



GW Law Faculty Publications & Other Works

Faculty Scholarship

2012

Outsourcing Covert Activities

Laura T. Dickinson

George Washington University Law School, ldickinson@law.gwu.edu

Follow this and additional works at: http://scholarship.law.gwu.edu/faculty_publications

 Part of the [Law Commons](#)

Recommended Citation

Laura Dickinson, Outsourcing Covert Activities, 5 J. Nat'l Security L. & Pol'y 521 (2012).

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

Outsourcing Covert Activities

Laura A. Dickinson*

Over the past decade, the United States has radically shifted the way it projects its power overseas. Instead of using full-time employees of foreign affairs agencies to implement its policies, the government now deploys a wide range of contractors and grantees, hired by both for-profit and non-profit entities. Thus, while traditionally we relied on diplomats, spies, and soldiers to protect and promote our interests abroad, increasingly we have turned to hired guns. Contrast the first Gulf War to later conflicts in Iraq and Afghanistan. During the Gulf War the ratio of contractors to troops was 1 to 100; now, with approximately 260,000 contractors working for the State Department, Department of Defense (DoD), and the U.S. Agency for International Development (USAID) in Iraq and Afghanistan, that ratio has often exceeded 1 to 1.¹ To be sure, U.S. history is rich with examples of contractors; the privateers of the Revolutionary period are a case in point. But our current turn to privatized labor does reflect a new trend, spurred by the post-Cold War decline of the standing military and the elimination of the draft, supported by the public's faith (not always backed up by data) that the private sector can perform work more efficiently than government employees, and fueled by the exigencies of the war on terror in the aftermath of the attacks of September 11, 2001.² Many of these modern contractors perform logistics functions, such as delivering meals to troops or cleaning latrines on the battlefield. Others guard diplomats, convoys, and military bases. But contractors have also gathered intelligence, interrogated detainees, and engaged in tactical maneuvers, sometimes under circumstances involving hostile fire.

All of this outsourcing tests our commitment not to contract out core governmental functions. Indeed, while the United States officially does not allow security contractors to engage in military action,³ many contractors have tangled with foreign populations in ways that look very much like combat. For example, in a notorious 2007 incident in Baghdad's Nisour

* Oswald Symister Colclough Research Professor of Law, The George Washington University Law School.

1. COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 20 (2011) (final report to Congress), available at http://www.whs.mil/library/Reports/CWC_FinalReport-lowres.pdf.

2. For a more thorough account of the forces spurring the growing use of foreign affairs contractors, see LAURA A. DICKINSON, OUTSOURCING WAR AND PEACE, 23-39 (2011).

3. See, e.g., Office of Federal Procurement Policy, Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56229 (Sept. 12, 2011) (adding . . . "[a]ll combat" and "security operations in certain situations connected with combat or potential combat" to the "illustrative list of inherently governmental functions").

Square, security guards employed by the firm then known as Blackwater, under contract with the U.S. government, fired into a crowd and killed civilians. Elsewhere, contract interrogators hired by the Department of the Interior actually supervised uniformed military police officers who harshly questioned and abused detainees at Iraq's Abu Ghraib prison.⁴ And while the Central Intelligence Agency (CIA) and DoD have now formally banned the use of contract interrogators,⁵ and DoD has outlawed intelligence gathering by contractors, the lines appear to be blurred on the ground.⁶ Indeed, even after the DoD ban, former intelligence operative Duane Clarridge reportedly established a private network of spies and provided information gathered by these agents to the U.S. government.⁷

The ever-expanding use of contractors threatens core public values because the mechanisms of accountability and oversight that the United States has generally used to curb abuses by government employees do not translate well to contractors. Not all contractors are bad apples, of course, and over 1,350 have died protecting U.S. interests in Iraq and Afghanistan.⁸ Yet outsourcing as it is currently practiced threatens core commitments not to use torture and to respect the human dignity of individuals overseas, or the commitment to use force in a limited fashion that does not target civilians, or the commitment to have some degree of transparency and public participation in decisions to pursue aggressive activities abroad. For example, although the soldiers who abused Abu Ghraib prisoners faced courts-martial and were punished for their roles in the abuse, no contractors have been held accountable in that instance. Jurisdictional loopholes in our criminal law, combined with weak enforcement mechanisms and limited evidence gathering capabilities, have enabled them to escape scrutiny. Criminal proceedings against the Blackwater guards involved in the Nisour Square incident have also met with difficulties.⁹

Government privatization of covert activities is of particular concern. To be sure, reining in the excesses of government actors engaged in covert operations is a challenge even without outsourcing. This is because it is much harder to gather information about such activities, regardless of

4. GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 50-51 (2004), available at http://www.cbc.ca/news/background/iraq/pdf/fay_report20040825.pdf.

