

FROM NUREMBERG TO BAGHDAD: HOW THE PRINCIPLES OF NUREMBERG, CREATED BY THE UNITED STATES, HAVE BEEN TURNED ON THEIR CREATOR

I. INTRODUCTION

It was Christmas Eve and a young, twenty-six-year-old “cowboy”¹ was returning home from a party. The cowboy was very drunk and not without his trusty pistol. As he stumbled along, attempting to find his way home, he was stopped by the local police and asked to hand over his pistol. Instead of handing over the gun, he turned it on the officer and began to fire wildly. Three bullets hit their mark and ended the officer’s life. The cowboy ran off into the night in an attempt to escape. He went to lay low with some friends who ferried him across the border to escape the consequences of his actions.

This sounds like the beginning of an old Western movie straight out of Hollywood. Unfortunately, this happened in modern day Iraq.² The young cowboy was a member of the highly paid private military firm, Blackwater USA.³ The police officer was an Iraqi guard who stopped the drunken Blackwater employee from entering the Iraqi Prime Minister’s compound.⁴ The friends who helped the young cowboy escape were his Blackwater superiors who spirited him across the border into Jordan.⁵ The Blackwater officials, with the help of the U.S. State Department, finally brought him home to the United States.⁶

1. U.S. military commanders used the term “cowboy” to describe the actions and behaviors of Blackwater and other private military contractors operating in Iraq. The commanders also said the Blackwater guards “have very quick trigger fingers,” and they “shoot first and ask questions later.” Memorandum from the Majority Staff to the Members of the House Committee on Oversight and Government Reform, Additional Information About Blackwater USA 6 (Oct. 1, 2007), available at <http://graphics8.nytimes.com/packages/pdf/national/20071001121609.pdf> [hereinafter Blackwater Memorandum].

2. *Id.* at 9–11.

3. The contractor was a former member of the U.S. Army’s 82nd Airborne Division who, at the time of the incident, was working security for Blackwater in Iraq. See Justine Redman & Mike Mount, *Contractor Involved in Iraq Shooting Got Job in Kuwait*, CNN, Oct. 4, 2007, <http://www.cnn.com/2007/POLITICS/10/04/blackwater.contractor/index.html>.

4. Blackwater Memorandum, *supra* note 1, at 10.

5. *Id.* at 10–11.

6. The Blackwater employee was actually detained for a short time by the International Zone Police but after testing his blood alcohol level, they determined he was too intoxicated to be interviewed. *Id.* The next day he was flown by Blackwater out of Iraq into Jordan, and eventually into the United States, “[u]nder the authority of the DOS Regional Security Officer.” *Id.* Not only was he

If this had been a movie, the locals would have rounded up a posse to ride off in hot pursuit of the “cowboy” and ensure that at least some form of justice was done. However, no posse was formed because the young contractor fell under the blanket immunity provided to military contractors operating in Iraq at the time.⁷ The only consequence the contractor faced was the termination of his contract.⁸ The reason for termination: possessing a firearm while intoxicated.⁹ Within two months he was hired by another private contractor and working in Kuwait.¹⁰

too drunk to make a statement, thereby raising the question of whether he should have been allowed to carry a weapon in that state, he was then secretly whisked out of the country under the authority of the U.S. government. *Id.* Initially, the U.S. Embassy was internally conflicted on the amount it wanted to have Blackwater pay the family of the deceased. *Id.* at 11. The first sum mentioned was \$250,000. *Id.* The Diplomatic Security Service called this a “crazy sum[]” that would cause Iraqis to “try to get killed so as to set up their family financially.” *Id.* Previous payments had only been around \$5,000 for “a guy’s car and a wound to the leg.” *Id.* The amount finally given to the grieving family was only \$15,000, which was paid by Blackwater “with the assistance of the State Department.” *Id.* In addition, the cash payment “did not prevent diplomatic tensions from surfacing as a result of the killing.” *Id.* at 12. In a memo to the United States Secretary of State, the Embassy is reported to have stated that the Iraqi government “felt strongly that justice had to be done . . .” as “Iraqis would not understand how a foreigner could kill an Iraqi and return a free man to his own country.” *Id.*

7. The contractor was not subject to Iraqi law and could not be tried by the Iraqi government. Coalition Provisional Authority Order Number 17 (Revised) (June 17, 2004), *available at* http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev__with_Annex_A.pdf [hereinafter CPA Order 17]. Under CPA Order 17, “Contractors means non-Iraqi legal entities or individuals not normally resident in Iraq, including their non-Iraqi employees and Subcontractors not normally resident in Iraq, supplying goods or services in Iraq under a Contract.” *Id.* § 1(11).

Private Security Companies means non-Iraqi legal entities or individuals not normally resident in Iraq, including their non-Iraqi employees and Subcontractors not normally resident in Iraq, that provide security services to Foreign Liaison Missions and their Personnel, Diplomatic and Consular Missions and their personnel, the MNF and its Personnel, International Consultants and other Contractors.

Id. § 1(14). Under these definitions, private military firms such as Blackwater perform a service under contract as non-Iraqi legal entities and therefore fall under the heading of contractors. CPA Order 17 grants immunity as follows: “[c]ontractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.” *Id.* § 4(3). Immunity is granted but may be waived: “Requests to waive immunity for Contractors shall be referred to the relevant Sending State in relation to the act or acts for which waiver is sought. Such a waiver, if granted, must be express and in writing to be effective.” *Id.* § 5(3). The request must be sent back to the sending state, which, in the present instance, is the United States. The United States government has been slow to grant any waivers, if it has granted any at all. *See* Blackwater Memorandum, *supra* note 1, at 1, 12 (“No charges have been brought relating to the killing of the Iraqi . . . it is unclear whether there is any serious effort to pursue a prosecution in this matter.”).

8. Blackwater Memorandum, *supra* note 1, at 10–12. Other sources report that the offending contractor was also fined, although the amount is not disclosed. In fact, the CEO of Blackwater commented: “We fired him. We fined him. But we, as a private organization, can’t do any more . . . That’s up to the Justice Department. We are not empowered to enforce U.S. law.” Redman & Mount, *supra* note 3.

9. Blackwater Memorandum, *supra* note 1, at 10.

10. Redman & Mount, *supra* note 3. The contractor was able to retain employment so quickly “[b]ecause the State Department and Blackwater kept the incident quiet and out of [his] personnel

The blanket immunity offered to the contractors was a major sticking point in the negotiations between the United States and the new Iraqi government as they attempted to establish a status of forces agreement (“SOFA”).¹¹ This agreement would effectively end the United States’ involvement in the day-to-day operations of Iraq and establish the parameters under which U.S.-led forces are punished for their crimes.¹² The standard SOFA in similar circumstances would hold U.S. servicemen and -women accountable to the U.S. Military Code of Justice for any crimes they may commit.¹³ However, private contractors, such as Blackwater employees, are not viewed as servicemen and -women, and thus, this type of SOFA would not apply to them.¹⁴ The Iraqi government has expressed a strong intent to prosecute these contractors under Iraqi law.¹⁵ The American government has struggled to provide a valid reason

records.” *Id.* In fact, the contractor’s name was not released until October of the following year. *See id.* In addition, the U.S. army even tried to recall him to active service after the incident but declined to do so only because they were informed he was overseas. *Id.*

