

Chapter 12 — Contract as a tool for regulating private military companies

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Private military companies (PMCs) do not inhabit a complete regulatory void, but rather operate in an environment regulated by a complex array of existing international and domestic legal provisions. Nevertheless, there can be little doubt that the increasing use of private military contractors does at least challenge the current international and transnational legal framework. For example, ambiguities persist as to the extent to which certain public law commitments, such as the international law prohibition on official torture,¹ apply to contractors because they are, at least nominally, non-state actors. In response to this challenge, scholarly and policy work focusing on military privatization has mostly emphasized the possible role of transnational litigation,² domestic and international licensing schemes,³ treaty reform,⁴ and industry self-regulation.⁵ Yet, few scholars have homed in on the regulatory potential of the government contracts themselves.⁶ Contracts are, however, the vehicle of military privatization, and as such they could carry what we

¹ See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 1 (defining torture as certain activities designed to inflict pain or suffering when such “pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”). Of course, this international “state action” requirement can be challenged on a number of grounds. See, e.g., Jordan J. Paust, “Human Rights Responsibilities of Private Corporations”, *Vanderbilt Journal of Transnational Law*, vol. 35 (2002), pp. 801ff; see also Laura A. Dickinson, “Public Law Values in a Privatized World” *Yale Journal of International Law*, vol. 31 (2006), pp. 394ff (summarizing arguments that international “state action” requirement is minimal).

² See, e.g., Tina Garmon, “Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act”, *Tulsa Journal of International and Comparative Law*, vol. 11 (2003), pp. 325ff. Victims of abuse by contractors at Abu Ghraib prison in Iraq have brought suit under the Alien Tort Claims Act. See, e.g., *Ibrahim v. Titan Corp. et al.*, 04-cv-01248 (D.D.C. 2004); *Al Rawi v. Titan Corp. et al.*, 04-cv-1143 (S.D. Ca. 2004).

³ See, e.g., chapter two in this volume by Kevin O’Brien; Juan Carlos Zarate, “The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder”, *Stanford Journal of International Law*, vol. 34 (1998), pp.75ff; see also P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca: Cornell University Press, 2003).

⁴ See, e.g., Todd S. Milliard, “Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies”, *Military Law Review*, vol. 176 (2003), pp. 1ff.

⁵ See, e.g., chapter thirteen in this volume by Andrew Bearpark and Sabrina Schulz; see also International Peace Operations Association (IPOA) Code of Conduct, available at <<http://www.ipoaonline.org/conduct/>>.

might call the norms and values of public international law into the “private” sector.

There are many ways in which private military companies, government officials, and non-governmental organizations seeking to prevent military contractors from committing abuses can use governmental contracts to incorporate crucial public law values, including human rights, transparency, and anticorruption norms.⁷ Contracts could be drafted explicitly to extend relevant norms of public international law to private contractors, provide for enhanced oversight and enforcement, and include more specific terms such as carefully drafted training and accreditation requirements. Further, this analysis has drawn on insights from the scholarly literature on the long-standing trend within the United States to privatize domestic governmental functions, such as prison management, healthcare, welfare, and education.⁸ In each of these contexts, scholars have noted efforts to incorporate various substantive and procedural accountability mechanisms into privatization contracts; similar provisions could be included in contracts with private military companies.

This chapter explores the numerous objections that policymakers and scholars might make to such contractual provisions. To be sure, because few commentators have focused specifically on the role that contract might play in the arena of military privatization, no one has yet articulated a comprehensive set of objections. Nonetheless, it is possible to extrapolate from the debates about privatization in the domestic context. Drawing on those debates, six objections to the idea of reforming contracts so as to make them a more effective tool for regulatory oversight can be identified. Critics might argue that: (1) the existing contractual framework is sufficient without any reforms; (2) reforming contracts would be a costly venture that would eat up any cost savings from privatization; (3) neither government officials nor private military companies are likely to agree to such reforms; (4) the structure of the private military contractor market itself undermines the prospects of successful contractual regulation; (5) reforms that grant rights to third parties either to participate in contract design or to file grievances would be unwieldy; or (6) terms in governmental contracts are difficult to enforce, and expanding enforcement to include third parties would be impossible to manage. Each of these will be considered in turn, along with a response supporting both the viability and desirability of contractual provisions as a means of regulating PMC conduct.

⁶ One scholar who has is Steve Schooner, a government contracts expert who has identified problems in the Iraq military and reconstruction contracts. See Steven L. Schooner, “Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government”, *Stanford Law and Policy Review*, vol. 16 (2005), pp. 549ff. Schooner has not, however, focused specifically on how contracts could be used to protect human rights.

⁷ See Dickinson, “Public Law Values in a Privatized World” (footnote 1 above).

⁸ See, e.g., Jody Freeman, “The Private Role in Public Governance”, *New York University Law Review*, vol. 75 (2000), pp. 543 ff; Gillian Metzger, “Privatization as Delegation”, *Columbia Law Review*, vol. 103 (2003), pp. 1367 ff.

The adequacy of the existing contractual framework

A number of critics who oppose regulation of private military companies have implied that reform of the governmental contracting process is unnecessary. Instead, it is contended that existing contractual arrangements and industry self-regulation are the most effective means of curbing abuses. Deborah Avant would similarly eschew most forms of regulation other than efforts to professionalize the culture of private military company employees.⁹

The current contractual framework is far from adequate, however, as examples from the US-led military and reconstruction efforts in Iraq demonstrate. Contractor interrogators working for the firm CACI tortured detainees at Abu Ghraib and subjected them to cruel treatment, and contractor translators working for the firm Titan were also implicated. Victims have since brought suit against the contractors in US courts under the Alien Tort Claims Act (ATCA) and have alleged violations of international law.¹⁰

In addition to violating human rights, Iraq contractors have also been implicated in fraud and other financial abuses. For example, Kellogg, Brown & Root's more than \$10 billion in contracts with the US government in Iraq "have been dogged by charges of preferential treatment, over-billing, cost overruns, and waste."¹¹ Perhaps even more egregious was Custer Battles, a company that had received two \$16 million contracts from the US Agency for International Development (USAID) to provide security for the Baghdad airport and distribute Iraqi dinars. Custer Battles employees reportedly chartered a flight to Beirut with \$10 million in new Iraqi dinars in their luggage, set up sham Cayman Islands subsidiaries to submit invoices, and regularly overcharged for materials — in one case allegedly billing the United States \$10 million for materials that it purchased for \$3.5 million.¹² A jury issued a \$10 million verdict against Custer Battles in connection with such abuses.¹³ In a similar case, former US occupation official Robert J. Stein has pleaded guilty

⁹ See chapter ten in this volume by Deborah Avant.

¹⁰ See case cited in footnote 2 above.

¹¹ Warren Hoge, "UN Criticizes Iraq Occupation Oil Sales", *New York Times*, 15 December 2004. In addition, the chief contracting officer for the Army Corps of Engineers has publicly accused the Army of granting preferential treatment to KBR (through its parent company, Halliburton) in awarding contracts in Iraq and the Balkans, in violation of US contracting regulations. Erik Eckholm, "A Top US Contracting Official for the Army Calls for an Inquiry in the Halliburton Case", *New York Times*, 25 October 2004.