5. FY 2010 National Defense Authorization Act, Pub. L. 110-84, §1038 (2009); Siobhan Gorman, *CIA Bans Interrogations by Outside Contractors*, WALL ST. J., Apr. 10, 2009, at A3; DFARS 237.173 (2010). The statute does allow the agencies to waive the ban in the interest of national security.

6. Mark Mazzetti, *Former Spy with Agenda Operates a Private C.I.A.*, N.Y. TIMES, Jan. 23, 2011, at A1.

7. *Id.*

8. Steven L. Schooner, *Why Contractor Deaths Matter*, 38 PARAMETERS 78, 78 (2008).

9. For a more extensive discussion of these issues, see DICKINSON, *supra* note 2, at 40-68.

whether they are carried out by government employees or by contractors. And the tools of oversight and accountability we might deploy to control covert actors are especially limited because of the secrecy that these kinds of operations demand. Increased oversight by Congress and the general public through enhanced transparency laws such as an expanded Freedom of Information Act (FOIA), greater whistleblower protections, and agency reporting, may often be impractical.

Yet reforms are possible, and indeed critical, if we care about preserving core public values in the arena of covert operations. History tells us that we should care about preserving those values, both because covert operations can run amok without adequate accountability and because effective oversight can actually improve the intelligence gathering function itself. In my recent book, *Outsourcing War and Peace*, I lay out a reform agenda for increasing oversight and accountability of private contractors performing a range of military, security, and broader foreign affairs functions.¹⁰ While not all of these proposals are pertinent to contractors performing covert activities, many can be deployed in the intelligence context. This essay will briefly outline how these reforms might apply to the contracting out of covert operations.

Before doing so, however, I should describe three assumptions underlying my discussion. First, I start from the premise that we should remain committed to certain core public values, such as the protection of human dignity, even as we promote our security interests abroad. These core values are reflected, for example, in our adherence to the international treaty prohibiting torture and cruel, inhuman, and degrading treatment. They are likewise reflected in our adherence to the Geneva Conventions and our commitment to protect civilians during armed conflict. We might sometimes have disputes about where to draw the line, but we should be able to agree that some lines may not be crossed. And, as already discussed, these lines both protect our values and also are likely to contribute to more effective operations. Yet, to the extent that there are some who wish to challenge whether *any* constraints should limit the scope of our covert operations, I will not engage that debate here.

Second, I assume that another core value we share consists of some degree of public participation in the decisions about how we use our covert actors overseas. National security may require secrecy for these operations to be successful, but I assume that we want some measure of public engagement in the decisionmaking about how we prosecute these activities, as well as some measure of transparency, though again we might disagree about where to draw the line. Covert operations and public engagement are not incompatible. Some “covert” operations, for example, are reported in the press.

10. See DICKINSON, *supra* note 2.

Third, I assume that outsourcing, even of covert operations, is here to stay, at least for a long time to come. Again, we may draw lines, such as with respect to offensive combat and interrogation, but for a variety of political reasons, outsourcing is not likely to disappear any time soon. Most notably, a political culture that assumes the efficiency of the private sector (without necessarily accumulating data to prove it) makes the hiring of contract workers much easier politically than expanding the number of government employees or uniformed soldiers. Providing contracts to private employees serves the illusion that “government is not big” or “is getting smaller.” As a consequence, the starting point for my argument is that we should accept the reality of outsourcing and seek to control it better. We are in a brave new world, and we cannot ignore it. Accordingly, our best way forward is not to rail against the use of contractors in toto, but to provide better accountability for the contractors upon whom we increasingly rely.

A recent example illustrates why better accountability would be useful, both strategically and morally. In February of 2011 Pakistani officials arrested Raymond Davis after he killed two men on a street in Lahore.¹¹ Although American officials assert that Davis acted in self-defense when the men attacked him, the Pakistani press, outraged, accused the United States of letting its contract spies run amok on Pakistani soil. They alleged that the man was an employee of Blackwater. U.S. authorities initially denied that he was a contractor, claiming that Davis was a consular employee and therefore entitled to some form of immunity in Pakistani courts. Eventually they conceded that Davis was in fact a CIA contractor, and indeed an employee of Blackwater, confirming the Pakistanis’ worst fears.¹²

Significantly, one of the core concerns of the Pakistanis was the lack of accountability for U.S. contractors operating overseas. Whether or not Davis acted inappropriately, there has not been a good track record of accountability. To be sure, there have been a few cases in which U.S. courts have convicted contractors for abuse. For example, in August 2006 David Passaro, a contractor, was convicted in the U.S. District Court for North Carolina for abusing an Afghan detainee during an interrogation.¹³ But other proceedings have been less successful. As noted above, the case against the Blackwater guards implicated in the Nisour Square incident has faced numerous difficulties, and no contractors were held accountable for their role at Abu Ghraib.

11. Mark Mazetti, Ashley Parker, Jane Perlez & Eric Schmitt, *American Held in Pakistan Worked with C.I.A.*, N.Y. TIMES, Feb. 22, 2011, at A1.