11. Mohammed Tawfeeq, Arwa Damon & Elise Labott, *U.S. Troops May Leave by 2011, Iraqi Officials Say*, CNN, Aug. 8, 2008, <http://www.cnn.com/2008/WORLD/meast/08/07/iraq.main/index.html>. However, an argument has been put forth by the White House and Blackwater management that removing the immunity will hurt the mission in Iraq because it will cause the supply of contractors to dry up. Arwa Damon & Joe Sterling, *Contractor: Losing Immunity Would Hurt Iraq Mission*, CNN, July 31, 2008, <http://www.cnn.com/2008/WORLD/meast/07/31/iraq.contractors/index.html>. However, these arguments failed. The Iraqi government intends to force Blackwater out of the country. August Cole & Gina Chon, *Iraq Will Force Blackwater to Leave the Country*, WALL ST. J., Jan. 30, 2009, at A7, available at <http://online.wsj.com/article/SB123322324877728287.html>. Blackwater will not be issued a license from the new Iraqi government in Iraq because it “acted inappropriately.” *Id.*

12. Sam Dagher, *Iraqis Insist on Changes to Long-Delayed Security Pact with U.S.*, N.Y. TIMES, Oct. 30, 2008, at A16, available at <http://www.nytimes.com/2008/10/30/world/middleeast/30iraq.html>.

13. *See* Status-of-Forces Agreement (SOFA), <http://www.globalsecurity.org/military/facility/sofa.htm> (last visited Nov. 14, 2010). *See, e.g.*, Press Release, The White House, Joint Declaration of the United States-Afghanistan Strategic Partnership (May 23, 2005), available at <http://merln.ndu.edu/archivepdf/afghanistan/WH/20050523-2.pdf> (exemplifying an agreement that provides unfettered access for American armed forces).

14. At least one argument has been made that civilian contractors are subject to the Military Code of Justice. *See* Richard Morgan, *Professional Military Firms under International Law*, 9 CHI. J. INT’L L. 213 (2008). However, this is a strained argument that focuses on statutory language defining what parties are subject to the code of military justice. Uniform Code of Military Justice, 10 U.S.C. § 802(a)(10) (2006). The statute relied on reads: “In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.” *Id.* This passage can be construed very narrowly to include only those civilians that are side-by-side with armed forces personnel in the field. This would not include those security details that accompany State Department officials or provide other security that does not fall under the category of being “in the field.” The article describes the categories of combatants into which private contractors might fit. Morgan, *supra*, at 215.

15. Tawfeeq et al., *supra* note 11. Tensions in the Iraqi government ran so high over the agreement that a brawl broke out on the floor of the Iraqi parliament during a reading of the agreement. Campbell Robertson & Suadad Al-Salhy, *Brawl Halts Session of Iraqi Parliament*, N.Y. TIMES, Nov. 19, 2008, at A14, available at <http://www.nytimes.com/2008/11/20/world/middleeast/20iraq.html>.

for the immunity and its attempts to extend it.¹⁶ The actions of these contractors in Iraq have led to considerable erosion of America's political and moral credibility in the international realm.¹⁷

Ironically, America's actions at the end of World War II laid the groundwork for the Iraqi government's insistence to hold the contractors individually liable for crimes committed in a war zone. At the end of World War II, the American government took a leadership role in the Nuremberg trials that prosecuted individual Germans for the crimes they committed while in the midst of war.¹⁸ The ghost of Nuremberg has come back to haunt the American international negotiators who are now being held accountable to a standard their predecessors helped to thrust upon the international community over half a century ago.¹⁹ While the actions of the Blackwater contractors pale in comparison to the atrocities committed by the Nazi party in World War II, the international attitude currently standing in opposition to American negotiators in Iraq was founded on the

16. The White House has actively attempted to prevent removal of the immunity from both Iraqi law and U.S. law. The White House said it "opposes a bill that would bring private military contractors overseas under U.S. law, warning it would have 'unintended and intolerable consequences' for national security." *White House: Contractor Bill Would Have 'Intolerable' Effects*, CNN, Oct. 3, 2007, <http://www.cnn.com/2007/WORLD/meast/10/03/iraq.contractors/index.html>. The White House claimed that putting the contractors under the jurisdiction of the United States would overstretch the Federal Bureau of Investigation and create federal jurisdiction overseas, where it would be "impossible or unwise to extend it." *Id.* In opposition to Iraqi control over the contractors, the argument was raised that placing the contractors under Iraqi law would force the contractors to either demand substantially larger fees or possibly not even accept the contracts at all. Damon & Sterling, *supra* note 11. This is because "[i]t's like putting a police officer in the middle of Folsom Prison, on murderers row with five guys he put away They're not going to get a fair trial." *Id.*; see also SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, 110TH CONG., QUARTERLY AND SEMI-ANNUAL REPORT 6 (July 30, 2008) [hereinafter REPORT TO CONGRESS] ("The removal of immunity could lead to a contractor exodus, which would impose significant limitations on U.S. relief and reconstruction operations.").

17. "A senior U.S. military official has asserted that the impact of Blackwater's actions on Iraqi attitudes toward U.S. forces 'is going to hurt us badly' and 'may be worse than Abu Ghraib.'" Blackwater Memorandum, *supra* note 1, at 6.

18. Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1206 (2007).

19. Building trust and respect, the international community starts with refraining from indiscriminate killing. Violence done in the name of a ruling power, whether by that ruling power or its agents, can be dealt with in the courts. That was a novel idea at Nuremberg and was vehemently fought for by the Americans involved. It is this notion of justice that the Iraqi government now invokes and in fact trusts the United States government to execute. In the eyes of the Iraqi people, the United States is capable of bringing such justice. Haythem, a man whose son and wife were killed in a shooting instigated by Blackwater contractors, said he only seeks justice through the courts and that he trusts the U.S. and international judicial systems. Jomana Karadsheh, *Dad: Blackwater Blew Up Son's and Wife's Skulls*, CNN, Oct. 16, 2007, <http://www.cnn.com/2007/WORLD/meast/10/16/dad.blackwater/index.html>. This shows that the notions of justice for atrocities committed by those in power, or their agents, has permeated the community of Baghdad, a city that has lived under the brutal hand of tyranny for decades.

principles established by the Nuremberg tribunal. America took a public stance in favor of these principles—which included individual liability for crimes committed in a war zone²⁰—and it is upon these principles that Iraq is now demanding liability for contractors' actions.

Many question whether the United States is qualified to be a member of the international culture of human rights that it has created. The current difficulties facing America will only grow in future years unless the United States can live up to its own standards. However, in order to determine whether America can live up to this cultural expectation, certain concepts must be understood. First, what exactly is the legacy of the Nuremberg tribunal and its principles? Second, how have these principles manifested themselves in the years after the Nuremberg Trials, specifically in the Iraq war and occupation? Third, how do the new breed of private contractors and their ambiguous status in international law fit into the previous groundwork laid down over the years since the Trials? Finally, how has the immunity provided to private contractors impacted attempts at liberation? All of these issues are multifaceted and complex. While there is voluminous literature on these topics individually,²¹ this Note seeks to synthesize these notions into a cohesive whole that can shed light on the struggles in Iraq and help to pave the way for further dialogue on how best to move forward into the future.

