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# Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law

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GOVERNMENT FOR HIRE:  
PRIVATIZING FOREIGN AFFAIRS AND THE PROBLEM OF  
ACCOUNTABILITY UNDER INTERNATIONAL LAW

LAURA A. DICKINSON\*

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## INTRODUCTION

The privatization of governmental functions has long since become a fixture of the American political landscape. From the management of prisons, to the provision of welfare and other services, to the running of schools, federal and state governments have handed over more and more tasks to either for-profit or nonprofit private enterprises. Indeed, a 2003 *Harvard Law Review* symposium went so far as to declare ours an “Era of Privatization.”<sup>1</sup> And while some scholars have extolled the cost savings that privatization may bring,<sup>2</sup> others have expressed deep misgivings, arguing that privatization threatens to erode legal and democratic accountability.<sup>3</sup> Such scholars worry that, because private actors are usually not subject to the constitutional and administrative law norms that apply to governments, any purported efficiency gains from privatization<sup>4</sup> may come at the cost of losing important public values.<sup>5</sup> Finally, an emerging middle ground position embraces privatization while seeking new mechanisms for extending public values through contract,<sup>6</sup> democratic participation,<sup>7</sup> and other modes of accountability.

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1. See Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003).

2. See, e.g., Simon Domberger & Paul Jensen, *Contracting Out by the Public Sector: Theory, Evidence, Prospects*, 13 OXFORD REV. ECON. POLY 67, 72-75 (1997).

3. See, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. (forthcoming 2005) (manuscript at 23-24, on file with the author) (contending that prison privatization threatens to erode fundamental public values such as the humane treatment of inmates and the integrity of the incarceration system).

4. Such efficiency gains are themselves a matter of dispute. See, e.g., ELLIOTT D. SCLAR, *YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION* 47-70 (2000).

5. See, e.g., Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1374-76 (2003) (arguing that privatization limits the reach of constitutional norms and proposing a revival of the nondelegation doctrine as a means of applying these norms to a variety of privatized governmental activities).

6. See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549 (2000) (arguing that contract can be a tool for extending public law values to a variety of settings in which the government enters into agreements with private entities to provide services).

7. See, e.g., ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* 137-81 (2004) (arguing that, while privatization has helped create a “democracy deficit,” new opportunities have also emerged for promoting democratic accountability through enhanced transparency and citizen participation).

Despite this rich debate about privatization in the domestic context, far less attention has been paid to the simultaneous privatization of what might be called the foreign affairs functions of government. Yet privatization is as significant in the international realm as it is domestically. The United States now regularly relies on private parties—both for-profit and nonprofit—to provide all forms of foreign aid (including emergency humanitarian relief, development assistance, and post-conflict reconstruction),<sup>8</sup> to perform once sacrosanct diplomatic tasks such as peace negotiations,<sup>9</sup> and even to undertake a wide variety of military endeavors. These military functions include not only support services such as constructing weapons and building barracks, but also core activities such as training the military, gathering intelligence, providing security services, and even conducting combat-related missions.<sup>10</sup> Nor is this development confined to the United States. Other countries, as well as international organizations such as the United Nations, have privatized many aspects of their work.<sup>11</sup> Indeed, some “failed” states have relied almost exclusively on private actors to perform both international and domestic roles of government, using private military companies to fight their wars, foreign nongovernmental organizations (NGOs) to provide their essential social services, and foreign for-profit companies to build their roads, dams, and other infrastructure.<sup>12</sup>

One need only look at recent events to glimpse the significance of this trend. For example, not only are there approximately 20,000 private military contractors in Iraq,<sup>13</sup> but the Abu Ghraib prison scandal revealed that even such sensitive tasks as military interro-

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8. See *infra* Part I.B.

9. See James Larry Taulbee & Marion V. Creekmore, Jr., *NGO Mediation: The Carter Center*, in *MITIGATING CONFLICT: THE ROLE OF NGOS* 156, 156-71 (Henry F. Carey & Oliver P. Richmond eds., 2003).

10. See *infra* Part I.A.

11. See, e.g., *BEYOND UN SUBCONTRACTING: TASK-SHARING WITH REGIONAL SECURITY ARRANGEMENTS AND SERVICE PROVIDING NGOS* (Thomas G. Weiss ed., 1998) (analyzing increasing practice of UN to partner with regional security organizations and NGOs) [hereinafter *UN SUBCONTRACTING*].

12. See, e.g., Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?*, 72 U. CHI. L. REV. (forthcoming 2005) (manuscript at 3, on file with the author).

13. Jonathan Turley, *Soldier of Fortune—At What Price?*, L.A. TIMES, Sept. 16, 2004, at B11.

gations have been privatized.<sup>14</sup> Moreover, according to a military report, over one-third of the private interrogators at Abu Ghraib lacked formal military training as interrogators.<sup>15</sup> As one of these interrogators revealed, “cooks and truck drivers” were hired because the private company in charge of providing interrogation services was “under so much pressure to fill slots quickly.”<sup>16</sup> It is not surprising then that many reported incidents of abuse at Abu Ghraib have now been tied to these private contractors.<sup>17</sup> Meanwhile, on the foreign aid front, the FBI is investigating whether the Pentagon improperly awarded Iraq reconstruction contracts on a no-bid basis to Halliburton, a company with close ties to the White House and Defense Department.<sup>18</sup> Indeed, the extent of Halliburton’s contracts in Iraq gives a sense of the scope of privatization: these contracts by themselves are estimated at nearly \$15 billion, more than twice the cost to the United States of the entire 1991 Gulf War.<sup>19</sup>

Despite the magnitude of these developments and their potentially far-reaching consequences, international law scholars have not yet focused sufficiently on privatization as a comprehensive trend in the international arena, let alone considered its implications. To be sure, many scholars have, over the past two decades, challenged the state-centered focus of traditional international law scholarship and instead emphasized the growing importance of non-state actors. Yet, even these scholars have not homed in on privatization specifically: the growing phenomenon of governments delegating to private actors various foreign affairs functions formerly provided by states.<sup>20</sup> Thus, we have seen work on how

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14. See Joshua Chaffin, *Private Workers Found Central to Jail Abuse: Fay Report on Abu Ghraib Points to Reliance on Contractors for What Were Once Military Jobs*, FIN. TIMES, Aug. 27, 2004, at 7.

15. *Id.*

16. Lynda Hurst, *The Privatization of Abu Ghraib*, TORONTO STAR, May 16, 2004, at F3.

17. Chaffin, *supra* note 14.

18. See John Solomon, *FBI Investigating Halliburton’s No-Bid Contracts*, ASSOCIATED PRESS, Oct. 28, 2004, <http://www.globalpolicy.org/security/issues/iraq/contract/2004/1028greenhouse.htm>.

19. See Felix Rohatyn & Allison Stanger, *The Profit Motive Goes to War*, FIN. TIMES, Nov. 17, 2004, at 19.

20. Throughout, I use the term “privatization” to refer to the practice of “retaining collective financing but delegating delivery to the private sector” rather than removing certain responsibilities from the collective realm altogether. See JOHN DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 215 (1989).

international law norms might be extended or reinterpreted to apply to *specific* non-state actors, such as guerrilla organizations, terrorist groups, and corporations.<sup>21</sup> There has also been much discussion about the more *general* role of NGOs, international civil society, and networks of state and non-state actors.<sup>22</sup> But none of these inquiries is framed as an examination of the particular practice of *government privatization*.<sup>23</sup>

As a result, international law scholars have not offered a systematic analysis of how privatization in the international and

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21. See *infra* text accompanying notes 116-23.

22. See generally MICHAEL EDWARDS, *FUTURE POSITIVE: INTERNATIONAL CO-OPERATION IN THE 21ST CENTURY* (1999) (examining the new relationships that have arisen and will develop through international co-operation); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (describing the political world as a complex global web of government networks); Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT'L L. REV. 1335, 1336-38 (1999) (discussing the rise, development, and future of transnational civil society); Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 958-59 (1996) (examining the rise of nongovernmental organizations).

23. Although some scholars of international law and policy have (to a degree) focused on privatization in this sense, they have studied only specific contexts and have not explored the variety of mechanisms that might be used to hold private actors accountable, nor have they drawn on the domestic administrative law framework. See generally P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003) [hereinafter SINGER, *CORPORATE WARRIORS*] (security); Leon Gordenker & Thomas G. Weiss, *Devolving Responsibilities*, in UN SUBCONTRACTING, *supra* note 11, at 30 (foreign aid); Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1 (2003) (security); Clifford Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004) (security); Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004) [hereinafter Singer, *Vacuum of Law*] (security); Ian Smillie, *At Sea in a Sieve? Trends and Issues in the Relationship Between Northern NGOs and Northern Governments*, in STAKEHOLDERS: GOVERNMENT-NGO PARTNERSHIPS FOR INTERNATIONAL DEVELOPMENT, at 7 (Ian Smillie & Henny Helmich eds., 1999) (NGOs) [hereinafter Smillie, *At Sea in a Sieve?*]; Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75 (1998) (security); Tina Garmon, Note, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325 (2003) (security). At the same time, domestic administrative law scholars have not, to date, applied their insights to the international context. Martha Minow's recent work identifying the problems of military privatization, see Martha Minow, *Outsourcing Power: Private Police, Prisons, and War*, Cecil A. Wright Lecture at the University of Toronto Faculty of Law (Jan. 20, 2004) (manuscript on file with author), and Fred Aman's work identifying the democracy deficit created by privatization and situating that deficit within a global context, see AMAN, *supra* note 7, are important exceptions.

transnational sphere might affect norms of accountability crucial both to the rule of law and to democratic legitimacy. Yet, at least on its face, privatization seems to be as consequential internationally as it is domestically. Indeed, because most formal international law instruments apply only to governmental actors,<sup>24</sup> we face the specter (as with domestic U.S. constitutional law) of private contractors falling through the cracks of the international legal regime and evading accountability altogether.<sup>25</sup>

So, is the sky falling on international law? This Article argues that it is not. Rather, privatization in the international sphere need not actually result in less accountability, legal or otherwise. Indeed, the opposite may sometimes be the case because, unlike in the domestic context, legal accountability is actually very difficult to achieve under international law with respect to *either* state *or* private actors. Accordingly, though privatization may take constitutional norms out of the equation domestically (leading to a dramatically reduced scope of accountability), no equivalent to that constitutional baseline exists in the international realm. Such failures of accountability are, of course, a cause for concern, and I would join with most international human rights scholars in regretting the relative weakness of international law. Ironically, however, this very weakness means that, when foreign affairs functions are transferred to private actors, any reduction in accountability likely will not be as great as in the domestic sphere, where the baseline of accountability for government action is far more robust. In addition, the very fact of privatization—with its hybrid public-private character—may actually open up alternative norms and avenues of accountability beyond the formal instruments of international law. Thus, I argue that accountability and public

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24. See *infra* text accompanying notes 106-15.

25. See, e.g., Thomas Catan, *Private Armies March into a Legal Vacuum: Growing Use of Contractors for Duties Formerly Carried Out by the Official Military Has Left an Accountability Gap*, FIN. TIMES, Feb. 8, 2005, at 8 (“These ‘private soldiers’ have been operating in effect in a legal limbo, with precious few rules governing their activities.”); P.W. Singer, *Above Law, Above Decency*, PITTSBURGH POST-GAZETTE, May 9, 2004, at B1 (“That private contractors are interrogators in U.S. prison camps in Iraq should be stunning enough.... But even more outrageous is the fact that gaps in the law may have given them a free pass so that it could be impossible to prosecute them for alleged criminal behavior.”).

values can not only be maintained but in some cases even increased in an era of privatization.

Such accountability, however, will not come exclusively (or perhaps even primarily) from formal international legal instruments. Certainly these instruments can be amended or reinterpreted to bring non-state actors working in a quasi-governmental capacity within their ambit. This amendment and reinterpretation process has been the principal response of international law to the rise of non-state actors,<sup>26</sup> and it is an important and necessary first step. But it is only a first step, because formal international law instruments are a relatively weak accountability mechanism even with regard to state actors, let alone private entities.

This Article, therefore, takes a different approach. Drawing on the extensive domestic administrative law literature on privatization, I argue that international law scholars must consider three additional modes of accountability that may be important specifically *because* of the relationships between states and the private actors working for them under contract. Each of these three modes of accountability has been discussed extensively by administrative law scholars,<sup>27</sup> but has remained under-theorized in the international law literature. First, domestic scholars have examined the idea of democratic accountability and have attempted to respond to the concern that privatized government functions might render those functions less accountable to the public at large. Although democratic accountability questions are obviously more complicated in the international sphere—because those affected by a governmental (or quasi-governmental) act are most likely not members of the polity of the government authorizing the act—we shall see that norms of transparency and democracy may still provide an important check. Second, provisions in government contracts might explicitly incorporate a variety of disciplining measures, from international law norms, to rules regarding training, to assurances about transparency and public participation, to specific output requirements. Such provisions could render private actors contractually liable for violations and provide for various forms of

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26. See *infra* text accompanying notes 120-23.

27. See, e.g., Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1266-70 (2003).

monitoring. Third, we can turn our attention to what might be called internal institutional accountability, the idea that organizations and corporations, whether public or private, have their own formal accountability mechanisms and informal cultures, both of which might have a restraining effect. Using these various accountability mechanisms we can begin to construct policies that will more effectively address the increasing privatization of the international realm.

In addition to these alternative accountability *mechanisms*, the domestic literature emphasizes several alternative *norms*, as well. Although international law has usually focused only on the norms of human dignity embodied in formal legal instruments, we might expand the frame to include norms concerning the rational and nonarbitrary provision of services as well as various anti-corruption norms. Though these norms have not been extensively studied by international law scholars, they provide additional bases for evaluating the consequences of privatization and thinking creatively about how best to respond to concerns about the different types of abuses committed by contractors.

In discussing these various accountability mechanisms and applicable norms, this Article seeks to provide a more comprehensive taxonomy and framework for evaluating all forms of privatization in the international sphere. By doing so, we can see that privatization may result in radically decreased accountability in some contexts but potentially increased accountability in others and that various forms of privatization may threaten different mechanisms of accountability and implicate different norms. Only such a comprehensive framework, then, will allow us to truly evaluate privatization in its many guises.

My argument proceeds in three parts. Part I describes privatization efforts in two very different areas: military activities and foreign aid. By providing examples from such disparate contexts, we can begin to grasp the full scope of the phenomenon, and we will be better able to see how efforts to ensure accountability in one context might or might not be usefully employed in another. Part II begins by describing the way in which international law has usually responded to the problems posed by non-state actors and suggests that a similar strategy of expanding the formal legal norms of

international law to apply to private contractors is not sufficient. This Part then identifies the domestic administrative law literature on privatization as a potential source of wisdom in helping both to articulate various concerns that may accompany the handing over of governmental functions to non-state actors and to formulate appropriate responses to those concerns. In particular, this Part discusses the various norms and accountability mechanisms that collectively provide a more comprehensive framework for analyzing privatization, both domestically and internationally. Finally, Part III applies this framework to both the military and foreign aid contexts, considering each of the accountability mechanisms in turn.