12. *Id.* Blackwater has changed its name to Xe Services, and more recently it adopted the name Academi. *The Security Contractor Formerly Known as Blackwater Changes Its Name Again*, BUSINESS INSIDER, Dec. 12, 2011.

13. Dafna Linzer & Josh White, *Ex-Contractor Guilty of Assaulting Detainee*, WASH. POST, Aug. 18, 2006, at A08.

This lack of accountability is an important part of the way host nations such as Pakistan perceive contractors. Host nation citizens routinely attribute the actions of contractors to the U.S. government. As one military lawyer I interviewed for my book noted, “If an incident [in which a contractor used force] occurred in our area,” it was to the “contractor’s advantage to fly under the radar.”¹⁴ But it was “[the military’s] job to respond, to take the flak from families.”¹⁵ The “military has to clean it up, conduct an investigation.”¹⁶ Thus, the United States is not deemed any less responsible just because it has deployed contractors rather than soldiers. Yet the lack of oversight for contractors is evident to all – and so the use of contractors is viewed as an effort to flout existing rules and norms. A more effective system of accountability would send a strong signal to host nations that contractors, like government employees, must adhere to the core commitments of the United States.

So how can we provide better oversight regarding contractors, in particular those who are engaged in covert operations? We should focus on four mechanisms of accountability and constraint. The first is *legal accountability*, the extent to which private contractors might be amenable to criminal prosecution or civil suit in international or domestic legal forums. There are multiple immunity and jurisdictional issues that limit the possibilities for contractor accountability. Nonetheless, though far from perfect, some legal avenues do exist, at least in theory, to hold contractors accountable through either domestic criminal prosecutions or civil suits. Thus, it would be a mistake to assume that privatization removes the possibility of legal accountability altogether. Indeed, while significant gaps persist in existing criminal and civil law, the problem of legal accountability is not so much a deficiency of law on the books as it is a failure of law in action. Rather than focusing on writing new laws, we should devote our energy to redesigning our institutions of enforcement.¹⁷

Nevertheless, because legal accountability is weak in the foreign affairs context with regard to either state or non-state actors, alternative mechanisms of control are essential. A second mechanism, therefore, is *contractual accountability and constraint*. Contractual terms might explicitly extend the norms of public international law to contractors (thereby addressing any potential “state action” problems in international

14. DICKINSON, *supra* note 2, at 178.

15. *Id.*

16. *Id.*

17. For example, a dedicated unit could be established within the Department of Justice, combined with a team of FBI agents trained to work in conflict zones and collaborate with military investigators and state department officials. This would establish a cadre of people with the expertise to build these very difficult cases. Such a reform, while perhaps not a complete solution, could go a long way toward curing some of the problems we’ve seen in the past. See DICKINSON, *supra* note 2, at 63.

law), provide more specific terms (such as training requirements and performance benchmarks), assure better monitoring and oversight, require contractors to submit to outside accreditation by third-party organizations, and offer better enforcement mechanisms, such as third-party beneficiary suits.¹⁸

Public participation is a third mechanism of accountability and constraint, which, while less available when dealing with covert activities, may nonetheless be relevant to some degree. Here I refer to public participation within the United States as well as within the host nation. The latter is complicated by the fact that the communities directly affected will often have only minimal ability to influence the distant government overseeing the contract or its polity. Thus, it is especially important to build into the privatized relationship mechanisms that will require contractors to consult with affected populations concerning the design of projects and to offer opportunities for feedback or the filing of grievances concerning implementation.

Finally, *organizational constraints* are important to consider. In my book, I use organizational theory to explore ways that government and private entities (both for-profit and not-for-profit) develop internal organizational structures and norms of behavior that render them more or less likely to conform to various public law values. For example, in the years following Vietnam, the U.S. military built a culture of respect for the values embedded in international law, including those rules addressing the treatment of detainees and limits on the use of force during armed conflict. The military achieved this goal in part through organizational structure, by increasing the role and authority of uniformed judge advocates in the field.¹⁹ And despite actions by civilian officials within the George W. Bush administration aimed at weakening that commitment post September 11, 2001, it is significant that the uniformed leadership persisted in its efforts to protect those values.

Yet the use of private military contractors – especially interrogators and security contractors – has effectively weakened that culture on the ground, leading to abuses such as those at Abu Ghraib. Interviews with uniformed judge advocates about the growing role of security contractors shows how the rise of such contractors threatens the judge advocates' ability to protect public values on the battlefield. Use of military contractors also muddies command lines of authority in theater and creates conflicts between

18. Government contracts typically may be enforced only by the contractor (or a firm that could have been awarded the contract) or the government. *See, e.g.*, *Scott v. United States*, 78 Fed. Cl. 151 (2007). Some commentators have suggested that suits brought by third party beneficiaries to the contracts might be a possibility, and there have been some examples of courts recognizing this theory in the health care privatization context. *See, e.g.*, Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 603, 608 (2000).