II. THE PRINCIPLES AND LEGACY OF THE NUREMBERG TRIBUNAL

The end of World War II brought a sense of accomplishment to the free world. The oppression of Nazi Germany and its allies was at an end and the greatest threat the world had ever known was no more.²² However, the aftermath of the war brought the international community face-to-face with the atrocities committed by Hitler and his regime.²³ The international

20. "Curiously enough, little attention was paid to what was perhaps the Tribunal's most important pronouncement. I refer to the finding that individuals and not merely nations should be held responsible." NORBERT EHRENFREUND, *THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIMES TRIALS CHANGED THE COURSE OF HISTORY* 130 (2007) (quoting Judge Biddle, who was the U.S. judge on the tribunal at Nuremberg).

21. See generally Sadat, *supra* note 18, at 1206; Morgan, *supra* note 14; Zakia Afrin, *Post-Conflict Justice in Iraq*, 14 ANN. SURV. INT'L & COMP. L. 23 (2008); Anna Triponel, *Can the Iraqi Special Tribunal Further Reconciliation in Iraq?*, 15 CARDOZO J. INT'L & COMP. L. 277 (2007); Michael A. Newton, *A Near Term Retrospective on the Al-Dujail Trial & the Death of Saddam Hussein*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 31 (2008); Ingrid Detter, *The Law of War and Illegal Combatants*, 75 GEO. WASH. L. REV. 1049 (2007); William R. Casto, *Regulating the New Privateers of the Twenty-First Century*, 37 RUTGERS L.J. 671 (2006).

22. See EHRENFREUND, *supra* note 20, at 6.

23. *Id.* at 11–12. Word of the atrocities had reached the Allies before the end of the war,

community answered these atrocities with the Nuremberg Trials.²⁴ The main trial was held from November of 1945 until the end of August of 1946.²⁵ At this trial, there were 403 open sessions with thirty-three witnesses for the prosecution and sixty-one witnesses for the defense—and this was only for the individually named defendants.²⁶ The trial was a monumental undertaking that continues to influence the way the international community functions.²⁷

The seeds of the trial were planted in October of 1943 with the Moscow Declaration.²⁸ This brief declaration served as a warning to the Germans committing atrocities that they would be “brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged.”²⁹ This language is indicative of the Allies’ mentality at that point in the war. They initially wanted to round up the leaders of the Nazi party and have them shot without any trial.³⁰ However, calmer heads prevailed, and in 1945, the London Agreement was promulgated, containing the means of establishing an international tribunal for “the trial of war criminals . . . whether they be accused individually or in their

prompting them to issue the Moscow Declaration, warning that those “German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged.” U.N. INT’L L. COMM’N, THE CHARTER AND JUDGMENT OF THE NÜRNBERG TRIBUNAL: HISTORY AND ANALYSIS, at 87, U.N. Doc. A/CN.4/5, U.N. Sales No. 1949.V.7 (1949) [hereinafter U.N. HISTORY AND ANALYSIS]. However, the notion of judging mentioned here is not what eventually took place. What the Allies initially wanted to do was merely confirm the person’s identity before placing them in front of a firing squad. See *infra* note 30 and accompanying text.

24. U.N. HISTORY AND ANALYSIS, *supra* note 23, at 6.

25. *Id.* After the main trial held by the international tribunal, there were several smaller trials held by the various countries in their occupation zones. EHRENFREUND, *supra* note 20, at 93–98. The United States held at least twelve more trials in Nuremberg including the famous medical trials that dealt with the horrible medical experiments performed by the Nazi doctors on concentration camp inmates. *Id.*

26. U.N. HISTORY AND ANALYSIS, *supra* note 23, at 6. This does not include the institutional defendants tried by the Tribunal such as the *Schutzstaffeln*, known as the SS, and the *Geheime Staatspolizei*, known as the Gestapo. *Id.*

27. EHRENFREUND, *supra* note 20, at 121–37, 153–85 (finding that Nuremberg influenced the American justice system, brought human rights to the forefront of international awareness, and had a positive impact on the problem of racial prejudice).

28. U.N. HISTORY AND ANALYSIS, *supra* note 23, at 3, 87.

29. *Id.* at 87–88.

30. Winston Churchill believed that the Nazis did not deserve a trial, that they should be summarily shot, and that they had forfeited any right to legal procedure by committing atrocities such as the Holocaust and the bombings of London. EHRENFREUND, *supra* note 20, at 7. One man counseled Roosevelt that “[t]he people want revenge, not a long drawn-out legal proceeding.” *Id.* When stories of the concentration camp atrocities reached America, “[m]any wondered why in the world these despicable characters deserved even a single day in a court of law.” *Id.* at 12.

capacity as members of organizations or groups or in both capacities.”³¹ The tribunal was formed, the defendants were named, and the trial was held.

The trial marked the first time that individuals were held accountable on an international level for their actions in war.³² In all, twelve people were sentenced to death by hanging, three received life sentences in prison, four received lesser sentences, and three were acquitted.³³ However, the legacy of Nuremberg goes beyond the verdicts it rendered against those twenty-two people.

The international community had witnessed horrendous acts of atrocities and the wholesale slaughter of millions of innocent people. Although the initial response was to seek swift retribution by having the Holocaust leaders summarily executed, down this road lay the chance of making martyrs out of monsters and sowing the seeds of resentment in a conquered people.³⁴ Instead, the United States raised the notion of having a trial to render justice instead of mere vengeance.³⁵ It is this decision to institute justice that is the legacy and true impact of Nuremberg.³⁶

The impact of this radical decision was felt almost immediately. On October 23, 1946, President Harry S. Truman delivered a speech to the General Assembly of the United Nations.³⁷ President Truman extolled the benefits of having established a new precedent that based international actions “upon principles of law and justice.”³⁸ He further stated that crimes against humanity should be punished through an invocation of international justice.³⁹ Within days, President Truman received a report by

31. Agreement for the Establishment of an International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, reprinted in U.N. HISTORY AND ANALYSIS, *supra* note 23, app. II at 89–90. See also EHRENFREUND, *supra* note 20, at 7–17 (providing a vivid and detailed account of how the idea of a trial took shape and came to be).

32. EHRENFREUND, *supra* note 20, at 216.

33. *Id.* at 88–89. See also U.N. HISTORY AND ANALYSIS, *supra* note 23, at 7–8.

34. Some even thought this would lead to another war, as perhaps the treatment of the German people after the First World War had led to the Second World War. EHRENFREUND, *supra* note 20, at 7.

35. See *infra* note 66 and accompanying text.

36. As stated by Ehrenfreund,

In the decades that followed the last trial of the major Nazi criminals, the word “Nuremberg” acquired a meaning far beyond geography or history; it grew to represent a commitment to justice that was gradually embraced by half the nations of the world. Nuremberg stood for the highest standards of law and due process

Id. at 153.

