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TORTURE AND CONTRACT *

Laura A. Dickinson †

This symposium has raised important questions about the problem of torture and, in particular, the use of torture in the so-called “War on Terror.” In considering this problem, I would like to focus on an aspect of the issue that has only recently received popular and scholarly attention, but that is likely to have profound implications: the privatization of military functions, and specifically, the privatization of torture. Such privatization may, at first blush, seem to render it more difficult to hold human rights abusers accountable because private actors might not be deemed subject to various international human rights instruments that were initially drafted primarily with states in mind. Yet, while the extensive outsourcing of torture to private military contractors is certainly a cause for serious concern, it is my perhaps controversial claim that such outsourcing may not provide as serious an impediment to accountability as it may at first seem. Indeed, abuses by private contractors may actually be *more* readily subject to legal sanction than abuses by official governmental actors. Nevertheless, I do believe that scholars and policymakers need to look beyond simply the formal instruments of international human rights law and consider alternative modes of accountability as well, such as the use of contractual provisions and internal institutional structures. These alternative modes of accountability harness the potential of the government contracts that are the very engine of privatization to help deter and prevent torture and other abuses.

Scholars have written extensively about the phenomenon of privatization in the United States.¹ Increasingly, prisons, schools, healthcare, and

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¹ For example, some scholars have extolled the cost savings that privatization may bring, *see, e.g.*, Simon Domberger & Paul Jensen, *Contracting Out by the Public Sector: Theory, Evidence, Prospects*, 13 OXFORD REV. ECON. POL’Y 67, 72-75 (1997), while others have expressed deep misgivings, arguing that privatization threatens to erode legal and democratic accountability. *See, e.g.*, Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. (forthcoming 2005) (unpublished manuscript, on file with the author) (contending that prison privatization threatens to erode fundamental public values such as the humane treatment of inmates and the integrity of the incarceration system). Such scholars worry that, be-

welfare programs are being run by private companies, and scholars have raised concerns about the degree to which outsourcing results in reduced legal accountability for abuses committed by contractors.² Legal realist arguments notwithstanding, constitutional scrutiny is typically applied only to state actors. Thus, privatization often threatens to remove historically public functions from constitutional oversight.

In the international sphere, we likewise see an increasing turn to private contractors who are engaging in what we might think of as core governmental functions. For example, even within the military, private actors are performing more and more functions.³ In the Abu Ghraib prison in Iraq, where detainees were tortured and abused, the individuals involved in the torture included not only members of the military, but private contractors hired to do the interrogation and translation.⁴ This kind of military privatization, however, is only the tip of the iceberg. In the United States, although our government still does not contract out direct combat functions, we are increasingly turning to private actors to provide logistical support to those in combat on the battlefield as well as to aid in strategic planning and

cause private actors are usually not subject to the constitutional and administrative law norms that apply to governments, any purported efficiency gains from privatization may come at the cost of losing important public values. *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1374-76 (2003) (arguing that privatization limits the reach of constitutional norms and proposing a revival of the nondelegation doctrine as a means of applying these norms to a variety of privatized governmental activities). Finally, an emerging middle ground position embraces privatization while seeking new mechanisms for extending public values through contract, democratic participation, and other modes of accountability. *See, e.g.*, Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549 (2000) (arguing that contract can be a tool for extending public law values to a variety of settings in which the government enters into agreements with private entities to provide services); ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* 137-81 (2004) (arguing that, while privatization has helped create a "democracy deficit," new opportunities have also emerged for promoting democratic accountability through enhanced transparency and citizen participation).

² Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1508 (2001).

³ P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B3 ("More than 20,000 private contractors are working for the U.S. government in Iraq, performing a wide range of military functions.").

⁴ *Id.* ("Sixteen of the 44 incidents of abuse the Army's latest reports say happened at Abu Ghraib involved private contractors outside the domain of both the U.S. military and the U.S. government.").

tactical advice.⁵ Other states such as Sierra Leone have used private contractors to engage in direct combat,⁶ and international organizations have weighed the possibilities of using private contractors to perform peacekeeping functions.⁷ States and international organizations are also turning to private non-profit and for-profit entities to deliver all forms of foreign aid⁸ and even to undertake diplomatic tasks such as peacekeeping negotiations.⁹ Moreover, if we see the principles of the recent Supreme Court decision *Rasul v. Bush*¹⁰ applied broadly so that there is U.S. judicial review of governmental detention facilities anywhere in the world, it is not far-fetched to think that we might see an increasing turn to privately run detention facilities using private contractors for supervision and interrogation in order to avoid U.S. constitutional oversight.