¹² See "Waste, Fraud, and Abuse in US Government Contracting in Iraq: Hearing Before the S. Democratic Policy Comm.", 109th Cong. 10 (2005) [hereinafter SDPC Hearing], pp. 1-2 (statement of Alan Grayson).

¹³ The suit was brought as a private enforcement action under the Federal False Claims Act, 31 U.S.C. § 3730 (2000). See Yochai J. Dreazen, "Attorney Pursues Iraq Contractor Fraud", *Wall Street Journal*, 19 April 2006 (discussing the suit). In March 2006 a jury ordered Custer Battles to return \$10 million in ill-gotten funds to the government. See *ibid.* Yet, though the district court judge in that case had permitted the suit to proceed, *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005), it is unclear whether the verdict will ultimately hold up on appeal and whether such False Claims Act suits will be deemed sustainable

to charges of corruption and bribery in the award of reconstruction contracts.¹⁴ Army reserve officers have also been arrested and indicted for charges in related proceedings, and a US businessman, Philip Bloom, has pleaded guilty to charges of conspiracy and money laundering.¹⁵ At the core of the inquiry, prosecutors say, was a scheme in which Stein and other officials steered at least \$8.6 million in reconstruction contracts to companies controlled by Bloom, in exchange for millions of dollars in bribes, jewellery and other favours.¹⁶ Stein also pleaded guilty to federal weapons charges for having used the money to buy submachine guns, grenade launchers and other weapons in the United States. Investigators suspect that there may be a link between these cases and the death of human rights worker Fern Holland and press officer Robert Zangas.¹⁷ Moreover, all indications are that the corruption that has come to light so far is only the tip of the iceberg. In short, corruption and fraud have been rampant in the Iraqi contracts.

The existing governmental contracts have clearly not prevented such abuses. A careful examination of such agreements both highlights their deficiencies and at the same time suggests possible reforms. In a recent study, for example, I examined all publicly available Iraq military and reconstruction contracts entered into by the US government, and compared them to agreements between local state government contracts involving roughly analogous domestic governmental functions, such as prison management.¹⁸ In contrast to the domestic agreements, the Iraq contracts are strikingly vague. And though some flexibility is undoubtedly necessary to cope with the exigencies and security concerns inherent in the sorts of environments where PMCs are likely to be used, the foreign contracts (at least those that are publicly available) possess so few guidelines, requirements, or benchmarks that they effectively contain no meaningful evaluative criteria whatsoever. Drawing on the lessons from the domestic setting, these contracts could be reformed in a number of ways that would have a significant impact. Specifically, the contracts could resolve any lingering ambiguity about the applicability of international human rights and humanitarian law, include more specific terms, such as training and accreditation requirements, and provide for enhanced monitoring, oversight, and enforcement.

in this context.

¹⁴ James Glanz, “Two Years Later, Slayings in Iraq and Lost Cash are Mysteries”, *New York Times*, 9 May 2006.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ See Dickinson, “Public Law Values in a Privatized World” (footnote 1 above).

Making human rights and humanitarian law apply

Perhaps most importantly, the contracts could explicitly require that the contractors obey the norms that implement public law values. The terms of each agreement could provide that private contractors must abide by relevant human rights and humanitarian law rules applicable to governmental actors. Such contractual terms would obviate the need to show that the private actors were functioning as an extension of government so as to satisfy any state action requirement that might arise under domestic and international legal regimes. Instead, the norms applicable to governmental actors would simply be part of the contractual terms, enforceable like any other provisions, regardless of state action.

While such provisions are commonplace in the domestic setting,¹⁹ the US government's military and foreign aid contracts in Iraq are woefully inadequate. To be sure, a 2005 Department of Defense (DOD) document providing general instructions regarding contracting practices does state that contractors "shall abide by applicable laws, regulations, DOD policy, and international agreements."²⁰ Nevertheless, of the sixty publicly available Iraq contracts,²¹ none contains specific provisions requiring contractors to obey human rights, anticorruption, or transparency norms.

The agreements between the US government and CACI to supply military interrogators starkly illustrate this point. The intelligence personnel were hired pursuant to a standing "blanket purchase agreement" between the Department of the Interior and CACI, negotiated in 2000.²² Under such an agreement the procuring agency need not request specific services at the time the agreement is made but rather may enter task orders as the need arises. In 2003 eleven task orders, worth \$66.2 million, were submitted (none of which was the result of competitive bidding).²³ The orders specify only that CACI would provide interrogation support and analysis work for the US Army in Iraq, including "debriefing of personnel, intelligence report writing, and screening/interrogation of detainees at established holding areas."²⁴ Significantly, the orders do not expressly require that the private contractor interrogators comply with international human rights or

¹⁹ As a term in their contracts with privately run prisons, for example, many states require compliance with constitutional, federal, state, and private standards for prison operation and inmates' rights.

²⁰ US Department of Defense Instruction, No. 3020.41, § 6.1 (3 October 2005).

²¹ See Center for Public Integrity, Contracts and Reports, available at <http://publicintegrity.org/wow/resources.aspx?act=resources> [hereinafter Contracts and Reports] (providing text of contracts).

²² See Agreement Between the Department of the Interior and CACI Premier Technology, Inc., No. NBCHA010005 (2004), available at <http://publicintegrity.org/wow/docs/CACI_ordersAll.pdf> [hereinafter DOI-CACI].

²³ Work Orders Nos. 000035/0004, 000036/0004, 000037/0004, 000038/0004, 000064/0004, 000067/0004, 000070/0004, 000071/0004, 000072/0004, 000073/0004, & 000080/0004, issued under DOI-CACI (footnote 22 above), available at <http://http://publicintegrity.org/wow/docs/CACI_ordersAll.pdf>.

humanitarian law rules such as those contained in the Torture Convention or the Geneva Conventions. Drafting contracts to include such provisions is an easy and obvious reform.

Making contractual terms more specific and requiring accreditation

The contracts with private military contractors could also include more specific terms. For example, contracts could explicitly require contractor-employees to receive training in international human rights and humanitarian law. Domestic contracts in the United States between state governments and private prison operators regularly include such terms.²⁵ Yet, while the 2005 DOD instructions require documentation of training concerning appropriate use of force,²⁶ none of the publicly available Iraq contracts appears to require such training. Indeed, although a few of the agreements require that contractors hire employees with a certain number of years' experience,²⁷ none specifies that the contractor must provide any particular training at all. Thus, it is not surprising that an Army Inspector General report on the conditions that led to the Abu Ghraib scandal concluded that 35 percent of CACI's Iraqi interrogators did not even have any "formal training in military interrogation policies and techniques," let alone training in international law norms.²⁸

Similarly contracts might lay out more specific performance benchmarks. In the domestic context, commentators and policymakers have long urged that contracts include benchmarks, and rigorous performance standards regularly appear in contracts.²⁹ For

²⁴ Work Order No. 000071/0004 (footnote 23 above).

