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## The Detainee Treatment Act of 2005: Embodying U.S. Values to Eliminate Detainee Abuse by Civilian Contractors and Bounty Hunters in Afghanistan and Iraq

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# NOTES

## **The Detainee Treatment Act of 2005: Embodying U.S. Values to Eliminate Detainee Abuse by Civilian Contractors and Bounty Hunters in Afghanistan and Iraq**

### ABSTRACT

*The growth in the number of bounty hunters and civilian contractors accompanying the U.S. military into battle has swelled during the current conflicts in Afghanistan and Iraq. Civilians have been utilized in all facets of those military campaigns, including the interrogation of suspected terrorists or insurgents. Faced with intense pressure to rapidly obtain information about terrorist operations and yet having little oversight of their interrogation activities, some of these contractors and bounty hunters have been accused of abusing detainees. This Note explores the legal avenues for addressing accusations of detainee abuse by U.S. civilians in Afghanistan and Iraq and concludes that those offenses should be prosecuted in U.S. courts to ensure swift and efficient justice and protect the rights of the accused. The Author critiques several other proposed legal avenues, including international bodies, host-country justice, and civil suits in U.S. federal courts. Finally, the Note discusses the Detainee Treatment Act and argues that it provides the most comprehensive legal solution to the detainee abuse problem by promoting clear, uniform standards of interrogation, closing loopholes in existing criminal statutes, and allowing for a reasonable person defense by the accused.*

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## I. INTRODUCTION

After the collapse of the Soviet Union caused the military threat of communism to dissipate, the U.S. military underwent a quiet revolution that transformed the size and structure of future military operations. From 1989 to 2000, both the U.S. defense budget and the number of military personnel were reduced by approximately 40%.<sup>1</sup> Apart from the Gulf War in 1990-1991, which involved approximately 500,000 soldiers, the U.S. military found itself involved in small, target engagements such as those in Panama, Somalia, and Haiti.<sup>2</sup> The attacks of September 11, 2001 and the subsequent invasions of Afghanistan and Iraq, produced an immediate need for long-term engagements that required higher military expenditures and personnel.<sup>3</sup> Since 2001, the Department of Defense's base budget has

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1. Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F. L. REV. 127, 131 (2004).

2. The Unfinished War: A Decade since Desert Storm, <http://www.cnn.com/SPECIALS/2001/gulf.war/facts/gulfwar/> (last visited Oct. 1, 2006).

3. See OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005, at 87 (Department of Defense Budget), available at <http://www.whitehouse.gov/omb/budget/fy2005/pdf/budget/defense.pdf>.

increased by 35%, to a total of \$402 billion in fiscal year 2005.<sup>4</sup> To cope with the demand for more soldiers, the Pentagon began the largest reserve mobilization since the Second World War.<sup>5</sup> Even with the increased utilization of National Guard and Reserve soldiers, the overall number of military personnel remained low when compared to Cold War levels—as evidenced by the reduction in the number of active army divisions from eighteen at the end of the Cold War to ten today.<sup>6</sup>

As a result of the downsizing, the Pentagon increasingly relies on private citizens to perform many tasks in war zones. These activities include everything from supplying fuel for convoys to providing food for soldiers and personal security services for important officials.<sup>7</sup> In order to promote the capture of notorious terrorists, the U.S. military also offered bounties for Osama Bin Laden and many members of Saddam Hussein's regime, who were identified in the infamous deck of cards that gained prominence in the media during the early days of the Iraq War.<sup>8</sup> The prospect of large financial awards, coupled with a post-9/11 surge in patriotism, caused many veterans and other individuals to head to Afghanistan or Iraq in order to obtain those bounties.<sup>9</sup> This led some soldiers returning from the war zones to compare those areas to the Wild West of the American frontier.<sup>10</sup>

The characterization of the new U. S. military frontiers as the Wild West may not be too far from the truth. In both Afghanistan and Iraq, the U.S. military focuses its efforts on fighting an insurgency that has maintained its intensity since the beginning of the military conflicts. Searching for ways to reduce the insurgencies, officials settled on a strategy to ramp up detention and interrogation activity.<sup>11</sup> Due to the grueling nature of the wars in Afghanistan and Iraq and the heightened focus on information-gathering, the U.S. military has become embroiled in several detainee abuse scandals,

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4. *Id.*

5. Julian E. Barnes, *Guard Faces Phase-Out of Combat Role*, L.A. TIMES, May 8, 2006, at 1.

6. Brigadier Gen. Daniel Kaufman, Dean of Academic Bd., U.S. Military Acad. at West Point, *Where in the World is the US Army?*, MIT Securities Studies Program Seminars (Oct. 16, 2002), available at <http://web.mit.edu/SSP/fall02/fall02.html>.

7. See Douglas, *supra* note 1, at 133–34 (describing the various types of battlefield contractors).

8. See Dep't of Defense, *Personality Identification Playing Cards*, <http://www.defenselink.mil/news/Apr2003/pipc10042003.html> (last visited Oct. 1, 2006).

9. See Peter Bergen, *The Shadow Warrior*, ROLLING STONE, May 19, 2005, at 57.

10. Eric Wedeking, *Army Guardsman Completes Special Duty in Afghanistan*, DEFENDAMERICA NEWS, Feb. 10, 2003, available at <http://www.defendamerica.mil/profiles/feb2003/pr021003a.html>.

11. Scott Wilson & Sewell Chan, *As Insurgency Grew, So Did Prison Abuse*, WASH. POST, May 10, 2004, at A01. For example, the number of prisoners at Abu Ghraib rose from 5,800 to 8,000 in five months. *Id.*

most notably the incidents that occurred at Abu Ghraib prison.<sup>12</sup> Private civilians, who have been heavily involved in Afghanistan and Iraq, have also been implicated as playing key roles in the torture of detainees.<sup>13</sup>

This Note explores the legal avenues available for dealing with U.S. civilian contractors or bounty hunters who stand accused of detainee abuse. Section II traces the history of the involvement of U.S. civilians in military conflicts and introduces the problem of contractors and bounty hunters who torture. Section III examines three different approaches for addressing this newly emerging and critical legal problem. Each approach offers benefits, such as promoting international cooperation and achieving swift and efficient justice, but ultimately fails to provide a comprehensive and effective solution to the problem.

The first of the three approaches utilizes international institutions, such as the International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries (Convention Against Mercenaries) and the International Criminal Court (ICC). While this approach promises justice in a neutral international forum, the narrow language of the Convention Against Mercenaries renders it inapplicable to most torture cases, and the ICC fails to adequately protect the rights of U.S. citizens. The second approach entails turning over the accused party for trial in foreign judicial systems. This approach is best exemplified by the case of the recently convicted Jack Idema, a bounty hunter who had constructed his own private prison in Afghanistan.<sup>14</sup> Because justice can be swiftly rendered in the country where the alleged torture occurred, this method may provide more immediate resolution than international judicial institutions. Unfortunately, future detainee abuse cases that are the focus of this Note will arise in fledgling democracies such as Afghanistan, with developing legal systems ill-equipped to address the complex legal issues involved in the torture cases and protect the rights of the accused. The third approach pursues civil remedies, such as the Alien Tort Statute (ATS) and the Torture Victims Protection Act, and criminal remedies under the War Crimes Act. However, the proposed civil remedies fail to redress the wrongs since they only apply to officially sanctioned state torture while War Crimes Act prosecutions are unrealistic.

Section IV of this Note proposes a solution that addresses the problem of detainee abuse by U.S. civilians in military conflicts. Currently, the U.S. government is utilizing the Military Extraterritorial Jurisdiction Act (MEJA) and the Patriot Act to

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12. Tara McKelvey, *Torture, Inc.*, LEGAL AFF., Sept.-Oct. 2005, at 13.

13. *Id.*

14. Bergen, *supra* note 9, at 61.

prosecute a civil contractor who interrogated a detainee in Afghanistan.<sup>15</sup> The landmark case of David Passaro, a CIA contractor accused of beating a prisoner to death, is currently underway in a U.S. District Court in North Carolina.<sup>16</sup> He is the first U.S. civilian to be tried in federal court for detainee abuse in Afghanistan or Iraq.<sup>17</sup> Although Passaro's prosecution offers an important test case, the Detainee Treatment Act of 2005 offers a more comprehensive solution to the problem of civilians who abuse detainees.<sup>18</sup> The Detainee Treatment Act establishes detailed interrogation standards, applies to all prisoners regardless of their location, and allows for a reasonable defense for accused torturers.<sup>19</sup> Section V concludes by reviewing the legal approaches for addressing detainee abuse by U.S. civilians and connecting the solution to broader U.S. values.

## II. CONTRACTORS AND BOUNTY HUNTERS IN WAR ZONES

The U.S. government has employed civilians throughout its history. In the Revolutionary War, George Washington used civilian drivers to haul supplies.<sup>20</sup> The Pentagon employed contractors to transport supplies and maintain railroads during the Korean War.<sup>21</sup> In Vietnam, the United States hired civilians to provide construction, energy supplies, and technological support.<sup>22</sup>

The end of the Cold War and the dissolution of the Soviet Union provided greater opportunities for reductions in U.S. military forces and civilian involvement in non-combat positions. The Soviet Union's collapse coincided with a national consensus in favor of deficit reduction during the 1990s, as evidenced by the Presidential candidacy of Ross Perot in 1992.<sup>23</sup> Perot focused on the issue of deficit reduction and consequently had the best showing by a third-party Presidential candidate since Theodore Roosevelt.<sup>24</sup> The Department

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

16. *Id.*

17. *Id.*

18. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005).

19. *Id.* §§ 1002-04.

20. Douglas, *supra* note 1, at 130.

21. *Id.*

22. Gordon L. Campbell, U.S. Army Combined Arms Support Command, *Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend on Them*, Presentation to the Joint Services Conference on Professional Ethics (Jan. 27-28, 2000), available at <http://www.usafa.af.mil/jscope/JSCOPE00/Campbell00.html>.

23. See James Carney, *Oh Deficit, Where is Thy Sting?*, TIME ONLINE, Feb. 14, 2003, <http://www.time.com/time/nation/article/0,8599,422899,00.html>.