19. For a more detailed analysis, see DICKINSON, *supra* note 2, at 144-188.

uniformed personnel and their higher paid private counterparts. Finally, the contract firms do not have the robust organizational infrastructure of the U.S. military or the equivalent of judge advocates, who can help to inculcate rule-of-law values within firms. Perhaps these are arguments against outsourcing itself. Yet the power of organizational structure and culture might also be harnessed as a mode of controlling private military companies. Firms, even those engaged in covert operations, could be better integrated into the military's judge advocate system, for example if judge advocates trained the contractors. Alternatively, firms might implement organizational reforms that could mitigate some of the problems.

Let us now consider how these four mechanisms of accountability and constraint might apply to contractors engaged in covert operations.

I. LEGAL ACCOUNTABILITY AND CONSTRAINT

In the case of legal accountability, we ought to consider both jurisdictional defects as well as enforcement issues. In both contexts, reforms are relevant to contractors working in covert operations, whether they are gathering intelligence, providing security, or performing some other function. With respect to criminal accountability, in the case of extreme abuse, lack of clarity about federal court jurisdiction over extraterritorial acts has been a stumbling block. For example, the Military Extraterritorial Jurisdiction Act (MEJA) is the primary law that gives U.S. courts the power to try contractors when they are accused of committing serious abuses.²⁰ However, MEJA does not explicitly govern contractors who work for agencies other than the DoD, such as the State Department contractors involved in the Nisour Square incident.²¹ It is vital that Congress close the jurisdictional gap, and efforts are underway to do so in the Civilian Extraterritorial Jurisdiction Act (CEJA), sponsored by Senator Patrick Leahy, former Senator Edward Kaufman, and Representative David Price, which is now pending in Congress.²²

One of the hurdles in enacting CEJA is apparently the concern among the intelligence agencies, that, as drafted, the bill would give federal courts jurisdiction over too broad a swath of federal crimes. Indeed, virtually any federal crime a contractor commits overseas, even minor non-violent crimes, would come within federal jurisdiction. This concern is particularly relevant to covert operatives, whether contractors or government employees. However, regardless of whether one agrees that such operatives

20. Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§3261, 3267 (2006).

21. 18 U.S.C. §3267 (1)(A)(II)(ii) (2006) (extending jurisdiction only to those contractors from other agencies whose "employment relates to supporting a Department of Defense mission").

22. S. 1145, 112th Cong. (2011).

should have the leeway to engage in actions that would be minor federal crimes in the United States, there is arguably scope for agreement that at least some serious abuses should be subject to jurisdiction, and Congress could delineate some narrower set of crimes, as it has done in proposed legislation.²³ Alternatively, prosecutorial discretion to refrain from prosecuting overly sensitive cases might serve as another safety valve.

Nevertheless, closing jurisdictional loopholes, while important, is not sufficient. Indeed, even under the current jurisdictional scheme more prosecutions could have been pursued, which implies both that we could be doing a better job right now in holding contractors responsible for abuses and that closing jurisdictional loopholes cannot be the only answer. For example, in the case of David Passaro, federal prosecutors were able to secure a conviction by using the Special Maritime and Territorial Jurisdiction, which gives federal courts jurisdiction over crimes committed overseas in certain types of facilities controlled by the U.S. government. Because Passaro interrogated the subject in such a facility, the courts had jurisdiction. Using the same approach, courts might also have exercised jurisdiction over the contract interrogators at Abu Ghraib. Likewise, prosecutors encountered jurisdictional and other difficulties in the Nisour Square case, illustrating serious flaws in the current legal and regulatory regime that governs contractors overseas. Although prosecutors initiated proceedings against five Blackwater guards in December of 2008, a district court judge threw out the case a year later. The court of appeals reinstated the prosecution on April 22, 2011, so it seems set finally to go to trial, but jurisdictional and other enforcement issues may resurface.²⁴ Accordingly, the lack of prosecution in these cases suggests problems beyond jurisdiction.

Thus, we also need to restructure our institutions of enforcement to build more expertise and set better incentives for pursuing these cases. For many years, responsibility for contractor abuse cases lay with U.S. Attorneys offices around the country, and lawyers there did not necessarily see these cases as a high priority, or have the experience needed to prosecute them successfully. We need a designated office within the Department of Justice to focus on these types of cases, and we should require the office to report on its efforts. Special expertise to handle such cases is particularly significant in covert cases, when issues such as “graymail” might arise. Graymail is a type of blackmail in which suspects might threaten to disclose information that would put national security interests at risk. Indeed, according to the prosecutor, graymail was an issue in the Passaro case, and having an office with special expertise in handling such security threats would likely help. At the same time, we need better

23. *Id.* §3273 (limiting federal jurisdiction to egregious crimes such as murder and assault).

24. *United States v. Slough*, 641 F. 3d 544 (D.C. Cir. 2011).

evidence gathering in the field.²⁵ It took two weeks for FBI investigators to get to Nisour Square to gather information, and ultimately it was largely the evidentiary problems that caused this case to fall apart. Thus, I support CEJA's provisions requiring theater investigative units to gather evidence in cases of abuse.