²⁵ A standard term in state agreements with companies that manage private prisons, for example, requires companies to certify that the training they provide to personnel is comparable to that offered to state employees. See, e.g., Oklahoma Department of Corrections, "Correctional Services Contract" § 6.4, available at <<http://www.doc.state.ok.us/Private%20Prisons/98cnta.pdf>> [hereinafter Oklahoma Contract]; Florida Corrections Privatization Commission, "Correctional Services Contract with Corrections Corporation of America" § 6.5 [hereinafter Florida Contract].

²⁶ Dep't of Defense Instruction (footnote 20 above), § 6.3.5.3.4.

²⁷ See, e.g., Work Order No. 000071/0001 (footnote 24 above), (requiring that human intelligence advisor must have at least ten years of experience and must be "knowledgeable of Army/Joint Interrogation procedures"). Notably, this work order does not require the contractor to provide any training.

²⁸ US Department of the Army, Inspector General, "Detainee Operations Inspection" (2004), pp. 87-89, available at <<http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf>>.

²⁹ See, e.g., Harry P. Hatry, Urban Inst., "Performance Measurement: Getting Results" (1999), pp. 3-10 (1999). Scholars have argued that, ideally, performance-based contracts should "clearly spell out the desired end result" but leave the choice of method to the contractor, who should have "as much freedom as possible in figuring out how to best meet government's

example, under the model contract for private prison management drafted by the Oklahoma Department of Corrections, contractors must meet such delineated standards for security, meals, and education.³⁰

In contrast, the Iraq contracts are again woefully inadequate. Indeed, it is striking that, of the publicly available Iraq contracts for military services, not one contains clear benchmarks or output requirements. For example, a contract between the US government and Military Resources Professionals Incorporated (MPRI) to provide translators for government personnel, including interrogators, simply provides that the contractors will supply interpreters.³¹ The agreement says nothing about whether the interpreters must be effective or how effectiveness might be measured. Similarly, the CACI task orders for interrogators specify only that CACI will provide interrogation support and analysis work for the US Army in Iraq, including “debriefing of personnel, intelligence report writing, and screening/interrogation of detainees at established holding areas.”³² Other than these broad goals, the task orders say little more. Security imperatives may sometimes require some degree of vagueness. Nonetheless, the task orders could be much more specific about training requirements, standards of conduct, supervision, and performance parameters.

Furthermore, contracts could require that independent organizations accredit military contractors. Industry organizations have in fact begun to do so. In chapter thirteen of this volume Andrew Bearpark and Sabrina Schulz describe such an initiative in Britain.³³ The International Peace Operations Association (IPOA), another industry-based organization, has launched a similar effort.³⁴ Independent organizations without industry ties could establish a rating system as well. Yet amazingly, not one of the available contracts for aid or military services in Iraq requires that the entities receiving the contracts be vetted or accredited by independent organizations.

On this score, the domestic context provides a particularly rich set of models as to how an accreditation scheme might work. For example, in the healthcare field, state laws or contractual terms often specify that health maintenance organizations (HMOs) must receive accreditation by the National Committee for Quality Assurance (NCQA), an independent non-profit organization, before receiving public funding. Until recently, NCQA certification was primarily voluntary, offering HMOs an advantage when competing for

performance objective.” William D. Eggers, *Performance-Based Contracting: Designing State-of-the-Art Contract Administration and Monitoring Systems* (Los Angeles: Reason Public Policy Institute, 1997), p. 2.

³⁰ See, e.g., Oklahoma Contract (footnote 25 above) § 5.

³¹ Agreement Between DOD and MPRI, “Iraq Interpreters”, No. GS-23F-9814H (Apr. 28, 2003), available at http://publicintegrity.org/docs/wow/MPRI_Linguists.pdf.

³² Work Order No. 000071/0004 (footnote 24 above), p. 6.

³³ See chapter thirteen in this volume by Andrew Bearpark and Sabrina Schulz.

³⁴ See, e.g., International Peace Operations Association Code of Conduct, available at <http://www.ipoaonline.org/conduct/>.

contracts.³⁵ When states became managed care purchasers, however, they adopted NCQA as a benchmark of quality.³⁶ Many contracts with private prison operators require companies to receive accreditation by the American Correctional Association.³⁷ And because private investors come to view accreditation as an indicator of quality, an accreditation requirement creates significant compliance incentives.

Enhancing oversight

The Iraq contracts also fall far short in the arena of monitoring and enforcement.³⁸ It should go without saying that any effective contractual regime must include sufficient numbers of trained and experienced governmental contract monitors, along with a team of governmental ombudspersons: leaders of independent offices charged with providing enhanced oversight. Recently the government has moved in precisely the wrong direction, however, by dramatically *reducing* its acquisitions workforce.³⁹ And few contract monitors are trained in international human rights and humanitarian law standards.

An added problem is the prevalence of broad, standing purchase agreements, which agencies can use as a basis for issuing work orders. The use of such work orders enables government actors to avoid more stringent regulations that apply to negotiating contracts. In addition, because one agency can earn fees by facilitating another agency's contracts, there are incentives to sponsor other agencies' contracts but little incentive to supervise them.⁴⁰ These arrangements can lead to abuse, as occurred in the case of the Department of

³⁵ Although NCQA's accreditation program is voluntary, almost half the HMOs in the nation, covering three quarters of all HMO enrollees, are currently involved in the NCQA Accreditation process. Significantly, employers increasingly require or request NCQA accreditation of the plans with which they do business. See National Comm. for Quality Assurance, NCQA: Overview, available at <http://www.ncqa.org/Communications/Publications/overviewncqa.pdf>.

³⁶ Freeman, "The Private Role in Public Governance" (footnote 8 above), pp. 618-619.

³⁷ See, e.g., Oklahoma Contract (footnote 25 above).

³⁸ For a searing indictment of the government's failure to oversee military contractors and that failure's role in the Abu Ghraib atrocities, see Schooner, "Contractor Atrocities at Abu Ghraib" (footnote 6 above).

³⁹ Comptroller Gen., US General Accounting Office (GAO), Sourcing and Acquisition, Rep. No. GAO-03-771R (2003), p. 1; see also Laura Peterson, "Outsourcing Government: Service Contracting Has Risen Dramatically in the Last Decade", 30 October 2003, available at <http://publicintegrity.org/wow/report.aspx?aid=68>. For a detailed discussion of the depletion of the acquisition workforce, see David A. Whiteford, "Negotiated Procurements: Squandering the Benefit of the Bargain", *Public Contractor Law Journal*, vol. 32 (2003), pp. 555-557.

⁴⁰ Schooner, "Contractor Atrocities at Abu Ghraib" (footnote 6 above), pp. 564-

the Interior sponsorship of DOD's task orders for intelligence services at Abu Ghraib prison.