24. *Id.*

of Defense, which typically accounts for roughly half of all discretionary (non-entitlement) spending, offered many opportunities to help in reducing the deficit.<sup>25</sup> Unsurprisingly, the Pentagon's budget declined noticeably during the 1990s.<sup>26</sup>

The Gulf War of 1990-1991 presented the first opportunity for large-scale civilian involvement in military conflict. That involvement was driven by several trends, including the downsizing of professional soldiers, increased global instability, and a general trend towards privatization.<sup>27</sup> During the Gulf War, the U.S. military used over 9,000 contractors to expel Saddam Hussein and the Iraqi army from Kuwait.<sup>28</sup> In Bosnia, the United States employed almost 6,000 contractors, a number roughly equal to the amount of U.S. military personnel involved in the conflict.<sup>29</sup> From 1994-2002, the Pentagon paid approximately \$300 billion to private contractors.<sup>30</sup>

Building upon the increase during the 1990s, the use of private civilians greatly expanded in the conflicts in Iraq and Afghanistan. These large, expensive wars have provided ample opportunities for a wide variety of civilian involvement. In Iraq, there are between 50,000 and 100,000 contractors, about 20,000 of whom are providing security services.<sup>31</sup> Some of those services have included providing security for the Coalition Provisional Authority officials when they ran Iraq and protecting various oil and infrastructure projects throughout the nation.<sup>32</sup> Contractors are drawn to the high salaries, which can be as much as \$20,000 a month for security personnel and \$100,000 per year for blue-collar workers.<sup>33</sup> Some former Special Forces Soldiers have left their positions with the military to become civilian contractors.<sup>34</sup>

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25. See OFFICE OF MANAGEMENT AND BUDGET, FY06 BUDGET PRIORITIES, TABLE S-2, <http://www.whitehouse.gov/omb/budget/fy2006/tables.html> (last visited Oct. 21, 2006).

26. *Budget Fact and Fantasy*, AIR FORCE MAG., Oct. 2000, available at [http://www.afa.org/magazine/Oct2000/1000budget\\_print.html](http://www.afa.org/magazine/Oct2000/1000budget_print.html). The Pentagon's budget declined from approximately \$345 billion in 1991 to \$277 billion by 1998. *Id.*

27. P. W. Singer, *Outsourcing War*, FOREIGN AFF., Mar.-Apr. 2005, at 119-20.

28. Douglas, *supra* note 1, at 130.

29. *Id.*

30. P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 522 (2004).

31. Tom Regan, *US Troops, Security Contractors Increasingly At Odds in Iraq*, CHRISTIAN SCI. MONITOR ONLINE, June 13, 2005, <http://www.csmonitor.com/2005/0613/dailyUpdate.html>.

32. Ellen L. Frye, Note, *Private Military Firms in the New World Order: How Redefining "Mercenary" Can Tame the Dogs of War*, 73 FORDHAM L. REV. 2607, 2610 (2005).

33. Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 515 (2005).

34. *Id.*

The government sees several advantages to using contractors instead of military personnel. First, using civilians allows the Pentagon to focus on its "core competency," which is fighting military battles.<sup>35</sup> Second, by staffing contractors, the military can reduce recruiting efforts and focus more resources toward the retention of current servicemen.<sup>36</sup> This is especially important given the recent recruiting problem faced by the Army.<sup>37</sup> The recruiting problem is exemplified by a Pentagon policy which offers citizenship to non-citizen soldiers after one year of military service.<sup>38</sup> This policy has led to an estimated 30,000 non-citizens currently serving in the U.S. military.<sup>39</sup> Finally, there are some political benefits of using private civilians in conflicts. The deaths of private military contractors are not included among official estimates of U.S. war casualties, which given the political sensitivity of combat casualties, can serve to artificially lower the actual number of U.S. deaths in foreign wars.<sup>40</sup>

The U.S. government has also created huge financial incentives for bounty hunters in Afghanistan and Iraq. Shortly after 9/11, the United States offered a \$25 million bounty for the capture of Osama Bin Laden and considered raising that amount to \$50 million.<sup>41</sup> Some commentators have even suggested offering up to \$1 billion for the capture of the elusive terrorist mastermind.<sup>42</sup> In Iraq, the U.S. government paid \$30 million for information that led to the deaths of Saddam Hussein's two sons, Uday and Qusay.<sup>43</sup> In addition, the government has offered to pay the \$25 million bounty for the information that led to the death of Abu Musab al-Zarqawi, the leader of al-Qaeda in Iraq, although no one has yet been found eligible.<sup>44</sup> Altogether, the United States has paid more than \$60 million through its Rewards for Justice program that compensates informants or bounty hunters.<sup>45</sup> Former hostages in Iraq have even delved into the shadowy world of bounty hunting, with one former

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35. Douglas, *supra* note 1, at 131.

36. *Id.* at 132.

37. *Army Has Plan to Boost Signups*, Oct. 11, 2005, <http://www.military.com/NewsContent/0,13319,78436,00.html?ESRC=army.nl>. The Army announced a recruiting shortfall of almost 7,000 for the last fiscal year, the first shortfall since 1999. *Id.*

38. U.S. Citizenship & Immigr. Servs., Naturalization Information for Military Personnel, <http://www.uscis.gov/graphics/services/natz/MilitaryBrochurev7.htm> (last visited Oct. 2, 2006).

39. Frye, *supra* note 32, at 2618.

40. Regan, *supra* note 31.

41. Tim McGirk, *A New Osama Push*, TIME, Jan. 31, 2005, at 17.

42. James D. Miller, *A Billion for Bin Laden*, TCS DAILY, Aug. 9, 2004, <http://www.techcentralstation.com/080904D.html>.

43. *US Puts \$13 m on Bomber's Head*, THE AUSTRALIAN, Oct. 8, 2005, at 13.

44. *US: Nobody Yet Identified for Big Zarqawi Bounty*, [http://www.boston.com/news/world/middleeast/articles/2006/06/08/us\\_nobody\\_yet\\_identified\\_for\\_big\\_zarqawi\\_bounty/](http://www.boston.com/news/world/middleeast/articles/2006/06/08/us_nobody_yet_identified_for_big_zarqawi_bounty/) (last visited Oct. 2, 2006).

45. *Id.*



hostage offering money to anyone willing to track down and “eliminate” his former captors.<sup>46</sup> This atmosphere of privatized combat and police operations has led unscrupulous individuals to engage in questionable practices, including torturing victims in a quest to achieve the goal of tracking down and finding terrorists.

The abuse of suspected terrorists or enemy combatants has developed into a prominent scandal, which has damaged the international reputation of the United States and perhaps fueled the motivations of Islamic radicals battling the U.S. military in Afghanistan and Iraq.<sup>47</sup> The most well known incidents of abuse occurred at the infamous Abu Ghraib prison in Iraq. Abuses at that prison included the raping, beating, and choking of several prisoners.<sup>48</sup> Several military personnel have been convicted for their roles in that scandal—most notably Lynndie England, the private who was famously photographed holding a detainee by a leash.<sup>49</sup>

Given the large number of civilian contractors working with the military in Afghanistan and Iraq, as well as the smaller number of roving bounty hunters in both countries, it was perhaps inevitable that U.S. civilians would become embroiled in the torture scandal. A report of abuses at Abu Ghraib prison by Major General George R. Fay and Lieutenant General Anthony R. Jones disclosed that sixteen of the forty-four instances of abuse involved private contractors.<sup>50</sup> However, none of the contractors implicated in the report have been charged with any crime.<sup>51</sup> Many contractors lacked adequate training, with the Fay-Jones report finding that 35% of contract interrogators “lacked formal military training as interrogators.”<sup>52</sup> The report also concluded that the military “had no training to fall back on in the management, control, and discipline of these personnel.”<sup>53</sup>

The vexing question remains how best the United States and the rest of the world can deal with the growing problem of detainee abuse by U.S. civilians in war zones. The goals of a legal solution to the problem should be to bring accused criminals to justice in a swift, fair and efficient manner; to protect the rights of U.S. citizens; and to

46. *Wood's Fellow Hostage Hires Bounty Hunters*, SYDNEY MORNING HERALD, June 26, 2005, available at <http://www.smh.com.au/news/world/woods-fellow-hostage-hires-bounty-hunters/2005/06/26/1119724523143.html?oneclick=true#>.

47. Wilson, *supra* note 11, at A01. Clerics such as Moqtada al-Sadr have demanded trials for those accused of torture in Iraq, and warned of reprisals if trials were not carried out. Brig. Gen. Mark Kimmitt has remarked that the torture scandal at Abu Ghraib further soured the Iraqi public on the U.S. occupation. *Id.*

48. McKelvey, *supra* note 12, at 13.

49. Josh White, *Reservist Sentenced to 3 Years for Abu Ghraib Abuse*, WASH. POST, Sept. 28, 2005, at A12.

50. P. W. Singer, *In Iraq, Outsourced Abusers Out of Control*, COLUMBIA STATE, Sept. 14, 2004, at A9.

51. *Id.*

52. *Id.*

53. *Id.*

improve the damaged image of the United States before the international community. Three legal avenues emerge as possible solutions: prosecuting violators under international law or before international tribunals, such as the ICC; prosecuting violators in the countries where the alleged torture occurred; and prosecuting violators in U.S. courts. Each of these methods varies widely in its applicability to U.S. civilians overseas, standards of evidence, conduct of the trial, and the protections offered to defendants.

### III. THREE APPROACHES TO PROSECUTING CIVILIANS ACCUSED OF TORTURE

#### *A. International Legal Approaches*

Several international legal avenues promise means of redressing the problem of detainee abuse by U.S. contractors or bounty hunters. In 1989, the U.N. General Assembly adopted the Convention Against Mercenaries.<sup>54</sup> The Convention Against Mercenaries fails as a viable solution because its definitions would not cover most of the acts of U.S. civilians involved in the war on terror.<sup>55</sup>

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54. Frye, *supra* note 32, at 2630.