In pursuing this project, I aim to avoid the unfortunate polarization that often dominates discussions of privatization, in which some herald all privatization for increasing efficiency while others bemoan each step away from direct government services for purportedly leading to a decline in accountability, oversight, and public participation. With regard to efficiency arguments, this Article will have little to say. I suspect that some privatization of what I have called foreign affairs functions will lead to greater efficiency, while there are other areas where government can actually provide the service in question more efficiently and at lower cost. In any event, a detailed analysis of the efficiency gains or losses from privatizing foreign affairs functions is beyond the scope of this Article. Indeed, a central premise of this Article is that *regardless* of the possible efficiency gains from privatization, we should make sure that important public values and the mechanisms to enforce them are made part of the privatization scheme itself.

To those inclined to reject all efforts at privatization because they necessarily reduce accountability, this Article will have more to offer. To begin with, as the history of privatization makes clear, it is very difficult to find some halcyon era when services were clearly governmental and accountability was the norm. Instead, the blending of public and private has always occurred to some degree or another. Indeed, though I tell a story of increasing privatization of governmental functions in the international sphere, I do not in any way suggest that such a progression has taken place in a steady, straight line. Rather, many of the so-called governmental functions I describe have in the past been performed by private

actors. Privatization has therefore been cyclical, and it is difficult to say that any functions are intrinsically “core state functions.” In addition, given that the unmistakable trend of recent decades is towards increasing privatization, it seems unhelpful simply to resist that trend *in toto*. While it may well be that something is lost when certain activities and policy choices are removed from the public sphere and are therefore less subject to public deliberation and oversight,<sup>28</sup> those concerned about maintaining some form of accountability cannot simply mourn the loss of the public sphere. Instead, this Article, while not neglecting possible areas of concern, seeks to suggest ways in which public-private governance arrangements could be structured to preserve important public-regarding features. Finally, as discussed above, it is not as if in the international sphere the mechanisms of accountability are so robust even for government actors. Thus, privatization in this context may be less of a threat and more of an opportunity.

Of course, some might see any efforts to import public-regarding accountability mechanisms into privatization as misguided because one of the key reasons governments privatize is to *avoid* accountability. Thus, one might think that such governments would resist, say, the inclusion of more robust oversight provisions into their contracts. Yet, while avoiding accountability may be one reason governments privatize, governments are not monolithic, and there are always actors within bureaucracies seeking greater oversight. Empowering those actors to lobby for an expanded monitoring role is one of the key aims of this Article. In addition, government actors are susceptible to outside pressure from NGOs and other watchdog groups. Such groups should, therefore, focus greater attention on how privatization is managed and how governments and international organizations can pursue more effective oversight practices, rather than simply resisting privatization altogether.

Ultimately, the expanded framework I articulate may allow us to more easily distinguish those circumstances in which privatization may be benign from those in which the risk of impunity is too high.

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28. See Peter Lindseth, *Agents Without Principals?: Delegation in an Age of Diffuse and Fragmented Governance* (Univ. of Conn. Sch. of Law Working Paper Series, Paper No. 18, 2004), available at <http://lsr.nellco.org/uconn/ucwps/papers/18> (paper prepared for the Second Workshop in Self-Regulation, European University Institute, Nov. 14-15, 2003).

Moreover, this broader vision of both the avenues of accountability available and the norms served will, at the very least, provide a more comprehensive set of options for introducing policy reforms. In any event, by opening a dialogue between international law and administrative law scholars on the subject of privatization, this Article seeks creative engagement concerning this important trend. After all, if we really are now in an era of privatization, it is crucial that scholars work together to develop responses. Thus, administrative law scholars must see privatization as a global issue and not simply a domestic one. And international law scholars must conceive of privatization as a topic worthy of comprehensive study in its own right. Together, we must begin to seek new ways to embed public values into the hybrid governance structures that are rapidly emerging in this public-private century.

#### I. PRIVATIZATION IN THE INTERNATIONAL SPHERE

Just as the state is turning more and more to private actors to fulfill the domestic functions of government, private actors are increasingly fulfilling its foreign affairs functions as well. To be sure, many of the functions that are now being shifted to private actors under contract with the government were, at some point in the past, similarly performed by private actors. Indeed, the modern state itself emerged only relatively recently, in a process of increasing centralization and bureaucratization that culminated in the mid-twentieth century.<sup>29</sup> Thus, one cannot say that there is a one-way move toward ever-increasing privatization. Yet, the unmistakable trend in the past several decades has been toward more and more private contracting, a hollowing out and deconstruction of the state that is in a sense the classic condition of postmodernity.<sup>30</sup> This trend raises questions about the extent of private actors' accountability—to the international community and

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29. See Brooks, *supra* note 12 (manuscript at 11).

30. See generally DAVID HARVEY, *THE CONDITION OF POST-MODERNITY* (1990) (examining the rise of postmodernist culture); SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996) (discussing the way in which economic globalization and immigration have eroded state sovereignty).

to various domestic and transnational communities—under international law.

This Part provides a brief overview of the extent of privatization in two key areas in which governments act internationally: military activities and foreign aid. I will focus primarily on the United States government, though I will note some examples involving other governments and international organizations, as well. I will both discuss the rationales behind governments' increasing use of private actors and introduce the potential problems this trend raises for legal accountability.

I choose to offer examples from these two, very different, areas because I believe a broader lens is necessary to understand both the scope of privatization and the possible responses that might be available. Indeed, it may be that mechanisms of accountability available in one context could be imported into another. For example, forms of third-party accreditation that are now being used to vet companies seeking contracts to provide development aid might also be used in certain military settings. Similarly, by considering two different areas of privatization we are reminded always to consider not only norms of human dignity but also norms of rational, nonarbitrary conduct and anti-corruption norms when evaluating privatization efforts. In any event, viewing seemingly unrelated privatization contexts encourages us to look at privatization as a comprehensive trend and not just a set of discrete, issue-specific problems. Such a comprehensive approach may help spur creative problem solving and may encourage scholars in multiple areas to work together to forge responses.

#### *A. Military Functions*

Perhaps no function of government is deemed more quint-essentially a “state” function than the military protection of the state itself. Indeed, scholars of privatization in the domestic sphere have often assumed that privatization of the military is one area where privatization does not, or should not, occur.<sup>31</sup> For example, some have argued that, by hiring private armies to keep itself

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31. See, e.g., Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1300 (2003).

secure, the state would threaten its own very existence because it would have no way to control these private military actors.<sup>32</sup>

Yet, as the pathbreaking work of Peter W. Singer has shown, governments around the world, including the United States, are increasingly hiring private military companies to perform core military functions.<sup>33</sup> For decades, of course, the U.S. government has entered into agreements with private companies to build weapons and other equipment, as well as to provide the basic goods necessary to run a government agency—everything from desks to office supplies.<sup>34</sup> But increasingly military contracts with private firms have extended beyond ordinary office procurement and agreements to purchase weaponry, and now include contracts to provide logistics and other services to active troops in the field.<sup>35</sup> Moreover, these services include not only support services, such as food, accommodations, and sanitation for troops on the battlefield, but also core functions such as translating, intelligence gathering, and even troop training—functions that, for at least the past fifty years, uniformed members of the armed services have performed virtually exclusively.<sup>36</sup>

One might argue that the privatization of military services is nothing new. Mercenaries, loosely defined as soldiers working for private gain, have appeared throughout history. Indeed, the use of mercenaries predates the national armies that arose only after the Treaty of Westphalia.<sup>37</sup> Yet, by the twentieth century, at least in the West, only pockets of mercenaries, such as the French Foreign Legion, remained.<sup>38</sup> Apart from some postcolonial wars of independence, where mercenaries often fought against national liberation movements, the bulk of military security work has been performed by professionalized, bureaucratized armies and not private actors.<sup>39</sup>

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32. See, e.g., Rosky, *supra* note 23, at 882-83.

33. SINGER, CORPORATE WARRIORS, *supra* note 23, at 3-17.

34. See Rebecca Rafferty Vernon, *The Future of Competitive Sourcing, Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 371-72 (2004).

35. *Id.*

36. *Id.*

37. Milliard, *supra* note 23, at 2-3.

38. *Id.* at 7.

39. SINGER, CORPORATE WARRIORS, *supra* note 23, at 8.

It is against this backdrop that we can consider the increasing reprivatization of military functions in the past two decades.

If one looks to U.S. forces actually deployed on the battlefield, the ratio of private contractors to troops has increased dramatically in the past fifteen years. In the first Gulf War, the ratio was one in a hundred;<sup>40</sup> in the current war in Iraq, the ratio is one in ten.<sup>41</sup> Although the United States has not yet used the employees of private companies in actual combat roles, it has deployed them to fulfill tasks such as military intelligence gathering, troop training, and support functions that are very close to combat; indeed, these private actors have the power to wield force in a variety of circumstances.<sup>42</sup> Other countries, such as Sierra Leone and Angola, have explicitly hired private armies.<sup>43</sup> In many modern conflicts, these private military companies have played a decisive role.<sup>44</sup>

Military privatization can perhaps be explained primarily by the promise of cutting costs.<sup>45</sup> The government need not offer pensions or benefits to employees of private companies working under contract, and it can hire contractors on a short-term basis, thereby decreasing the size of the uniformed military. In addition, private military companies may offer greater flexibility. Such companies are touted for their ability to work quickly, constructing bases, for example, on very short notice.<sup>46</sup> In states with ill-equipped, poorly functioning militaries, private companies can also provide badly needed expertise to help train, or even replace, the government troops.<sup>47</sup> Finally, private military companies may enable states to deploy forces with lower domestic political costs because fewer

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40. George Cahlink, *Army of Contractors*, GOV'T EXECUTIVE, Feb. 1, 2002, at 43, available at <http://www.govexec.com/features/0202/0202s5.htm>.

41. Singer, *Vacuum of Law*, *supra* note 23, at 523.

42. Vernon, *supra* note 34, at 407-09.

43. *See infra* text accompanying note 56.

44. *See infra* text accompanying notes 56-57.

45. *See* Barry Yeoman, *Need an Army? Just Pick Up the Phone*, N.Y. TIMES, Apr. 2, 2004, at A19. It should be noted, however, that these cost savings have not been conclusively demonstrated. Indeed, private military companies typically pay their employees more than government employees, and because of the types of contracts they receive, private military companies are particularly susceptible to cost overruns.

46. Samantha M. Shapiro, *Iraq, Outsourced*, N.Y. TIMES, Dec. 14, 2003, at F1.

47. *See infra* text accompanying note 54 (listing countries that have hired private companies to perform military functions).

uniformed troops are put at risk, thus keeping official casualty figures down.<sup>48</sup>

A brief overview of the type of work some of the leading private military companies perform gives a sense of the breadth and depth of their operations. For example, U.S.-based Kellogg, Brown, and Root (KBR) began performing logistical support for U.S. military operations in Somalia in 1992 and has since won contracts from the U.S. government to provide such support in Rwanda, Haiti, Kuwait, Bosnia, Kosovo, Afghanistan, and Iraq.<sup>49</sup> Under these contracts, KBR has built and maintained military bases, transported troops and equipment to and on the battlefield, repaired and maintained roads and vehicles, distributed water and food to troops, washed laundry, refueled equipment, attended to hazardous materials, and performed related environmental services.<sup>50</sup> These operations are extremely lucrative; Singer estimates that KBR earns roughly \$1.7 billion annually from military work.<sup>51</sup>

Beyond the logistics support functions of KBR, another U.S. company, Military Professional Resources Incorporated (MPRI), is one of the leading firms to provide core military functions such as troop training and intelligence gathering. Founded by a group of retired senior military officers in 1987, MPRI began by teaching U.S. troops how to use equipment, but has since expanded to perform a wide range of training and advising functions.<sup>52</sup> Beginning in 1996, the company has run the ROTC training programs at universities around the country and has played a key role in numerous programs to educate U.S. forces, including the training of officers, war gaming, and tactical planning.<sup>53</sup> Like KBR, MPRI has expanded its services beyond the U.S. government to a wide variety of countries, including Croatia, Bosnia, Angola, Saudi

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48. Yeoman, *supra* note 45.

49. SINGER, CORPORATE WARRIORS, *supra* note 23, at 142-45.

50. See Halliburton Company, About KBR, <http://www.halliburton.com/kbr/aboutKBR/index.jsp> (last visited Sept. 20, 2005).

51. SINGER, CORPORATE WARRIORS, *supra* note 23, at 139.

52. See MPRI, About MPRI, <http://www.mpri.com/site/about.html> (last visited Sept. 20, 2005).

53. See Press Release, Army Reserve 88th Regional Readiness Command, Team MPRI Looking for ROTC Instructors (July 3, 2000), [http://www.usarc.army.mil/88thrc/news/archive/news\\_rotc\\_instructors\\_needed.asp](http://www.usarc.army.mil/88thrc/news/archive/news_rotc_instructors_needed.asp); see also MPRI, *National Overview*, at [http://www.mpri.com/site/nat\\_overview.html](http://www.mpri.com/site/nat_overview.html) (last visited Sept. 20, 2005).

Arabia, Sri Lanka, Nigeria, and Equatorial Guinea,<sup>54</sup> as well as to regional intergovernmental programs such as the African Crisis Response Initiative.<sup>55</sup>

Finally, military companies have provided direct combat services. Probably the best known and most controversial is the now dissolved South African company Executive Outcomes, which drew its personnel largely from the apartheid-era South African Defense Force, and won contracts with governments in Angola, Sierra Leone, Uganda, Kenya, South Africa, Indonesia, Congo, and others to engage in direct combat during the 1980s and 1990s.<sup>56</sup> The company provided both manpower and weaponry, and engaged in its own intelligence gathering. Indeed, its activities in Sierra Leone and Angola are widely believed to have altered the outcome of the conflicts in those states.<sup>57</sup> Thus, while the firm has simultaneously been vilified as a “mercenary army of racist killers” and praised as saviors,<sup>58</sup> both critics and supporters agree that the firm has been effective. Ultimately, links to the apartheid past, made prominent in the hearings of the South African Truth and Reconciliation Commission, led to increased regulation in South Africa and prompted the company to dissolve.<sup>59</sup> Related and spin-off companies are still active, however.<sup>60</sup>

Significantly, private military companies performing each of these functions—logistics, advising, and direct combat—have engaged in activities that have raised questions about the willingness of their employees to abide by international law standards that normally would apply to governmental actors, as well as about the difficulty of holding these employees accountable for any violations. For example, the firm CACI provided military intelligence operatives who were deployed to Abu Ghraib prison in Iraq, where they,

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54. SINGER, CORPORATE WARRIORS, *supra* note 23, at 130-32.