II. USING CONTRACTUAL TERMS

Contractual terms can also be an important tool of accountability and constraint. To begin with, contracts should explicitly require that contractors obey norms and rules that implement public law values. For example, terms of each agreement could identify relevant legal frameworks and provide that private contractors must abide by applicable legal rules within those frameworks. Similarly, contracts should provide for specific training of contractors that would better enable contractors to abide by those rules.

In a study I conducted of all of the publicly available Iraq contracts several years into the U.S. engagement there, I concluded that the contracts fell far short in these respects, particularly in comparison to state and local privatization contracts for prison management, health care, and other services.²⁶ And even as of 2007, four years after the beginning of the Iraq War and six years after the beginning of the conflict in Afghanistan, the DoD and State Department had strikingly different contracting practices. For example, a report produced by the Secretary of State's Panel on Personal Protective Services in Iraq observed after two weeks of on-the-ground interviews that security contractors in Iraq were operating "in an environment that is chaotic, unsupervised, deficient in oversight and accountability, and poorly coordinated."²⁷ Moreover, the report noted a lack of "parallelism" between the State Department rules and those of the U.S. Central Command (CENTCOM) on the use of force by contracted security in Iraq, and in particular urged the State Department to revise its rules to clarify that "if an authorized employee must fire his/her weapon, he/she must fire only aimed shots; fire with due regard for the safety of innocent bystanders; and make every effort to avoid civilian casualties."²⁸

Since then, the DoD and State Department have entered into a Memorandum of Agreement²⁹ to harmonize their approaches to standards

25. See DICKINSON, *supra* note 2, at 59-60.

26. *Id.* at 69-101.

27. REPORT OF THE SECRETARY OF STATE'S PANEL ON PERSONAL PROTECTIVE SERVICES IN IRAQ 4 (2007), available at <http://merln.ndu.edu/archivepdf/iraq/State/94122.pdf>. Panel members included Eric J. Boswell, George A. Joulwan, J. Stapelton Roy, and Patrick F. Kennedy.

28. *Id.* at 9.

29. Memorandum of Agreement (MOA) between the U.S. Dep't of Def. and the U.S.

for private security contractors as well as contract management more broadly. This effort has earned the praise of watchdogs such as the Government Accountability Office (GAO)³⁰ and the Special Inspector General for Iraq Reconstruction (SIGIR).³¹ Yet the fact that the rules regarding the use of force for contractors were so different for so long is troubling. In addition, the Memorandum of Agreement covers only security contractors, not other contractors, such as covert operatives, translators, or logistics contractors, who carry weapons for self-defense and who therefore might use force. Moreover, the contract language remains relatively broad and vague. More useful terms would refer to particular obligations under international law, such as specific human rights or humanitarian law treaties, as opposed to the general command to obey applicable law.

Provisions must also be made for increased contract monitoring, which would help ensure an important additional check on abuses. Such monitoring should include, to begin with, sufficient numbers of trained and experienced government contracts monitors. In addition, other government personnel who interact with contractors, such as commanders, uniformed military personnel, or agency officials must understand contractors' roles and in some cases have their own oversight capability. Finally, government ombudspersons – leaders of independent offices charged with providing enhanced oversight – serve as an important supplement to contract monitors. Thus, at a minimum, it is essential that government agencies devote sufficient resources to ensure that these requirements are implemented in a meaningful way. Contractual terms, such as mandatory contractor self-evaluation and performance benchmarks, can increase the impact of monitoring.

As with contractual language, both the George W. Bush administration and now the Obama administration have also made some strides in monitoring contracts. Agencies have improved contract monitoring to some degree since the early days of the conflict in Iraq and Afghanistan. Indeed, the GAO concluded in 2008 that the “DOD and the State Department have improved oversight and coordination” of security contractors.³² For example, in 2007 the DoD established a new unit, the Armed Contractor Oversight Division, to monitor security contractors. This division has improved tracking of serious incidents involving armed

Dep't of State on USG Private Sec. Contractors (Dec. 5, 2007).

30. U.S. GOV'T ACCOUNTABILITY OFFICE, REBUILDING IRAQ: DOD AND STATE DEPARTMENT HAVE IMPROVED OVERSIGHT AND COORDINATION OF PRIVATE SECURITY CONTRACTORS IN IRAQ, BUT FURTHER ACTIONS ARE NEEDED TO SUSTAIN IMPROVEMENTS 4 (2008) [hereinafter REBUILDING IRAQ].

31. *See, e.g.*, OFFICE OF THE SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, SIGIR 09-019, OPPORTUNITIES TO IMPROVE PROCESSES FOR REPORTING, INVESTIGATING, AND REMEDIATING SERIOUS INCIDENTS INVOLVING PRIVATE SECURITY CONTRACTORS IN IRAQ 1-2 (2009).