55. The Convention Against Mercenaries defines a mercenary as follows:

1. A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) Is not a member of the armed forces of a party to the conflict; and
- (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. A mercenary is also any person who, in any other situation:

- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
  - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
  - (ii) Undermining the territorial integrity of a state;
- (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
- (c) Is neither a national nor a resident of the State against which such an act is directed;
- (d) Has not been sent by a State on official duty; and

The Convention Against Mercenaries would not apply to most U.S. civilians engaged in Afghanistan or Iraq for several reasons. First, bounty hunters and civilian contractors could successfully argue that they were not recruited to “fight in an armed conflict,” as only a few civilians have actually engaged in combat operations in Afghanistan or Iraq.<sup>56</sup> This argument eliminates the possibility of civilians fitting into the first definition of mercenary. As for the second definition of mercenary contained in that Convention, bounty hunters and contractors were not recruited to participate in a “concerted act of violence,” but rather to provide specific services to the U.S. government or to capture potential terrorists.<sup>57</sup> Civilians in Afghanistan or Iraq could argue that, regardless of their recruitment, they never aimed to “overthrow” the governments of those nations or undermine their “territorial integrity,” especially in post-Saddam Iraq and the lawless tribal areas of Afghanistan. Finally, U.S. civilians could argue that their “motivation” for participating in activities in Afghanistan and Iraq was not the promise of “significant personal gain,” but rather a sense of patriotism (as many bounty hunters have claimed)<sup>58</sup> or contractual obligations (as many private contractors would probably maintain). Since the Convention Against Mercenaries would be inapplicable to virtually all U.S. civilians in Afghanistan and Iraq, other solutions, such as the ICC, must be considered.

Many international human rights organizations have proposed using the ICC as a neutral forum for providing international justice.<sup>59</sup> Despite the noble motivations of its founders, however, the ICC is a non-starter to prosecute U.S. civilians for three reasons. First, the ICC asserts jurisdiction over U.S. citizens, even though the United States has not signed the treaty.<sup>60</sup> Second, the ICC can be potentially abused and manipulated by political opponents of U.S. policy.<sup>61</sup>

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(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. 44/34, Annex, U.N. Doc. A/RES/44/34 (Dec. 4, 1989) [hereinafter Convention Against Mercenaries].

56. *Id.* ¶ 1(a).

57. *Id.* ¶ 2(a).

58. *See id.* ¶ 2(b); Bergen, *supra* note 9, at 90.

59. *See generally* Coal. for the Int'l Crim. Ct., <http://www.iccnw.org> (last visited Oct. 1, 2006) (describing the C.I.C.C. as “the first permanent international judicial body capable of trying individuals for genocide, crimes against humanity and war crimes when national courts are unable or unwilling to do so”). The CICC contains more than 2,000 organizations that promote international support for the ICC. *Id.*

60. Rome Statute of the International Criminal Court art. 12, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

61. *See id.* at art. 17 (dealing with issues of admissibility, and stating that a case will be admissible if the State is “unwilling or unable genuinely to carry out the investigation or prosecution”).

Third, the ICC fails to protect important constitutional rights guaranteed to U.S. citizens, such as the right to a jury trial.<sup>62</sup>

The Rome Statute of 1998 established the ICC.<sup>63</sup> However, the United States has not ratified the agreement.<sup>64</sup> Reasons given by administration officials for rejecting the treaty included the unchecked power of the ICC, the threat to U.S. sovereignty posed by the court, and the risk of politicized prosecutions.<sup>65</sup> The ICC grew out of the war crimes tribunals against officials in the former Yugoslavia and Rwanda.<sup>66</sup> As a result, the ICC's jurisdiction is limited mainly to crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>67</sup> Most recently, the U.N. Security Council authorized the ICC to prosecute cases related to the war in the Darfur region of Sudan.<sup>68</sup> Some groups sent Iraq-related communications to the Office of the Prosecutor of the ICC, alleging war crimes committed by United States, including targeting Iraqi civilians.<sup>69</sup> The Prosecutor ultimately rejected the allegations, but this incident exemplifies the problems with using the ICC in relation to the conflicts in Afghanistan and Iraq.<sup>70</sup>

The first problem created by the ICC is its power to obtain jurisdiction over U.S. citizens although the United States has not ratified the treaty. Under the Rome Statute, the ICC has jurisdiction over nationals of states that have ratified the ICC or nationals who committed their alleged crimes in states that have ratified the ICC.<sup>71</sup> Currently, the list of parties to the ICC has reached one hundred nations, including Afghanistan (but not Iraq).<sup>72</sup> Therefore, the ICC

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62. *Id.* at art. 67.

63. *Id.* at art. 1.

64. Jeffrey S. Dietz, Comment, *Protecting the Protectors: Can the United States Successfully Exempt U.S. Persons From the International Criminal Court with U.S. Article 98 Agreements?*, 27 HOUS. J. INT'L L. 137, 147 (2004).

65. Marc Grossman, Under Sec'y for Political Affairs, U.S. Dep't of State, Remarks to the Center for Strategic and International Studies (May 6, 2002).

66. Coal. for the Int'l Crim. Ct., A Timeline of the Establishment and Work of the International Criminal Court, [http://www.iccnw.org/documents/CICCFS\\_Timeline\\_current.pdf](http://www.iccnw.org/documents/CICCFS_Timeline_current.pdf) (last visited Oct. 1, 2006).

67. Dietz, *supra* note 64, at 150.

68. Juan Forero, *Bush's Aid Cuts on Court Issue Roil Neighbors*, N.Y. TIMES, Aug. 19, 2005, at A1.

69. Luis Moreno-Ocampo, Chief Prosecutor of the Int'l Crim. Ct., Statement to Citizens Concerned about Loss of Life in Iraq (Feb. 9, 2006), available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf).

70. *Id.* The Prosecutor examined the evidence, including statistics on precision-guided weapons, and found that there was no "reasonable basis" to determine that an "excessive attack within the jurisdiction of the Court had been committed." *Id.*

71. Rome Statute, *supra* note 60, at art. 12.

72. See Int'l Crim. Ct. (ICC), The States Parties to the Rome Statute, <http://www.icc-cpi.int/asp/statesparties.html> (last visited Oct. 1, 2006).

could have jurisdiction over U.S. civilians accused of detainee abuse in Afghanistan.

In response to the broad jurisdiction of the ICC, Congress passed the American Servicemembers' Protection Act of 2002, which among other things, prohibits military assistance to states that participate in the ICC and prohibits cooperation with the ICC.<sup>73</sup> The President can lift those restrictions on a foreign state if that state enters into an Article 98 agreement, wherein the foreign state agrees to prevent the ICC from exercising jurisdiction over U.S. citizens.<sup>74</sup>

Two types of Article 98 agreements enable the United States to skirt the ICC's jurisdiction. The first type of agreement requires either the United States or the foreign state to gain the consent of the other before sending the other state's citizens to the ICC.<sup>75</sup> Since the United States has no intention of participating in the ICC, this effectively takes the ICC option off the table.<sup>76</sup> The second type of ICC agreement provides only immunity for U.S. citizens and is used less frequently.<sup>77</sup> The United States has entered into approximately one hundred Article 98 agreements and will continue to use these agreements in order to limit the jurisdiction of the ICC.<sup>78</sup> For example, in September 2002, the United States entered into a key Article 98 agreement with the government of Afghanistan.<sup>79</sup>

The second problem with the ICC is the potential for abuse by opponents of U.S. foreign policy. Under its guidelines, the ICC cannot seek to prosecute an individual who is being investigated by a state.<sup>80</sup> However, if the United States conducts a thorough investigation of an alleged case of detainee abuse and decides not to prosecute the accused individual, the ICC can still take the case if it determines that the decision not to prosecute resulted from the "unwillingness" or "inability" of the United States to prosecute the case.<sup>81</sup> This vague language can create the potential for politically motivated prosecution by countries or individuals. Human-rights expert Richard Dicker of Human Rights Watch contends that some countries or politicians may want to manipulate the ICC and employ it "as a political battering ram" to undermine the policies of foreign heads of state.<sup>82</sup>

73. Dietz, *supra* note 64, at 147.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Forero, *supra* note 68, at A1.

79. Agreement Between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America Regarding the Surrender of Persons to the International Criminal Court, U.S.-Afg., Sept. 20, 2002, available at <http://foia.state.gov/documents/IntAgreements/0000B947.pdf>.

80. Dietz, *supra* note 64, at 150.

81. Rome Statute, *supra* note 60, at art. 17.

82. Forero, *supra* note 68, at A1.

One State Department official has noted that “[t]he exposure faced by the United States goes well beyond people on active duty and it includes decision-makers in our government.”<sup>83</sup> This prediction came true shortly after the U.S. invasion of Iraq in 2003, when an anti-war Belgian legislator filed a suit at the ICC against General Tommy Franks, the commander of U.S. forces in Iraq, alleging war crimes.<sup>84</sup>

Finally, the ICC does not provide the same constitutional protections as U.S. courts. The Sixth Amendment to the Constitution provides a right to a jury trial in all criminal prosecutions.<sup>85</sup> In contrast, the ICC is composed of eighteen judges from states that have ratified the agreement.<sup>86</sup> Three of the judges in the Trial Division then conduct the trial.<sup>87</sup> Thus, it is entirely possible (although not probable) that a U.S. civilian could be tried and sentenced by a panel of judges from such bastions of human rights as Sierra Leone, Venezuela, and Cambodia—to name three countries that have ratified the ICC.<sup>88</sup>

Because of the ICC’s ability to obtain jurisdiction over U.S. citizens absent the consent of the U.S. government, the potential for political manipulation of the court, and the lack of constitutional protections the court would provide U.S. citizens, the ICC is not a feasible solution to address the problem of detainee abuse by U.S. civilians in combat zones.

### B. Host Country Justice

Another alternative that may seem to hold promise, but is ultimately impractical, is granting jurisdiction over such cases to the host countries in which the alleged offenses occur. However, the judicial systems in these countries often produce chaotic trials that would fail to meet even minimal standards of justice.

The strange case of Jack Idema, an intriguing bounty hunter, exemplifies the dangers of host country justice with its dramatic resolution in a tense Afghanistan courtroom. Jack Idema, a former Special Forces soldier, was convicted of abuse by an Afghan judge.<sup>89</sup> A native New Yorker, Idema headed to Afghanistan after the 9/11 attacks to hunt for Bin Laden.<sup>90</sup> Idema was a colorful character with a checkered past. Idema served in the Army’s Special Forces and trained foreign militaries, but he was also convicted of wire fraud

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83. *Id.*

84. Dietz, *supra* note 64, at 146.

85. U.S. CONST. amend. VI.

86. Rome Statute, *supra* note 60, at art. 36.

87. *Id.* at art. 39.

88. *See* The States Parties to the Rome Statute, *supra* note 72.