37. U.N. HISTORY AND ANALYSIS, *supra* note 23, at 11.

38. *Id.*

39. *Id.*

Francis Biddle,⁴⁰ saying that the principles of the Nuremberg Charter should be codified into international law by the United Nations.⁴¹ The President agreed,⁴² and on November 15, 1946, the United States delegation introduced a proposal asking that the codification of the Nuremberg principles be given “primary importance.”⁴³

The proposal to codify the principles of the Nuremberg charter into international law was taken up by the Sub-Committee in charge of the codification of international law on December 3, 1946.⁴⁴ The Sub-Committee wrestled with the task. At first blush, the notion appeared simple. First, identify the principles of the Nuremberg Charter; this was not difficult, as the Charter conveniently lists them.⁴⁵ Next, codify them into international law.⁴⁶ However, this did not occur. Instead, the United States delegate who had initiated the proceedings changed the course of the proceedings by altering the words of its initial proposal.⁴⁷ Where previously the proposal called for the codification of the principles into international law, they now called for the Sub-Committee to merely make “plans for” how the codification might take place in the future.⁴⁸ The result was that the Sub-Committee called for the formation of a new committee to take up the task.⁴⁹

40. Biddle was the American judge for the International Military Tribunal at Nuremberg. *Id.*

41. His report recommended “that the United Nations as a whole reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind.” *Id.*

42. President Truman said, “[A] code of international criminal law to deal with all who wage aggressive war . . . deserves to be studied and weighed by the best legal minds the world over . . .” *Id.* at 12.

43. The resolution was entitled “Resolution relating to the codification of the principles of international law recognized by the Charter of the Nürnberg Tribunal.” *Id.*

44. *Id.*

45. The Charter states: “The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes against peace . . . (b) War crimes . . . (c) Crimes against humanity.” Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, reprinted in U.N. HISTORY AND ANALYSIS, *supra* note 23, app. II, at 92–93. This forms the basic principles of the Tribunal. That is, that the international community will not tolerate these types of behavior anymore and will punish them according to the notion of fair justice.

46. This too should be simple as this was the same Sub-Committee in charge of the codification of international law. U.N. HISTORY AND ANALYSIS, *supra* note 23, at 12.

47. The initial proposal had two main points, and the Soviets had major objections to the second point. The Soviet delegate proposed to delete the whole paragraph containing the international law provisions and instead to merely affirm the principles of Nuremberg without codifying anything. *Id.* at 12–13.

48. This concession drastically altered the scope of the proposal and would continue to influence the handling of the proposal as it wound its way through the committees. *Id.* at 13.

49. *Id.* at 15. In short, the Soviet delegate won the first round but only with the support of the United States. The principles were affirmed but not codified and would not be codified anytime soon.

The new committee was formed the following year and did not fare much better.⁵⁰ The French delegation to the committee submitted a memorandum seeking to establish an international court of criminal jurisdiction and to define the principles of the Nuremberg Charter.⁵¹ The first step was complete. However, the United States' delegate again disrupted the establishment of these principles into international law⁵² when he claimed that the new committee's purpose was only to discuss "plans for" the codification and that the committee should not deal in any "substantive" matters of international law.⁵³ The committee agreed with the delegate from the United States, and avoided making any "substantive" declaration of what the principles of Nuremberg were or codifying them into international law.⁵⁴ The Nuremberg Charter was faltering before it was even born.

Interestingly, the Nuremberg Trials were brought about almost entirely through the influence of the United States.⁵⁵ Additionally, the United States was very vocal in supporting the principles of the Nuremberg Charter as sound moral guidelines would deter the possible occurrence of further atrocities.⁵⁶ However, the United States itself created the main stumbling block in establishing a binding rule of law.⁵⁷ With the formation

50. *Id.* at 15–19.

51. *Id.* at 15–16. The formation of an international criminal court would have to wait until 1998, when the International Criminal Court was established in the Rome Statute. EHRENFREUND, *supra* note 20, at 173. Again, it was the United States that tried to block the establishment of the International Criminal Court. *Id.* at 173–74.

52. There is no evidence to suggest that the United States delegate was negotiating this time. *See* U.N. HISTORY AND ANALYSIS, *supra* note 23, at 19–20. No mention is made of a Soviet objection. *See id.* Instead, the United States' delegate took it upon himself to delay the process he initiated. *See id.* No reason was given other than a legalistic argument to follow the literal words of the proposal. *See id.* This could have been easily dealt with, but instead the United States' delegate decided to stick to his previous assertion. *See id.*

53. *Id.* The previous change in the United States' proposal had reared its head again. *See also* U.N. HISTORY AND ANALYSIS, *supra* note 23, at 13.

54. *Id.* at 20.

55. The international community did not want to sit through a trial of the German offenders. Instead, it wanted to seek revenge against the Nazis by summarily executing them. The very notion of a trial was not present in the minds of the Soviets or the British. Only after the Americans stood up and made themselves heard did the international community contemplate a trial. *See generally* EHRENFREUND, *supra* note 20 at 7–14; *supra* note 30.

56. The day following President Truman's speech, the Secretary-General of the United Nations affirmed his remarks and further stated:

In the interest of peace, and in order to protect mankind against future wars, it will be of decisive significance to have the principles which were implied in the Nürnberg trials, and according to which the German war criminals were sentenced, made a permanent part of the body of international law as quickly as possible.

U.N. HISTORY AND ANALYSIS, *supra* note 23, at 11.

57. *Id.* at 19–20.

of the Nuremberg tribunal, the United States set in motion the creation of an international culture of human rights and criminal prosecution for the violation of those rights. However, the United States was also largely responsible for restricting the concrete formation of a binding standard that could be invoked against it.⁵⁸ This has become a recurring theme in how the United States handles international crimes and its own liability.

III. HOW THE NUREMBERG PRINCIPLES HAVE MANIFESTED THEMSELVES IN OTHER TRIALS AND TRIBUNALS

The actions of the United States' delegate did not entirely eviscerate the legacy and impact of the Nuremberg tribunal.⁵⁹ The tribunal format has found favor in the international community since 1946.⁶⁰ Further, the ideas behind Nuremberg, such as the notion of international human rights and the condemnation of aggressive war, have become entrenched in international culture.⁶¹ The most recent incarnation of the tribunal format was displayed worldwide during the trial of Saddam Hussein after the American-led invasion of Iraq.⁶² A comparison of the two tribunals shows how the concept of the tribunal has evolved over the years. Further, the rationale behind the changes and the role tribunals can play in a community's survival demonstrates how the culture the United States brought to the international community through Nuremberg has become entrenched in modern society.

58. *Id.*

59. EHRENFREUND, *supra* note 20, at 121–37, 153–90.

60. Tribunals have been established to deal with genocide and human rights abuse in the former Yugoslavia, Rwanda, Kosovo, East Timor, Cambodia, and Sierra Leone. Triponek, *supra* note 21, at 280; *see also* Afrin, *supra* note 21, at 32–35 (comparing other international tribunals to the current tribunal established in Iraq, with an added comparison to the United Nations Missions in Kosovo and East Timor); EHRENFREUND, *supra* note 20, at 153–71 (giving a detailed account of the tribunals in Yugoslavia, Rwanda, Sierra Leone, East Timor, and Cambodia).

61. EHRENFREUND, *supra* note 20, at 216. The principles have reached not just the leaders of nations but the citizens of those nations as well. *See* Karadsheh, *supra* note 19 (quoting a man in Baghdad expressing his faith that the U.S. legal system will render justice for the brutal death of his son and his wife at the hands of Blackwater employees).

62. The prosecutor sought to hold Saddam Hussein accountable for crimes committed against his own people. He was convicted and hanged for the killing of 148 Shias in Dujali in 1982. This is a direct parallel of the Nuremberg Trials, where German leaders were held accountable for the brutal extermination of German citizens. *See* Afrin, *supra* note 21, at 25–32; Triponek, *supra* note 21, at 280–81.