32. REBUILDING IRAQ, *supra* note 30, at 1, 4, 9, 19.

security contractors, and has increased accountability. Furthermore, military units are now “more responsible for providing oversight” including “reporting and investigating as well as contract management.”³³ Thus, according to the GAO, on-the-ground military units are no longer working in ignorance of contracts, or even worse, at cross-purposes with contract monitors. And the State Department has increased oversight of security contractors by placing diplomatic security agents in each security contractor motorcade and has increased the number of government security agents.³⁴

Yet significant challenges remain. As recently as 2008, Jack Bell, then Deputy Under Secretary of Defense (Logistics and Materiel Readiness), emphasized that “faced with this unprecedented scale of dependence on contractors, we have confronted major challenges associated with visibility, integration, oversight, and management of a large contractor force working alongside our deployed military personnel that, frankly, we were not adequately prepared to address.”³⁵ Indeed, even in praising the DoD and the State Department for their increased contract monitoring, the GAO questioned whether the agencies had enough personnel in place to be effective. As the GAO put it, “It is not clear whether DOD can sustain this increase [in staffing].”³⁶ Indeed, according to the report, the Army “lacks the leadership and military and civilian personnel to provide sufficient contracting support to either expeditionary or peacetime missions.”³⁷ In a separate 2009 audit of the State Department security contracts with Blackwater, the SIGIR found that the contract officer representatives (CORs) for the contract were severely overtaxed: “[S]ince the COR duties are collateral and are assigned to special agents who spend most of their time planning and executing their own protective missions, the special agents have little time for contract administration or monitoring.”³⁸ These reports strongly suggest that contract management remains a side job that gets short shrift in the face of other, overwhelming duties. Even the DoD’s recent commitment to hire twenty thousand new contract-monitoring

33. *Id.* at 4, 9.

34. *Id.*

35. The Hon. P. Jackson Bell, Deputy Under Sec’y of Def. (Logistics and Materiel Readiness), U.S. Dep’t of Def., Testimony Before the U.S. Senate Comm. on Homeland Sec. and Gov’t Affairs (Feb. 27, 2008), *available at* <http://www.dod.mil/dodgc/olc/docs/testBell080227.pdf>.

36. REBUILDING IRAQ, *supra* note 30, at 4.

37. *Id.* at 16.

38. U.S. DEP’T OF STATE, THE BROAD. BD. OF GOVERNORS OFFICE OF INSPECTOR GEN., & THE OFFICE OF THE SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION (SIGIR), SIGIR-09-21, AUD/IQO-09-16, JOINT AUDIT OF BLACKWATER CONTRACT AND TASK ORDERS FOR WORLDWIDE PERSONAL PROTECTIVE SERVICES IN IRAQ 32 (2009).

personnel by 2015,³⁹ though a step in the right direction, is probably insufficient given the huge growth in contract labor over the past decade.

Another contractual tool for promoting public law values is accreditation. Independent organizations, often consisting of experts or professionals in the field, can evaluate and rate private contractors. Government authorities can then require that contractors receive certain ratings. Or government entities or international institutions, such as the United Nations, could develop accreditation regimes. For example, both the George W. Bush and Obama administrations have supported what might be termed an international accreditation process, sometimes referred to as the Montreux Document, for private military and security contractors. Initiated by the Swiss government and the International Committee of the Red Cross, the process now includes a code of conduct and involves participation by governments, industry, and civil society groups. The code sets standards for practices such as vetting and training of military and security firms.⁴⁰ Accreditation would also require establishment of a grievance procedure and an auditing process, both of which are contemplated in the code, though the precise grievance mechanism and audit requirements remain to be worked out.⁴¹

Finally, Congress or the relevant agencies could improve contract enforcement. Currently, even in the domestic setting, generally only government officials and contractors may enforce contract violations, though Congress has provided for limited private enforcement against those who have defrauded the government. Measures that would enhance enforcement might include greater opportunities for third-party enforcement actions in domestic courts, expanded whistleblower protections for contractor employees, and privatized grievance procedures.

Many of these contractual reforms are relevant to the privatization of covert activities. The need for more specific contractual terms regarding training and the use of force, for example, applies equally to contract spies as to contract security guards protecting military installations, although the precise terms might vary depending on the nature of the particular operation. Similarly, more and better trained oversight personnel, whether in DoD or the CIA or other agencies, is critical. And inspectors general should monitor and report on the activities of contractors engaged in covert operations. If the publication of such reports would compromise national security, transmission to congressional committees without broader public disclosure is possible.

39. Elise Castelli, *How DOD Will Add 20,000 Acquisition Officers*, DEFENSE NEWS, Apr. 13, 2009, <http://www.defensenews.com/story.php?i=4035334>.

40. International Code of Conduct for Private Security Service Providers, Nov. 9, 2010, *available at* http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede150311audcodeofconduct_/sede150311audcodeofconduct_en.pdf.