89. Bergen, *supra* note 9, at 61.

90. *Id.* at 57.

during the mid-1990s.<sup>91</sup> In addition, Idema once sued DreamWorks for \$130 million, audaciously claiming that DreamWorks' film *The Peacemaker*, which starred George Clooney as a U.S. soldier who broke up a Russian nuclear smuggling ring, based its plot on Idema's life experiences without first receiving his permission.<sup>92</sup>

Upon traveling to Afghanistan, Idema quickly continued his penchant for bravado and publicity seeking, striking up relationships with journalists in Kabul.<sup>93</sup> In one instance Idema provided videotapes to CBS News showing Islamic rebels performing military training, tapes that were broadcast on 60 Minutes II in January 2002.<sup>94</sup> Along with Brent Bennett, a former soldier in the 82nd Airborne; Ed Caraballo, a cameraman who worked with ABC News; and several Afghani assistants and translators, Idema formed a paramilitary operation he called Task Force Saber 7 and began tracking down terrorists such as Osama Bin Laden, Mullah Omar, and other Taliban members.<sup>95</sup>

On July 5, 2004, Afghani police raided a private prison operated by Idema and his associates.<sup>96</sup> Inside, they discovered three men hanging upside down and several who had been beaten in another room.<sup>97</sup> Included among the three men was Afghan Supreme Court Judge Maulawi Siddiqullah.<sup>98</sup> Afghani police arrested Idema and the other members of Task Force 7, and a trial began shortly thereafter—a trial that showcased the perils and pitfalls of justice in a foreign land with an underdeveloped judicial system.<sup>99</sup>

Idema and his co-conspirators presented a spirited defense, arguing that they were acting with the support of the U.S. government. Several pieces of evidence lent some support to that claim. First, an U.S. military spokesman admitted that the Army had detained a prisoner who had been turned over by Idema.<sup>100</sup> Second, the judge conceded that Idema had saved the life of the Afghan Education Minister.<sup>101</sup> Third, the FBI revealed that it had taken documents from Idema's house and returned them to the defense lawyers three weeks later, with several documents missing.<sup>102</sup>

91. *Id.*

92. Duncan Campbell & Kitty Logan, *The Man Who Thinks He's George Clooney: A Story of Today's Kabul*, THE GUARDIAN (London), July 9, 2004, at 1.

93. Bergen, *supra* note 9, at 58.

94. *Id.*

95. *Id.* at 59.

96. Jonathan Turley, *Privatization of the Military Gives 'Contractors' Free Rein*, J. GAZETTE (Fort Wayne, Ind.), Sept. 22, 2004, at 9.

97. *Id.*

98. Bergen, *supra* note 9, at 61.

99. *See id.*

100. *Id.*

101. *Id.*

102. *Id.*

Finally, Idema's lawyers played tapes of conversations between Idema and officials in the Department of Defense.<sup>103</sup>

Irregularities plagued the proceedings throughout. During the case, the presiding Afghan judge, Abdul Baset Bakhtiari, had noticeable difficulty understanding the taped conversations, which were poorly translated and hard to follow.<sup>104</sup> In addition, Judge Bakhtiari denied Idema the opportunity to cross-examine witnesses.<sup>105</sup> Despite the evidence and irregularities in the proceeding, Idema and Bennett were swiftly sentenced to a ten-year prison term, while Caraballo received an eight-year sentence.<sup>106</sup> Caraballo's lawyer summed up the case: "The United States knew about operatives catching terrorists they didn't want the world to know about. The easiest way to deal with them was to put them before a kangaroo court and leave them to rot in an Afghan prison."<sup>107</sup> An appeals court later reduced Idema's sentence to five years, Bennett's sentence to three years, and Caraballo's sentence to two years.<sup>108</sup> In December 2004, several of Idema's fellow prisoners at Pul-e-Charki prison attempted to kill the three prisoners in a surprise attack, but prison guards ultimately repelled the attack.<sup>109</sup> President Hamid Karzai released Caraballo on April 30, 2006, three months shy of his two-year sentence, but did not reduce the sentences of Idema or Bennett.<sup>110</sup> While Jack Idema's checkered past and bizarre behavior did not endear him to members of the U.S. public or the media, serious questions can be raised about the conduct of the Afghan court and the Afghan judicial system in general.

The nascent Iraqi legal system also seems disorganized and unwieldy, most visibly in the trial of Saddam Hussein. That trial has been characterized by a raucous atmosphere in which the former Iraqi dictator has yelled at the judge, thrown papers, and stormed out of the courtroom.<sup>111</sup> In addition, several judges and lawyers have been murdered during the past year.<sup>112</sup> Given the strength of the Iraqi insurgency and the negative publicity about the Abu Ghraib scandal, it is not difficult to imagine that putting a U.S. contractor on

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103. *Id.*

104. Carlotta Gall, *Mercenaries in Afghan Case Get 8 to 10 Years in Prison*, N.Y. TIMES, Sept. 16, 2004, at A12.

105. Turley, *supra* note 96, at 9.

106. Gall, *supra* note 104, at A12.

107. Nick Meo, *Pentagon Hitman or Fantasist? Action!*, INDEP. ON SUNDAY (London), Nov. 28, 2004, at 21.

108. *3 Sentences for Torture are Reduced*, FORT WORTH STAR TELEGRAM, Apr. 1, 2005, at A29.

109. Bergen, *supra* note 9, at 63.

110. Carlotta Gall, *Karzai's Holiday Pardons Set an American Free*, N.Y. TIMES, May 1, 2006, at 1.

111. *Salvaging Saddam Hussein's Trial*, THE ECONOMIST, Feb. 16, 2006, at 12.

112. *Id.*



trial in Iraq would result in a very dangerous courtroom that could not be trusted to conduct a fair trial.

Because of the instability of the judicial systems in foreign countries such as Afghanistan and Iraq and the lack of adequate legal protections, foreign courts in those countries do not hold much promise as a suitable venue for trying U.S. civilians accused of abusing detainees.

### C. Justice in U.S. Courts

The remaining legal option for trying such accused individuals is the U.S. legal system. U.S. courts can protect the rights of the accused and provide the swift judicial administration and sensitivity that these cases require. Several civil and criminal remedies exist for addressing the problem of detainee abuse by U.S. civilians in war zones, but solutions such as the ATS and the War Crimes Act ultimately have fatal flaws that render their application to most cases very problematic.

#### 1. Civil Remedies

Judicial interpretation has rendered civil remedies to the detainee abuse problem inadequate and ineffective. The ATS, also known as the Alien Tort Claims Act (ATCA), is a law that has been on the books since the country's founding, and it establishes the potential for civil justice for alleged victims of abuse or torture.<sup>113</sup> The ATS states, "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."<sup>114</sup> The law has been infrequently invoked throughout U.S. history but has come under intense scrutiny recently, especially after a 1980 decision that interpreted the phrase "the law of nations" contained in the ATS.<sup>115</sup> In that case, *Filartiga v. Pena-Irala*, the plaintiff sued the defendant, the Inspector General of Police in Paraguay, for torturing his son.<sup>116</sup> The plaintiff sued under the ATS, and the Second Circuit Court of Appeals held that the defendant had violated the law of nations because "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."<sup>117</sup> Since that seminal

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113. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (established by First Congress in the Judiciary Act of 1789).

114. 28 U.S.C.A. § 1350 (2005).

115. Mark W. Bina, Comment, *Private Military Contractor Liability and Accountability After Abu Ghraib*, 38 J. MARSHALL L. REV. 1237, 1253-54 (2005).

116. *Filartiga*, 630 F.2d at 878.

117. *Id.* at 880.

case, there has been considerable disagreement among the Courts of Appeals over whether the ATS reaches torture committed by private actors.<sup>118</sup>

The Second Circuit, in *Kadic v. Karadzic*, addressed the issue of whether the ATS applies to private actors as well as state officials.<sup>119</sup> In that case, victims of the Bosnian genocide sued the President of the self-proclaimed Bosnian-Serb Republic, an unrecognized government entity, under the ATS.<sup>120</sup> Judge Newman, writing for the majority, stated that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”<sup>121</sup> The court held that those certain forms of conduct for which private actors could be liable included piracy, genocide, and war crimes, although it also held that “torture . . . when not perpetrated in the course of genocide or war crimes [is] proscribed by international law only when committed by state officials or under color of law.”<sup>122</sup> The D.C. Circuit, in one of three concurring opinions in *Tel-Oren v. Libyan Arab Republic*, declined “to read section 1350 [of the ATS] to cover torture by non-state actors, absent guidance from the Supreme Court on the statute’s usage of the term ‘law of nations.’”<sup>123</sup> This decision was later reinforced by the D.C. Circuit in *Sanchez-Espinoza v. Reagan*, where the court held that claims of torture and abduction were not actionable under the ATS, since the ATS did not apply to “private, non-state conduct.”<sup>124</sup>

The Supreme Court recently had an opportunity to weigh in on the issue in the 2004 case of *Sosa v. Alvarez-Machain* but declined to do so. In *Sosa*, a Mexican citizen, abducted to the United States from Mexico by Mexican policemen and U.S. DEA agents to stand trial for murder, sued under the ATS.<sup>125</sup> In *Sosa*, the Court held that the ATS is “a jurisdictional statute creating no new causes of action.”<sup>126</sup> The Court then noted that kidnapping “violates no norm of customary international law so well defined as to support the creation of a federal remedy.”<sup>127</sup> However, the Court also remarked in a footnote that “[a] related consideration is whether international law extends

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118. See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206–07 (D.C. Cir. 1985) (holding claims of torture and abduction aren’t actionable under the ATS when committed by private actors).

119. *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995).

120. *Id.* at 237.

121. *Id.* at 239.

122. *Id.* at 239–40, 243.

123. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring).

124. *Sanchez-Espinoza*, 770 F.2d at 206–07.

125. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 692 (2004).

126. *Id.* at 724.

127. *Id.* at 738.

the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”<sup>128</sup> The Supreme Court’s failure to address the issue directly affected a recent case involving contractors at Abu Ghraib prison in Iraq.