Because many international human rights are framed as rights against state overreaching, the turn to private actors might seem to present a similar problem of legal accountability in the international sphere as it does domestically. For example, because torture is defined as abuse committed by *official* actors,¹¹ one might think that a “state action” problem analogous to the domestic constitutional one exists under international human rights law.

Yet, for a variety of reasons, this problem proves not to be as significant with respect to military privatization as it does in roughly analogous domestic contexts, such as prison privatization. Indeed, the same U.S. courts that would apply a narrow conception of the state action doctrine in domestic cases against contractors appear to be willing to impute

⁵ See generally P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003).

⁶ See Abraham McLaughlin, *Guns for Hire Thrive in Africa*, CHRISTIAN SCI. MONITOR, Mar. 15, 2004, at 6, available at <http://www.csmonitor.com/2004/0315/p06s03-woaf.html>.

⁷ See, e.g., SINGER, *supra* note 5, at 182-86.

⁸ See, e.g., BEYOND UN SUBCONTRACTING: TASK-SHARING WITH REGIONAL SECURITY ARRANGEMENTS AND SERVICE-PROVIDING NGOS (Thomas G. Weiss ed. 1998) [hereinafter UN SUBCONTRACTING]; Ian Smillie, *At Sea in a Sieve?: Trends and Issues in the Relationship Between Northern NGOs and Northern Governments*, in STAKEHOLDERS: GOVERNMENT-NGO PARTNERSHIPS FOR INTERNATIONAL DEVELOPMENT, at 7 (Ian Smillie & Henny Helmich eds., 1999).

⁹ See, e.g., James Larry Taulbee & Marion V. Creekmore, Jr., *NGO Mediation: The Carter Center*, in MITIGATING CONFLICT: THE ROLE OF NGOS 156 (Henry F. Carey & Oliver P. Richmond eds., 2003).

¹⁰ *Rasul v. Bush*, 542 U.S. 466 (2004).

¹¹ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention] (defining torture as only acts that are committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”).

state action in civil suits brought under the Alien Tort Claims Act¹² to redress violations of international human rights law.¹³ Moreover, acts of torture committed by private contractors might draw criminal prosecutions and civil suits under ordinary domestic law.¹⁴ Thus, avenues for legal accountability may actually be greater than are available against official governmental actors.¹⁵

Moreover, even apart from legal accountability, there are alternative modes of accountability that have significant potential in the privatization context. Using the Abu Ghraib prison abuse scandal as a case study, this essay will discuss ways in which accountability mechanisms can be contractually mandated, as well as ways in which the institutional cultures of various private contractors can be harnessed or changed to increase compliance with international legal norms, and specifically the prohibition of torture.

At Abu Ghraib, U.S. military personnel responsible for detention operations abused detainees by forcing them to strip and undergo acts of sexual humiliation, threatening them with dogs, applying electric shocks, subjecting them to mock executions, exposing them to severely cold weather, beating them, nearly suffocating them, and, in some cases, killing them.¹⁶ Private employees operating under contract with the Department of the Interior as interrogators and translators participated in the abuse alongside uniformed military personnel and reportedly directed some of the activities.¹⁷ Such acts clearly violated multiple norms embodied in both international and domestic law, and specifically the norm prohibiting torture.¹⁸

¹² 28 U.S.C. § 1350 (2000).

¹³ See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, 47 WM. & MARY L. REV. 137, 188 nn.232-33 (2005).

¹⁴ See *id.* at 188-89.

¹⁵ See *id.* at 182-89.

¹⁶ See MAJ. GEN. ANTONIO TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, at 16-17 [hereinafter TAGUBA REPORT]; FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 13 (2004); U.S. DEP'T OF THE ARMY, INSPECTOR GEN., DETAINEE OPERATIONS INSPECTION at 19-20 (2004); LT. GEN. ANTHONY R. JONES & MAJ. GEN. GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND THE 205TH MILITARY INTELLIGENCE BRIGADE 68-95 (2004) [hereinafter FAY REPORT].

¹⁷ FAY REPORT, *supra* note 16, at 131-35; TAGUBA REPORT, *supra* note 16, at 48.

¹⁸ Under international law, the abuses could be characterized as torture; cruel, inhuman, or degrading treatment; or war crimes. See Torture Convention, *supra* note 11, at arts. 1, 16; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Civilians Convention]; Rome Statute of the International Criminal Court arts. 7(2)(a), 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute]. The acts might also constitute crimes against humanity, if the abuses were "widespread or systematic" and committed "pursuant to . . . a State or organiza-

Yet, international law scholars have not sufficiently focused on possible means of preventing and punishing such acts of privatized torture, and the domestic U.S. literature on privatization may provide a useful set of responses that has been largely overlooked. To begin with, in considering the question of accountability under international law, we need to recognize that it's not as if *state* actors are always held accountable. Indeed, international law has often been criticized as having relatively weak enforcement mechanisms. While this fact may not be cause for celebration, it does serve to remind us that we do not lose quite as much with respect to accountability when we privatize in the international sphere as we do when, for example, we privatize domestically. But more importantly, we should understand that there are forms of accountability that inhere in the privatized relationship itself. In other words, there are what might be called alternative accountability mechanisms contained in the relationship between governments (and international organizations) and private contractors.