A. A Comparison of Nuremberg and the Trial of Saddam Hussein

The Nuremberg tribunal has been aptly called “victor’s justice” by commentators,⁶³ since the tribunal was constructed and administered by the victorious Allies of World War II.⁶⁴ There were no German judges presiding. Instead, the sitting judges were from the United States, the United Kingdom, the Soviet Union, and France. Additionally, the tribunal applied American legal precepts, not German law.⁶⁵ This forced the defense attorneys to frantically learn new and unfamiliar law in order to attempt to defend their clients.⁶⁶ Many questioned whether a fair trial could be held at all.⁶⁷ The first attempt at international justice looked more like a sham trial put on for show than any attempt at real justice.

The trial of Saddam Hussein was vastly different in construction. The decision was made by the U.S.-led coalition to forgo a U.N.-sanctioned international tribunal and create a national tribunal.⁶⁸ Instead of a panel of judges from different countries, all of the judges presiding over the trial

63. EHRENFREUND, *supra* note 20, at 215; Sadat, *supra* note 18, at 1206.

64. While the term “victor’s justice” may seem trivial and obvious, it is important to recognize that the Nuremberg Trial was established and run by the “victors” of the war. Compare this to the trial of Saddam Hussein, which was conducted by the new government raised in place of his regime and consisted solely of Iraqi people. See *infra* notes 68–70. These Iraqi people were not a conquering victor like the Allies in World War II; they were a people newly liberated from an oppressive regime. See *infra* notes 74–75.

65. The whole prosecution hinged on the crime of conspiracy, which was used to link the actions of the defendants and to hold each of them accountable for the actions done by the others. EHRENFREUND, *supra* note 20, at 15–16.

66. The crime of conspiracy was found only in American law, and the French were particularly apprehensive about using this legal theory. *Id.* at 16. The French described it as “a barbarous legal anachronism unworthy of modern law.” *Id.* They also had problems with the notion that aggressive war was a crime and fought hard against it. *Id.* at 14. Thus, America faced non-trivial challenges to commencing the trials and invoking its own laws on a conquered people. Some would call this *ex post facto* justice, *id.* at 15, and it certainly seems to be a clear-cut case of creating a law after the fact and charging someone for its violation prior to the law’s passage.

67. All of the leaders involved had expressed a clear intent to have those on trial executed. They then created a system of law and trial that found most of the defendants guilty. It seems as though the means were established with a particular end in mind. However, the fact that three defendants were acquitted shows that the procedures had some semblance of fairness; otherwise, none of the defendants would have been acquitted. See *generally id.*

68. The United States enabled the Iraqi people to take ownership over the proceedings. By placing Iraqis at the head of the court, the United States made them responsible for the happenings of the court instead of merely invoking “victor’s justice” on Saddam Hussein. Once in power, the Iraqi people seemed to have wanted to ensure that the death penalty was available. (Under an international tribunal, the death sentence would have been off the table.) By placing the trial in the hands of the Iraqis and using Iraqi law established prior to the rise of Saddam Hussein, the death penalty was back in play. Afrin, *supra* note 21, at 26.

were Iraqis.⁶⁹ The proceedings were governed by Iraqi law and followed Iraqi criminal procedure.⁷⁰

However, several similarities remained, such as the involvement of the United States in establishing and organizing the tribunal. In Nuremberg, the United States took center stage in the leadership of the tribunal, even going so far as to appoint a justice from the United States Supreme Court as prosecutor.⁷¹ However, in Iraq, the United States chose a more subtle approach by gathering the evidence, training the judges and prosecutors, and then stepping back to watch their handiwork.⁷² The fairness of both trials has been questioned. In both, the United States was heavily involved in the organization and establishment of the courts. In Nuremberg, the Allies were accused of dispensing “victor’s justice”; in Iraq the trial was set up so as to specifically ensure that the death penalty was available, a clear indication that the verdict was decided before the trial had begun.⁷³

B. The Rationales Behind Tribunals and the Reasons for the Evolution in the Forms of Tribunals

The differences between the trials are stark: an international panel of judges versus a panel of local judges, a foreign body of laws and procedures versus the resuscitation of local laws and procedures. These structural changes were brought about to effect a certain outcome. In Nuremberg, the Allies wished to establish a new ideal of international justice and to avoid planting the seeds of resentment in the German people.⁷⁴ In Iraq, the coalition forces were there in the guise of liberators, not as victorious foes of war dealing with the vanquished.⁷⁵ This brings to the forefront the questions: what is the purpose behind tribunals, and how can they be used?

69. *Id.* at 28; Triponel, *supra* note 21, at 297.

70. *See* Afrin, *supra* note 21, at 29.

71. *See generally* EHRENFREUND, *supra* note 20. The United States initiated the proceedings, selected the charges, and gave the opening statement. While the prosecutors split their duties, each taking a specific charge, the United States played a major role throughout the whole trial.

72. Afrin, *supra* note 21, at 29. The American role in Saddam Hussein’s trial should not be understated. The establishment of the tribunal was done at the will of the U.S.-led coalition government. *Id.* at 27. Just because the United States did not take center stage by presiding over the proceedings and providing prosecutors does not mean that the Iraqi tribunal was free to do as it pleased. The American presence was pervasive.

73. *Id.* at 26; *see supra* note 63.

74. *See supra* notes 34–36.

75. The United States entered Iraq to overthrow the regime of Saddam Hussein. While successful in that regard, the main problems with Iraq and America lie in the occupation that followed. For a look at how occupation law fits into this picture, see Newton, *supra* note 21, at 44–45.

Nuremberg established the concept that a government can be held criminally responsible for the actions it takes against its own people.⁷⁶ This was also the case in the trial of Saddam Hussein.⁷⁷ Hussein was tried and convicted on the charge of ordering the massacre of his own people.⁷⁸ Thus, in both trials, former leaders were faced with crimes they committed against those it was their duty to serve. Some have said that this leads to the conclusion that the trials can serve the additional purpose of reconciliation.⁷⁹

Reconciliation is important for countries where atrocities have been committed.⁸⁰ Following the Second World War, the Nazi party became synonymous with evil. Without some clear detachment from its wartime behavior, modern Germany might have been forever condemned for the actions of its former leaders. The trials at Nuremberg allowed the German people a chance to detach themselves from the Nazi party that incited World War II.⁸¹

However, reconciliation can be tainted by charges of retaliation. In Iraq, the tribunal's purpose was clear: establish a guilty verdict and put Saddam Hussein to the death penalty.⁸² This transparent objective reflects not reconciliation but retaliation. When tribunals function as retaliatory bodies rather than seekers of justice, their usefulness is diminished.⁸³

76. *See supra* note 62.

77. *Id.*

78. *Id.*

79. As Triponel stated,

In theory, international criminal law has the opportunity to impact diverse goals crucial for the reconciliation process, namely installing a sense of justice in victims, playing a deterrent effect on wrongdoers, providing a statement of the facts, acknowledging officially what happened, and providing an important foundation moment for the society.

Triponel, *supra* note 21, at 282.

80. As Triponel stated,

More and more, international criminal law must live up to the test of how "to change and transform [the post-conflict] country, so that the massive injustices . . . , which led to the violations, are corrected [and so] that the people who suffered so much historically can now get on with their lives and enjoy their lives and feel full, free human beings . . ."