Shortly after the Abu Ghraib scandal surfaced in the media, Iraqi citizens who had been imprisoned there sued the Titan Corporation and CACI, two military contractors who provided interpreters and interrogators at the infamous prison.<sup>129</sup> The Iraqis claimed they had been tortured—forced to endure sleep deprivation, attacks by dogs, and other humiliating treatment.<sup>130</sup> Noting that the Supreme Court had failed to address the issue of whether the ATS covers private conduct, the District Court judge in *Ibrahim v. Titan* held that under the precedents of *Tel-Oren* and *Sanchez-Espinoza*, the allegations of torture were “not actionable under the Alien Tort Statute’s grant of jurisdiction, as a violation of the law of nations.”<sup>131</sup> Another case, *Saleh v. Titan*, began in the Southern District of California but was transferred to the Eastern District of Virginia in March 2005.<sup>132</sup> After again being transferred to the D.C. Circuit, the Judge dismissed the ATS complaint, noting that “there is no middle ground between private action and government action, at least for purposes of the Alien Tort Statute.”<sup>133</sup>

The conflicts among the Circuits coupled with the Supreme Court’s refusal to address whether the ATS can be used to sue private actors for alleged torture violations makes the ATS an unstable and inadequate legal approach to the problem. An alternative to the ATS is the Torture Victims Protection Act. Congress enacted the Torture Victim Protection Act in 1991 to comply with its U.N. obligations, specifically the Convention Against Torture.<sup>134</sup> The Act creates a civil action for torture and states, “An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual.”<sup>135</sup> Because the statute specifically requires that an alleged torturer act under “authority” of a foreign government, it would not apply to U.S. contractors or bounty hunters accused of torture. The lack of civil remedies for victims of U.S. civilians who abuse or torture detainees may disappoint alleged victims, but that

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128. *Id.* at 732 n.20.

129. *Ibrahim v. Titan*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005).

130. *Id.*

131. *Id.* at 15.

132. *Saleh v. Titan*, 361 F. Supp. 2d 1152, 1171 (S.D. Cal. 2005).

133. *Saleh v. Titan*, 436 F. Supp. 2d 55, 58 (D.D.C. 2006).

134. *Bina*, *supra* note 115, at 1256.

135. Torture Victim Protection Act of 1991, Pub. L. No. 102-256(1)(a), 106 Stat. 73, 73–74 (1992).

failure does not preclude the application of U.S. criminal law to the problem.

## 2. Criminal Remedies

Federal prosecutors can use several criminal laws to prosecute U.S. civilians accused of detainee abuse. One of the most prominent laws, the War Crimes Act, seems well suited to address detainee abuse by civilians in war zones since cruel treatment and torture are war crimes.<sup>136</sup> The War Crimes Act states, “Whoever, whether inside or outside the United States, commits a war crime . . . shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.”<sup>137</sup> The Act requires that the accused war criminal be “a member of the Armed Forces of the United State or a national of the United States.”<sup>138</sup> A war crime is defined as “a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party.”<sup>139</sup>

The convention referred to in the War Crimes Act that applies to civilians who abuse foreign prisoners is commonly referred to as the Third Geneva Convention, or the Geneva Convention Relative to the Treatment of Prisoners of War.<sup>140</sup> Article Three of the Third Geneva Convention requires states to comply with the following provisions “in cases of armed conflict not of an international character” occurring within the territory of a signatory state:

(1) Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To that end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted

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136. See 18 U.S.C. § 2441(a), (c)(1) (2000); Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Geneva Convention].

137. 18 U.S.C.A. § 2441(a) (2005).

138. *Id.* at § 2441(b).

139. *Id.* at § 2441(c)(1).

140. Geneva Convention, *supra* note 136, 6 U.S.T. at 3317.

court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.<sup>141</sup>

The Bush administration has maintained that the War Crimes Act does not address any of the cases of U.S. civilians who abuse detainees since the protections of the Third Geneva Convention do not apply to members of al-Qaeda or other terrorist organizations.<sup>142</sup> The administration has stated that al-Qaeda is “an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty.”<sup>143</sup> However, administration officials decided that Taliban members could possibly be covered “because Afghanistan is a party to the Convention.”<sup>144</sup>

The Administration also believes that language in Article Four of the Third Geneva Convention shows that the Geneva Convention did not apply to suspects captured in Afghanistan or Iraq.<sup>145</sup> Under the

141. *Id.* at art. 3.

142. Article Two lays out the standards for applicability of the Convention:

In addition to the provisions which shall be implemented in peace time, the present Convention 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, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

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

*Id.* at art. 2. A list of the state parties can be found at: [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party\\_gc/\\$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf).

Note that the case of Jack Idema would be handled under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War since the alleged torture victim was a non-combatant civilian. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.

143. Press Release, Off. of the Press Sec’y, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/print/20030507-18.html>.

144. *Id.*

145. *Id.* Article Four of the Convention states that:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy :

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party

definition of prisoners of war in Article Four, the White House determined that “Taliban detainees are not entitled POW status” because they “have not effectively distinguished themselves from the civilian population of Afghanistan” and “have not conducted their operations in accordance with the laws and customs of war.”<sup>146</sup>

Despite that evidence, Article Five of the Third Geneva Convention addresses situations where it is questionable whether or not prisoners of war qualify under Article Four. That provision states that:

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>147</sup>

For several years, the United States failed to hold any so-called Article Five tribunals to determine the status of detainees. However,

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to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions :

- (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance ;
  - (c) that of carrying arms openly ;
  - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
  - (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
  - (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.
  - (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Geneva Convention, *supra* note 136, at art. 4.

146. Press Release, *supra* note 143.

147. Geneva Convention, *supra* note 136, at art. 5.

several Kuwaiti and Australian detainees, interned at the U.S. facility in Guantanamo Bay, Cuba, challenged their detention in the case of *Rasul v. Bush*.<sup>148</sup> Each detainee claimed that he had never “been a combatant against the United States or . . . engaged in any terrorist acts.”<sup>149</sup> The Supreme Court held in *Rasul* that “the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.”<sup>150</sup> As a result of that decision, the Pentagon ordered Combatant Status Review Tribunals (CSRTs) for all detainees at Guantanamo Bay.<sup>151</sup>

The Pentagon Order laid out the process by which the CSRTs would take place. The Order defined “enemy combatant” as anyone “part of or supporting Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”<sup>152</sup> The Pentagon then granted each detainee “the opportunity to contest designation as an enemy combatant” before a tribunal consisting of “three neutral commissioned officers of the U.S. Armed Forces.”<sup>153</sup> The detainee would have the right to call witnesses and introduce evidence at trial.<sup>154</sup>

After conducting the hearing, the CSRTs would “determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant.”<sup>155</sup> The standard used would be “[p]reponderance of the evidence,” but there would be a “rebuttable presumption in favor of the Government’s evidence.”<sup>156</sup> If the CSRT determined that a detainee was not an enemy combatant, the detainee could be transferred or released to his country of citizenship.<sup>157</sup> Since the order creating the CSRTs, the military has conducted 558 tribunals and found that thirty-eight detainees did not qualify as enemy combatants, and these detainees were subsequently released.<sup>158</sup>

The CSRTs were challenged by several detainees and their attorneys. Salim Ahmad Hamdan, a detainee at Guantanamo Bay, Cuba, who had been captured in Afghanistan in 2001, challenged his

148. *Rasul v. Bush*, 542 U.S. 466, 470–71 (2004).

149. *Id.* at 471–72.

150. *Id.* at 485.

151. Memorandum for the Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal, at \*1 (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

152. *Id.*

153. *Id.*

154. *Id.* at 2–3.

155. *Id.* at 3.

156. *Id.*

157. *Id.* at 3–4.

158. Kathleen T. Rehm, *38 Guantanamo Detainees to be Freed After Tribunals*, AM. FORCES PRESS SERV., Mar. 30, 2005, available at [http://www.defenselink.mil/news/Mar2005/20050330\\_368.html](http://www.defenselink.mil/news/Mar2005/20050330_368.html).

detention claiming it violated the Geneva Convention.<sup>159</sup> In *Hamdan v. Rumsfeld*, decided in November 2004, the District Court Judge, James Robertson, rejected the government's claim that Hamdan was not covered by the Geneva Convention because he "was captured, not in the course of a conflict between the United States and Afghanistan, but in the course of a 'separate' conflict with al-Qaeda."<sup>160</sup>

First, Judge Robertson relied on an amicus brief and a memorandum by the State Department to hold that "the government's attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with."<sup>161</sup> Second, the Judge held that even though a CSRT determined that Hamdan was a member of al-Qaeda, that failed to demonstrate that "a competent tribunal has determined that Hamdan is not a prisoner-of-war under the Geneva Conventions."<sup>162</sup> Even though the President had determined that all "detained al-Qaeda members [were] not prisoners-of-war under the Geneva Conventions," that does not meet the Convention's requirements since "the President is not a 'tribunal.'"<sup>163</sup>

Soon after the ruling, the government appealed the case to the D.C. Circuit Court of Appeals. That decision, filed in July 2005, held that the Geneva Convention "did not apply to al-Qaeda members" because "al-Qaeda is not a state and was not a 'High Contracting Party' to the Convention."<sup>164</sup> In addition, the court held that the CSRTs met the Geneva Convention's standard as a "competent tribunal" to determine Hamdan's status.<sup>165</sup> On November 7, 2005, the Supreme Court granted a writ of certiorari to hear the case.<sup>166</sup> Chief Justice John Roberts declined to participate in the case, since he was part of the three-judge panel that ruled on the case in the D.C. Circuit.<sup>167</sup>

The Supreme Court issued its ruling in *Hamdan* on June 29, 2006.<sup>168</sup> First, the Court tackled the issue of jurisdiction. The Court noted that subsection (e)(1) of § 1005 of the Detainee Treatment Act, signed into law on December 30, 2005, provided that "no court,

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159. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155–56 (D.D.C. 2004).

160. *Id.* at 160.

161. *Id.* at 161.

162. *Id.* at 162.

163. *Id.*

164. *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005).

165. *Id.* at 43.

166. *Hamdan v. Rumsfeld*, 126 S. Ct. 622, 623 (2005).

167. Gina Holland, *Supreme Court to Hear Tribunals Challenge*, WASH. POST, Nov. 7, 2005, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/11/07/national/w070831S82.DTL>.

168. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).



justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.”<sup>169</sup> The Court also noted that Paragraph 2 of subsection (e) of the Detainee Treatment Act “vests in the Court of Appeals for the District of Columbia Circuit the exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly designated as an enemy combatant.”<sup>170</sup> The Court recognized that § 1005(h) contained an “effective date provision” stating that “Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.”<sup>171</sup> The Government moved to dismiss *Hamdan*, maintaining that due to the aforementioned subsections, the Supreme Court lacks “jurisdiction to review the Court of Appeals’ decision below.”<sup>172</sup>

After reviewing common law and the legislative history, the Court held that it had jurisdiction over the case and denied the motion to dismiss.<sup>173</sup> Specifically, the Court noted that the Government accepted that “only paragraphs (2) and (3) of subsection (e) are expressly made applicable to pending cases.”<sup>174</sup> Since Hamdan’s action was a petition for a writ of habeas corpus and not a challenge of “any ‘final’ decision of a CSRT or military commission, his action does not fall within the scope of subsection (e)(2) or (e)(3).”<sup>175</sup>

After establishing jurisdiction, the Court delved into the issues of the case, including the applicability of Geneva Convention protections to Hamdan and other captured individuals. The Government argued that Common Article 3 of the Geneva Convention, which applies to conflicts “not of an international character occurring in the territory of one of the High Contracting Parties,” did not apply to the conflict between the United States and al-Qaeda since that conflict is “international in scope.”<sup>176</sup> However, the Court reasoned that since Article 2 applied to conflicts “between two or more High Contracting Parties,” the phrase “not of an international character” in Article 3 should be interpreted “in contradistinction to a conflict between nations.”<sup>177</sup> Thus, the conflict between the United States and al-Qaeda qualified for Article 3 protection because that Article protects “individuals associated with neither a signatory nor even a

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169. *Id.* at 2762.

170. *Id.* at 2763.

171. *Id.*

172. *Id.*

173. *Id.* at 2769.

174. *Id.* at 2764.

175. *Id.* at 2769.

176. *Id.* at 2795.

177. *Id.*

nonsignatory 'Power' who are involved in a conflict 'in the territory of a signatory.'<sup>178</sup> The Court concluded that military commissions failed to meet the standards of the Geneva Convention because they did not involve "regularly constituted" courts or provide "all the judicial guarantees which are recognized as indispensable by civilized peoples," such as giving the accused the right to be present at trial and the right to have access to the evidence in the case.<sup>179</sup>

The effect of the *Hamdan* ruling cannot yet be entirely ascertained, but the case provoked a quick response from government officials. On July 7, 2006, the Office of the Secretary of Defense sent out a memorandum ordering all Department of Defense personnel to "promptly review all relevant directives, regulations, policies, practices, and procedures under your purview to ensure that they comply with the standards of Common Article 3."<sup>180</sup> A prominent U.S. Senator has remarked that the *Hamdan* ruling "opened up a can of worms. You could have a situation if we don't bring some restraint where anybody who has done anything to an al-Qaeda suspect that's harsh could be prosecuted."<sup>181</sup> The former general counsel for the C.I.A. conjectured that interrogators would refrain from "any arguably abusive behavior" due to fear of potential War Crimes Act prosecutions.<sup>182</sup> This exact fear so concerned the Bush Administration, that then-White House Counsel Alberto Gonzales addressed the issue in a January 25, 2002 memo to the President.<sup>183</sup> Gonzales concluded that declaring the inapplicability of Geneva Convention prisoner of war status to al-Qaeda and Taliban detainees "substantially reduces the threat of domestic criminal prosecution under the War Crimes Act."<sup>184</sup> White House Counsel was especially worried about the "undefined" language of the Convention such as "inhuman treatment," and the possibility of "unwarranted charges" based on the War Crimes Act.<sup>185</sup>

The administration and Congress have pledged to work together on the issue of detainee abuse, given that legal experts agree that

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178. *Id.* at 2796.

179. *Id.* at 2796-98.

180. Off. of the Sec'y of Def., Memorandum for Secretaries of the Military Departments, Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense, July 7, 2006.

181. Michael Isikoff & Stuart Taylor, Jr., *The Gitmo Fallout; The Fight Over the Hamdan Ruling Heats Up- As Fears About Its Reach Escalate*, NEWSWEEK, July 17, 2006, at 14.

182. Neil A. Lewis & Mark Mazzetti, *Lawyers Weighing Suits Over C.I.A.'s Secret Jails*, N.Y. TIMES, July 13, 2006, at A20.

183. Michael Isikoff, *Memos Reveal War Crimes Warnings*, NEWSWEEK, May 19, 2004, available at <http://msnbc.msn.com/id/4999734>.

184. Memorandum from Alberto Gonzales to the President on Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002).

185. *Id.*

future cases of detainee abuse could be placed in the category of war crimes.<sup>186</sup> The acting Assistant Attorney General recently testified before Congress, urging it to “bring clarity and certainty to Common Article Three” of the Geneva Convention.<sup>187</sup> One Senator suggested that Congress could limit Article Three “in a way that resembled the language of the measure setting standards for the treatment of detainees” that became law last year.<sup>188</sup> In response, the Bush Administration recently submitted a draft to Congress that narrows the list of actions that could be prosecuted under the War Crimes Act.<sup>189</sup> That draft included torture as a prosecutable offense under the War Crimes Act but excluded outrages upon personal dignity and humiliating and degrading treatment.<sup>190</sup> Although no U.S. civilian has ever been prosecuted under the War Crimes Act, the Army’s Judge Advocate General believes that the proposed changes to the legislation may encourage future prosecutions by elevating the War Crimes Act “from an inspiration to an instrument.”<sup>191</sup>

Congress debated the revised War Crimes Act legislation in fall 2006, trying to resolve the difficult and vexing question of how narrowly to define interrogation techniques that may subject interrogators to War Crimes Act prosecution.<sup>192</sup> In late September, Congress approved the Military Commissions Act, which established that certain acts are prosecutable under the War Crimes Act, including torture, rape, murder, and any act intended to cause serious physical or mental pain or suffering.<sup>193</sup> The Act also gave the President wide discretion to authorize other interrogation techniques and interpret which techniques constitute grave breaches of the Geneva Convention.<sup>194</sup> President Bush signed the bill into law in October 2006, and it has already generated several legal challenges.<sup>195</sup> However, it should be noted that some experts believe it is unrealistic to expect that federal prosecutors would bring any indictments for violations of the War Crimes Act.<sup>196</sup>

186. Kate Zernike et al., *White House Prods Congress to Curb Detainee Rights of Detainees*, N.Y. TIMES, July 13, 2006, at A1.

187. *Id.*

188. *Id.*

189. R. Jeffrey Smith, *War Crimes Act Changes Would Reduce Threat of Prosecution*, WASH. POST, Aug. 9, 2006, at A1.

190. *Id.*

191. *Id.*

192. Charles Babington, *Cheney, Senators Discuss Detainees*, WASHINGTON POST, Sept. 13, 2006 at A07.

193. Kate Zernike, *Senate Passes Detainee Bill Sought by Bush*, N.Y. TIMES, Sept. 28, 2006, at A1.

194. *Id.*

195. See Rosa Brooks,  *Holding High Officials Culpable*, PITT. TRIB. REV., July 9, 2006, available at [http://www.pittsburghlive.com/x/pittsburghtrib/opinion/columnists/guests/s\\_461046.html](http://www.pittsburghlive.com/x/pittsburghtrib/opinion/columnists/guests/s_461046.html).

196. *Id.*

Until the uncertainty surrounding the War Crimes Act is resolved, prosecutors must utilize other alternatives to tackle the problem of U.S. civilians accused of torturing detainees to bring those perpetrators to justice efficiently and effectively. This Note proposes a solution that requires U.S. courts to first establish jurisdiction over the civilian accused of detainee abuse via the MEJA and the Patriot Act, and then prosecute the accused individual using an existing criminal statute such as felony assault or murder. This approach is currently being utilized in the case of David Passaro, the first civilian charged with detainee abuse in Afghanistan or Iraq.<sup>197</sup> Going forward, the United States should utilize and emphasize the Detainee Treatment Act of 2005 because it standardizes interrogation techniques, applies to all detainees regardless of location, and allows for a reasonable defense for the accused.

#### IV. MOVING FORWARD IN FUTURE CASES

##### *A. Using MEJA and the Patriot Act to Establish Jurisdiction*

The first step in criminal prosecutions of U.S. contractors or bounty hunters accused of detainee abuse is to establish jurisdiction. In 2000, Congress passed the MEJA, which gave federal courts jurisdiction over crimes committed outside the territorial boundaries of the United States.<sup>198</sup> However, the MEJA remained limited to only two groups of U.S. citizens: members of the armed forces or contractors “employed by or accompanying the Armed Forces outside of the United States.”<sup>199</sup> The statute defined individuals “employed by the Armed Forces” as were employees or contractors of the Department of Defense but did not extend to employees or contractors affiliated with other government agencies or entities.<sup>200</sup> In addition, the MEJA limited the definition of those “accompanying the Armed Forces” to dependents of service members.<sup>201</sup>

Congress addressed the shortcomings of the MEJA with the Patriot Act and an amendment to the MEJA during the 2005 legislative session. The Patriot Act expanded the “special maritime and territorial jurisdiction of the United States” to include “the premises of United States diplomatic, consular, military or other United States Government mission or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or

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197. Stockman, *supra* note 15.

198. Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole*, THE ARMY LAW., June 2005, at 41.

199. *Id.*

200. *Id.* at 42.

201. *Id.*

ancillary thereto or used for purposes of those missions or entities.”<sup>202</sup> This broad language encompasses most overseas detention facilities, giving prosecutors the necessary jurisdiction to bring detainee abuse cases.

Congress amended the MEJA to apply to contractors employed by agencies other than the Department of Defense.<sup>203</sup> The legislation now identifies a civilian as “employed by the Armed Forces” if he or she is “a contractor (including a subcontractor at any tier) of . . . any other Federal Agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.”<sup>204</sup> However, Congress failed to explain what it means to support “the mission of the Department of Defense overseas.”<sup>205</sup> Contractors working for the CIA or other government agencies could argue that they were supporting the mission of the CIA in gathering intelligence, which would be entirely independent of the “mission of the Department of Defense overseas.”<sup>206</sup> That claim remains to be made in future cases, but may prove to be specious since intelligence gathering and interrogation of suspected terrorists clearly supports the military’s mission. Granted the necessary jurisdiction, federal prosecutors are now embarking on the first case of detainee abuse by a civilian interrogator.