International law scholars have not, to date, focused extensively on such alternative mechanisms. Rather, the response to the problem of privatization has usually been normative. With each wave of non-state actors—such as guerrilla movements,¹⁹ terrorists,²⁰ non-governmental organizations,²¹ and corporations²²—international law practitioners and scholars have advocated an expansion of international law norms to apply to each group. Thus, scholars and practitioners have argued either that states should (by treaty or customary international law) develop new norms that apply directly to these categories of non-state actors, or that any “state action” requirements contained in existing norms (again either in treaties or customary international law) should be interpreted expansively to apply to non-

tional policy . . .” *Id.* at art. 7. In addition, the acts alleged would likely constitute offenses under U.S. law, which directly prohibits the international crimes of torture, 18 U.S.C. § 2340 (2000), and war crimes, 18 U.S.C. § 2241 (2000), and which also criminalizes assault, murder, manslaughter, and maiming. Finally, the acts are crimes under Iraqi law. Coalition Provisional Authority Order No. 7 § 2 (June 10, 2003), available at <http://www.iraqcoalition.org/regulations/index.html#Orders> (adding prohibition on torture and cruel and inhuman treatment to Iraqi criminal code), and U.S. military law. *See, e.g.*, 10 U.S.C. § 893 (2000) (forbidding “cruelty and maltreatment”).

¹⁹ *See, e.g.*, Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29, 30-33 (1983).

²⁰ *See, e.g.*, Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 756-57 (2004).

²¹ *See, e.g.*, Math Noortmann, *Non-State Actors in International Law*, in NON-STATE ACTORS IN INTERNATIONAL RELATIONS 71-72 (Bas Arts et al. eds., 2001).

²² *See, e.g.*, Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 526-30 (2001); *see also* David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901 (2003).

state actors in a broad range of contexts. At the same time, these scholars and practitioners have tended to focus on the need for courts and tribunals—in many cases new ones—to apply and interpret these norms.

While this approach is important and useful because it results in the articulation of norms in the international sphere, ultimately it can only have a limited effect. After all, even if the proposed courts and tribunals are established and fully functioning, and even if they expand the norms of international law to apply to the broad range of privatized action, these tribunals will never have the capacity to hold more than a limited number of individuals (and groups) accountable. A corresponding focus on alternative modes of accountability is thus essential.

International law scholars and practitioners have not generally focused on these alternative modes of accountability in part because they tend to frame the issue of privatization quite broadly. Accordingly, they have usually addressed the question as one concerning the rise of “non-state actors” more generally, rather than “privatization” specifically. This is a crucial point, because it has meant that less attention has been paid to a key facet of privatization that makes it different from, say, the rise of guerrilla movements. Privatization as a specific phenomenon involves an increasing *contractual* relationship between governments (or international organizations) and private actors. And, as U.S. administrative law scholars have suggested, there may be alternative modes of accountability that inhere in the privatized relationship itself.²³ These domestic scholars have not, however, considered the privatization of foreign affairs functions. Accordingly, I have been working over the past couple of years to open a dialogue between international law scholars and domestic administrative law scholars concerning privatization and public law accountability.²⁴

So, what are some of the alternative mechanisms for holding private actors accountable in the international sphere, beyond applying expanded international law norms in international courts and tribunals? First, we could think more about the contracts themselves and the extent to which these contracts could be used as a mode of accountability. Second, we could look at the ways in which internal institutional cultures might affect the willingness and ability of private organizations to follow international law and ways we might change and affect those cultures over time to enhance accountability.

²³ See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

²⁴ See Laura A. Dickinson, *Public Law Values in a Privatized World*, 35 YALE J. INT'L L. (forthcoming 2006); Dickinson, *supra* note 13; see also *Public Values/Private Contract*, in *OUTSOURCING THE U.S.* (Jody Freeman & Martha Minow eds., Harvard Univ. Press, forthcoming 2006).

A. CONTRACT

Turning to contract, there are a number of different mechanisms that could be used to ensure that privatized activities are carried out in accordance with international norms. I have used as a case study all of the publicly available contracts that the U.S. government has negotiated in Iraq, but the principles would apply to other types of contracts negotiated by states or international organizations with contractors providing a variety of foreign affairs functions.