In addition, contracts should include terms allowing the government to take over contracts by degrees for failure to observe international human rights and humanitarian law norms. In the domestic context, states are turning to mechanisms such as graduated penalties, for example, to increase oversight of private nursing homes receiving public funding.⁴¹ Although many of the US Iraq contracts do have termination provisions, outright termination is an extreme measure that the government rarely exercises. Indeed, after CACI employees were implicated in the abuse at Abu Ghraib, not only did government actors fail to terminate the contract, they actually *expanded* its terms. Graduated takeover provisions would help alleviate the problem by permitting a more moderate remedy short of outright termination.

Perhaps even more importantly, contracts should provide for enhanced whistleblower protections and third-party suit provisions. Currently, only the government or the contractor may enforce the terms of the agreement. Yet those who are subject to a contractor security action should be deemed third-party beneficiaries, either by statute or through contractual terms. Accordingly, third parties would be able to make private law claims under the contracts for non-compliance with international human rights and humanitarian law norms. Claims could be heard and adjudicated in courts or, alternatively, through grievance procedures established and run either by the contractor itself or by a professional association of contractors. Such privatized grievance mechanisms are commonplace in contracts with private prison operators⁴² or HMOs receiving federal funding to cover their treatment of Medicare beneficiaries.⁴³ And though, as discussed below, critics might worry that granting such rights might be unwieldy, third-party beneficiary provisions could be crafted to take account of the exigencies of various types of contracts.

These various reforms provide a menu of possible contractual provisions that, while by no means a panacea, would almost certainly improve the meagre contractual oversight that now exists. Thus, to argue that reforms are unnecessary or that they would necessarily be ineffectual lacks empirical support. And in any event, given the widespread abuses in the current contracting process, settling for the status quo is simply not a viable option.

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⁴¹ Freeman, "The Private Role in Public Governance" (footnote 8 above), p. 608.

⁴² For examples of contracts with private operators that require grievance procedures, see Florida Contract (footnote 25 above), § 5.24; Oklahoma Contract (footnote 25 above), § 5.15.

⁴³ 42 U.S.C. § 1395mm(c)(5)(A) (2000).

The cost of reform

A second critique of contractual regulation is to cite the cost of contractual reform. One of the central rationales for privatizing governmental functions is the savings that privatization promises, although the extent to which privatization actually does result in such savings is not fully understood. Certainly there is some empirical work, particularly on domestic services such as prison management, that supports claims of cost-cutting.⁴⁴ Such savings may accrue because contractors are free from expensive civil service requirements. Indeed, proponents of military privatization have emphasized that freedom from such requirements enables greater “nimbleness”.⁴⁵ And while contractors may earn more for a particular job, their pay is typically for a shorter term. They can be mobilized quickly on the front end and terminated quickly on the back end. Some proponents of privatization thus might argue that enhanced contractual requirements, such as human rights training provisions, self-evaluation, and accreditation would be costly ventures that would essentially re-bureaucratize the privatized work force, undermining the flexibility of private contractors and potentially reducing or even eliminating the very cost savings that provide the principal justification for privatization in the first place.⁴⁶

It is far from clear, however, that the costs of reforms would outweigh the savings they might generate, as there is a high price for *not* implementing some of the proposals suggested above. The argument that increased contractual requirements necessarily increase costs requires more empirical study, but at this point we do have evidence that the *failure* to incorporate certain requirements imposes hefty costs. Perhaps most notably, poor monitoring and oversight lead to corruption and waste that is itself quite expensive. Contractual terms that mandate comprehensive outside monitoring and require contractors to engage in self-evaluation, combined with increased resources for monitors, can therefore result in savings down the line.

The Iraq case provides some clear examples of the costs that arise from the failure to engage in serious contractual monitoring. As former Coalition Provisional Authority (CPA) official Alan Grayson has observed, “contracts were made that were mistakes, and were poorly, if at all, supervised [and] money was spent that could have been saved, if we simply had the right numbers of people.”⁴⁷ Grayson has asserted that lack of employee screening and training, combined with poor government contract monitor oversight, led to

⁴⁴ See, e.g., Oliver Hart, Andrei Shleifer, and Robert W. Vishny, “The Proper Scope of Government: Theory and an Application to Prisons”, *Quarterly Journal of Economics*, vol. 112 (1997), p. 1143 (claiming that their model “explains why in some — arguably most — cases, private provision leads to both lower costs and higher quality”); see also Jody Freeman, “Extending Public Law Norms through Privatization”, *Harvard Law Review*, vol. 116 (2000), pp. 1295-1301 (summarizing pragmatic arguments that privatizing domestic services cuts costs).

⁴⁵ See Martha Minow, “Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy”, *Boston College Law Review*, vol. 46 (2005), p. 1004 (discussing nimbleness argument of military privatization proponents).

⁴⁶ For a comparable argument in the domestic prison privatization context, see Sharon Dolovitch, “State Punishment and Private Prisons”, *Duke Law Journal*, vol. 55 (2006), pp. 437ff.

the theft of millions of dollars.⁴⁸ Indeed, with regard to the Custer Battles fiasco described earlier, another former CPA official has argued that even devoting a single staff person to the two \$16 million Custer Battles contracts would have saved at least \$4 million.⁴⁹ The various other corruption examples described previously have cost US taxpayers further millions of dollars.

Moreover, government reports suggest that the abuses that have come to light are not isolated instances but rather stem from systematic problems in oversight and monitoring. A recent DOD Inspector General study concluded that more than half of the Iraq contracts had not been adequately monitored.⁵⁰ This fact is not surprising given that DOD reduced its acquisition workforce by more than half between 1990 and 2001, while the department's contracting workload increased by more than twelve percent.⁵¹ In addition, those who were assigned to monitor contract performance were often inadequately trained.⁵² Indeed, in an ironic twist, private contractors themselves are often hired to write the procedural rules governing contracting rules and monitoring protocols: the DOD handbook on the contracting process, for example, was drafted by one of its principal military contractors.⁵³ Similarly, with respect to the CPA, a report notes that the CPA had not kept accounts for the hundreds of millions of dollars of cash in its vault, had awarded contracts worth billions of dollars to American firms without tender, and had no idea what was happening to the money from the Development Fund for Iraq, which was being spent by the interim Iraqi government ministries.⁵⁴ Thus, a strong case can be made that better monitoring and other contractual reforms would actually save far more money than they would cost.

Perhaps even more significantly, failure to implement contractual reforms can lead to human rights abuses that result in enormous costs, both economic and non-economic, that are difficult to measure but that impose serious liabilities on the government. The role of CACI and Titan in the torture and cruel treatment of prisoners Abu Ghraib is just one

⁴⁷ SDPC Hearing (footnote 12 above) (statement of Franklin Willis).

⁴⁸ SDPC Hearing (footnote 12 above) (testimony of Alan Grayson).

⁴⁹ SDPC Hearing (footnote 12 above) (statement of Franklin Willis).

⁵⁰ Office of the Inspector Gen., US Dep't of Defense, "Acquisitions: Contracts Awarded for the Coalition Provisional Authority by the Defense Contracting Command — Washington" Report No. D-2004-057 (2004), p. 24.