Id.

81. Nuremberg presents a clear illustration of what Triponel calls a "foundation moment" for the new society. *Id.* A clean break is made between the old rulers and the new country. The leaders of the old regime were unveiled for the masterminds and manipulators that they were, leaving the people of Germany in a position to rebuild their country. *See generally id.*

82. "The U.S. administration reportedly preferred the local institution so that the Iraqi people would feel more in charge of the events. Anything less than the death penalty for Saddam Hussein would not have likely been acceptable to the people . . ." Afrin, *supra* note 21, at 26.

83. As Triponel stated,

[The tribunal in Iraq] has restricted the statement of the facts that is deemed important for the reconciliation process, legitimized the principle of retaliation, driven the convicted

Instead of bringing people together, they plant seeds of resentment that may never be washed away. The very resentment the Allies wished to avoid in Germany arose in Iraq as the trial reached its conclusion.⁸⁴ Retaliatory schemes interfere with the healing and forgiveness that post-conflict societies need.⁸⁵

Many of the differences between the Nuremberg Trials and the trial of Saddam Hussein can be interpreted as responses to some of the negative perceptions people had of Nuremberg: for example, the change from foreign judges using foreign laws to local judges using local laws. Though the changes were meant to legitimize the court and help in the reconciliation process, they instead cast a shadow of retaliation over the tribunal.

While tribunals must walk the fine line between reconciliation and retaliation, they must also be conscious of deterrence. Indeed, this is a driving force behind criminal law, and was the driving force behind Nuremberg and the push to adopt the principles of Nuremberg as codified international law.⁸⁶ The threat of criminal punishment is thought to deter leaders from allowing their armies to commit war crimes.⁸⁷ However, what happens when threatening criminal punishment is not enough?

perpetrators into social and political isolation, and reinforced the culture of impunity because of its lack of fair trials. Thus, both the organization and conduct of the trials in Iraq have lead [sic] to missed opportunities for reconciliation among the Iraqi people.

Triponel, *supra* note 21, at 299.

84. As Triponel stated:

The trial and execution of Saddam Hussein, 'which was originally billed as an exercise in reconciliation,' has been described instead of having 'only inflamed sectarian tensions.' Reconciliation efforts are said to have been set back since the execution, as 'the two communities [of Shia and Sunni] have moved further apart.'

Id. at 300. Also, on revenge and further sectarian violence, "the root causes of the sectarian violence lie in revenge killings and lack of accountability for past crimes as well as in the growing sense of impunity for on-going human rights violations." *Id.* at 317, quoting U.N. Assistance Mission for Iraq, *Human Rights Report for November 1 – December 31, 2006*, at 1 (2006), available at <http://www.uniraq.org/FileLib/misc/HR%20Report%20Nov%20Dec%202006%20EN.pdf>.

85. *Id.* When people feel one injustice is being followed by another, peace cannot be sustained. When this happens, the people lack a defining moment that sets apart the current era from the previous one. When this line has been blurred, any potentially momentous occasion may lose its impact because real change has not occurred when old behaviors continue under a new name.

86. See U.N. HISTORY AND ANALYSIS, *supra* note 23. Indeed, the general principle behind criminal law is that of deterring the commission of crimes in the first place.

87. "We shall never know, however, how many national leaders have been deterred from initiating military conquest and cruel abuse of innocent civilians by the threat of a Nuremberg-type prosecution." EHRENFREUND, *supra* note 20, at 215. Some have also said that the very presence of current horrors proves how ineffectual Nuremberg was. This is a poor argument because many laws are written to be a deterrent and yet are subsequently broken. This does not show that the laws are absolute failures; it only shows that they are not absolute in deterrence.

IV. THE ROLE OF LIBERATORS AND THEIR PRIVATE MILITARY FIRMS

When threats of criminal sanctions fail to deter war crimes, an oppressed populace may still hope that the international community will intervene and liberate them from oppression. The United States' involvement in World War II can be seen as that of a liberator.⁸⁸ The coalition forces claimed the same role in Iraq.⁸⁹ The liberator's role in ending the oppression and bringing the former regime to justice has been seen several times since World War II and is yet another legacy of the Nuremberg Trials.⁹⁰ In fact, forceful liberation may even be a prerequisite of justice—the defendants cannot be put to trial unless they are first detained, and detention must be effected by force.

Liberators can pose their own set of problems. What happens when the liberators are worse than the original regime? Is there to be an infinite regression of liberators and tribunals to bring the former liberators to justice when they turn sour? The United States finds itself in this very situation now by having urged the importance of international human rights and the use of force in enforcing those rights. However, those rights must be enforceable against *every* individual including the liberators who must face an accounting of any and all transgressions they committed in the process of liberation or reconstruction.⁹¹ Paradoxically, the very

88. EHRENFREUND, *supra* note 20, at 215. Ehrenfreund argues that the United States' involvement in the Second World War is justified by the exposure of Hitler's plans of aggression and the Holocaust. This would mean that the involvement of the United States could be characterized as that of the liberator. America's entrance into the war put an end to Nazi Germany's atrocities.

89. This is seen in the very trial of Saddam Hussein himself. The trial was viewed as removing a dictator from office and holding him accountable for his crimes, made possible by the force of the American army.

90. However, this can easily begin to take on the appearance of a war of aggression. When the United States became embroiled in Vietnam under the purported cause of liberation from communism, people spoke out and symposia were held comparing the American involvement to a war of aggression. For example, in one symposium conducted with participants of the Nuremberg trials, both sides were argued: one member of the panel argued that the involvement of the United States in the war in Vietnam was closely akin to a war of aggression while another panelist stepped up and claimed that the United States was a liberator of Vietnam. Nuremberg Revisited: The Judgment of Nuremberg in Today's World, Program of Int'l and Comp. Law Section of the Amer. Bar Ass'n. (Aug. 12, 1970), at 12–25 (transcript available in the Washington University School of Law Library). The disagreements illustrate the problems of couching military involvement in narrow terminology. First, a military force can just as easily be a liberator as an aggressor. Second, there will always be significant bias whether the classification is performed by the classified (no state will call itself an aggressor, as that would subject it to the wrath of the international community and criminal prosecution) or another party with material interests in the involvement.

91. Although the law of occupation is particularly relevant, occupational law issues do not alter the current analysis of how Nuremberg created an expectation of human rights that has been violated by the United States. *See, e.g.*, Newton, *supra* note 21, at 44; EHRENFREUND, *supra* note 20, at 121.

deterrence sought by war crime tribunals could serve to deter the liberation necessary to establish such tribunals.

Liberators may protect themselves with self-imposed standards for their militaries. One example is the United States Uniform Code of Military Justice (UCMJ).⁹² The UCMJ provides punishments for crimes committed by soldiers during wartime and peacetime.⁹³ A system of justice that handles transgressions of soldiers diminishes the need for protection from liberators. International pressure on the liberating force to invoke self-imposed standards further serves to provide protection to newly liberated peoples.