55. *Id.* at 131.

56. See *We're the Good Guys These Days*, THE ECONOMIST, July 29, 1995, at 32; Garmon, *supra* note 23, at 331-34.

57. See Zarate, *supra* note 23, at 94-97.

58. SINGER, CORPORATE WARRIORS, *supra* note 23, at 101.

59. South Africa implemented the Foreign Military Assistance Act to limit mercenary activity in 1998. See Nicole Itano, *Africa Takes Tough Stand on Coups*, CHRISTIAN SCI. MON., Aug. 31, 2004, at 6.

60. SINGER, CORPORATE WARRIORS, *supra* note 23, at 118.

alongside the uniformed military personnel, abused Iraqi detainees.<sup>61</sup> Indeed, the uniformed personnel on the scene often took orders from the contract intelligence operatives.<sup>62</sup> Translators hired under a similar contract with the firm Titan, Inc. were also implicated in the abuse.<sup>63</sup> And while the Geneva Conventions and the Convention Against Torture clearly prohibit the actions of the military personnel,<sup>64</sup> some commentators have pointed out that the treaties' applicability to non-state actors is ambiguous, and that even if such norms do apply, *fora* for holding them accountable under such norms are limited.<sup>65</sup> Moreover, while multiple treaties ban the use of certain categories of mercenaries outright, broad gaps in the definition of "mercenary" leave most types of work by private military companies outside the treaties' prohibitions.<sup>66</sup>

The U.S. government's use of private contractors to transport terrorism suspects to countries known to practice torture has raised similar questions. For example, on December 18, 2001, American operatives reportedly participated "in what amounted to the kidnapping of two Egyptians ... who had sought asylum in Sweden."<sup>67</sup> Believed to be linked to Islamic militant groups, the Egyptians "were abruptly seized in the late afternoon and flown out of Sweden a few hours later on a U.S. government-leased Gulfstream 5 private jet to Cairo, where they underwent extensive, and brutal, interrogation."<sup>68</sup> The company that owns the jet is apparently a corporation registered in Delaware and represented by the Massachusetts law firm Hill & Plakias.<sup>69</sup> As in the case of the Abu Ghraib abuse, the Convention Against Torture prohibits

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61. See *supra* note 17 and accompanying text.

62. SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 61 (2004).

63. See MAJ. GEN. ANTONIO TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, 26, 36, 48 (2004) [hereinafter TAGUBA REPORT]; see also HERSH, *supra* note 62, at 32-34, 61; Joel Brinkley & James Glanz, *Contractors in Sensitive Roles, Unchecked*, N.Y. TIMES, May 7, 2004, at A15.

64. See *infra* note 207.

65. See *infra* text accompanying notes 208-17.

66. See Milliard, *supra* note 23, at 19-69 (summarizing treaties).

67. HERSH, *supra* note 62, at 53.

68. *Id.*

69. Farah Stockman, *Terror Suspects' Torture Claims Have Mass. Link*, BOSTON GLOBE, Nov. 29, 2004, at A1.

governments from taking such actions, but its applicability to private actors is ambiguous.<sup>70</sup>

Private military companies engaging in direct combat are perhaps the most notorious for committing atrocities. According to a former UN special rapporteur, the presence of mercenaries “is a factor which tends to increase the violent and cruel nature of specific aspects of the conflict in which they are involved.”<sup>71</sup> Adventurer mercenaries fighting in the postcolonial wars in Africa, for example, engaged in human rights abuses on a massive scale. The French mercenary Costas Giorgiu, who led a band in the Angolan civil war in the 1970s, regularly fired on civilians and summarily executed many of his own group when he believed they might desert.<sup>72</sup> More recently, during the conflict in Sierra Leone, officers of Executive Outcomes, working under contract with the government, reportedly ordered employees carrying out air strikes against rebels to “[k]ill everybody,” even though the employees had told their superiors they could not distinguish between civilians and rebels.<sup>73</sup> Neither the Executive Outcomes employees, nor the company itself, has been held legally accountable.

Finally, private military companies have also been implicated in abuses of other norms, such as norms prohibiting fraud and waste. For example, KBR’s more than \$10 billion in contracts with the U.S. government in Iraq “have been dogged by charges of preferential treatment, overbilling, cost overruns, and waste.”<sup>74</sup> Indeed, 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) when awarding contracts

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70. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46 2, U.N. GAOR, 9th Sess., art. 3, 1465 U.N.T.S. 85, 116 (1984) [hereinafter *Torture Convention*] (“No State Party shall expel, return ... or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”) (emphasis added).

71. *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. ESCOR, 50th Sess., at 13, U.N. Doc. E/CN.4/1994/23 (1994).

72. Milliard, *supra* note 23, at 48-49.

73. Elizabeth Rubin, *An Army of One’s Own*, HARPER’S, Feb. 1997, at 48.

74. Warren Hoge, *U.N. Criticizes Iraq Occupation Oil Sales*, N.Y. TIMES, Dec. 15, 2004, at A21.

in Iraq and Bosnia, thereby violating U.S. contracting regulations.<sup>75</sup> Likewise, the FBI has begun investigations concerning the legality of various Defense Department contracts in Iraq.<sup>76</sup>

### *B. Foreign Aid*

Although privatization in the military context has received far more attention, overseas aid is another area in which states are increasingly turning to private contractors to fulfill functions formerly performed directly by the state. From emergency humanitarian relief to long-term development assistance to post-conflict reconstruction programs, private actors are performing more and more of these functions under contract with the U.S. and other governments. In emergency situations, for example, the U.S. government has contracted with private companies such as KBR to build refugee camps,<sup>77</sup> and with nonprofit NGOs such as Save the Children to deliver relief supplies and medical services.<sup>78</sup> Similarly, with respect to longer-term development assistance, the U.S. increasingly has used international and foreign NGOs to provide aid overseas, rather than providing aid directly to foreign governments.<sup>79</sup> Reconstruction assistance has followed a similar trend, as the cases of Iraq and Afghanistan make clear, where multimillion dollar contracts have been awarded to private for-profit companies, as well as nonprofit organizations, to undertake post-conflict reconstruction tasks.<sup>80</sup>

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75. Erik Eckholm, *A Top U.S. Contracting Official for the Army Calls for an Inquiry in the Halliburton Case*, N.Y. TIMES, Oct. 25, 2004, at A13. Yet, apparently in response to her decision to speak out, that contracting official has now been demoted. See Griff Witte, *Halliburton Contract Critic Loses Her Job*, WASH. POST, Aug. 29, 2005, at A11.

76. See Solomon, *supra* note 18.

77. See SINGER, CORPORATE WARRIORS, *supra* note 23, at 144.

78. See USAID, DCHA/PVC-ASHA PORTFOLIO, FISCAL YEAR 2004, at app. B-5 (2005), available at [http://www.usaid.gov/our\\_work/cross-cutting\\_programs/private\\_voluntary\\_cooperation/portfolio05.pdf](http://www.usaid.gov/our_work/cross-cutting_programs/private_voluntary_cooperation/portfolio05.pdf).

79. See Leon Gordenker & Thomas G. Weiss, *Pluralizing Global Governance: Analytical Approaches and Dimensions*, in NGOS, THE UN, AND GLOBAL GOVERNANCE 17, 37 (Leon Gordenker & Thomas G. Weiss eds., 1996) [hereinafter GLOBAL GOVERNANCE].

80. See USAID, ASSISTANCE FOR IRAQ: CONTRACTS AND GRANTS (Mar. 2005), available at <http://www.usaid.gov/iraq/activities.html> (last visited Sept. 20, 2005) [hereinafter CONTRACTS AND GRANTS].

To be sure, as in the case of the military, private foreign aid is not a completely new development. In the United States, private groups provided aid for specific causes overseas long before the government developed foreign assistance programs.<sup>81</sup> Indeed, the practice of government-sponsored foreign assistance did not develop in a significant way in the United States until the period following World War II, with the initiation of the Marshall Plan.<sup>82</sup> In 1961, the U.S. Agency for International Development (USAID) was created, and the focus of aid turned to underdeveloped nations.<sup>83</sup> Throughout this period much of the aid consisted of direct grants to needy countries, though even then the U.S. government disbursed some aid through NGOs.<sup>84</sup> In the last two decades, however, the government has channeled more and more foreign aid through nongovernmental actors, both nonprofit, and (increasingly in recent years) even for-profit organizations. Indeed, while total U.S. aid to developing countries is declining,<sup>85</sup> more and more of that aid is being delivered through private actors.<sup>86</sup>

The most dramatic shift from direct government aid to aid disbursed by private organizations under contract with the government has occurred with respect to emergency aid. For example,

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81. The international nongovernmental organization movement has its roots in missionary activities that date back to the sixteenth century. Smillie, *At Sea in a Sieve?*, *supra* note 23, at 8. And many secular international NGOs such as the Red Cross were born out of the conflicts and social movements of the nineteenth and twentieth centuries. *See id.* For example, Save the Children, established in 1920, developed as a response to World War I; Foster Parents Plan emerged after the Spanish Civil War (1936-39); Oxfam and CARE from World War II; World Vision from the Korean War (1950-53); and Medecins Sans Frontières from the conflict in Biafra (1967-70). *See id.* Further growth occurred in the 1960s and the 1970s, stimulated in part by operations such as the Peace Corps, as well as the burgeoning human rights, environmental, and women's movements. *See id.* at 8. *See also* Ian Smillie, *United States, in* STAKEHOLDERS, *supra* note 23, at 249 [hereinafter Smillie, *United States*].

82. *See generally* USAID, THE MARSHALL PLAN STUDY GUIDE, at <http://www.usaid.gov/multimedia/video/marshall/study.html> (last visited Sept. 20, 2005) (providing background information on the Marshall Plan).

83. *See* USAID, USAID HISTORY, at [http://www.usaid.gov/about\\_usaid/usaidhist.html](http://www.usaid.gov/about_usaid/usaidhist.html) (last visited May 26, 2005).

84. *Cf.* Smillie, *United States*, *supra* note 81 at 249 (discussing the history of private aid organizations, including growth in the 1960s and 1970s).

85. Total aid fell from \$16 billion in 1989 to less than \$12 billion in 1990 to \$7.4 billion in 1995. *Id.* at 252. Even with a slight rise to \$9.4 billion in 1996, this figure represents only 0.12 percent of GNP, the lowest figure in a decade and the lowest among the twenty most industrialized countries. *Id.*

86. *Id.* at 253.

for fiscal year 2003, the USAID Office of U.S. Foreign Disaster Assistance spent sixty-six percent of its nearly \$300 million budget through NGOs.<sup>87</sup> Other countries and international organizations are similarly turning more and more to NGOs to deliver emergency relief.<sup>88</sup>

Longer-term development aid has followed a similar trend. By the mid-1980s, development agencies had begun to shift their focus from general funding for foreign governments to more targeted direct support both to grassroots organizations helping to eradicate poverty and to other civil society institutions seen as necessary for democracy and development.<sup>89</sup> In this new environment, NGOs were considered better able to connect with civil society actors and the grassroots, and thus became favored as aid providers. In addition, many NGOs had evolved into large, efficient organizations, “some operating like tightly-knit corporations, others as loose but well-connected networks.”<sup>90</sup> Accordingly, these NGOs appeared to be the best positioned to respond to both complex emergencies and the goals of long-term development.<sup>91</sup>

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87. 2003 USAID OFFICE OF U.S. FOREIGN DISASTER ASSISTANCE ANN. REP. 14, available at [www.usaid.gov/our\\_work/humanitarian\\_assistance/disaster\\_assistance/publications/annual\\_reports/pdf/AR2003.pdf](http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/publications/annual_reports/pdf/AR2003.pdf).

88. See Smillie, *At Sea in a Sieve?*, *supra* note 23, at 9 (describing foreign aid in France, Sweden, and the EU); see also Andrew S. Natsios, *NGOs and the UN System in Complex Humanitarian Emergencies: Conflict or Cooperation?* in GLOBAL GOVERNANCE, *supra* note 79, at 67, 73 (noting the relationships of UNICEF and UNHCR with NGOs); Ruth Wedgwood, *Legal Personality and the Role of Non-Governmental Organizations and Non-State Political Entities in the United Nations System*, in NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW 23 (Rainer Hofmann ed., 1998) (describing the use of private contractors by United Nations High Commissioner on Refugees (UNHCR)).

89. See, e.g., Mark Duffield, *NGO Relief in War Zones: Toward an Analysis of the New Aid Paradigm*, in UN SUBCONTRACTING, *supra* note 11, at 139, 146 (“By the mid-1980s, a noticeable change in donor funding policy had occurred, from direct donor assistance to recognized governments in favour of international support for private, non-governmental sectors.”).

90. Ian Smillie, *NGOs and Development Assistance: A Change in Mind-set?* in UN SUBCONTRACTING, *supra* note 11, at 185 [hereinafter Smillie, *Change in Mind-set*].

91. See *id.* Moreover, the line between humanitarian relief and longer-term development assistance is blurring, as humanitarian relief organizations increasingly seek to provide emergency funds that will assist in long-term development prospects. See USAID, OFF. OF PRIVATE VOLUNTARY COOPERATION, 2004 REP. OF VOLUNTARY AGENCIES ENGAGED IN OVERSEAS RELIEF AND DEVELOPMENT REGISTERED WITH THE U.S. AGENCY FOR INT’L DEV., available at [http://www.usaid.gov/our\\_work/cross-cutting\\_programs/private\\_voluntary\\_cooperation/volag04.pdf](http://www.usaid.gov/our_work/cross-cutting_programs/private_voluntary_cooperation/volag04.pdf) [hereinafter 2004 VOLAG REPORT] (“Gradually, [private volunteer

Finally, privatization is also taking place in the arena of post-conflict reconstruction. In recent years, USAID has relied heavily on U.S. and local organizations and corporations to engage in reconstruction efforts in Bosnia, Haiti, and Angola, among others, and it has even established a separate Office of Transition Initiatives in order to coordinate such efforts.<sup>92</sup> It is in this context that we are seeing perhaps the greatest use of for-profit as well as nonprofit organizations operating under contract with governments and inter-governmental organizations. In Iraq for example, USAID has awarded fifteen contracts worth a total of \$3.2 billion to for-profit companies, while it has awarded only six grants worth \$40 million to nonprofit organizations.<sup>93</sup>

As governments (and international organizations) have turned more and more to private actors to deliver aid, abuses of the norms of human dignity committed by these actors have again raised complicated questions about the application of international law. Although aid workers do not by any means regularly mistreat aid beneficiaries, such incidents occur more often than one might suspect. For example, employees of Dyncorp Inc., a private corporation under contract with the U.S. Government to train police in Bosnia in the 1990s, joined a sex-trafficking ring and committed numerous acts of rape, sexual abuse, and exploitation.<sup>94</sup> Even staff members of not-for-profit organizations have at times been implicated in abuses. For example, a recent study of refugees and internally displaced persons in West African camps in Guinea,

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organization] efforts broadened from relief and emergency food distribution to longer term, more sustainable development programs designed to address the root causes of poverty and disaster mitigation.”).