### B. *The Passaro Case: A Critical First Test*

The case of David Passaro is the first critical application of the most effective solution to the problem of detainee abuse by U.S. civilians in a war zone. Passaro’s case is very important to this developing problem because, as one counterterrorism and national security law expert observed, his case is one of first impression.<sup>207</sup>

David Passaro, a civilian contractor employed by the CIA in Afghanistan, was engaged in “paramilitary activities in support of the U.S. military base in Kunar province.”<sup>208</sup> In June 2003, Passaro helped to interrogate Abdul Wali, an Afghani suspected of launching rocket attacks on the U.S. base in Asadabad, Afghanistan.<sup>209</sup> Passaro allegedly kicked and beat Wali repeatedly with a flashlight during several days of interrogation, eventually causing Wali’s death.<sup>210</sup> Federal officials arrested Passaro, a former Army Ranger working at

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202. 18 U.S.C.A. § 7(9)(A) (2005).

203. Schmitt, *supra* note 198, at 43.

204. 18 U.S.C.A. § 3267(1)(A) (2005).

205. Schmitt, *supra* note 198, at 44.

206. *Id.*

207. Andrea Weigl, *Patriot Act’s Reach Questioned*, THE NEWS & OBSERVER, July 21, 2005, at B1.

208. *Id.*

209. *Id.*

210. *Id.*

Fort Bragg, North Carolina, in June 2004, and a grand jury in North Carolina indicted him on “two counts of assault with a dangerous weapon with intent to do bodily harm and two counts of assault resulting in serious bodily injury.”<sup>211</sup>

The Patriot Act gave federal prosecutors jurisdiction over Passaro since it extends their jurisdiction to crimes committed on “the premises of U.S. diplomatic, consular, military or other U.S. government missions or entities in foreign states.”<sup>212</sup> Passaro’s lawyers made several arguments that the Patriot Act did not apply to their client’s situation. First, his defense lawyers argued that the U.S. base in Afghanistan did not fit within the Patriot Act’s definition, but U.S. District Court judge Terence Boyle ruled in August 2005 that the Asadabad base qualified as “U.S. premises” because U.S. troops resided at the base and used it to support a military mission.<sup>213</sup> Alternatively, Passaro’s defense attorneys argued that the federal court had no jurisdiction over Passaro and that he should instead be “subject to the jurisdiction of the Afghan courts.”<sup>214</sup> Judge Boyle also denied that request, maintaining that anyone can be prosecuted for “alleged criminal misuse” of the authority granted by the President.<sup>215</sup>

After establishing U.S. federal court jurisdiction over Passaro, the parties delved into other important issues such as the relationship between national security and the use of classified information. Passaro’s defense lawyers gave notice to federal prosecutors that they planned to disclose government secrets when the case went to trial.<sup>216</sup> As a result, Judge Boyle ruled that every document filed in the case would be reviewed by a court security officer in order to redact classified information before the document was released to the public.<sup>217</sup> In addition, Judge Boyle ordered that a secure, soundproof room be made available for prosecutors and defense attorneys to review any and all classified documents.<sup>218</sup>

The prosecutors provided classified documents to the judge on several occasions.<sup>219</sup> However, Judge Boyle denied the defense access to the information, arguing that it is “not material to the defense, and

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211. Stockman, *supra* note 15.

212. Weigl, *supra* note 207.

213. Andrea Weigl, *Passaro’s Dismissal Try Rejected*, THE NEWS & OBSERVER, Aug. 13, 2005, at B5.

214. Weigl, *supra* note 207.

215. Weigl, *supra* note 213.

216. Andrea Weigl, *Use of Secrets at Trial Debated*, THE NEWS & OBSERVER, Sept. 21, 2005, at B1.

217. *Id.*

218. *Id.*

219. Andrea Weigl, *Passaro Denied Access to Papers*, THE NEWS & OBSERVER, Sept. 29, 2005, at B1.

that its disclosure prevents a risk to national security.”<sup>220</sup> Federal judges have the authority to determine access to classified material under the Classified Information Procedures Act.<sup>221</sup> This law, passed in 1980, allows judges to conduct a balancing test that weighs the defendant’s right to information that may help his defense against the government’s right to protect national security.<sup>222</sup>

However, Passaro and his attorneys argued that the judge made incorrect rulings and was not qualified to determine national security interests.<sup>223</sup> In an interview, Passaro stated that his attorneys had not yet received a copy of the report of the government investigation into Abdul Wali’s death.<sup>224</sup> Passaro claimed that he and his attorneys often received blank pages with stamps indicating that everything on those pages was deemed classified.<sup>225</sup> Passaro maintained, “They’re just classifying everything. They’re not classifying properly. The judge doesn’t know any better. My attorneys are having a very difficult time putting together an adequate defense due to the government’s deceptive practices.”<sup>226</sup>

As Passaro failed in many of his motions, he became increasingly frustrated during the course of the trial. In November 2005, Passaro attempted to fire his federal public defenders and replace them with a private attorney.<sup>227</sup> However, Judge Boyle ruled that the private attorney could only work as a co-counsel in the case because it would take too long for the attorney to get the appropriate security clearances and the trial had already been delayed.<sup>228</sup>

The outcome of the Passaro trial would ultimately rest with Judge Boyle’s decision on whether or not Passaro could establish a “public authority” defense.<sup>229</sup> In a public authority defense, Passaro would claim that he had the public authority granted by the government to use force during Wali’s interrogation and that Passaro cannot be prosecuted for his actions.<sup>230</sup> In February 2006, Judge Boyle agreed to let Passaro present evidence of the defense and said he would determine at trial “whether the facts in this case warrant a

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Andrea Weigl, *Passaro Says Assault Charges Political*, THE NEWS & OBSERVER, Oct. 20, 2005, at B1.

225. *Id.*

226. *Id.*

227. *Id.*

228. Andrea Weigl, *Passaro Not Allowed to Switch Lawyers*, THE NEWS & OBSERVER, Dec. 1, 2005, at B1.

229. Andrea Weigl, *Trial’s Weight Hinges on Ruling*, THE NEWS & OBSERVER, Dec. 16, 2005, at B1.

230. *Id.*

public authority defense.”<sup>231</sup> However, Judge Boyle ruled just before Passaro’s trial that Passaro could not use classified CIA memoranda and other documents since he failed to show who approved of his actions in the interrogation.<sup>232</sup>

On August 7, 2006, David Passaro’s trial began with a blow to the defense when Judge Boyle denied the defense’s request to subpoena key government officials such as former CIA Director George Tenet.<sup>233</sup> The government presented several witnesses, including military personnel and CIA agents in disguise to hide their identities, who testified that Passaro beat Wali severely.<sup>234</sup> After testimony from medical experts on the cause of Wali’s death, the government rested on Friday, August 11, 2006.<sup>235</sup>

Passaro’s attorneys presented a brief defense that focused on the cause of Wali’s death. A forensic pathologist testified that Wali did not receive a fractured pelvis or ruptured intestine and that he did not see any evidence of “extreme physical pain.”<sup>236</sup> The testimony of medical experts was crucial to the case since Wali’s relatives refused an autopsy because it violated Islamic law.<sup>237</sup> On Thursday, August 18, 2006, the jury returned its verdict, convicting Passaro of one count of felony assault and three counts of misdemeanor assault.<sup>238</sup> Passaro now faces between two and eleven and a half years in prison when he is sentenced.<sup>239</sup> After his conviction, his lawyers filed an appeal that asks a federal judge to enter a judgment of acquittal for Passaro since the verdict was not backed by sufficient evidence.<sup>240</sup>

Although some human rights officials were disappointed with the verdict, Passaro’s case may spur the Department of Justice to prosecute some of the twenty CIA agents and civilian contractors in

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231. Andrea Weigl, *Passaro Can Claim He Was Doing His Job*, THE NEWS & OBSERVER, Feb. 3, 2006, at B5.

232. *Judge: Passaro Can’t Have Classified Documents*, THE NEWS & OBSERVER, Aug. 4, 2006.

233. Andrea Weigl, *Afghan’s Deadly Beating Detailed*, THE NEWS & OBSERVER, Aug. 8, 2006, at A1.

234. Andrea Weigl, *Witness Testifies How Passaro Beat a Suspect*, THE NEWS & OBSERVER, Aug. 10, 2006; Andrea Weigl & Matthew Easley, *Agents Give Trial Air of Mystery*, THE NEWS & OBSERVER, Aug. 9, 2006.

235. Estes Thompson, *Government Rests in Ex-CIA Worker’s Case*, CBS NEWS, Aug. 12, 2006, available at <http://www.cbsnews.com/stories/2006/08/12/ap/national/printableD8JEIOC00.shtml>.

236. Andrea Weigl, *Passaro’s Defense Rests Case*, THE NEWS & OBSERVER, Aug. 16, 2006, at B5.

237. *Id.*

238. Andrea Weigl, *Passaro Convicted of Assaulting Afghan*, THE NEWS & OBSERVER, Aug. 18, 2006, at A1.

239. *Id.*

240. *CIA Contractor Retains Conviction*, WASH. POST ONLINE, Oct. 26, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/26/AR2006102601868.html>. Judge Terrence Boyle denied Passaro’s request to overturn his conviction. *Id.*



Afghanistan and Iraq accused of detainee abuse.<sup>241</sup> After the verdict, CIA Director William Hayden wrote to all CIA employees that “Passaro’s actions were unlawful, reprehensible, and neither authorized nor condoned by the Agency,” and prosecutors noted that “the verdict sent a message around the world that justice will be secured for anyone unjustly harmed in America’s wars.”<sup>242</sup>

The Passaro case, as could be reasonably expected, has illuminated some legal issues created by deficiencies in U.S. law that existed at the time of his indictment. These issues included the applicability of U.S. law to detainee abuse committed abroad and the defenses available to the accused. To comprehensively resolve the legal issues involved in detainee abuse cases and declare the firm opposition of the United States to the practice, Congress enacted the Detainee Treatment Act in late 2005, a well-crafted piece of legislation that can serve as a model for future prosecution of U.S. civilians accused of detainee abuse.<sup>243</sup>

### C. *The Detainee Treatment Act of 2005: Closing the Loopholes*

The Detainee Treatment Act of 2005 attempted to close loopholes created by existing U.S. criminal laws and demonstrate to the world that the United States intended to address the problem of detainee abuse. In 1994, Congress first enacted the Torture Statute.<sup>244</sup> The statute provides that, “Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.”<sup>245</sup> Torture is defined as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”<sup>246</sup>

In 2002, a memorandum to then-White House Counsel Alberto Gonzales from the Department of Justice Office of Legal Counsel counseled that an interrogation technique qualified as physical torture only if it was “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure,

241. *Id.*

242. *Id.*

243. *See* 18 U.S.C.A. § 2340 (2005).