Self-imposed standards are not created in a vacuum. Rulemakers apply international standards to certain classifications of participants in wars. These classifications are found in the law of war, as set forth in the Geneva Conventions, which are designed to draw distinctions between soldiers and civilians in order to ascertain which types of actions are criminal and which are justified by war.⁹⁴ When the Conventions were promulgated in 1949, the distinction between soldier and civilian was rather straightforward. However, the rise of private military firms (“PMFs”) such as Blackwater in recent years has blurred that distinction.⁹⁵

The use of private contractors in war has steadily increased since World War II thereby posing a new set of problems.⁹⁶ PMFs fall outside of

92. Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2010).

93. *Id.* § 802(a)(1).

94. Detter, *supra* note 21, at 1056–57. Very clear lines are drawn distinguishing traditional soldiers from civilians. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 50, *opened for signature* June 8, 1977, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) art. 4A, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950.

95. The private contractor is not in a uniform and does not wear fixed emblems like a soldier. Morgan, *supra* note 14, at 226. The Geneva Conventions require that a soldier wear a fixed emblem recognizable at a distance. Protocol I and Third Geneva Convention, *supra* note 94. Further, the Conventions require that soldiers wear their arms openly, and the contractor is openly armed. *Id.* Thus, the line is blurred because the contractor takes on the appearance of a soldier in some respects but not in others. Morgan, *supra* note 14, at 226. Further, the contractor acts like a soldier at times by engaging in combat-like situations:

The documents also reveal Blackwater’s activities under the State Department contract have on occasion involved engaging in tactical military actions in concert with U.S. troops. On April 10, 2004, Blackwater became aware from staff for the U.S. Ambassador to Iraq that there was an attack on Najaf and joined the firefight. Several Blackwater personnel took positions on a rooftop alongside U.S. Army and Spanish forces. The Blackwater personnel reinforced the military positions and used machine guns to ‘engage[] whatever targets of opportunity presented themselves.’

Blackwater Memorandum, *supra* note 1, at 8.

96. The rise of PMFs can be traced to the end of the Cold War. Casto, *supra* note 21, at 671–72.

the normal classifications applied to combatants.⁹⁷ They are neither members of the army nor civilians.⁹⁸ Applying the normal law of war to PMFs is difficult because they are not identified within the law, and therefore the law does not describe the behaviors and actions acceptable for them.

The United States is no stranger to using PMFs and has relied on them to supplement its volunteer-based army.⁹⁹ The United States used PMFs extensively in Iraq, with a single firm making as much as one billion dollars off of its contracts for services in Iraq.¹⁰⁰ Accordingly, these firms have a tremendous amount of bargaining power and the United States has had to make some concessions to them in order to maintain their availability. The most important concession is that of immunity from local laws.¹⁰¹

The reductions of military establishments have “flooded the world with a surplus of military personnel and equipments.” *Id.* at 672. This has led to the rise of private military firms to the extent that “[a]t least one foreign country has hired a private corporation to mount an entire military campaign on a virtually turnkey basis.” *Id.*

97. For a good summary of the rise of private contractors and an analysis of how they fit into international law, see *id.* See also Morgan, *supra* note 14, at 226. Morgan posits: “Protocol I and the Third Geneva Convention suggest four legal categories into which such contractors may fall: armed civilians, mercenaries, contractors accompanying the armed forces, or combatants subordinate to Parties to a conflict.” *Id.* at 215. He further analyzes each category and comes to the conclusion that the fourth category appropriately applies to private contractors like Blackwater. *Id.*

98. As Casto stated:

In contrast to the national military establishment, corporate warriors are subject to a significantly weaker and frequently sporadic panoply of regulatory systems. Private corporations and their employees are not subject to military discipline the way soldiers are. Their primary motivation is financial gain. Nor are private citizens subject to the Uniform Code of Military Justice. Of course, private persons within the United States are regulated by state and federal criminal law, but United States law does not generally regulate extraterritorial activities. When corporate warriors travel abroad, they frequently are not subject to United States criminal law.

Casto, *supra* note 21, at 672–73.

99. “The United States hires PMFs to provide a wide range of services ranging from mundane mess hall operations to operating highly complex technical equipment. In addition, PMFs working for the United States train foreign armies and provide security and bodyguard services abroad for branches of the American government.” *Id.* at 672. “[Special Inspector General for Iraq Reconstruction] estimates that about 70 private security companies have operated in [sic] country since 2003.” REPORT TO CONGRESS, *supra* note 16, at 6.

100. Blackwater Memorandum, *supra* note 1, at 3. The total of all contracts for private firms from 2003 until July of 2008 was approximately \$4.5 billion dollars. REPORT TO CONGRESS, *supra* note 16, at 6.

101. CPA Order 17, *supra* note 7, at 4; see also *supra* note 16 and accompanying text (stating reasons why this should be labeled a concession). If the contractors were not granted immunity, then the supply of contractors would likely diminish or the cost would become prohibitive, or so some argue. See *supra* note 16.

V. PRIVATE MILITARY FIRMS AND THEIR IMMUNITY ISSUES

Private military firms such as Blackwater have operated for most of the Iraqi conflict under blanket immunity from Iraqi law.¹⁰² This is not a problem in itself, because the U.S. armed forces operate under immunity from Iraqi law.¹⁰³ However, the U.S. armed forces are subject to the UCMJ and U.S. soldiers committing crimes will be subject to a clear set of punishments.¹⁰⁴ Military contractors, on the other hand, are not subject to the UCMJ, and frequently are not even subject to American laws.¹⁰⁵ This creates a circumstance wherein PMFs are free from any liability for their criminal behavior, an outcome inconsistent with the principles established by Nuremberg and its progeny. No group of people is above the law.

In response to the foregoing concerns about PMFs, the United States Congress passed the Military Extraterritorial Jurisdiction Act of 2000 (MEJA).¹⁰⁶ The Act established that PMFs hired by the United States Department of Defense (DoD) must be subject to American laws.¹⁰⁷ Under the MEJA, PMFs would have to answer for any and all transgressions—or so it seemed.¹⁰⁸

The MEJA laid out the guidelines for holding PMFs accountable, provided they were under contract with the DoD.¹⁰⁹ Those PMFs not under

102. Note again that this is total immunity, including not just criminal immunity, but immunity from civil and administrative proceedings as well. CPA Order 17, *supra* note 7, at 2.

103. Under CPA Order 17, United States soldiers fall under the definition of Multinational Force Personnel (“MNF”). The Order states, “Unless provided otherwise herein, the MNF, the [Coalition Provisional Authority], Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.” *Id.* § 2(1). Iraqi legal process is defined as “any arrest, detention or legal proceedings in Iraqi courts or other Iraqi bodies, whether criminal, civil, or administrative.” *Id.* § 1(10). Interestingly, this is *total* immunity covering *all* aspects of the law. No civil suit or administrative action can be brought in lieu of a denied right of criminal satisfaction for victims of violent crimes. *Id.*

104. *See generally* Uniform Code of Military Justice, 10 U.S.C. §§ 801–946. In particular, see § 802 art. 2 for persons subject to the Code. These include all members of the armed forces, but many other groups are potentially subject to the code as well. *Id.* § 802 art. 2.

105. Private military contractors are not subject to § 802 art. 2. *Id.* *But see supra* note 14 (referring to an argument that they might); *see also supra* note 96 (arguing that the contractor does not fall under U.S. law).

106. Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261–67 (2000).

107. *Id.* § 3262.