92. Smillie, *United States*, *supra* note 81, at 257.

93. *Contracts and Grants*, *supra* note 80. Although USAID has awarded a total of sixteen contracts, one of those contracts was awarded to the U.S. Air Force, so I did not include it in the total. *Id.* See also Rony Brauman & Pierre Salignon, *Iraq: In Search of a 'Humanitarian Crisis,'* in *IN THE SHADOW OF 'JUST WARS': VIOLENCE, POLITICS AND HUMANITARIAN ACTION* 269, 271 (Fabrice Weissman ed., 2004) [hereinafter *HUMANITARIAN ACTION*] (noting increased use of for-profit aid providers in Iraq).

94. Yeoman, *supra* note 45. Although Dyncorp offered security services under the contract, I include it and other such contracts within the foreign aid section because they provide assistance to a foreign country, as opposed to assistance to the U.S. military. Ironically, despite Dyncorp's troubles in Bosnia, the company was nevertheless hired to train the Iraqi police force. See Center for Public Integrity, *Windfalls of War*, <http://www.publicintegrity.org/wow/bio.aspx?act=pro&ddlc=17> (last visited September 27, 2005).

Liberia, and Sierra Leone reported widespread rape and sexual exploitation of women and children by many actors, including aid workers.<sup>95</sup> The aid workers and peacekeeping forces allegedly relied on their positions of relative power to use “the very humanitarian aid and services intended to benefit the refugee population as a tool of exploitation.”<sup>96</sup> In some camps, it appears that even necessities such as using a toilet were sometimes conditioned on the willingness to perform sexual favors.<sup>97</sup> As in the military context, although it would generally violate international agreements for governmental officials to commit such acts, the status of these private contractors is more ambiguous.<sup>98</sup>

Private aid providers have also been implicated in waste, incompetence, and corruption. Iraqi reconstruction aid has become notorious in this regard.<sup>99</sup> Less well known are the numerous errors committed during humanitarian relief efforts in Rwanda. After the

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95. UNHCR AND SAVE THE CHILDREN UK, NOTE FOR IMPLEMENTING AND OPERATIONAL PARTNERS ON SEXUAL VIOLENCE & EXPLOITATION, II (2002), available at <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/6010f9ed3c651c93c1256b6d00560fca> (last visited Apr. 12, 2005) [hereinafter SEXUAL VIOLENCE REPORT]; see also Michel Alger & Francoise Bouchet-Soulinier, *Humanitarian Spaces: Spaces of Exception*, in HUMANITARIAN ACTION, *supra* note 93, at 297, 302 (describing such abuses in refugee and IDP camps in Guinea, Liberia, and Sierra Leone); Fabrice Weissman, *Sierra Leone: Peace at Any Price*, in HUMANITARIAN ACTION *supra* note 93, at 43, 57 (describing sexual exploitation by aid workers in IDP camps in Sierra Leone).

96. See Scott A. Levin, *Sexual Exploitation of Refugee Children by U.N. Peacekeepers*, 19 N.Y.L. SCH. J. HUM. RTS. 833, 834-35 (2003).

97. See SEXUAL VIOLENCE REPORT, *supra* note 95; see also Malinda M. Schmiechen, *Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugee and Internally Displaced Women in Camps*, 22 ST. LOUIS U. PUB. L. REV. 473, 490 (2003).

98. For example, rape or other sexual abuse committed by a public official would in many cases constitute torture under the Convention Against Torture, but similar actions taken by a non-state actor would not, unless undertaken with the “consent or acquiescence” of such an official. *Torture Convention*, *supra* note 70, at art. 1. Rape and related sexual violence are also considered war crimes if committed in either international or internal armed conflict, but only those individuals acting under the authority of the actual parties to the conflict may be held criminally responsible for such acts. *Rome Statute of the International Criminal Court*, at arts. 8(2)(b)(xxii), 8(2)(e)(vi), UN Doc. A/CONF.183/9 (1998), corrected through Jan. 16, 2002, at [http://www.icc-epi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-epi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf) [hereinafter *ICC Statute*]. Though non-state actors can commit crimes against humanity, such activity would only qualify if it is “widespread or systematic” and conducted pursuant to an organizational plan or policy. *ICC Statute*, *supra* at arts. 7(1)(g), 7(2)(a).

99. See, e.g., SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, REPORT TO CONGRESS, 14-17 (2005), available at <http://www.sigir.mil/pdf/SIGIR%20Jan05%20-%20Report%20to%20Congress.pdf> (describing unsatisfactory audit of KBR).

genocide, humanitarian aid organizations conducted a study to determine what they could have done better. To be sure, these organizations provided relief to an enormous number of victims and faced extraordinarily difficult conditions: brutal mass killings of between 500,000 and 800,000 people, an ensuing epidemic of cholera and dysentery that killed hundreds of thousands more, and an international community that refused to halt the violence. Yet the study concluded that aid providers' lack of coordination, duplicative efforts, and poor decision making in numerous instances also contributed to the deaths of tens of thousands of people from disease.<sup>100</sup> Similar problems have arisen in other contexts. For example, a report evaluating relief provided in response to the 2001 earthquake in Gujarat, India that killed 20,000 people and damaged or destroyed more than a million homes concluded that, although victims received "substantial and timely assistance," poor decision making, duplicative efforts, and inappropriate priorities hurt aid beneficiaries on the ground.<sup>101</sup> Indeed, aid organizations apparently wasted hundreds of thousands of dollars on costly shipments of materials available much more cheaply locally and focused on the construction of large public buildings that the local government would have rebuilt anyway at much lower cost.<sup>102</sup> These efforts diverted resources more urgently needed for temporary shelters.<sup>103</sup>

Thus, privatization of foreign aid may also raise questions about the accountability of private actors under norms prohibiting nonrational, wasteful, or corrupt governmental action—accountability both to populations paying for the aid as well as to aid

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100. John Borton et al., *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience, Study 3, Humanitarian Aid and Effects*, J. HUMANITARIAN ASSISTANCE (1996) [hereinafter *International Response*], <http://www.reliefweb.int/library/nordic/book3/pb022.html> (last visited Apr. 12, 2005); see generally Nicholas Stockton, *Performance Standards and Accountability in Realising Rights: The Humanitarian Case*, Paper Delivered at Overseas Development Institute (Mar. 17, 1999), at <http://www.odi.org.uk/speeches/stockton.html> (describing concerns about "the consequences of agency proliferation and the alleged humanitarian opportunity costs of technical 'amateurism,' particularly after the 1994 Rwanda emergency").

101. See Alex Jacobs, *Regulating Humanitarian Interventions*, Presentation for the 21st Century Trust (Apr. 3, 2003), at 9-10, available at <http://www.mango.org.uk/pool/Regulating%20Humanitarian%20Interventions%20AJ%203Apr03.pdf>.

102. *Id.*

103. See *id.* at 10.

beneficiaries themselves. In contrast to the norms of human dignity, however, it is unclear whether international law even contains norms that would bind *public* actors, let alone private ones, in this context. Although some scholars and policymakers have argued that norms protecting aid beneficiaries' right to receive aid and to rational decision making in the delivery of aid is emerging,<sup>104</sup> it is unlikely that any such norms would apply to private organizations.

Finally, though I have focused here on military services and foreign aid, it is worth noting that other foreign affairs activities, such as peacemaking and diplomacy, have been privatized as well.<sup>105</sup> Accordingly, privatization is a significant phenomenon, and it is unclear whether the formal instruments of international law are adequate to respond to this trend.

## II. INTERNATIONAL LAW, ADMINISTRATIVE LAW, AND THE PROBLEM OF PRIVATIZATION

Unlike international law scholars, those working in domestic administrative law have focused extensively on the issue of privatization and have understood privatization as an overarching phenomenon requiring systematic study. Such study has involved both the possible norms that may be imperiled by privatization and the various mechanisms of accountability that might be used to help ensure enforcement of those norms even in a world of increased non-state power. Although it has not itself addressed privatization in the international sphere, the domestic administrative law literature thus offers a useful framework for considering the consequences of privatization more generally. Accordingly, after briefly discussing the limitations of the international law responses to privatization to date, this Part builds on the domestic literature to identify a series of substantive norms and accountability mechanisms that, together, help provide a richer, more complex understanding of how privatization may alter the regulatory landscape.

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104. See *infra* text accompanying notes 371-75.

105. See Taulbee & Creekmore, *supra* note 9 (discussing the Carter Center, a prominent NGO involved in peacemaking and diplomacy).

*A. International Law*

It is something of a truism that international human rights and humanitarian law does not generally bind non-state actors in most cases. The principal international human rights and humanitarian law instruments of the twentieth century—the United Nations Universal Declaration of Human Rights,<sup>106</sup> the International Covenant on Civil and Political Rights,<sup>107</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>108</sup> the Genocide Convention,<sup>109</sup> the Convention Against Torture,<sup>110</sup> the Geneva Conventions,<sup>111</sup> and the Rome Statute of the International Criminal Court<sup>112</sup>—were drafted primarily with states in mind. As such, states are both the primary parties to the treaties and the central bearers of rights and responsibilities. These instruments do grant individuals rights, of course—such as the right to be free from torture, cruel, inhuman or degrading treatment, or the right to a fair trial—but these are predominantly conceived as rights against the state.<sup>113</sup> It is also true that individual members of state bureaucracies (and even corporations working in tandem with the state) have been held criminally or civilly responsible, in both international and domestic fora, for violating the rights articulated in these instruments.<sup>114</sup> And in addition, some of these rights, such as the

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106. *Universal Declaration of Human Rights*, G.A. Res. 217 (III)A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

107. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171 (1966) [hereinafter ICCPR].

108. *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

109. *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, art. 2, S. Exec. Doc. O, 81-1, at 7 (1949), 78 U.N.T.S. 277, 280 [hereinafter *Genocide Convention*].

110. *Torture Convention*, *supra* note 70.

111. *See Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Civilians Convention*].

112. *ICC Statute*, *supra* note 98.

113. The *Torture Convention*, for example, defines as torture only acts that are committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” *Torture Convention*, *supra* note 70, at art. 1. The ICCPR likewise defines the rights to a fair trial as rights in proceedings before public “courts and tribunals.” ICCPR, *supra* note 107, at art. 14.

114. *See, e.g., Prosecutor v. Delalic*, I.C.T.Y. Case No. IT-96-21-T (1998) (Trial Chamber Judgment) (convicting several individuals for war crimes including murder, torture, and

right to be free from genocide and crimes against humanity (as defined in the recent statute of the International Criminal Court) apply not just against the state but against individuals as well.<sup>115</sup> Yet, within the overarching framework of this body of law, the state still remains at the core.

The twentieth and early twenty-first centuries have put pressure on this state focus, as new categories of non-state actors, such as guerrilla forces,<sup>116</sup> ethno-nationalist movements,<sup>117</sup> transnational terrorist organizations,<sup>118</sup> multinational corporations,<sup>119</sup> and NGOs<sup>120</sup> have all emerged as important actors on the world stage. With the rise of each new category of non-state actor, international law scholars, practitioners (and sometimes judges) have primarily responded by seeking to bring that non-state actor under the international legal umbrella. Their approach has thus been predominantly normative and piecemeal: they have attempted to fill the gaps in the state-centered international law regime by arguing either that the law should expand to reach each type of non-state

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rape). Perhaps the most well-known domestic trial was Israel's prosecution of the Nazi official Adolf Eichmann for war crimes and crimes against humanity. See HANNAH ARENDT, *EICHMANN IN JERUSALEM* 21 (1977). As to corporations, see, for example, *Zyklon B Case (Trial of Bruno Tesch and Two Others)*, 1-5 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93-102 (William S. Hein & Co. 1997) (U.N. War Crimes Comm'n ed., 1949) (prosecution of corporation that provided gas for death chambers).

115. The Genocide Convention provides explicitly that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Genocide Convention, *supra* note 109, at art. 4. The definition of crimes against humanity requires only that the attacks be committed as part of a "State or organizational" policy. *ICC Statute, supra* note 98, at art. 7(2)(a).

116. See Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29, 30-33 (1984).

117. See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 554-55 (1995).

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

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

120. See Peter J. Spiro, *Accounting for NGOs*, 3 CHI. J. INT'L L. 161, 161-62 (2002).

entity,<sup>121</sup> or by deploying doctrines that have the potential to impose liability on non-state actors linked to the state.<sup>122</sup>

Such a response is essential; indeed, the idea that international law norms should apply to non-state actors is a necessary premise of this Article. Nevertheless, it is not a sufficient response both because it fails to consider alternative modes of accountability beyond formal legal mechanisms and because it neglects to address other norms that might be implicated by governmental delegations to non-state actors. This failure may stem in part from the fact that scholars have focused on the rise of non-state actors generally, rather than on the idea of privatization specifically.<sup>123</sup> And though literature on corporate responsibility,<sup>124</sup> NGOs,<sup>125</sup> soft law,<sup>126</sup> and transnational networks<sup>127</sup> has attempted to address some informal modes of accountability (such as internal institutional accountability and norm internalization), this work deserves to be expanded to include other types of accountability mechanisms (such as contract and democratic participation) and other areas of international and transnational activity. The field is thus ripe for the fresh perspective that the domestic administrative law privatization literature provides.

### *B. Administrative Law*

By looking to domestic administrative law, we can first expand the frame not only to include the norms of human dignity that are

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121. See Brooks, *supra* note 118, at 746-54 (terrorists); Junod, *supra* note 116, at 34-38 (guerrillas and insurgents); Math Noortmann, *Non-State Actors in International Law*, in NON-STATE ACTORS IN INTERNATIONAL RELATIONS, 71, 72 (Bas Arts et al. eds., 2001) (NGOs); Ratner, *supra* note 119, at 524-27 (corporations).

