll claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed."[261] This language stripped U.S. courts of the jurisdiction to hear any claims of persons in the former Pacific Trust Territories for damages resulting from nuclear testing. In *Antolok v. United States*, over the objections of individual claimants who lost their right to sue, the U.S. Court of Appeals for the District of Columbia enforced the provision and dismissed all the suits encompassed by the Section 177 Agreement that were pending before it.[262] Significantly, based on the broadly inclusive language of Articles X and XI, federal courts were likewise divested of jurisdiction over claims both against contractors and agents of the United States and also claims against the United States itself.

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[258] Agreement for the Implementation of Section 177 of the Compact of Free Association, June 25, 1983, United States-Marshall Islands, *available at* http://www.nuclearclaims tribunal.com/177text.htm [hereinafter Section 177 Agreement] (author was unable to locate an official source or a hard copy of this document, and it is cited in pertinent court cases only as an annex to the parties' exhibits) ; *Antolok*, 873 F.2d at 371.

[259] Section 177 Agreement, *supra* note 258, art. X, sec. 1; *Antolok*. 873 F.2d at 373.

[260] Section 177 Agreement, *supra* note 258, art. XI; *Antolok*, 873 F.2d at 373 n.4.

[261] Section 177 Agreement, *supra* note 258, art. XII; *Antolok*, 873 F.2d at 373.

[262] *Antolok*, 873 F.2d at 385. Other courts followed suit. *Id.* at 372 n.3; *see also* People of Enewetak v. United States, 864 F.2d 134 (Fed. Cir. 1988) (dismissing similar suits brought by residents of Enewetak); People of Bikini v. United States, 859 F.2d 1482 (Fed. Cir. 1988) (dismissing similar suits brought by Bikini Islanders).

C. Espousal and Emerging States

In *Juda v. United States*, a related case with special significance for Iraqi detainee claims, nuclear testing claimants from the Bikini Atolls, a political subdivision of the Republic of the Marshall Islands, argued that the Section 177 Agreement was invalid because the government of the Marshall Islands lacked the capacity to espouse the plaintiffs' claims.[263] More specifically, the Bikini plaintiffs argued that customary international law bars a government from espousing a claim unless the claim was continually owned by nationals of the state that purports to espouse the claim from the date the claim arose until at least the date the claim was asserted.[264] The plaintiffs contended that because their claims arose prior to the existence of the government of the Marshall Islands, the government lacked authority to espouse their claims.[265]

In response, the court agreed with the plaintiffs' statement of international law, but stated that its application under the facts of the case did not "accord with the rationale for the doctrine."[266] Unfortunately, the court does not go much farther than that, except to state that questions of international law regarding the nationality of citizens of emerging states were novel and unresolved, and that in any case, the jurisdiction-stripping provisions of Article XII were not contingent on judicial determination of the validity of the espousal provisions.[267] The court then upheld the provisions of Article XII and dismissed the case.[268]

It is beyond the scope of this article to fully address the answers, if any, that have emerged in the eighteen years since *Juda* regarding nationality in the context of emerging states and its impact on espousal agreements involving claims of Iraqi detainees. Nevertheless, given the parallels between the governments of emerging states and the new Iraqi government, drafters of similar provisions in any agreement between the United States and Iraq should give significant consideration to the language of the espousal and jurisdiction-stripping provisions to ensure an outcome that can withstand any reservations a court may have in the light of the language in *Juda*. Of course, it is significant to note that courts upheld the jurisdiction-stripping arrangements, despite questions

263 Juda v. United States, 13 Cl. Ct. 667, 684 (Cl. Ct. 1987).
264 *Id.* at 685.
265 *Id.* at 686.
266 *Id.*
267 *Id.*
268 *Id.* at 690.

surrounding the capacity of the government of the Marshall Islands to espouse the claims. Unlike the Marshall Islanders, who held U.S. citizenship prior to their independence, Iraqi detainees were nationals of Iraq even before the creation of the current Iraqi government. As noted by the court in *Juda*, concerns about the ability of a new Iraqi government to espouse such claims would have to be addressed first to that new government and would have no resonance in U.S. courts.[269]

Espousal of claims of abused Iraqi detainees as part of an overall treaty between the United States and the new Iraqi government has significant advantages. First, it would settle under the same terms all potential claims involving the United States rather than leaving each claimant to face separate litigation. Indeed, negotiators should explore the possibility of including U.S. contractors directly in the settlement provisions, perhaps even requiring contribution to the settlement amounts by these contractors. In the wake of settlements involving corporations and governments stemming from World War II era claims regarding insurance payments and slave labor, such a prospect is not unprecedented.[270]

Second, as the U.S-France Agreement demonstrates, such an arrangement couches the settlement of the claims in the overall terms of peace between the parties. Finally, espousal keeps Iraqi claims out of U.S. courts. This exclusion both helps claimants and meets the requirements of the state parties and international law.

V. Conclusion

News stories virtually every day remind the reader or listener that U.S. personnel and contractors abused detainees in U.S. custody in Iraq in violation of the U.S.' international law responsibilities. International humanitarian law, however, especially the 1949 Geneva Conventions, does not provide an avenue through which victims of international law violations may directly assert their claims. Nevertheless, international law places responsibility for these violations, whether committed by the United States itself or by its agents acting under color of state authority, squarely on the U.S. government.

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[269] *Id.*
[270] *See* Dolzer, *supra* note 17, at 296 (describing and analyzing recent lawsuits for World War II era claims).

The victims' most obvious response, one that several have already made, is to file claims and lawsuits under U.S. federal law against the United States, its employees, and contractors. For numerous reasons, that response is not only unlikely to result in satisfaction for claimants and plaintiffs, but also is not in the best interests of the United States. The United States can act to prevent this result by incorporating into future agreements with Iraq espousal of claims and jurisdiction stripping provisions like those used in the settlement of nuclear testing claims with the former Pacific Trust Territories.

Although Iraq is not emerging from trust status, the parallels between Iraq and the Pacific Trust Territories are significant. As with the former Trust Territories, the United States is seeking not only to settle claims but also to re-invent its relationship with Iraq. Accordingly, settlement of claims of abuse by Iraqi detainees must be treated as one interwoven part of the two governments' efforts to move beyond the past and into a more productive, mutually beneficial future.