41. *Id.* at 3, 15-16.

Accreditation is particularly relevant here. Firms hired by any government agency to perform covert work ought to receive some sort of pre-clearance or accreditation based on various benchmarks of quality. The Montreux framework could be broadened to apply explicitly to firms engaged in covert activities.⁴²

Expanding enforcement of contractual reforms in the case of privatized covert activities may pose special challenges. Indeed, it is unlikely that Congress will allow third party beneficiaries to challenge the terms even of logistics contracts, let alone contracts involving covert operations. And expansion of whistleblower protections is also problematic. But a grievance mechanism within an accreditation regime such as the proposed Montreux framework is a distinct possibility. Such a framework could preserve some measure of secrecy while allowing for accountability.

III. TRANSPARENCY AND PUBLIC PARTICIPATION

Expanding transparency is generally not a viable form of accountability and constraint for privatized covert activities. In *Outsourcing War and Peace* I argue, for example, that an expansion of the FOIA, broader whistleblower protections, and mandated disclosure of standard contractual terms could help promote public participation by increasing the transparency of the contracting process. I also argue that the agencies should gather data on contractor abuses and report that data to Congress and the public. Such reforms, while helpful in the case of security and logistics contracting, are unrealistic in cases where secrecy of operations is critical to protect U.S. interests.

Nonetheless, more limited disclosure of contractor activities in covert operations is potentially workable. Thus, agencies might at least report on such activities to congressional committees charged with keeping the information secret. Such an inter-branch check on executive authority is important, even if it does not entail broad public accounting.

42. The Montreux Document defines private military and security companies (PMSCs) as “private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.” Montreux Document, International Committee of the Red Cross U.N. Document A/63/467-S/2008/636 (Oct. 8, 2009) Annex, available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/537/10/pdf/N0853710.pdf?OpenElement>.

IV. INTERNAL ORGANIZATIONAL STRUCTURE AND CULTURE

Internal organizational compliance structure and the culture of organizations – whether agencies or private firms – comprise another, often overlooked mechanism of accountability and constraint. In *Outsourcing War and Peace*, I first review studies of organizational structure and culture in other settings, and then, through a series of interviews I conducted with uniformed military lawyers, I examine internal structural and cultural factors in the U.S. military that promote compliance with certain core values. Specifically, I rely on a broad literature suggesting that the existence of certain features within an organization, such as compliance agents who are: (1) integrated with operational employees, (2) possess strong commitments to core values, (3) have an independent hierarchy for promotion, and (4) can invoke an internal sanctions regime, promotes accountability and constraint.

The interviews I conducted with uniformed military lawyers – who can be viewed as the compliance agents within the military – suggest the critical role that these lawyers play on the battlefield, integrating public values into military decisionmaking by training troops in the laws of war and advising commanders on issues such as whether a particular targeting decision is a “good shoot or a bad shoot.” Military lawyers, embedded with troops in combat and consulting regularly with commanders, have internalized and seek to operationalize the core values inscribed in the international law of armed conflict, in particular the imposition of limits on the use of force. They also have a somewhat independent hierarchy for promotion, which depends on the assessments of more senior military lawyers as well as their battlefield commanders. And they can encourage their commanders to invoke a strong sanctions regime, the military justice system, when soldiers cross the line and commit abuses. To be sure, the lawyers are not always successful, and it would be simplistic to assume that the U.S. military always obeys international law. But the stories these military lawyers tell support the idea that the presence of lawyers on the battlefield can – at least sometimes – produce military decisions that are more likely to comply with international legal norms.⁴³

By contrast, contractors largely fall outside this organizational accountability framework. While they may receive some training in the rules regarding the use of force, that training does not typically include updated advice on the battlefield about how the rules apply in specific scenarios likely to arise. Contractors also do not receive ongoing situational advice from military lawyers or even from private lawyers employed by their firms. Finally, the accountability system that has applied to troops has not, at least until recently, been extended to contractors. Thus,

43. DICKINSON, *supra* note 2, at 144-188.

2012]

OUTSOURCING COVERT ACTIVITIES

535

many crucial, though subtle, mechanisms of compliance with public values are significantly weakened in the privatization process.

One response to this problem is to give the uniformed lawyers more of a role in advising contractors. They might do more training of contractors authorized to use force and provide consultation or supervision in the field. And they might take a more active role in recommending punishment from within the military justice system for contractors accused of committing abuses. Indeed, Congress enacted legislation several years ago that expanded the power of military courts to try contractors.⁴⁴ This approach is potentially available for some categories of contractors engaging in covert activities. Military lawyers might provide training to military contractors or contractors from other agencies working with the military regarding the applicable laws of war.

When contractors are engaging in activities outside conflict zones or are not partnering with the military, this approach would be less feasible. Nonetheless, an embedded oversight role for civilian lawyers is a possibility. For example, CIA lawyers are involved in the clearance process for drone attacks.⁴⁵ Of course, it is unclear whether the CIA has inculcated the same culture of respect for the rule of law that appears to be ingrained within the uniformed military, or whether the CIA's organizational structures support an independent cadre of compliance agents, as we see in the military context.