108. An important revision was made to the MEJA in 2004 that altered the scope of its application. *See* Ronald W. Reagan National Defense Authorization Act, Pub. L. No. 108-375, 118 Stat. 1811 (2004) (codified at 18 U.S.C. § 3267(1)(A) (2006)).

109. The MEJA originally defined a person who was “employed by the Armed Forces outside the United States” as “employed as (i) a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department); . . . (ii) a contractor (including a subcontractor at any tier) . . . ; or (iii) an employee of a contractor (or subcontractor at any tier) . . .”

contract with the DoD would continue to enjoy immunity from American laws.¹¹⁰ This loophole was not publicly recognized at first, and the United States was quick to capitalize on it.¹¹¹ The interrogators at Abu Ghraib prison were initially under contract with the DoD, but after the MEJA went into effect, their contracts were transferred to the Department of the Interior.¹¹² Since their contracts were no longer under the DoD, the MEJA no longer applied to the PMFs in charge of interrogation at Abu Ghraib, and they once again fell into a legal gray area that effectively granted them immunity.¹¹³

There are parallels between the shuffling of PMFs' contracts and the actions of the United States' delegate to the United Nations after World War II.¹¹⁴ In both, the United States took a public stance that supported the rule of law and the invocation of justice. In both, the United States took immediate steps to lessen the effects of laws it had just worked publicly to create. These duplicitous actions by the United States have eroded its political clout in the international realm.¹¹⁵

Difficulties between Iraq and the United States regarding the SOFA negotiations are representative of the international reaction to the United States' behavior.¹¹⁶ While the United States sought to retain immunity for its PMFs, the new Iraqi government adamantly insisted that Iraqi law should apply to the private contractors for plain reasons.¹¹⁷ The PMFs had

18 U.S.C. § 3267(1)(A). This clearly limits the statute's application in situations involving private military contractors to only those that had their contracts through the DoD.

110. *Id.*

111. Casto, *supra* note 21, at 685.

112. *Id.*

113. Casto noted:

In 2004, apparently in response to the Abu Ghraib scandal, Congress expanded M.E.J.A.'s scope beyond DoD contractors to regulate PMCs hired by federal agencies and departments other than the DoD. Unfortunately, gaps and ambiguities in the amended statute significantly restrict its value. Congress was aware of the fact that PMCs are routinely hired by various federal agencies and departments but restricted the amendment's expansion to employees, contractors, and subcontractors 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."

Id. at 685–86. Thus, if a contractor's employment does not relate to supporting the mission of the DoD overseas, then the statute does not apply, and other immunities already in place remain active.

114. *See supra* note 52.

115. *See supra* note 1. The Committee on Oversight and Government Reform held a hearing to determine, *inter alia*, "[I]s Blackwater's presence advancing or undermining U.S. efforts in Iraq?" Blackwater Memorandum, *supra* note 1, at 1.

116. Since the negotiations for the Status-of-Forces Agreement took place after the Oversight Committee's hearing, it is apparent that Blackwater has had a negative effect on the U.S. efforts in Iraq, in particular, the apparent immunity provided for the contractors.

117. *See* Robertson & Al-Salhy, *supra* note 15; *see also* Dagher, *supra* note 12.

become a violent burden on Iraq.¹¹⁸ Tales of shootings and atrocious behavior by the PMFs were and are common.¹¹⁹ Further, the United States' own reports show that in firefights involving PMFs, the PMFs fired first in over eighty percent of the incidents.¹²⁰ Iraq has rightly invoked the principles of Nuremberg that no force shall be above criminal sanctions for crimes against humanity. The destruction caused by PMFs continues to be unacceptable, and Iraq has claimed a right to have justice for its people.¹²¹ In using PMFs, the United States has brought upon the Iraqi people the very thing against which Nuremberg stood.¹²²

VI. CONCLUSION

The ghost of Nuremberg has turned the Iraqi conflict from a symbol of liberation into a political liability for the United States government.¹²³ While the Nuremberg tribunal was not without its faults, it brought lofty ideals to the international table and its legacy has endured. The evolution of the war trial has placed greater emphasis on reconciliation while avoiding retaliation. The role of liberator was more precisely defined as

118. "Iraqi authorities say Blackwater guards fired indiscriminately, killing as many as 20 civilians; Blackwater says its employees responded properly to an insurgent attack on a convoy." Mike Mount, *U.S. General: Security Contractors Use 'Over-The-Top' Tactics in Iraq*, CNN, Sept. 28, 2007, <http://www.cnn.com/2007/WORLD/meast/09/28/iraq.security/index.html>. This happened at the famous Nisoor Square. *Id.* A total of seventeen civilians were killed, and nearly thirty others were wounded. Kevin Bohn, *Sources: Blackwater-Guard Charges Unveiled Monday*, CNN, Dec. 7, 2008, <http://www.cnn.com/2008/CRIME/12/07/iraq.blackwater.indictment/index.html>. The incident has been at the heart of the immunity controversy, because the Iraqis claim the contractors fired without provocation while the contractors claim they were fired upon by insurgents. *Id.* Short of either side admitting instigation, only a proper investigation will uncover the truth. *Id.* Fortunately, political pressure against the United States has risen and charges have been filed against five of the contractors. *See id.*

119. For a chilling account of random violence committed by a private military contractor, see Morgan, *supra* note 14, at 213 ("[T]he fourth contractor, who had previously commented that he 'wanted to kill someone today,' opened fire on a presumably civilian truck . . .").

120. Blackwater Memorandum, *supra* note 1, at 6. In addition, the Committee found that Blackwater was involved in escalation of force incidents at a rate of 1.4 per week and accounted for more shooting incidents than two other large private military contractors combined. *Id.* at 7.

121. Justice cannot be had when the State Department's primary response in cases of Blackwater misconduct that result in Iraqi deaths was asking Blackwater to make monetary payments to "put the matter behind us," rather than insisting on fuller accountability such as investigating Blackwater personnel for potential criminal liability. *Id.* at 9. "The most serious consequence faced by Blackwater personnel for misconduct appears to be termination of their employment." *Id.* Even this consequence can be worked around—the "cowboy" shooter was back on location within months of being terminated from his Blackwater contract. Redman & Mount, *supra* note 3.

122. While there is a vast difference in scale between the atrocities committed by the Nazi regime and those random acts of violence perpetrated by the private military firms operating in Iraq, the pain of the victims and their families is just as real in each case. *See* Karadsheh, *supra* note 19.

123. *See supra* note 17.

measures were taken to ensure that liberators do not abuse their powers. However, the United States has been unable or unwilling to live up to the very standards it helped to create. The rise of PMFs has altered the international law landscape. While the old laws had ways of dealing with either civilians or combatants when they committed a crime, the distinction between the two groups has been forever blurred with the use of PMFs. No longer do participants in a combat zone fall neatly into one of the two categories of civilians or combatants. Now the international community must learn how to deal with drunken cowboys who shoot first and ask questions later.

The recent indictments of several Blackwater guards and the tightening of some of the loopholes in MEJA show promise for the future. However, past harms can be difficult to heal. The winding down of military activities in Iraq and the escalation of the conflict in Afghanistan provide the perfect opportunity for the United States to take a leadership role in the resolution of international conflicts. Liberators must focus on upholding the principles of Nuremberg and bringing reconciliation to the oppressed. To successfully accomplish this, the United States must place on itself the same burdens of justice it places on others.

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