⁵¹ GAO, "Sourcing and Acquisition", Rep. No. GAO-03- 771R (2003), p. 1; see also Peterson, "Outsourcing Government" (footnote 39 above). For a detailed discussion of the depletion of the acquisition workforce, see David A. Whiteford, "Negotiated Procurements: Squandering the Benefit of the Bargain" *Public Contractor Law Journal*, vol. 32 (2003), pp. 555-557.

⁵² *Ibid.*

⁵³ See Singer, *Corporate Warriors* (footnote 3 above), pp. 123-124.

⁵⁴ Ed Harriman, "Where Has All the Money Gone?" *London Review of Book*, 7 July 2005.

example. The government has now tried seven uniformed officers for abuses at Abu Ghraib in proceedings that taxpayers must fund. If the Abu Ghraib victims succeed in their ATCA suits against CACI and Titan, either in court or in an out-of-court settlement, the litigations' costs presumably would ultimately be passed on to the government in higher contract fees. Indeed, even the fear of such litigation may result in expenses that companies such as CACI and Titan may factor into their bids. Beyond these economic costs, human rights abuse scandals cost the government untold amounts in reputation. These reputational losses impede the ability of diplomats to pursue not only human rights policies such as eradicating torture around the world in countries such as China, but also in building coalitions with other countries to engage in cooperative efforts — from trade to fighting terrorism.⁵⁵

Rebecca Weiner has recently sought to identify, and to some degree quantify, many of the costs of military outsourcing.⁵⁶ She emphasizes that the general indefinite quantity or indefinite cost framework of many of the contracts, in which contractors can simply charge the government a certain percentage above the price to them of the services they perform, has been quite expensive for the government (and for taxpayers). She also notes that insurance and workers' compensation are hidden costs not usually factored into the pricetag for outsourcing. Contract reform might reduce some of these costs.

Finally, the privatization of domestic functions, such as prisons and healthcare, provides some evidence that contractual reforms do not eat up all of the cost savings of privatization. Indeed, state governments in the United States have long implemented many of the contractual reforms discussed above, suggesting that even with such reforms contracting remains cost-effective. For example, state governments' contracts with companies that manage private prisons routinely require compliance with constitutional norms of human dignity, as well as training regarding these norms equivalent to the training state prison guards would receive. Similarly state governments' contracts with HMOs routinely require accreditation, self-evaluation, and private grievance mechanisms for patients who believe they were not treated fairly. Thus, while much more research quantifying the costs of privatization is necessary, it is difficult to argue that contractual reform would necessarily eliminate all of the cost savings that may accrue.

⁵⁵ Cf. Brief of Amicus Curiae Diplomats Morton Abramowitz, et al., *McCarver v. North Carolina*, No. 00-8727 (US Supreme Court, filed 8 June 2001), pp. 8-9 (arguing that executing mentally retarded defendants strains diplomatic relations with allies, provides diplomatic ammunition to countries with demonstrably worse human rights records, increases US diplomatic isolation, and impairs other US foreign policy interests).

⁵⁶ Rebecca Ulam Weiner, "Incorporating the Combat Zone: An Overview of the Military Service Provider Industry" (unpublished paper on file with the author).

Government and contractor resistance

A third critique of contractual reforms is that neither governments nor contractors would adopt them. Indeed, with respect to governmental actors, critics might claim that governments engage in privatization generally, and military privatization in particular, precisely to *avoid* the legal commitments that bind bureaucratic actors. According to this view, the US government used contractor interrogators and translators at Abu Ghraib prison in order to escape potential accountability for abuses. With respect to the contractors, critics might maintain that private military companies would not agree to more onerous contractual terms because the companies would view these measures as too expensive and cumbersome.

For both sets of actors, however, substantial evidence actually points in the opposite direction. More research is needed to understand the motivations of governments' privatization decisions as well as the interests of contractors. But there is certainly a case to be made that government actors and contractors would not be nearly as reluctant to embrace these reforms as critics have supposed.

Government actors

To begin with, the argument that governments privatize to avoid accountability runs into some difficulties because government actors do not necessarily escape responsibility merely by outsourcing particular tasks. As Chia Lehnardt argues in chapter eight of this volume, while some existing ambiguities might enable contractors to slip through certain cracks in international law, contractors do not exist in a regulatory void.⁵⁷ In particular, the UN's Articles on Responsibility of States for Internationally Wrongful Acts aims to make clear that the "conduct of any State organ shall be considered an act of that State under international law," and that a person's conduct shall be attributed to the state if he or she is acting on the state's instructions or under the state's direction.⁵⁸ Courts and tribunals have at times applied principles of state responsibility for instrumentalities to impute the liability of companies onto states.⁵⁹ Privatization is not a failsafe way for governments to avoid

⁵⁷ See chapter eight in this volume by Chia Lehnardt; see also Laura A. Dickinson, "Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law", *William & Mary Law Review*, vol. 47 (2005), pp. 135ff.

⁵⁸ See, e.g., Draft Articles on Responsibility of States for Internationally Wrongful Acts, arts. 4, 8, in International Law Commission, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN Doc A/56/10 (2001).

⁵⁹ See, e.g., *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 351-352 (D.C. Cir. 1995) (holding Iran responsible for corporation over which it exercised control); *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-US Cl. Trib. Rep. 228, 241-242 (1987) (same); *Maffezini v. Kingdom of Spain* (Rectification and Award), 5 ICSID (World Bank) 387, 412-413 (2001) (holding Spain responsible for the acts of its state entity); *Case Concerning Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain) (Second Phase)*, 1970 I.C.J. 4, 39, ¶ 58

accountability.

At the same time, a decision *not* to privatize does not necessarily result in full accountability. Indeed, courts have not generally held large numbers of official governmental actors accountable for abuses under our existing legal regime. For example, in the wake of reports on widespread prisoner abuse in Iraq and Afghanistan, very few governmental officials implicated in the abuse have faced trial. Thus far, only eleven uniformed soldiers have been convicted for cruel treatment at Abu Ghraib, and all of those tried have been relatively low-level actors.⁶⁰ Moreover, the first officer was not charged until April 2006.⁶¹ To the extent that governmental actors want to avoid accountability for abuses, privatization is not particularly necessary. Moreover, because governments are not monolithic, even if some in any given administration seek to privatize in order to avoid accountability or funnel money to cronies, there are many who sincerely want to do their job and could spearhead efforts to reform the contract monitoring process.

Significantly, in the somewhat analogous arena of development and humanitarian aid, governmental and inter-governmental officials have voluntarily undertaken significant contractual regulation. For example, USAID has imposed extensive self-evaluation requirements and performance benchmarks on aid organizations.⁶² Meanwhile, the UN High Commissioner for Refugees has begun to experiment with beneficiary participation in program design and critiques of operations in refugee camps.⁶³ And the World Bank has established grievance mechanisms for people adversely affected by development projects, including public-private partnerships.⁶⁴

While one might think that military privatization would be more resistant to such increased contractual regulation, even here some reforms have occurred. For example, some of the existing Iraq contracts now include terms requiring stakeholder notification and participation. And the Department of Defense has begun to require more specificity in the terms of its military contracts. Its August 2005 contracting regulations require that agreements include terms stating that contractors are bound by international law and specifying that contractors must train their employees in applicable rules regarding the use

(Feb. 5) (“[V]eil lifting . . . is admissible to play . . . a role in international law.”).