244. *Id.*

245. 18 U.S.C.A. § 2340A(a) (2005).

246. 18 U.S.C.A. § 2340(1) (2005).

impairment of bodily function, or even death.”<sup>247</sup> An interrogation technique would be considered mental torture only if it caused psychological harm that lasted for “months or even years.”<sup>248</sup> This memorandum was leaked to the media in summer 2004 and was soon rejected by numerous legal scholars, causing the Department of Justice to repudiate its findings.<sup>249</sup> However, the controversy surrounding detainee abuse eventually resulted in a new law concerning the treatment of detainees, the Detainee Treatment Act of 2005.<sup>250</sup>

The Detainee Treatment Act, notably sponsored by Senator John McCain (a former prisoner of war) as an amendment to the Department of Defense Appropriations bill, contains four primary provisions.<sup>251</sup> First, the Act establishes the U.S. Army Field Manual as the standard in detainee interrogation, stating that detainees shall not be “subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.”<sup>252</sup> This has the advantage of standardizing interrogation techniques and was supported by a coalition of retired military officers in a letter to Senator McCain, who referred to the Army Field Manual as the “gold standard” of interrogation techniques.<sup>253</sup> However, the Pentagon opposed this effort, claiming that “restricting techniques to those published in the manual would make it still easier for captured terrorists to anticipate and resist interrogations.”<sup>254</sup>

The Pentagon recently edited the Army Field Manual to include specific, detailed examples of approved and prohibited interrogation techniques.<sup>255</sup> Prohibited techniques include “stripping prisoners, keeping them in stressful positions for a long time, imposing dietary

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247. Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush; Aide Says President et Guidelines for Interrogations, Not Specific Techniques*, WASH. POST, June 9, 2004, at A3.

248. *Id.*

249. John W. Dean, *The Torture Memo by Judge Jay S. Bybee that Haunted Alberto Gonzales's Confirmation Hearings*, FINDLAW'S LEGAL NEWS & COMMENTARY, Jan. 14, 2005, available at <http://writ.findlaw.com/dean/20050114.html>.

250. Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006, at A1.

251. Press Release, U.S. Senator John McCain, McCain Statement on Detainee Amendments (Oct. 5, 2005), available at [http://mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPressRelease&Content\\_id=1611](http://mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPressRelease&Content_id=1611).

252. Detainee Treatment Act of 2005, 109 Pub. L. No. 148, 119 Stat. 2680 § 1002(a) (2005).

253. Letter from Gen. Joseph Hoar et. al. to Sen. McCain, available at <http://www.globalsecurity.org/military/library/news/2005/10/051003-letter-to-sen-mccain.htm>.

254. Lawrence Di Rita, *Don't Tie Our Hands; Congress Shouldn't Set Limits on Interrogating Captured Terrorists*, USA TODAY, Aug. 5, 2005, at A12.

255. Eric Schmitt with Joel Brinkley, *New Army Rules May Snarl Talks with McCain on Detainee Issue*, N.Y. TIMES, Dec. 14, 2005, at A1.

restrictions, employing police dogs to intimidate prisoners, and using sleep deprivation as a tool to get them to talk.”<sup>256</sup> The Pentagon recently delayed the release of the updated Army Field Manual after Congress objected to “tougher techniques for unlawful combatants than for traditional prisoners of war.”<sup>257</sup> After pressure from Congress and military officials, the Pentagon decided to drop the plan for two different sets of interrogation methods and will not include a classified section in the new manual.<sup>258</sup> The Army finally released the new intelligence manual, Field Manual 2-22.3, Human Intelligence Collector Operations, on September 6, 2006, noting that the new manual was in “complete compliance with the Detainee Treatment Act of 2005.”<sup>259</sup>

Second, the Detainee Treatment Act eliminates the “color of law” requirement in the Torture Statute and applies regardless of location—which should eliminate the issue of defining what constitutes U.S. premises abroad. The text of the Act states, “No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”<sup>260</sup> The Act defines cruel, inhuman, or degrading treatment or punishment as:

[T]he cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.<sup>261</sup>

However, it should be noted that there is some debate on what constitutes “cruel, unusual, and inhumane treatment or punishment,” since courts have applied varying interpretations in criminal proceedings.<sup>262</sup>

256. *Id.*

257. Julian E. Barnes, *Army Rules Put on Hold*, L.A. TIMES, May 11, 2006, at A1.

258. Eric Schmitt, *Pentagon Rethinking Manual With Interrogation Methods*, N.Y. TIMES, June 14, 2006; see also Lolita C. Balador, *Pentagon Won't Hide Interrogation Techniques*, ABC NEWS, 2006, available at <http://www.abcnews.go.com/Politics/print?id=2072928>.

259. *Army Releases New Interrogation Manual*, ARMY NEWS SERVICE, Sept. 6, 2006, available at [http://www4.army.mil/ocpa/read.php?story\\_id\\_key=9525](http://www4.army.mil/ocpa/read.php?story_id_key=9525).

260. Detainee Treatment Act of 2005, 109 Pub. L. No. 148, 119 Stat. 2680 § 1003(a).

261. *Id.* § 1003(d).

262. LEE WOOD, OVERVIEW AND ANALYSIS OF SENATE AMENDMENT CONCERNING INTERROGATION OF DETAINEES, CRS REPORT FOR CONGRESS (2005), available at <http://fpc.state.gov/documents/organization/56860.pdf>. For example, some courts have held that handcuffing someone to a post for an extended period of time might

Third, the Detainee Treatment Act allows for a defense by U.S. Government personnel accused of torture or abuse in interrogation, including contractors. The Act states that in civil and criminal actions where government officials stand accused of crimes involving detainee interrogation, "it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful."<sup>263</sup> This is a key provision that should be acceptable to both the United States and the international community since it applies something akin to a "reasonable person" standard to detainee interrogation.

Fourth, and perhaps most controversially, the Detainee Treatment Act states that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba."<sup>264</sup> As previously discussed, however, the Supreme Court in *Hamdan* held this provision did not limit the Court's jurisdiction.<sup>265</sup>

Finally, it should be noted that President Bush signed the bill outlawing unlawful detainee treatment through a "signing statement."<sup>266</sup> The statement provides that the President will interpret the law "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch . . . which will assist in achieving the shared objective of the Congress and the President . . . of protecting the American people from future terrorist attacks."<sup>267</sup> This could allow the President to bypass the law and permit torture or abuse in such special situations as a "'ticking time bomb' scenario," but would not apply in virtually all other cases of U.S. civilians accused of abusing detainees.<sup>268</sup>

By addressing the problem of detainee abuse by U.S. civilians, the Detainee Treatment Act of 2005 can provide significant political and military benefits for the United States in the war on terror. The problem of detainee abuse has made it more difficult for key allies such as Afghan President Hamid Karzai to publicly support the United States and has eroded the support of the public for the wars in

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constitute cruel or degrading treatment, while other courts have held that holding a prisoner in solitary confinement would not constitute such treatment. *Id.* at 5.

263. Detainee Treatment Act of 2005, 109 Pub. L. No. 148, § 1004(a), 119 Stat. 2680.

264. *Id.* § 1005(e).

265. See *supra* text accompanying notes 168–75.

266. Savage, *supra* note 250.

267. President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," Dec. 30, 2005, available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

268. Savage, *supra* note 250.

Afghanistan and Iraq.<sup>269</sup> The Detainee Treatment Act, if utilized consistently and effectively, can combat that decline in support and “reassure foreign allies that have expressed unease” about the U.S. failure to observe internationally accepted human rights standards.<sup>270</sup> Finally, the Detainee Treatment Act will provide much-needed clarity to both soldiers on the battlefield and the civilians who are integral participants in the war on terrorism.<sup>271</sup>

## V. CONCLUSION

The problem of detainee abuse by U.S. civilians in Afghanistan and Iraq is vexing, complex, and still unresolved. Torture and abuse cast a pall on the valiant actions of soldiers and contractors overseas in the war on terror and sully the reputation of the United States across the world, unfairly tarring the United States as a country that disregards the rule of law. Thus, the problem must be addressed in a comprehensive and efficient manner.

This Note has argued for U.S. courts to address the matter, utilizing the Detainee Treatment Act of 2005 to close loopholes and provide much-needed clarity that has been lacking as the detainee abuse scandal has mushroomed. International legal solutions have the appearance of being global solutions but pose too many problems, including vague legal definitions susceptible to manipulation and the lack of constitutional protections. Host-country justice can often prove chaotic and inconsistent. Civil actions against bounty hunters or contractors who abuse detainees remain invalid based on current legal precedent. This leaves the Detainee Treatment Act of 2005 as the most comprehensive and effective solution to the problem of detainee abuse by civilians. The Act establishes a uniform standard for detainee interrogations, closes loopholes related to the location of the detention, and allows for a reasonable defense for the accused. In his speech on the Senate floor urging his colleagues to support the Detainee Treatment Act, Senator John McCain said:

We are Americans, and we hold ourselves to humane standards of treatment of people no matter how evil or terrible they may be. To do otherwise undermines our security, but it also undermines our greatness as a nation. We are not simply any other country. We stand for something more in the world—a moral mission, one of freedom and democracy and human rights at home and abroad. We are better than these terrorists, and we will win. The enemy we fight has no respect for human life or human rights. They don't deserve our sympathy. But this

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269. Thomas Donnelly & Vance Serchuk, *One Code to Rule Them All*, THE WKLY. STANDARD, Oct. 4, 2005.

270. Thomas E. Ricks, *U.S. Troops Will Benefit From Clarity*, WASH. POST, July 12, 2006, at A05.

271. *Id.*

isn't about who they are. This is about who we are. These are the values that distinguish us from our enemies.<sup>272</sup>

The Detainee Treatment Act embodies the cherished and deeply held values that make the United States a beacon to the world.

*Ryan P. Logan\**

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272. Press Release, *supra* note 251.

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