122. See, e.g., Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 77-80 (2005).

123. Although a few scholars have focused on privatization as such, this work has been piecemeal. See *supra* note 23.

124. David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 952-58 (2004); Ratner, *supra* note 119, at 531-34.

125. Gordenker & Weiss, *supra* note 79, at 40-43.

126. See DINAH SHELTON, COMMITMENT AND COMPLIANCE, THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (2003).

127. See SLAUGHTER, *supra* note 22.

the primary focus of international law but also norms concerning rational, nonarbitrary, non-corrupt governance. Both the U.S. Constitution's procedural due process requirement, which applies to certain agency determinations and prohibits denials of benefits without minimum procedural protections,<sup>128</sup> and the framework of the Administrative Procedure Act (APA)<sup>129</sup> itself reflect these additional norms. Indeed, many of the judicial review doctrines in administrative law—arbitrary and capricious review,<sup>130</sup> substantial evidence review,<sup>131</sup> the “hard look” doctrine,<sup>132</sup> and so on—are explicitly designed to try to ensure that governmental decisions are based on reasoned deliberation, that they take into account contrary evidence and points of view, and that they derive from material found in the administrative record.<sup>133</sup> Beyond just trying to ensure rationality, other laws—such as the Freedom of

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128. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976) (concluding that the Social Security Administration is subject to constitutional due process requirements and cannot deny requested services without providing some minimum opportunity to be heard).

129. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

130. *See* 5 U.S.C. § 706(2)(A) (2000).

131. *See, e.g., id.* at § 706(2)(E); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 476-91 (1951) (defining the scope of substantial evidence review under the National Labor Relations Act).

132. Mark Seidenfeld has offered an apt description of how courts applying a “hard look” at agency decisionmaking can help to effectuate norms of rational, nonarbitrary, and non-corrupt governance:

[U]nder the hard look test, the reviewing court scrutinizes the agency's reasoning to make certain that the agency carefully deliberated about the issues raised by its decision.... Courts require that agencies offer detailed explanations for their actions. The agency's explanation must address all factors relevant to the agency's decision. A court may reverse a decision if the agency fails to consider plausible alternative measures and explain why it rejected these for the regulatory path it chose. If an agency route veers from the road laid down by its precedents, it must justify the detour in light of changed external circumstances or a changed view of its regulatory role that the agency can support under its authorizing statute. The agency must allow broad participation in its regulatory process and not disregard the views of any participants. In addition to these procedural requirements, courts have, on occasion, invoked a rigorous substantive standard by remanding decisions that the judges believed the agency failed to justify adequately in light of information in the administrative record.

Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 491-92 (1997).

133. *See id.*

Information Act (FOIA),<sup>134</sup> which may require governmental entities to release materials concerning their decision-making process; the Federal Advisory Committee Act (FACA),<sup>135</sup> which imposes open meeting and disclosure requirements; and other so-called “sunshine laws,”<sup>136</sup> which delineate guidelines for public disclosure of administrative processes—also seek to protect the administrative decisionmaking process from undue influence or other forms of corruption. Moreover, the idea that there is something akin to a right to transparent, nonarbitrary government decision making applies even when the effects of the government decision do not themselves implicate constitutional norms of human dignity.<sup>137</sup> Thus, administrative law provides fertile ground for articulating and defining important norms to be applied in the international sphere as well.

In addition to articulating these *norms*, administrative law scholars have also explored alternative *mechanisms* for attempting to hold privatized action accountable. In the remainder of this Part, I will briefly identify each of these accountability mechanisms. Then, Part III will consider such mechanisms in the international context.

### 1. *Legal Accountability*

As with international law, the formal legal rules of constitutional and administrative law are insufficient when confronting privatization. This is primarily because, under the so-called “state action” doctrine, these rules may not apply to private contractors.<sup>138</sup> The state action inquiry, which asks whether “there is a sufficiently close nexus between the State and the challenged action” to justify

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134. 5 U.S.C. § 552 (2000).

135. 5 U.S.C. app. § 2 (2000).

136. *See, e.g.*, 5 U.S.C. § 552. For a discussion of state sunshine statutes and state court decisions applying these statutes to privatized governmental action, see Craig D. Feiser, *Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L. REV. 825 (2000).

137. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976).

138. *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1403 (2003) (arguing that “[t]he danger is that handing over government programs to private entities will operate to place these programs outside the ambit of constitutional constraints, given the Constitution's inapplicability to ‘private’ actors”).

the application of constitutional norms<sup>139</sup> could, at least in theory, permit a finding of state action in many cases where government has delegated its responsibilities to a private actor.<sup>140</sup> And indeed, as discussed in Part III, certain private actors, such as private prison guards, have sometimes been deemed to be state actors and thus subject to constitutional norms. Yet, over the past three decades, U.S. courts have been reluctant to find such a nexus,<sup>141</sup> and most private contractors are not treated as governmental entities for purposes of legal accountability.

In response, scholars have sought other ways of imposing formal legal accountability. For instance, the nondelegation doctrine might be revived and used to prevent governmental entities from handing over too much power to non-state actors.<sup>142</sup> Alternatively, private contractors could face nonconstitutional civil suits, which would not require a nexus to state action.<sup>143</sup> In addition, statutes allowing

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139. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

140. See Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1190-91 (1994) (advocating that private entities should be considered state actors when they are the sole providers of public services and defining those services in terms of contemporary shared understandings of government responsibilities rather than traditional practice).

141. See, e.g., *NCAA v. Tarkanian*, 488 U.S. 179, 191-99 (1988) (holding that the National Collegiate Athletic Association is not a state actor); *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542-47 (1987) (holding that the U.S. Olympic Committee, a corporation created by federal statute and given control over U.S. participation in the Olympics as well as exclusive oversight of private amateur sports organizations participating in international competition, is not a state actor); *Blum v. Yaretsky*, 457 U.S. 991, 1008-09 (1982) (holding that private nursing homes providing long-term care to Medicaid beneficiaries "are not state actors, even though they ... operate under contract with the government and make need determinations authorized by statute"); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-43 (1982) (holding that private schools are not state actors even though the government contracted with the schools to fulfill its statutory obligation to provide education to special-needs students). *But see* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001) (holding that a private organization overseeing nearly all public and private high school athletic events is a state actor); *West v. Atkins*, 487 U.S. 42, 54-58 (1988) (holding that a private doctor treating prisoners pursuant to a contract with a prison is a state actor).

142. See, e.g., Lindseth, *supra* note 28; Metzger, *supra* note 138, at 1442-45, 1456-500. For an argument that private prisons, specifically, are unconstitutional delegations, see Joseph E. Field, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 655-56 (1987); Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 914-15 (1988). For a similar argument about the privatization of welfare services, see Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 105-11 (2003).

143. For example, health care providers could face malpractice or other tort actions. See

enforcement through third-party beneficiary suits<sup>144</sup> or *qui tam* actions<sup>145</sup> could be expanded. Indeed, non-state actors may sometimes face greater prospects of liability because they would likely be unable to take advantage of various immunity doctrines available to state actors.<sup>146</sup>

On the other hand, these remedies would probably require that the defendant commit gross violations of the norms of human dignity before they could be viable. Thus, while tort claims against non-state actors might be cognizable for the sort of conduct that would give rise to an Eighth Amendment action alleging cruel treatment, such an avenue would likely not be readily available for alleged violations of the norms concerning rational and non-corrupt governance discussed above. Accordingly, private tort suits will rarely be able to vindicate concerns about mismanagement, waste, corruption, due process, or arbitrary and capricious decisionmaking.<sup>147</sup> Nevertheless, courts have been willing to read due

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Freeman, *supra* note 6, at 623 & n.324 (“Courts have grown receptive to patient attempts to sue managed care organizations in negligence and wrongful death actions,” particularly “in the context of ERISA, the federal statute that limits employee remedies against health care organizations selected by employees as part of a benefit plan.” (citing 29 U.S.C. § 1144(a) (1994)). It is true that the U.S. Supreme Court ruled in 2004 that ERISA preempts patients from suing under state tort law for an insurer’s refusal to pay for doctor-recommended medicines and procedures. See *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 2492-93, 2502 (2004). Nevertheless at least one post-*Davila* verdict seems to indicate that negligence suits regarding managed care will continue. See Brenda Sapino Jeffreys, *Despite Davila, Widower Successfully Sues HMO for Negligence*, TEX. LAW., Aug. 1, 2005, at 1. Moreover, *Davila* would not affect suits against the health care providers themselves.

144. See, e.g., Freeman, *supra* note 6, at 608; Eleanor D. Kinney, *Private Accreditation as a Substitute for Direct Government Regulation in Public Health Insurance Programs*, 57 LAW & CONTEMP. PROBS., 47, 68 (1994) (“Some state statutes and judicial decisions have recognized a private right of action to enforce state licensure laws particularly with respect to nursing homes.”). Currently, however, courts do not generally find state provider contracts to be a source of third-party beneficiary claims against nursing homes and other types of service providers for statutory violations, and only rarely recognize private rights of action to redress violations of federal law. Freeman, *supra* note 6, at 603; Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1196 (1982).

145. See, e.g., 31 U.S.C. § 3730 (2000).

146. See, e.g., *Richardson v. McKnight*, 521 U.S. 399, 412 (1997) (holding that private prison guards do not enjoy qualified immunity); *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1882 (2002) [hereinafter *Two Systems*] (arguing that, because of the possibility of private tort suits and unavailability of qualified immunity for prison guards working in such prisons, “private prisons are, if anything, more accountable ... than are public prisons”).

147. Courts might be willing to impose these values in some cases through suits for

process terms into certain types of employment contracts,<sup>148</sup> signaling the possibility that common-law courts could be a vehicle for effectuating such broader public law values, regardless of state action.

*2. Alternative Mechanisms of Accountability: Democratic, Contractual, and Institutional*

Beyond formal legal accountability, administrative law scholars have explored ways in which privatization may affect alternative mechanisms of accountability. Such mechanisms can be grouped into three categories: democratic accountability, contractual accountability, and internal institutional accountability. Of course, democratic accountability—the ability of the polity to respond to (and therefore affect) governmental action—has always been a central preoccupation of administrative law because government-run administrative agencies exercise important policymaking responsibility without a direct democratic check.<sup>149</sup> Indeed, FOIA,<sup>150</sup> FACA,<sup>151</sup> inspector general oversight,<sup>152</sup> whistle-

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negligent hiring, training, or supervision of employees. *See, e.g.,* *Jama v. Esmor Corr. Servs., Inc.*, 334 F. Supp. 2d 662, 683-85 (D.N.J. 2004).

148. *See, e.g.,* *Ambrosino v. Metro. Life Ins. Co.*, 899 F. Supp. 438, 445 (N.D. Cal. 1995) (holding that termination of membership based solely on physician's previous drug addiction was arbitrary and capricious, and violated plaintiff's common law right to fair procedures). For an extensive discussion of these issues, see Michael Asimow, *News from the States, The Private Due Process Train Is Leaving the Station*, 23 ADMIN. & REG. L. NEWS (1998), available at <http://www.abanet.org/adminlaw/news/vol23no4/statenew.html>.

149. *See, e.g.,* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U.L. REV. 1, 72 (2002) ("This layer of agencies creates obvious problems for theories of democracy that emphasize the ability of citizens to influence their government through participatory action or deliberative process."). *But see* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1542 (1992) (arguing that agencies, because they fall between the extremes of a "politically over-responsive Congress and the over-insulated courts," may be best situated to institute a civic republican model of policymaking).

150. 5 U.S.C. § 552 (2000).

151. 5 U.S.C. app. § 2 (2000) (requiring that critical regulatory meetings be announced in advance and be made open to the public).

152. Inspector General oversight arises from the Inspector General (IG) Act, codified as amended at 5 U.S.C. app. 3 §§ 1-12 (1994). The IG Act authorized the creation of offices whose mission is to detect and prevent fraud, waste, and abuse in their respective departments and agencies across the executive branch. For an analysis of the role that inspectors general play in various agencies, see Michael R. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 GEO. L. REV. 2027 (1998).

blower protection statutes,<sup>153</sup> civil service conflict of interest rules,<sup>154</sup> notice and comment rulemaking,<sup>155</sup> judicial review of agency decisionmaking under the APA,<sup>156</sup> and even the First Amendment<sup>157</sup> can be seen to embody concerns about transparency of governmental processes.

Although such a focus on transparency obviously does not change the fact that agency officials do not themselves stand for election, transparency does seek to maintain a feedback loop between the government and those affected by government policy. Indeed, democratic accountability is not simply about making sure a voting polity ratifies all governmental decisions.<sup>158</sup> Rather, it is concerned with ensuring that there is some sort of dialogue between the government and the governed to act as a disciplining check on power and guard against the possibility of capture by interest groups.<sup>159</sup> While the rise of administrative agencies creates concerns

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153. See, e.g., Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978). See generally Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employee Dissent*, 51 ADMIN. L. REV. 531 (1999) (analyzing the Act's provisions). Since enactment of the landmark Civil Service Reform Act in 1978, hundreds of state statutes have also been passed to protect whistleblowers. See Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581, 582-83 (1999) (collecting whistleblower statutes).

154. For a description of the civil service rules generally, see RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE AND THE PROBLEM OF BUREAUCRACY: THE ECONOMICS AND POLITICS OF INSTITUTIONAL CHANGE* (1994).

155. See 5 U.S.C. § 553(c) (2000).

156. 5 U.S.C. §§ 551-559, 701-706 (2000); see, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983) (requiring that regulators provide reasons for their policies and base their decisions on an administrative record that is publicly available).

157. See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) ("The Framers of the First Amendment .... protected the people against secret government.").

158. See Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1509 (2001) ("Political accountability should be understood to include the democratic character of decision-making, the clarity of responsibility for an action or policy within the political system, and the availability of the body politic to obtain accurate information about a governmental policy or action.").

159. Cary Coglianese, *Administrative Law*, in 1 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL & BEHAVIORAL SCIENCES 85-88 (Neil J. Smelser & Paul B. Bates eds., 2001) ("Transparent procedures and opportunities for public input give organized interests an ability to represent themselves, and their constituencies, in the administrative process.... These procedures may also protect against regulatory capture...."); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997) (noting the judicial thrust toward "changing the procedural rules that govern agency decisionmaking ... [to] force agencies to open their doors—and their minds—to formerly unrepresented points of view, with the result

for democratic accountability, privatization certainly takes these concerns a step further because the private contractor is even more removed from democratic oversight, and it may be much more difficult to insist on any sort of transparency with regard to the operations of the contractor.<sup>160</sup>

Despite the threats that privatization poses to legal and democratic accountability, the blended public-private power created by privatization may offer new mechanisms for imposing accountability, i.e., new ways of encouraging government and private actors to adhere to norms of human dignity, good governance, and anti-corruption. Scholars such as Fred Aman have argued that transparency laws can be extended and citizen participation increased to enhance democratic accountability.<sup>161</sup> For example, Aman has proposed that the APA notice and comment requirements could be expanded to include government outsourcing of social services or prison management.<sup>162</sup> Others have argued that FOIA and other sunshine laws should apply to private contractors.<sup>163</sup>

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that capture would be eliminated or at least reduced"). On the other hand, some argue that the focus on transparency can at times impede the ability of regulators to secure much-needed information from the industries they regulate. See Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 280 (2004) ("We conclude that regulators' need to secure information from those they regulate provides a reason for preserving some degree of opacity in an otherwise transparent and accountable regulatory process.").