Nevertheless, embedding government lawyers is not the only possible approach. Even for contractors conducting covert operations, we could require contract firms to install internal accountability agents with a role comparable to that of uniformed lawyers in the military. Such agents should be responsible for training employees, monitoring their actions, tracking abuses, and imposing sanctions in the case of such abuses. Perhaps the decision by Academi (formerly Blackwater) to appoint former Attorney General John Ashcroft as their lead ethics agent is a step in this direction.⁴⁶

CONCLUSION

There are, of course, potential difficulties with all four mechanisms of accountability and constraint described in this essay, whether the privatized activities are covert or not, and a detailed discussion of implementation is

44. 10 U.S.C. §802(a)(10) (2006).

45. Tara Mckelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 13, 2011, at 34.

46. Eyder Peralta, *Ashcroft Joins Former Blackwater Firm as Head of Ethics Committee*, NATIONAL PUBLIC RADIO (May 4, 2011), <http://www.npr.org/blogs/thetwo-way/2011/05/04/135991896/ashcroft-joins-former-blackwater-firm-as-head-of-ethics-committee>. See *supra* note 12.

beyond the scope of this article. One overall objection that might be raised, however, deserves a response here. It might be suggested that any reform proposal to provide better accountability for contractors is inherently unrealistic because one of the main reasons governments privatize is precisely to *avoid* the kinds of constraints that I argue should be imposed. Yet governments are not monolithic, and there are undoubtedly many people within bureaucracies, such as contract monitors, who would welcome (and lobby for) mechanisms that increase accountability. In addition, legislatures sensitive to public opinion may be able to play an increased oversight role, and NGOs and international organizations can sometimes pressure states to adopt at least some of the approaches I have discussed. Moreover, even when states fail to act, NGOs can take actions on their own – such as adopting accreditation and rating schemes – that may have a significant impact. And these efforts may occur domestically or through transnational legal and political processes. Finally, once the focus moves beyond simply trying to impose direct legal liability, governments may be more willing to consider alternative contract language, internal organizational structure, and public participation values in drafting and awarding contracts in the first place. The problem is that neither policy-makers nor scholars have sufficiently focused on privatization or the alternative mechanisms of constraint that the privatized relationship opens up.

Most importantly, while it is of course true that these various mechanisms of constraint will not solve the problems posed by privatization, either separately or in combination, it is not as if even *non*-privatized foreign affairs activity is subject to sufficient mechanisms of accountability or constraint. And in any event, given that foreign affairs privatization is probably here to stay, those who care about human dignity, public participation, and transparency will need to think creatively about a variety of plausible means to constrain privatization. We will not be able to simply resist the privatization trend altogether. In addition, once we seek to constrain privatization, rather than eliminate it outright, we may find that while outsourcing sometimes threatens these values, it does not always do so. Indeed, the very fact of privatization may actually create some interesting and surprising spaces where public law values may be protected, and perhaps even expanded.

In all of this analysis, it should be emphasized that the law in action matters just as much as, if not more than, the law on the books. Of course, if State Department officials can plausibly argue that federal laws do not give U.S. federal courts jurisdiction to try State Department contractors for crimes they commit overseas, Congress should enact new legislation to make it clear that those contractors are indeed subject to U.S. criminal law.⁴⁷

47. As noted above, the Military Extraterritorial Jurisdiction Act gives federal courts the power to hear criminal cases involving contractors from agencies other than the DoD if

2012]

OUTSOURCING COVERT ACTIVITIES

537

But the institutional and organizational arrangements to ensure that those laws are enforced – the ability of Congress to scrutinize the Department of Justice, the expertise and incentives of the lawyers within the Department of Justice, and the ability of the Department of Justice to gather evidence overseas – are just as significant as the formal legal rules. Indeed, the intangible norms of a particular organization’s culture – as the uniformed judge advocates’ commitment to the principle that the use of force is limited during armed conflict powerfully attests – are perhaps the most significant factor of all. We need to bring to the surface these often hidden and intangible elements in responding to the particular challenges that arise from foreign affairs privatization.

Privatization in the international realm is a crucial field of study, and it is essential that we have more dialogue like this one among international and domestic scholars, advocates, and policy-makers concerning appropriate responses to this trend. And more attention must be paid to finding a variety of mechanisms to constrain contractor malfeasance and hold private actors more accountable both to those affected by their activities and to those footing the bill. In the coming years we shall need to think broadly about how best to respond to the threats posed by the outsourcing of governmental functions to private entities. Only through such efforts will we be able to find ways to protect crucial public law values in the era of privatization that is already upon us.

their employment “relates to supporting a Department of Defense mission.” 18 U.S.C. §3267(1)(A)(II)(ii) (2006).