First, the contracts themselves could explicitly require that the contractors obey international human rights and humanitarian law. This may seem like an obvious point, but in the contracts that I have examined, none contained specific provisions requiring contractors to obey international human rights and humanitarian law.

Second, the contracts could explicitly require the contractors to receive training in international human rights and humanitarian law. Again, none of the publicly available Iraq contracts appears to require such training.

Third, provisions could be made for increased monitoring of the contracts, both by government monitors—the contract officers and ombudspersons within the government—and outside for-profit and non-profit organizations who could be empowered under the contracts to provide monitoring.

Fourth, the contracts could include more concrete performance benchmarks. This is probably particularly useful in the foreign aid context and has to some degree been implemented, particularly with regard to development aid.

Fifth, the contracts could require self-evaluation by contractors. Contractors could thus be required to assess their own performance as a way of enhancing accountability.

Sixth, contracts could include terms allowing the government (or international organization) to take over the contract by degrees and ultimately terminate the contract for failure to observe international human rights and humanitarian law norms. Many of the U.S. Iraq contracts do have provisions for complete termination, but they are very rarely exercised because government officials tend to be reluctant to impose such a severe sanction. Indeed, the contractor whose employees were implicated in the Abu Ghraib abuse not only was not terminated; its contract was actually expanded. It is important that governments (and international organizations) be encouraged to invoke termination provisions when contractors fall short. But even without full termination of the contractors, graduated government (or international organization) takeover could be a less draconian (and therefore more palatable) alternative.

Finally, the contracts could provide for enhanced whistleblower protections and third-party beneficiary suit provisions. For instance, those who receive aid or those who are subject to contractor security action might be able to make claims under the contracts for non-compliance with international human rights and humanitarian law norms.

Of course, these compliance mechanisms are necessarily only as good as the quality of the monitoring in question and, perhaps more to the point, the willingness of domestic or international actors to seek judicial enforcement at the back end if these norms are not observed. But, significantly, these contract-based mechanisms are no weaker than the existing formal transnational/international court system, and at least they have the benefit of opening up the possibility of legal enforcement regardless of whether or not there is state action and to provide the foundation for legal action in domestic, as well as international, fora.

B. INTERNAL INSTITUTIONAL ACCOUNTABILITY

Internal institutional accountability is another under-explored mode of accountability that can be used to promote the implementation of international law norms in an increasingly privatized world.

First, contracts could seek to harness the distinctive institutional cultures of various forms of contracting parties. For example, non-profit organizations, for-profit corporations, religious organizations, and governmental organizations each have specific institutional norms and cultures that make them more likely to obey certain norms and less likely to obey others. Such institutional cultures could be considered in the contracting process.

Second, professional standardization and accreditation could be encouraged. Accreditation of contractors, for example, could encourage an ethic of professionalism within the industry. Contracts and the courts could then use professional standards as benchmarks for interpreting compliance.

Finally, internal institutional sanctions could be harnessed and used more effectively. Demotion, firing, and other forms of shaming or non-legal sanctions that have social meaning within institutions could be brought to bear on individual actors to a greater degree. For example, within the military, a hierarchical organization in which rank and status are important, demotion and firing are sanctions that are very strongly felt. These kinds of sanctions could be used more effectively.

* * * * *

Of course, there may well be resistance to the proposals that I have suggested. First, one might argue that such reforms would remove some of the purported efficiency gains that privatization arguably provides. It should be noted, however, that the jury is still out on whether or not privatization does in fact result in efficiency gains. Moreover, to the extent that increased

oversight and professionalization results in less corruption and waste, these reforms might actually save money. Second, some might suggest that governments are pursuing privatization precisely to *avoid* the type of accountability mechanisms I am suggesting and would therefore never be effective monitors of contract compliance. However, governments are not monolithic entities, and it is important to develop proposals that will empower those within government bureaucracies who are interested in compliance with international norms. In addition, governments often respond to pressure from international organizations, other governments, or non-governmental organizations, and so these entities should at least consider advocating the alternative accountability mechanisms suggested in this essay. Finally, one might think that the government contractors themselves would resist the reforms. However, we should not underestimate the bargaining power that a state has when doling out such large and lucrative contracts. In addition, many private military contractors are actually *seeking* more oversight and professionalization in order to differentiate themselves from rogue outfits that are viewed as hurting the reputation of the industry as a whole.

In the end, more important than the pros and cons of the specific proposals I have mentioned is the need to consider such questions in the first place. International law scholars, advocates, and policy makers—who tend to focus on the extension of international law norms to cover private actors and the expansion of formal court-like mechanisms to hold such actors accountable—should spend at least as much time advocating for ways to use alternative accountability mechanisms that derive specifically from the fact of privatization itself.