160. See Mary L. Heen, *Congress, Public Values, and the Financing of Private Choice*, 65 OHIO ST. L.J. 853, 868 (2004) ("Politics offer a process for preference formation through the protection of voting rights and procedures for political deliberation, including open proceedings and constitutional protections for public discussion and criticism. Private firms have fewer obligations to provide access to information about their operations or the reasons for their decisions."). Cf. Paul Starr, *The Case for Skepticism*, in *PRIVATIZATION AND ITS ALTERNATIVES* 25, 27-29 (William T. Gormley, Jr. ed., 1991) (expressing concerns about privatization). For example, federal contracting measures are generally exempt from notice and comment requirements. See *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1053 (D.C. Cir. 1987) (ruling that a federal Request for Proposals and subsequent contract did not implicate the rulemaking processes of § 553 of the APA). Similarly, the Model Procurement Code for State and Local Governments allows a review of contracts only at the request of a bidder, not the public. Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1198 (2000) (citing Model Procurement Code for State and Local Governments § 9-101 (1979)).

161. AMAN, *supra* note 7.

162. *Id.* at 150.

163. See, e.g., Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM. L.J. 21, 22-24 (1999).

Scholars have also argued that the contractual agreements that are the very engine of privatization can provide new forms of governmental oversight and accountability. For example, Jody Freeman, seeking to find a middle ground between the efficiency-based supporters of privatization and the critics who fear that privatization will thwart important mechanisms of accountability, has contended that contracts can, through their terms, make substantive and procedural “public law” values applicable to private parties, as well as incorporate structural features and enforcement mechanisms to enhance compliance. For example, states “could require compliance with both procedural and substantive standards that might otherwise be inapplicable or unenforceable against private providers” and could mandate that personnel receive training equivalent to that of analogous state actors.<sup>164</sup> Contracts could also require compliance with specific performance standards and include performance benchmarks, graduated penalties, oversight by contract managers or independent observers, and reporting requirements.<sup>165</sup> Along with these front-end contractual terms to enhance accountability, contracts could also encourage back-end enforcement in the courts when these mechanisms fail. Contracts could thus explicitly permit third-party beneficiary suits and even allow relevant interest groups to bring suit in some contexts.<sup>166</sup>

Such an approach, of course, requires effective mechanisms for ensuring compliance with whatever contractual provisions are drafted. The literature on contract monitoring and compliance in the domestic context suggests, however, that the available mechanisms are imperfect at best. First, governments may not have any formal system of contract management in place.<sup>167</sup> One of the challenges of any contractual regime, therefore, must be to make sure that contract compliance becomes a core task of government bureaucracies.<sup>168</sup> Second, even with a robust system of governmental oversight

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164. Freeman, *supra* note 6, at 634.

165. *Id.* at 635.

166. *Id.* at 636.

167. See KEVIN LAVERY, SMART CONTRACTING FOR LOCAL GOVERNMENT SERVICES 73 (1999).

168. As one commentator has noted, “[i]n the twenty-first century, in many agencies, contracting management needs to come to be one of the central concerns of senior agency political and career executives, the same way other organizational core competencies are.”

in place, the sorts of contractual provisions Freeman envisions are necessarily difficult to monitor because they do not lend themselves to easily determined outcome goals or measures.<sup>169</sup> Third, compliance concerns may result in onerous reporting requirements that vastly increase the cost of privatization to both the contractor and the governmental entity overseeing the contract (perhaps even wiping out whatever purported efficiency gains the privatization may have achieved) while not really providing increased accountability.<sup>170</sup> Fourth, judicial review of government contracting may be unavailable because the contracts do not specify quantifiable outcomes or clear processes, leaving no judicially administrable standard.<sup>171</sup> And even if judicial review is available, a government may incur significant litigation costs and other administrative burdens, “siphon[ing] away public resources that could have been devoted to, among other things, the effective implementation and oversight of the contractors’ work.”<sup>172</sup> Finally, though an agency could theoretically exercise oversight and terminate the contract with a noncompliant firm, agencies may be reluctant to do so because termination would force the agency to find other ways of providing the good or service at issue.<sup>173</sup>

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Steven Kelman, *Remaking Federal Procurement 2* (Visions of Governance in the 21st Century Program, Working Paper No. 3, 2002), available at <http://www.ksg.harvard.edu/visions/publication/kelman.pdf> (last visited May 13, 2005).

169. See WILLIAM D. EGGERS, *PERFORMANCE-BASED CONTRACTING: DESIGNING STATE-OF-THE-ART CONTRACT ADMINISTRATION AND MONITORING SYSTEMS 2* (1997) (suggesting that performance-based contracts, to be useful, should “clearly spell out the desired end result”).

170. See, e.g., Stephen D. Knight & S. Jun Jin, *Compliance Problems for American Contractors in Iraq*, 24 *CONSTRUCTION LAW* 5, 5 (2004) (“The essential problem for government contractors doing business in Iraq is the combination of too little time, ‘fluid’ statements of work, enormous risk, and the expectation of near-perfect contractor compliance with both standard and special procurement requirements.”); see also *id.* at 6-7 (describing reporting requirements).

171. See, e.g., Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 *FORDHAM URB. L.J.* 1559, 1605 (2001) (“Legally, of course, all that can be demanded is adherence to the contract. Thus the outcomes expected must be stated as performance standards in order to demand actual contractor performance.”).

172. Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign’s Immunities from Exemplary Damages?*, 58 *OHIO ST. L.J.* 175, 191 (1997).

173. See Janna J. Hansen, Note, *Limits of Competition: Accountability in Government Contracting*, 112 *YALE L.J.* 2465, 2476 (2003).

In spite of these imperfections, there are important benefits to a contractual approach, not the least of which is that it can aid other mechanisms of accountability. For example, with regard to legal enforcement, the reliance on contract removes any state action consideration, making the contract more readily enforceable in ordinary civil suits, as long as the contractual provisions are sufficiently specific. If there is concern that governments will be overly hesitant to pursue breach of contract actions for violation of public-regarding rules, one type of contractual provision might allow citizen suits or at least public disclosure requirements so that popular political (or economic) pressure could be brought to bear on noncompliant contractors. Such public reporting might also allow citizen watchdog groups (or even other competing contractors) to monitor the effectiveness of the contract, publicize deficiencies, and lobby government officials for change.<sup>174</sup> Finally, the contractual approach may spur changes to institutional culture, leading to additional compliance monitoring and oversight.<sup>175</sup>

Such internal institutional accountability is another significant avenue to explore. I use the term internal institutional accountabil-

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174. Indeed, as Bradley Karkkainen has pointed out, the Toxics Release Inventory (TRI), 42 U.S.C. § 11023, which requires that industrial facilities report the release and transfer of specific chemicals, has had a significant impact on pollution emissions. See Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 287-88 (2001). According to Karkkainen, the TRI, because it creates a performance metric, “both compels and enables facilities and firms to monitor their own environmental performance” and “encourages them to compare, rank, and track performance among production processes, facilities, operating units, and peer or competitor firms.” *Id.* at 261. In addition, Karkkainen argues that the TRI data “subjects the environmental performance of facilities and firms to an unprecedented degree of scrutiny by their peers, competitors, investors, employees, consumers, community residents, environmental organizations, activists, elected officials, regulators, and the public in general.” *Id.* at 261-62. As a result, this transparency scheme “unleashes, strengthens, and exploits multiple pressures, all tending to push in the direction of continuous improvement as facilities and firms endeavor to leapfrog over their peers to receive credit for larger improvements or superior performance.” *Id.* at 262. In addition, administrators—whether within companies or in government bureaucracies monitoring contract compliance—have a natural desire to improve what they have data about. *Id.* at 295-305. Thus, although information by itself does not provide accountability, see *id.* at 338-45 (noting that some contractors may be unconcerned about the mere release of information), it can enable other accountability mechanisms.

175. See *id.* at 287 (“Mandatory production and disclosure of [environmental] information has prompted many firms to undertake ambitious voluntary emission reductions programs, often far beyond the levels required under current regulations.”).

ity to refer to cultural, organizational, and professional norms that promote accountability. Bureaucracies, companies, and organizations have internal norms and values, as well as both formal and informal modes of sanctioning noncompliance that may not rise to the level of a court proceeding, criminal conviction, or civil damages award but that nonetheless can have a significant disciplining or punitive impact on an individual.<sup>176</sup> Indeed, over time the development of professional standards of conduct may become a particularly powerful force influencing behavior.<sup>177</sup>

These are not new insights, of course. F.W. Maitland noted long ago that in England the church, the stock exchange, the legal profession, the insurance market, and even the Jockey Club had adopted various forms of self-regulation including machinery for arbitrating disputes among members.<sup>178</sup> More recent research on norms focuses on ways in which “private, closely knit, homogeneous micro-societies can create their own norms that at times trump state law and at other times fill lacuna in state regulation, but nonetheless operate autonomously.”<sup>179</sup> International civil society literature recognizes that international trade association groups and their

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176. Sociologists, social psychologists, and organizational theorists have studied the ways in which cultures internal to bureaucracies and other types of organizations, including for-profit firms, shape the behavior of, and sanction, individuals within those organizations. For several volumes of collected essays that have been particularly influential, see generally CLASSICS OF ORGANIZATION THEORY (Jay M. Shafritz & J. Steven Ott eds. 2001); ORGANIZATION THEORY (Oliver E. Williamson ed., 1990); ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS (W. Richard Scott ed. 1987).

177. See Freeman, *supra* note 6, at 629 (describing codes of conduct of several professional organizations).

178. See F.W. MAITLAND, *Trust and Corporation*, in MAITLAND: SELECTED ESSAYS 141, 189-95 (H.D. Hazeltine et al. eds., 1936) (1905) (describing the sophisticated nonlegal means of enforcing order among members of these institutions).

179. Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 184 (2005). See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (drawing on an empirical study of relations among cattle ranchers to develop a theory of nonlegal norms as a source of social control); Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL'Y REV. 1, 8-9 (2004) (using game theory to argue that the existence of pre-existing networks enhances a private legal system's ability to enforce norms); Lisa Bernstein, *Opting Out of the Legal System*, 21 J. LEG. ST. 115 (1992) (discussing a system of “private lawmaking” in the New York Diamond Dealers Club); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (presenting empirical data on nonlegal dispute settlement in the manufacturing industry).

private standard-setting bodies can wield tremendous influence in creating voluntary standards that, in turn, become industry norms.<sup>180</sup>

These codes of conduct can be created, monitored, and enforced solely within an institution, industry, or profession, but they may be enhanced through the intervention and oversight of outside groups.<sup>181</sup> Within an industry, norms are most likely to develop and become effective “when a professional group with its own standards of excellence dominates the institution, as with doctors in hospitals.”<sup>182</sup> By contrast, private nursing homes, run by low-wage staff with high turnover rates, “lack a dominant professional group” and are less effective.<sup>183</sup> In addition, whether an institution runs on a for-profit or not-for-profit basis may have an impact on internal culture. For example, in the health care context, one recent study suggests that nonprofit hospitals provide more public goods and services than for-profit institutions, possibly due to norms within the nonprofit sector.<sup>184</sup>

Turning to external oversight, independent monitors can serve as an important check that may serve to enhance internal modes of accountability. For example, many state governments rely on a private accrediting organization, the Joint Commission on Health Care and Accreditation of Health Organizations (JCAHO), to set licensure standards and certify that health care organizations are

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180. See FAIR LABOR ASS'N, WORKPLACE CODE OF CONDUCT, available at <http://www.fairlabor.org/all/code/index.html> (providing a set of standards defining decent and humane working conditions). But see Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 208 (2004) (discussing difficulties in holding private corporations to such codes).

181. See, e.g., Orly Lobel, *The Renew Deal: The Fall of Regulation and Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 374-75 (2004) (noting the importance of “private standard setting, accreditation, and certification plans by independent activists, as well as monitoring by both nonprofits and for-profit consulting firms”).

182. Freeman, *supra* note 6, at 614 (citation omitted).

183. *Id.*

184. See Jill R. Horwitz, *Why We Need the Independent Sector: The Behavior, Law, and Ethics of Not-for-Profit Hospitals*, 50 UCLA L. REV. 1345, 1367, 1372-73 (2003); see also M. BRYNA SANGER, THE WELFARE MARKETPLACE: PRIVATIZATION AND WELFARE REFORM 14-15, 65-71, 82-83 (2003) (making a similar argument about the benefits of using nonprofits in the context of welfare privatization). But see Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1746-47 (2002) (expressing skepticism that nonprofit status will have any significant disciplining effect on private welfare contractors); Stevenson, *supra* note 142 (expressing same skepticism).

in compliance with those standards.<sup>185</sup> Similarly, the shift to managed care organizations to provide health care services under Medicaid has increased governmental reliance on private accrediting organizations, such as the National Committee for Quality Assurance (NCQA), which evaluate and rate health care plans.<sup>186</sup> And while the governmental reforms incorporated into the Sarbanes-Oxley Act of 2002<sup>187</sup> received most of the attention in the wake of the scandal surrounding Enron Corporation, changes involving the way corporate debt is rated by Moody's and Standard & Poor's (both private corporations) may be even more significant over the long term.<sup>188</sup>

External monitoring can also be less direct, as when NGOs mobilize consumer pressure to influence changes in industry behavior. For example, the international anti-apartheid movement combined shareholder, consumer, and governmental action to persuade many corporations, universities, and pension funds to divest themselves of South African investments long before official national sanctions were in place.<sup>189</sup> Since then, similar boycott efforts have resulted in changes to tuna fishing practices so as to protect dolphins,<sup>190</sup> a decision by the French government to suspend

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185. See Kinney, *supra* note 144, at 52.

186. See John K. Iglehart, *The National Committee for Quality Assurance*, 335 NEW ENG. J. MED. 995, 997 (1996) (noting states that require health plans to be accredited by a recognized external review body in order to maintain operating licenses).

187. Pub. L. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

188. See Troy A. Paredes, *After the Sarbanes-Oxley Act: The Future of the Mandatory Disclosure System*, 81 WASH. U. L.Q. 229, 236 (2003) (noting that "Institutional Shareholder Services, GovernanceMetrics International, Standard & Poor's, and others have started grading the corporate governance structures of companies, just as Standard & Poor's or Moody's grade their debt"); see also Jenny Wiggins, *S&P Outlines Ratings Overhaul in Light of Enron*, FIN. TIMES, Jan. 26, 2002, available at <http://specials.ft.com/enron/FT3DYSSOWWC.html> (discussing changes in U.S. corporate governance and debt rating in the post-Enron world).