⁶⁰ See David Dishneau “Dog Handler Gets Split Verdict”, *Fort Worth Star-Telegram*, 2 June 2006.

⁶¹ See “Politics This Week”, *Economist*, 6 May 2006.

⁶² See generally USAID, “Results-Oriented Assistance: A USAID Sourcebook”, available at <http://www.usaid.gov/pubs/sourcebook/usgov>.

⁶³ See Tania Kaiser, “Participation or Consultation? Reflections on a ‘Beneficiary Based’ Evaluation of UNHCR’s Programme for Sierra Leonean and Liberian Refugees in Guinea, June-July 2000”, *Journal of Refugee Studies*, vol. 17 (2004), p. 186.

⁶⁴ See, e.g., David Hunter, “Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People”, *Chicago Journal of International Law*, vol. 4 (2003), pp. 201ff.

of force.⁶⁵

Perhaps most importantly, even if government actors are not particularly eager to initiate reforms, NGOs or international organizations can push for them, or indeed launch them independently. Such organizations can pressure governments to include various safeguards in their contracts by promulgating international guidelines and then exposing (or mobilizing diplomatic pressure against) governments that refuse to adopt the guidelines. Along these lines, Amnesty International made reform of military contracts a centerpiece of its annual human rights report and a leading advocacy project for 2006.⁶⁶

In addition, NGOs can independently rate or “accredit” private military companies according to human rights compliance and other values. As noted previously, the NCQA began such an independent accreditation effort to assess HMOs in the United States. While these independent efforts are of course more difficult without full access to information, nonetheless, measurements can be used to give scorecards to different companies. These measures are then very easy for the government to later use as a contractual requirement (as has happened with NCQA). Moreover, NGOs can try to harness popular political pressure to get governments and companies to adopt its accreditation or evaluation metrics.

Private military companies

Although at first blush it might seem surprising, many private military contractors are both willing to accept, and in some cases are even leading the way toward, contractual reforms. Indeed, although contractors often grumble about enhanced regulation generally — arguing that such regulation increases costs and impedes flexibility — the reality is that they rarely refuse contracts on this basis, which is perhaps not so surprising given how lucrative these contracts are.⁶⁷ Moreover, as mentioned previously, private military companies are initiating extensive self-regulation efforts in both the United States and Britain. Interestingly, many private military companies are eager for more regulation and accreditation requirements because they want to distinguish themselves from what they view as “rogue” outfits that give the industry as a whole a bad name. Moreover, contractual (as opposed to legislative) reform may be appealing to such companies because it is more flexible and project-specific. Thus, there is no reason to think that contractual reform is unrealistic.

⁶⁵ See US Department of Defense Instruction (footnote 20 above).

⁶⁶ Amnesty International Report 2006, “The State of the World’s Human Rights” available at <http://www.amnestyusa.org/news/document.do?id=ENGPOL100042006>; see also Alan Cowell, “Rights Group Criticizes US Over Outsourcing in Iraq”, *New York Times*, 24 May 2006; Peter Spiegel, “US Is Faulted for Using Private Military Workers”, *Los Angeles Times*, 24 May 2006.

⁶⁷ See Steven Schooner, “Fear of Oversight: The Fundamental Failure of Businesslike Government”, *American University Law Review*, vol. 50 (2001), p. 668, footnote 137.

Market barriers to contractual regulation

Critics might also cite the varied nature of private military contractors as an impediment to contractual regulation. Private military companies are a diverse group that includes, depending on the definition of the term, military logistics firms, military strategy firms, and direct military provider firms. In addition, some companies, such as MPRI, are large, long-established, and highly professionalized, with generals from major western militaries on their boards, while others are newcomers without the level of expertise, experience, or in some cases the commitment to professionalism. A one-size-fits-all approach therefore is inappropriate, one might argue, because of the range of functions that the firms provide. Furthermore, the differences may mean that some firms, such as the more established companies, may be more amenable to contract-based reform than others. For example, some firms may be better able to comply with contractual terms such as training requirements or private grievance systems (which require greater administrative infrastructure) than others. To the extent that contract enables tailoring of reforms to suit the particulars of a given company, results are likely to be piecemeal and therefore ineffectual. At the same time, critics might charge that regulating private military companies through contractual terms is the tail wagging the dog, as corruption and cronyism are rampant in the initial *award* of government contracts. Without addressing this corruption up front, one might think, reform of contractual terms can have little effect.

Nevertheless, despite the problems posed by the market's diversity and the potential for cronyism, the structure of the market for private military companies may in fact make contract the most effective regulatory approach. In a diverse market, contract has the advantage of flexibility. And there is no reason that contractual reforms cannot go hand in hand with other efforts to reduce corruption in the actual award of contracts.

Market diversity

One of the virtues of contract, as opposed to other forms of regulation, is that it is *not* a one-size-fits-all approach. As compared to treaty-based, statutory, or even regulatory reform, contractual reform can be implemented on a case-by-case basis and can be tailored to fit the particular type of firm. Contractual training requirements, could, for example, be moulded to suit the activities of the particular private military company in question. Thus, a government contract with a company such as Kellogg, Brown & Root that provides meals to troops might require employees to learn the limits of excessive force under international law, but would focus primarily on defensive use of force. A contract such as the CACI agreement providing military interrogators could require much more extensive training, homing in on the limits of proactive interrogation techniques. A contract with a company providing combat services, such as the Sierra Leonean government's agreement with the now disbanded Executive Outcomes, would require extensive training on offensive use of force on the battlefield. Similarly, contractual terms requiring companies to establish internal grievance mechanisms for those adversely affected by contractor actions could also vary according to the type of firm.

Moreover, the fact that contractual reform is inevitably piecemeal does not mean that such reform will necessarily be ineffectual. Indeed, although an estimated 90 different groups have entered the market for private military contracts,⁶⁸ only a very small number of firms, particularly in the United States, retain a significant market share.⁶⁹ These larger firms are likely to be the easiest to regulate. Even simply incorporating contractual reform in the most significant contracts with the largest firms would have important effects.

Cronyism and corruption

Many reforms to the terms of contracts at the back end may help address cronyism and corruption in the bidding process at the front end. There is no reason to think that seeking reform of contractual provisions and monitoring impedes or excludes efforts to reform the process by which contracts are awarded in the first place. Improvements in contractual monitoring, for example, will increase transparency and help prevent abuses. Similarly, accreditation by independent, third-party organizations will help serve as a brake on awards to contractors with histories of corruption. Accreditation provides information to the public at large, which can enhance the political incentives to award contracts to entities that receive high marks. And performance benchmarks also have an information-forcing effect that can help deter cronyism. To the extent that contractual terms are more specific and result-oriented, there is less room for contractors to take advantage of cronyism.