189. See Spiro, *supra* note 22, at 959 (detailing how interest groups, even "[w]here stymied by national regulators ... can accomplish equivalent results by commanding consumer preferences, which in turn works to constrain corporate or state behavior").

190. See *Choosing Your Fish with Care*, W. MORNING NEWS (U.K.), Mar. 12, 2004, at 12 (reporting that "wall of death" nets regularly threatened dolphins a decade ago, but now successful public awareness campaigns have led to changes in tuna fishing techniques, and tuna manufacturers routinely label their tuna containers as "dolphin-friendly"). For a discussion of the tuna-dolphin controversy as part of a consideration of the potential role of unilateral trade sanctions in protecting environmental resources, see generally Richard W.

its nuclear testing program,<sup>191</sup> and alterations in Shell Oil Corporation's decommissioning of a rig in the North Atlantic.<sup>192</sup> As *The Economist* has observed, "a multinational's failure to look like a good global citizen is increasingly expensive in a world where consumers and pressure groups can be quickly mobilised behind a cause."<sup>193</sup>

Finally, official governmental bodies can draw upon internal norms in establishing more formal methods of oversight. As scholars have recognized, "[d]ecisionmakers work under a continuing pressure to incorporate customary rules into their decisions."<sup>194</sup> A statute may be interpreted (or even supplanted) by reference to industry custom,<sup>195</sup> or an entire legal regime—such as the Uniform Commercial Code—may be adopted to codify industry practice.<sup>196</sup> Likewise, in the prison reform cases of the 1960s and 1970s, federal courts used the American Correctional Association (ACA) manual of professional conduct as a resource for establishing correctional

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Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1 (1999).

191. See *Greenpeace International Founder Dies in Car Crash*, ENV'T NEWS SERVICE, Mar. 23, 2001, <http://ens-newswire.com/ens/mar2001/2001-03-23-12.asp> (crediting Greenpeace with creating pressure that helped push the French government to end its nuclear testing program).

192. See Allan Pulsipher & William Daniel IV, *Onshore-only Platform Disposition Needs Exceptions*, OIL & GAS J., Jan. 15, 2001, at 64 (reporting that Shell's decision to cancel its plan for an "at-sea disposition" of an oil rig followed an unexpectedly fierce campaign featuring public boycotts).

193. *Multinationals and Their Morals*, ECONOMIST, Dec. 2, 1995, at 18.

194. Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323, 330 (1993).

195. See, e.g., LON L. FULLER, ANATOMY OF THE LAW 57-59 (1968) (arguing that the act of interpretation permits courts to adjust official legal norms to match custom or usage); James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 1836-1915*, at 289-94 (1964) (describing ways in which local norms in Wisconsin lumber industry played a significant role in the way contract law was applied).

196. See Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 503-19 (1987) (describing Karl Llewellyn's initial drafts of what later became Article 2 of the Uniform Commercial Code).

standards.<sup>197</sup> Compliance with internal standards can also be made a prerequisite for receiving government contracts.

Of course, this sort of compliance monitoring (both internal and external)—like the modes of accountability already discussed—is likely to be imperfect,<sup>198</sup> and institutional culture will never fully discipline egregious behavior.<sup>199</sup> Oversight is often lax, parties may hide behavior from auditors or internal monitors, supervisors may actually look the other way even while purporting to enforce institutional norms, and so on. Moreover, if it is left to private standard-setting bodies to give content to the applicable norms, the process could both dilute the norms and reduce public participation in their development.<sup>200</sup> To say that an accountability mechanism is imperfect, however, is not to say that it has no significant impact. Especially given that all accountability mechanisms have limitations, it would be foolish to ignore institutional accountability, particularly in an era of privatization. Accordingly, attention must be paid to the institutional settings of privatized action.

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In the end, the domestic administrative law context provides a more systematic series of operative norms and possible accountability mechanisms than is typically found in the international law

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197. See Robert Lilly & Paul Knepper, *The Corrections-Commercial Complex*, 39 CRIME & DELINQ. 150, 161 (1993). *But see* Bell v. Wolfish, 441 U.S. 520, 544 n.27 (1979) (noting that ACA standards do not themselves establish a constitutional minimum for cruel and unusual punishment under the Eighth Amendment). For further discussion of the relationship between ACA standards and judicial decisions concerning prison reform, see MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 163 (1998).

198. See, e.g., DEBORAH RHODE, IN THE INTEREST OF JUSTICE: REFORMING THE LEGAL PROFESSION 43-67 (2000) (discussing the limited ability of professional culture to police lawyer misconduct).

199. See, e.g., Pagnattaro, *supra* note 180, at 208-09 (expressing skepticism concerning efficacy of apparel industry's fair labor standards).

200. See, e.g., Freeman, *supra* note 6, at 612 (noting concerns arising from the policymaking nature of the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) accreditation). Indeed, standard-setting bodies such as the American Correctional Association (ACA) have been criticized because their officials are themselves often correctional officials, thereby "creating a common sympathy and sense of purpose that tells against tougher standards and more rigorous enforcement." Dolovich, *supra* note 3 (manuscript at 28). Moreover, Dolovich argues that because the institutions pay for accreditation, thereby "providing income on which the ACA is dependent for its survival," a high degree of capture is likely. *Id.*

literature. Moreover, by using this framework of norms and mechanisms, international law scholars can analyze privatization as a phenomenon, rather than simply discuss how to extend international legal norms to specific categories of non-state actors. It may be that, at least in some cases, privatization does *not* result in decreased accountability, at least when accountability is thought of in this broader way.

Of course, not all of the norms or mechanisms apply in precisely the same way when considering privatization in the international sphere. For example, the idea of democratic accountability must be reconceptualized when the affected population is not the same as the population whose government is providing the relevant service.<sup>201</sup> Nevertheless, this framework allows us to think more comprehensively about how best to articulate the relevant governmental norms we seek to protect when we encounter privatization and to recognize the variety of possible accountability mechanisms that might be used. Only through such a comprehensive approach can we evaluate the true effects of privatization on the international and transnational system.

### III. TWO CASE STUDIES OF FOREIGN AFFAIRS PRIVATIZATION

This Part uses the categories of norms and accountability mechanisms just discussed to analyze privatization in both the military and foreign aid contexts. Drawing on the domestic administrative law literature, I have laid out a framework of analysis that I think will help us better assess the problem as well as point the way toward solutions. Thus, I will evaluate the problem of privatization by considering, in each context, its impact on legal, democratic, contractual, and internal institutional accountability. Where possible, I will compare the impact of privatization on the relevant foreign affairs function of government with the impact on a roughly analogous domestic function. Such comparisons, which help highlight both the similarities and differences in various types of domestic and foreign affairs privatization, produce at least three important observations.

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201. *See infra* Part III.B.2.

First, although privatization in the international sphere eliminates certain potential avenues of legal accountability,<sup>202</sup> such consequences may not be as dramatic as we might at first assume because the baseline of accountability for state actors in the international system is already so low. In short, because international law is already weakly enforced, the transition from state to non-state actors may not affect the degree of accountability. Though we surely should be concerned about weak international enforcement in general, the specific phenomenon of privatization does not make the legal accountability problem substantially worse than it already is. Moreover, the few courts that have interpreted the state action doctrine in the international context have tended to do so quite broadly. As a result, in international and transnational cases, courts will often treat a private actor as sufficiently tied to the state to implicate norms against government conduct. Ordinary tort suits might also be available against private actors, who will be less able to take advantage of governmental immunities under international law. For these reasons, private actors may actually face greater legal accountability than state actors do under international law.

Second, in the realm of democratic accountability, administrative law scholars have much to teach international law scholars, but at the same time the limits of the domestic and international analogy become apparent. As noted previously, democratic accountability, and the means of ensuring it in the face of agency and privatized governmental action, has been one of the central preoccupations of domestic administrative law. Domestically, there is, at least theoretically, a democratic check on governmental action; if people are unhappy about the way a governmental act affects them, they can vote or lobby their representatives in order to effectuate change.

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202. I am using the term "legal accountability" to refer to a wide variety of forms of legal redress, including domestic criminal trials and civil suits brought under both domestic and international law, as well as criminal proceedings and state-to-state complaints in international fora. In each case, the individual or entity is, of course, being held accountable to a different community or group of communities under different legal standards. Nonetheless, the important point is that there would be some form of legal accountability somewhere. Moreover, by grouping all forms of legal accountability together, we can more easily draw contrasts between this form of accountability and other, less court-centered approaches such as democratic participation, contractual liability, and internal institutional sanctions.

As a result, there is a potential feedback loop between government and the governed. Citizens have both a substantive right to the rational, nonarbitrary administration of government programs and a vehicle to enforce that right through the democratic process.

The idea of democratic accountability is more problematic when states project power overseas because multiple relevant polities are affected. With respect to the members of the polity that is acting overseas, there is no question that they possess democratic entitlements and can exercise them. But their willingness and ability to do so is muted even without privatization. If the U.S. government acts abroad, for example, U.S. citizens retain the ability to respond through democratic mechanisms, but they are less likely to use such mechanisms because the activities at issue may have little impact in the United States, and transparency rules tend not to apply as readily. Thus, while privatization may further limit the possibilities of democratic participation, as in the case of legal accountability it does not necessarily result in as steep reduction of accountability as in analogous domestic contexts.

With respect to those who do not belong to the democratic polity exercising its power overseas, it is at best unclear whether they even possess any democratic entitlements from that polity, such as the right to rational, nonarbitrary, non-corrupt services from a foreign government. There is thus an important threshold debate about whether democratic norms apply. Certainly a strong case can be made that they do, but in that case, privatization will not dramatically reduce non-citizens' ability to influence foreign governments' policies. Indeed, privatization may actually yield alternative modes of democratic participation, through the vehicles of contract and internal institutional accountability discussed below.

Third, by studying domestic administrative law scholarship on privatization, we may come to devote more attention to the possibility of using contractual agreements and internal institutional mechanisms to impose a measure of accountability on private actors. Though the use of agreements is certainly not a panacea, contracts are an under-explored tool for enforcing public law norms when the international functions of government are transferred to private actors. Likewise, the internal institutional culture of organizations can have a strong impact on accountability.

### *A. Military Functions*

As discussed in Part I, the United States, other governments, and international organizations are increasingly contracting with private actors to perform a range of military functions, from logistics support on the battlefield, to tactical advising, to interrogation and detention services, to, in some cases, actual combat. While military contractors are susceptible to abuses under all three categories of norms that are the focus of this Article—norms of human dignity, norms against corruption and fraud, and norms of rational, nonarbitrary provision of services—the possibility that military contractors could infringe on the human dignity of those they encounter in the field is a particular concern because of the powers they wield.<sup>203</sup> This Part will therefore focus primarily on the impact of privatization on potential violations of human dignity norms, though it will make passing references to other norms where applicable. In addition, because of the serious and extensive nature of the abuses committed by private contractors at Abu Ghraib, I will use this incident as a point of departure and compare it to the roughly analogous domestic example of private prisons.

#### *1. Legal Accountability*

Most commentators who have taken note of the increase in military contracting and the potential for contractors to violate the human dignity of those within their control have emphasized the lack of legal remedies for contractor abuse.<sup>204</sup> While it is true that

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203. To be sure, U.S. military contractors are not permitted to perform direct combat roles. See 10 U.S.C. § 2464 (2000). Nonetheless, some logistics functions, such as maintaining fighter planes, tanks, and other weaponry during combat or providing security for airports and other facilities, place contractors very close to battle lines. Many battlefield contractors providing ancillary services are even entitled to carry weapons for self-defense. See ARMY MATERIEL COMMAND, PAMPHLET NO. 715-18, AMC CONTRACTS AND CONTRACTORS SUPPORTING MILITARY OPERATIONS 19-1 (2000), available at [http://www.amc.army.mil/amc/ci/pubs/p715\\_18.pdf](http://www.amc.army.mil/amc/ci/pubs/p715_18.pdf). Military prison interrogators wield enormous control over detainees subject to interrogation.

204. See, e.g., Myriam Gilles, *Private Parties as Defendants in Civil Rights Litigation: Introduction*, 26 CARDOZO L. REV. 1, 7 (2004); Singer, *Vacuum of Law*, *supra* note 23, at 525; Joanne Mariner, *Private Contractors Who Torture*, CNN, June 17, 2004, at <http://www.cnn>.

the avenues for legal redress in such cases are limited, this critique tends to miss the deeper point, that, at least when compared to the very few legal remedies available for government actors, the loss in remedies for private actors is actually not that great. Indeed, in some cases, more avenues of legal redress may exist in the international setting against private actors than against public ones.

At Abu Ghraib, U.S. military personnel responsible for detention operations abused detainees by forcing them to strip and undergo acts of sexual humiliation, threatening them with dogs, applying electric shocks, subjecting them to mock executions, exposing them to severely cold weather, beating them, nearly suffocating them, and, in some cases, killing them.<sup>205</sup> Private employees operating under contract with the Department of the Interior as interrogators and translators participated in the abuse alongside uniformed military personnel and reportedly directed some of the activities.<sup>206</sup>

Such abuses clearly violated multiple norms embodied in both international and domestic law.<sup>207</sup> Despite the magnitude of these violations, however, the avenues for legal redress, even against the governmental actors, are extremely limited. First, there are few, if any, international, Iraqi, or transnational venues in which the

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com/2004/LAW/06/17/mariner.contractors; Adam Liptak, *Who Would Try Civilians from U.S.? No One in Iraq*, N.Y. TIMES, May 26, 2004 at A11.

205. TAGUBA REPORT, *supra* note 63, at 16-17; FINAL REPORT OF THE INDEP. PANEL TO REVIEW DOD DETENTION OPERATIONS 13 (2004) [hereinafter SCHLESINGER REPORT]; DEP'T OF THE ARMY, INSPECTOR GEN., DETAINEE OPERATIONS INSPECTION, July 21, 2004, at 19-20 [hereinafter DAIG REPORT]; LT. GEN. ANTHONY R. JONES & MAJ. GEN. GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 68-95 (2004) [hereinafter FAY REPORT].