Furthermore, reforming contractual terms certainly can, and should, proceed in tandem with efforts to reform the contract award process. Specifically, as commentators have urged,⁷⁰ the government should dramatically reduce the number of no-bid contracts it enters into and should reduce the number of Freedom of Information Act exemptions it issues, thereby allowing for greater transparency in the bidding process. In addition, third-party agencies should not be permitted to conduct the bidding process and secure contracts that other agencies will administer, because such bifurcation tends to reduce oversight and accountability. But in any event, such reforms, while necessary, do not eliminate the need to reform the contracts themselves.

The feasibility of creating third-party beneficiary rights

A fifth critique might focus specifically on those contractual reforms that seek to give third parties rights either to be consulted in the contract design process or to bring grievances.

⁶⁸ See Singer, *Corporate Warriors* (footnote 3 above), p. 78.

⁶⁹ See Weiner, “Incorporating the Combat Zone” (footnote 56 above), p. 24.

⁷⁰ See, e.g., Schooner, “Contractor Atrocities at Abu Ghraib” (footnote 7 above). It is worth noting that, in a related setting, public outcry over the no-bid process resulted in quick reforms in the provision of disaster relief after Hurricane Katrina.

Critics could argue that such third-party participation would be unwieldy at best. For example, it would be very difficult to identify the appropriate third-party “beneficiaries” of a private military contract. Is a beneficiary anyone who is remotely affected by contractor actions? In the case of Iraq, for example, would any Iraqi citizen qualify as a beneficiary of a contract to train the Iraqi police? Are US citizens the beneficiaries of such contracts? The net could be drawn very widely indeed.

The flexibility of the contractual form again provides a means of addressing this problem. Beneficiaries could be defined differently depending on the context. Both at the front end in the design of agreements, and at the back end if they go awry, contracts can enable certain groups of beneficiaries to have a voice without opening up the process to broad and virtually unlimited involvement.

With respect to shaping contractual terms, the government and contractors can identify relevant stakeholders and include them based on the degree to which they stand to benefit from, or be harmed by, the contractor’s actions. For example, in the case of a contract to train Iraqi police, affected stakeholders or beneficiaries might include interim governmental officials responsible for security, existing Iraqi trade associations or groups likely to provide employees in the police force, as well as political leaders and civil society leaders in the communities subject to policing. The contract could require the company providing training to consult with each of these groups in designing its training plan, to notify them of the planned course of action, and to seek input from them about key issues, problems, or difficulties. Such a consultation process would have the added benefit of alerting contractor employees to any cultural issues or sensitivities that could impede training efforts.

In other contexts, the relevant beneficiaries or stakeholders would be different. For example, in the case of an agreement between the US government and a private company to feed troops stationed in Iraq, the beneficiaries are the US troops and, by extension, the US public at large. Iraqis might of course be affected by the actions of such a company, for example if armed company employees responded defensively to a perceived attack. Nevertheless, because Iraqis are not the direct beneficiaries of the contract, they need not be included at the design stage. And though security concerns may make broad public notification in the United States problematic, some transparency is certainly possible.

With respect to grievance procedures, again different provisions could be made depending on the type of contract because some contracts are far more likely to lead to abuses that would require such grievance procedures than others. For example, military interrogation work, such as was performed at Abu Ghraib by CACI, obviously poses a fairly high risk of harm to the bodily integrity of Iraqi prisoners. These prisoners are, by definition, in detention and not free to leave. Even with well-trained interrogators, the risk of crossing the line between permissible and impermissible uses of pressure is ever-present. In such circumstances, grievance procedures are particularly appropriate.

By contrast, contractors supplying food to troops on the battlefield do not engage in work that is as likely to directly affect the bodily integrity of Iraqis or others. It is true, as noted above, that contractor employees may be armed to defend themselves, and inappropriate uses of force may occur. Nonetheless, the contractors’ use of weapons is almost certain to be for defensive purposes only, and such uses of force are not at the core

of the contractors' purpose. Thus, the risk of harm to bodily integrity is probably much lower, and provisions for grievance procedures would be less appropriate in such contracts.

Significantly, in analogous contexts governments and inter-governmental organizations have allowed for this type of beneficiary involvement, and line-drawing among different categories of beneficiaries has not proved unworkable. For example, some of the de-mining contracts between the US government and private companies in Iraq require stakeholder notification and participation. The agreement between the Army Corps of Engineers and Tetra Tech to provide munitions support and removal also includes a provision requiring "public involvement."⁷¹ In this agreement, the contractor undertakes to "assist in responsiveness summaries, public meetings, restoration advisory boards, community restoration planning, administrative record establishment and maintenance, and other stakeholder forums that facilitate public involvement."⁷² The contract between the Corps and Zapata Engineering to remove hazards in Iraq (and Afghanistan) to ensure that lands and waters can be used safely contains a virtually identical provision.⁷³ And an agreement between the former Coalition Provisional Authority and Washington Group International to improve power systems within Iraq provides for "public participation in public outreach activities."⁷⁴ Such provisions could become standard terms.

The World Bank has also required private companies to engage in such beneficiary consultation processes as a condition of receiving loan agreements for public-private development projects. For example, the Bank prompted Exxon, the lead company building an oil pipeline in Chad, to engage in extensive consultations with local groups during the research phase of the project, from 1993 until 1996. During this period, Exxon's subsidiary in Chad, known as Esso Tchad, sent sociologists, ethnologists, and various experts and consultants to the region.⁷⁵

There are also models for third-party grievance procedures. As mentioned previously, the World Bank allows anyone affected by a Bank project to bring claims to an Inspection Panel or a Compliance Advisor Ombudsman. Similarly, in the United States,

⁷¹ Contract No. W912DY-04-D-0011, 8 April 2004, in Contracts and Reports (footnote 21 above).

⁷² *Ibid.* at § C.4.5.23.

⁷³ Contract No. W912DY-04-D-0007, 27 February 2004, at § C.4.5.23, in Contracts and Reports (footnote 23 above) (requiring that contractor "[a]ssist in responsiveness summaries, public meetings, restoration advisory boards, community restoration planning, administrative record establishment and maintenance, and other stakeholder forums that facilitate public involvement.")

⁷⁴ Contract No. W905S-04-D-0010, 12 March 2004, at §2.2.8, in Contracts and Reports (footnote 21 above).

⁷⁵ Luc Lampriere, "Exxon in Chad" (unpublished manuscript on file with author). For example, according to Exxon an American sociologist conducted 129 Human Environment survey village meetings, with over 5,000 participants, in the oil region. *Ibid.* One Exxon document states, "the project has conducted one of the most extensive consultation efforts ever undertaken in Africa for an industrial development project. Few similar . . . projects in Europe or North America have held so many village-level public consultation meetings over such a wide area." *Ibid.*

state government contracts with HMOs receiving Medicare and Medicaid reimbursement routinely require the HMOs to establish grievance procedures for individuals who believe they were adversely affected by HMO care. And again, though certain security considerations might require grievance procedures to be more circumscribed in the context of military contracts, there is no reason to believe that grievance provisions are completely unworkable.

Potential enforcement problems

Finally, critics of regulation by contract might point out that government contracts are particularly difficult to enforce, because generally only government actors (and the contractors) may enforce them. And government officials rarely do so. Indeed, as noted previously, in the wake of the Abu Ghraib prison abuse scandal, the government did not terminate the contract with CACI, the company that had hired interrogators implicated in the abuse. Moreover, litigation in courts is also rare, and the enforcement actions the government does bring usually focus on issues such as corruption rather than other public law values such as human rights. And litigation in the US runs up against the so-called “government contractor immunity” defence, which may protect from litigation those companies acting under the direction of the US government.

While these enforcement difficulties undoubtedly exist, many of the contractual reforms proposed actually would help address them. Graduated penalties or government takeover of failing contracts might give the government more enforcement options when termination is politically difficult. Because such penalties are less extreme than outright termination, they are far more likely actually to be invoked by contract monitors, making them a more effective enforcement mechanism than the harsher (though rarely invoked) termination provisions. As noted previously, in the domestic context, states are using graduated penalties in their oversight of private nursing homes receiving public funding.⁷⁶ Scholars and practitioners have also called for the use of such penalties in the private prison setting.⁷⁷

Similarly, inclusion of standards regarding international law and training make enforcement of human rights values in litigation more feasible. For example, in a case brought in US courts against a private company managing an Immigration and Naturalization Service detention centre, the training standards for employees served as the

⁷⁶ Freeman, “The Private Role in Public Governance” (footnote 8 above), p. 608.

⁷⁷ Alexander Volokh, “A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons”, *Harvard Law Review*, vol. 115 (2002), p. 1888; see also Alphonse Gerhardstein, “Private Prison Litigation: The ‘Youngstown’ Case and Theories of Liability”, *Criminal Law Bulletin*, vol. 36 (2000), p. 198.

basis for a tort claim against the company and its employees.⁷⁸ The court found these standards relevant in evaluating whether the company and its employees breached applicable duties.

Furthermore, enforcement by individuals other than the government or the contractor is at least possible. As discussed above, third-party beneficiary suit provisions can be added to agreements to improve enforcement capabilities. At the same time, even without such reforms, ATCA provides a means for non-citizens to bring suit against contractors for human rights violations.⁷⁹ The suits against CACI and Titan, for example, are proceeding under ATCA. Plaintiffs will have to demonstrate that the substantive international law violations alleged, including torture, were claims similar in nature to those existing in 1789 when the statute was enacted.⁸⁰ And they will have to demonstrate “state action” in order to make a successful claim for torture.⁸¹ Nevertheless, such claims are viable.⁸²

In addition, the actual employees of private military companies (or their families) can bring tort suits against the companies for wrongful death and fraud. One such case, *Nordan v. Blackwater Security Consulting, LLC*, alleges causes of action for wrongful death and fraud arising from the 21 March 2004 murder and mutilation of four military contractors in Fallujah, Iraq.⁸³ Two other cases, *Fisher v. Halliburton* and *Johnson v. Halliburton et al.*, allege that an employer knowingly used one convoy as a decoy for a second convoy in Iraq, resulting in the deaths of at least six drivers, and injuries to eleven others.⁸⁴ As in *Nordan*, plaintiffs in these cases have brought wrongful death and fraud claims, as well as a civil rights claim under 42 U.S.C. §1983. Although these cases have not yet reached an outcome, judges have made preliminary rulings in favour of the plaintiffs.⁸⁵

Finally, there are strong arguments that “government contractor immunity” does

⁷⁸ *Jama v. INS*, 334 F. Supp. 2d 662, 683-685 (D.N.J. 2004).

⁷⁹ 28 U.S.C. § 1350 (conferring jurisdiction on the federal courts to consider claims by aliens for torts in violation of the law of nations).

⁸⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁸¹ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (footnote 1 above).

⁸² See Dickinson, “Government for Hire” (footnote 57 above).

⁸³ *Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801 (E.D.N.C. 2005); see also Estes Thompson, “Families Sue Over Workers’ Slaying in Iraq”, *Washington Post*, 6 January 2005.

⁸⁴ *Pls.’ Complaint, Fisher v. Halliburton*, 390 F.Supp.2d 610 (S.D. TX, 2005); and *Pls.’ Complaint, Johnson v. Halliburton et al.*, No: EDCV05-265 (C.D. Cal. filed 29 March 2005).

⁸⁵ See generally Kateryna Rakowsky, “Military Contractors and Civil Liability”, *Stanford Journal of International Law*, forthcoming 2006, available at http://www.nlg.org/mltf/History_Litigation_Mil_Contractors.pdf.

not apply in this context. The case that establishes this doctrine, *Boyle v. United Technologies, Inc.*,⁸⁶ involved a products liability claim (not a claim regarding a services contract) and in any event limited the defence to circumstances in which the government set the design specifications with reasonable precision, leaving little discretion to the contractor. As noted previously, most of the Iraq contracts were not at all specific and left broad discretion to the contractor, thus removing the predicate for contractor immunity. Moreover, at least one court has concluded that the defence does not apply to international human rights claims in any event.⁸⁷

Enforcement is not impossible, particularly if reforms are implemented. And whatever deficiencies there may be, such reforms will at least be an improvement on the current system. Accordingly, we should try to implement such reforms instead of declaring them a failure in advance.

Conclusion

Based on the present state of military privatization, it is clear that some reform of the contracting process is sorely needed. None of the arguments in favour of doing nothing is convincing. Whatever the imperfections of contractual reform, we must at least make the effort. At the other extreme, some international law scholars, policymakers, and NGOs either resist privatization altogether or insist that the only useful reforms involve increasing the mechanisms for holding private actors directly responsible under international law. Such critics might equate a focus on contractual reform with capitulation.

Those concerned about abuses committed by private military companies cannot simply rail against privatization altogether, however, because the trend towards privatization will be difficult to reverse in the foreseeable future. Accordingly, energy is better spent seeking reform. There is, in any case, no reason that formal international legal instruments need to be the only possible regulatory mechanisms. After all, it is a regrettable, but nevertheless true, fact of international law that even state actors are only rarely prosecuted for human rights abuses. Even if all international instruments were interpreted to apply to private military contractors, we would still need to seek additional alternative accountability mechanisms in order to achieve meaningful oversight.

Accordingly, the claim advanced here is that reforming the terms of the contracts themselves should be one avenue of reform among many. In addition, unlike amending or reinterpreting formal international legal instruments, NGOs could create accreditation regimes without any official governmental support. NGOs could identify those companies

⁸⁶ 487 U.S. 500, 512 (1988).

⁸⁷ In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 85-99 (E.D.N.Y. 2005).

most committed to curtailing abuses and then mobilize political pressure to make sure only those companies are awarded contracts. And while such activities could be undertaken regardless of governmental approval, we might also find that governmental support (and even support from the private military companies themselves) is not as difficult to achieve as might first be supposed.

Private military and security companies (PMSCs) form a very diverse sector. In terms of activities, this sector comprises private agencies performing a great variety of tasks ranging from supporting combat operations to language interpretation. The most common analytic division is between private security companies (PSCs) and private military companies (PMCs) (Brooks 2000, 129; Abrahamsen and Williams 2007, 239).