206. FAY REPORT, *supra* note 205, at 131-35; TAGUBA REPORT, *supra* note 63, at 48.

207. Under international law, the abuses could be characterized as torture; cruel, inhuman, or degrading treatment; or war crimes. See *Torture Convention*, *supra* note 70, at arts. 1, 16; *Civilians Convention*, *supra* note 111, at art. 147; *ICC Statute*, *supra* note 98, at arts. 7(2)(a), 8. The acts might also constitute crimes against humanity, if the abuses were "widespread or systematic" and committed "pursuant to ... a State or organizational policy." *Id.* at art. 7. In addition, the acts alleged would likely constitute offenses under U.S. law, which directly prohibits the international crimes of torture, 18 U.S.C. § 2340 (2000), and war crimes, 18 U.S.C. § 2241 (2000), and which also criminalizes assault, murder, manslaughter, and maiming. Finally, the acts are crimes under Iraqi law. Coalition Provisional Authority Order No. 7 § 2 (June 10, 2003), available at <http://www.iraqcoalition.org/regulations/index.html#Orders> (adding prohibition on torture and cruel and inhuman treatment to Iraqi criminal code), and U.S. military law. See, e.g., 10 U.S.C. § 893 (2000) (forbidding "cruelty and maltreatment").

governmental actors or entities could be held criminally or civilly liable. The International Criminal Court has no jurisdiction over Iraq,<sup>208</sup> and, even if it did, under the complementarity principle any domestic investigation or prosecution would defeat jurisdiction.<sup>209</sup> No other international criminal tribunal has jurisdiction, either. Iraq could theoretically bring a complaint against the United States before the Human Rights Committee, the treaty monitoring body charged with monitoring implementation of the International Covenant on Civil and Political Rights.<sup>210</sup> State-to-state complaints in such a venue are extraordinarily rare,<sup>211</sup> however, and it seems unlikely that, given Iraq's continuing dependence on U.S. support and aid, the Iraqi government would risk souring that relationship by bringing such a complaint at any point in the near future. A suit in the International Court of Justice, while conceivable, is unlikely for the same reason. With regard to Iraqi courts, although criminal or civil proceedings could theoretically be brought locally, the U.S. Coalition Provisional Authority (CPA) granted immunity to U.S. and other foreign actors in Iraq.<sup>212</sup> It is, of course, an open question whether such an immunity provision can effectively shield individuals from accusations of gross human rights violations. Regardless,

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208. Unless the Security Council authorizes a case to proceed, the ICC may exercise jurisdiction only when either the state in which the alleged crime occurred or the state of the nationality of the accused has consented to jurisdiction. *ICC Statute*, *supra* note 98, at art. 12(2). Neither the United States nor Iraq has consented to jurisdiction. *See* Rome Statute Ratification Status, <http://www.un.org/law/icc/statute/romefra.htm> (last visited Sept. 20, 2005).

209. Under the complementarity regime, the ICC may not consider a case if a state with jurisdiction is investigating or prosecuting the case, unless that state is "unwilling or unable genuinely to carry out the investigation or prosecution." *ICC Statute*, *supra* note 98, at art. 17.

210. ICCPR, *supra* note 107, at arts. 28-45. Iraq and the United States have both ratified the ICCPR. *See* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS NEW YORK, DECEMBER 16 1966, <http://www.ohchr.org/english/countries/ratification/4.htm> (last visited Sept. 20, 2005).

211. *See* INTERNATIONAL HUMAN RIGHTS IN CONTEXT 776 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000) (noting that no interstate complaint has ever been brought under any of the UN treaty-body procedures).

212. *See* COALITION PROVISIONAL AUTHORITY, ORDER 17, STATUS OF THE COALITION PROVISIONAL AUTHORITY, MNF, CERTAIN MISSIONS AND PERSONNEL IN IRAQ, § 2, [http://www.iraqcoalition.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf) (last visited Sept. 20, 2005) ("Unless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.").

the Iraqi legal system is not in any condition to consider such cases.<sup>213</sup> Finally, the prospects of a transnational suit in a third-party state under principles of universal jurisdiction are also slim. For example, though a group of Abu Ghraib victims filed an action for war crimes in Germany under that country's universal jurisdiction statute,<sup>214</sup> the statute requires approval from the chief German prosecutor before jurisdiction can be exercised, and the prosecutor recently declined to move forward with the case,<sup>215</sup> most likely because of its politically sensitive nature.

The best options for legal accountability, therefore, are domestic. There has been *some* accountability within the U.S. military justice system. Thus far, seven enlisted soldiers have entered guilty pleas, one soldier was convicted following a military trial, and one trial is still pending.<sup>216</sup> These are fairly low-level actors, however, and their sentences have all been relatively short, ranging from no time at all to ten years in prison.<sup>217</sup> And though the military has also conducted some informal investigations, there has been no accountability at higher levels, despite suggestions that responsibility may lead further up the chain of command.<sup>218</sup> Thus far no criminal or civil cases have been brought in U.S. civilian courts, though such options are available at least in theory. Criminal prosecutions could also be initiated under U.S. statutes that criminalize torture<sup>219</sup> and war crimes<sup>220</sup> committed outside the United States. However, in light of the administration's reluctance either to characterize the Abu Ghraib abuse as torture or to set a precedent for prosecutions of war crimes in civilian courts, such prosecutions are unlikely. Indeed,

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213. See Robert F. Worth, *2 from Tribunal for Hussein Case Are Assassinated*, N.Y. TIMES, Mar. 2, 2005, at A1.

214. See Criminal Indictment Against Rumsfeld et al., Nov. 30, 2004, English translation available at [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/German\\_COMPLAINT\\_English\\_Version.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/German_COMPLAINT_English_Version.pdf) (last visited May 18, 2005).

215. See Reuters, *German Prosecutor Rejects Investigation of Rumsfeld*, L.A. TIMES, Feb. 11, 2005, at A9.

216. See T.R. Reid, *England to Plead Not Guilty in Second Trial; Judge Who Threw Out Army Private's Earlier Plea Will Preside over Court-Martial*, WASH. POST, July 8, 2005, at A7.

217. See *id.*

218. At the highest levels, of course, head-of-state and diplomatic immunities might apply. See *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 I.C.J. 121, para. 78 (Feb. 14, 2002).

219. 18 U.S.C. §§ 2340, 2340A, 2340B (2000).

220. 18 U.S.C. § 2441 (2000).

even though the acts of abuse may violate other federal laws for which military personnel can be held responsible, the administration may well be reluctant to prosecute such cases. Civil suits could be brought against U.S. government actors under international law using the Alien Tort Claims Act (ATCA),<sup>221</sup> but such suits are usually brought against noncitizens and are less likely to succeed against U.S. military personnel.<sup>222</sup> Avenues of relief under domestic law are similarly confined. It is at best uncertain whether the Constitution applies extraterritorially,<sup>223</sup> and though the Federal Tort Claims Act<sup>224</sup> may waive sovereign immunity for some domestic tort suits, such waiver is quite limited.<sup>225</sup>

Viewed against this backdrop, the possibility of legal accountability for private actors, either individuals or corporations, does not seem significantly worse. While there are added hurdles for such actors in some settings, in others there is actually a greater likelihood of legal accountability. Certainly there is again no international court or tribunal that would be likely to exercise jurisdiction, but, as discussed above, that is no different than for governmental actors. Similarly, Iraqi courts are an unlikely venue both because of the possible applicability of the CPA immunity provision and because of the undeveloped state of the current Iraqi legal system—but these courts would be equally unavailable for proceedings against governmental actors.

Domestically, it is true that the military justice system is not available to try the non-state actors, as the U.S. Supreme Court has prohibited military trials of U.S. civilians absent a declaration of war.<sup>226</sup> Yet, domestic criminal prosecutions in civilian courts may be

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221. 28 U.S.C. § 1350 (2000).

222. See William S. Dodge, *Sosa v. Alvarez-Machain and the Alien Tort Claims Act*, 12 TULSA J. COMP. & INT'L L. 87, 94 (2004).

223. See *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004); *Johnson v. Eisentrager*, 339 U.S. 763, 794 (1950).

224. 28 U.S.C. § 1346(b) (2000).

225. For example, suits arising from any discretionary function are barred, even if the government officials in question abused their discretion. 28 U.S.C. § 2680(a) (2000).

226. See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 248 (1960) (prohibiting military jurisdiction over civilian dependents in time of peace, regardless of whether the offense was capital or noncapital); *Grisham v. Hagan*, 361 U.S. 278, 280 (1960) (holding civilian employees committing capital offenses not amenable to military jurisdiction); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 283-84 (1960) (expanding *Grisham* to

*more* likely than such prosecutions of governmental actors. To be sure, prosecutions under the War Crimes Act or the statute criminalizing extraterritorial torture are unlikely for the same reasons that prosecutions of governmental actors are unlikely under these statutes: because the administration appears reluctant to characterize the abuses at Abu Ghraib as torture or to set a precedent for domestic civilian prosecution under these provisions. Moreover, prosecutors applying these statutes would need to show a sufficient nexus between the contractors and the governmental actors to establish state action (though this may not be a particularly onerous burden in this context).<sup>227</sup> Nevertheless, prosecution under ordinary domestic criminal law, which forbids the acts committed at Abu Ghraib even if not characterizing them as torture, is a real possibility. The Military Extraterritorial Jurisdiction Act, which was enacted precisely because U.S. military courts are not an option for private actors, specifically allows criminal charges to be brought against U.S. contractors working for the Defense Department.<sup>228</sup> Of course, because many of the contractors in Iraq are operating under agreements with the CIA or with the Department of Interior, the statute would not apply in all cases. The USA PATRIOT Act, however, closes this loophole to some extent by expanding the United States' special maritime and territorial jurisdiction (SMTJ) to include facilities run by the United States overseas.<sup>229</sup> Thus, a prosecutor might bring charges against private actors mistreating detainees overseas if the abuse constitutes a crime within the SMTJ as long as the crime was committed within a U.S. facility. In fact, one private contractor who was working for the CIA and was implicated in detainee abuse in Afghanistan has been indicted in the United States for assault committed within the SMTJ.<sup>230</sup>

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include noncapital offenses); *Reid v. Covert*, 354 U.S. 1, 40-41 (1957) (holding that civilians in time of peace are not triable by court-martial for capital offenses).

227. See *infra* notes 232-33 and accompanying text.

228. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 18 U.S.C. §§ 3261-3267 (2000).

229. See USA PATRIOT Act of 2001 § 804 (amending 18 U.S.C. § 7).

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

On the civil side, a number of possibilities also exist. A civil suit under the ATCA already has been filed against the contractors implicated at Abu Ghraib for violations of international law.<sup>231</sup> Because it has been brought against private parties, the suit will need to demonstrate a link to state action, at least with respect to the claims of torture and other norms that require such a link. However, in the Abu Ghraib setting such a link may not be so difficult to establish because the private contractors were working in a facility actually run by the U.S. government. To be sure, there is some ambiguity as to whether the uniformed personnel were taking orders from the contractors or vice versa. Yet, under even the narrow construction of the state action doctrine found in U.S. constitutional law, or, alternatively, under a theory of joint criminal action, the activities at Abu Ghraib would probably be actionable. If the prison were managed entirely by private contractors, showing a nexus to the state would be more difficult. But while U.S. courts have imported the state action doctrine from U.S. constitutional law to use in ATCA cases, they have applied the doctrine in a much broader way than they have in ordinary domestic suits.<sup>232</sup> International courts have also tended to apply theories of complicity, such as joint criminal enterprise, quite broadly.<sup>233</sup> Thus, in the international context, even where private actors wield considerable discretion to manage detention facilities, it is not nearly as difficult to demonstrate a sufficient link to the state.

Finally, an under-explored avenue is the extent to which ordinary municipal law, such as tort law, might provide norms that could be used to address human rights abuses like those committed at Abu Ghraib.<sup>234</sup> For example, assault or battery in the law of many countries would cover the same conduct that would give rise to a torture claim. In many suits brought under the Alien Tort Claims Act in the United States, plaintiffs assert state law tort claims

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231. See T. Christian Miller, *Ex-Detainees Sue 2 U.S. Contractors*, L.A. TIMES, June 10, 2004, at A9.

232. See, e.g., *Abdullahi v. Pfizer*, No. 01 CIV-8118, 2002 WL 31082956 at \*51-53 (S.D.N.Y. Sept. 17, 2002), *vacated in part by* 2003 WL 22317923 (2d Cir. 2003); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV-8386 (KMW) 2002 WL 319887, at \*3-4 (S.D.N.Y. Feb. 28, 2002).

233. See Danner & Martinez, *supra* note 122, at 103.

234. See generally TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed., 2001).

under a theory of pendant jurisdiction.<sup>235</sup> But such claims might also be asserted directly. Just as transnational tort cases can sometimes be brought in areas such as products liability, so too human rights suits might take the form of a transnational tort.

To be sure, for cases brought in the United States, contractors might argue that, in addition to immunities under the CPA, they should get the benefit of the so-called “government contractor defense,” the immunity given to governmental actors under the FTCA.<sup>236</sup> There is, however, at least a plausible argument that immunity should not apply to these types of claims. The case that establishes this doctrine, *Boyle v. United Technologies, Inc.*,<sup>237</sup> involved a products liability claim (not a claim regarding a services contract) and in any event limited the defense to circumstances in which the government set the design specifications with reasonable precision, leaving little discretion to the contractor. At least one court has concluded that the defense does not apply to international human rights claims.<sup>238</sup> For domestic claims arising from tort and contract, an argument could be made that because the government contracts for services at Abu Ghraib prison were not particularly specific, the contractor should not be able to invoke immunity.<sup>239</sup> In any event, it is clear that when the government privatizes military functions, individuals seeking redress may actually have *more* avenues to pursue legal accountability than when the government performs military functions directly.

The roughly analogous example of domestic prison abuse provides an instructive comparison. Prisoners who are victims of abuse in state-run prisons can bring suits under the Fifth, Eighth and Fourteenth Amendments, using either 42 U.S.C. § 1983 against governmental actors, or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>240</sup> To be sure, courts have in recent

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235. See, e.g., *Xuncax v. Gramajo*, 886 F. Supp. 163, 194-98 (D. Mass. 1995).

236. See 28 U.S.C. § 1346(b) (2000).

237. 487 U.S. 500, 512 (1988).

238. *In re Agent Orange Prod. Liab. Litig.*, 2005 WL 729177, at \*76-85 (E.D.N.Y. 2005).

239. *Cf. Jama v. Esmor Corr. Servs., Inc.*, 334 F. Supp. 2d 662, 688-89 (D.N.J. 2004) (rejecting government contractor defense for tort claims against private prison management corporation because contract did not specifically require or approve of corporation practices that led to abuse).

240. 403 U.S. 388 (1971). For example in 2001, prisoners initiated approximately 22,800

years tended to restrict such claims by interpreting the scope of substantive rights more and more narrowly, and procedural hurdles on prisoners bringing such claims have grown as well.<sup>241</sup> Yet in egregious cases, such suits remain a viable option, and while government officials do have the benefit of qualified immunity, this is a burden that can be overcome in clear instances of abuse.<sup>242</sup> Criminal prosecution is also a possibility. Thus, the baseline of legal accountability for governmental actors is far more robust than in the international context, and the risk of loss in accountability due to privatization is correspondingly potentially much greater. Indeed, when prison privatization took hold in its most recent incarnation in the 1980s and 1990s, critics initially raised concerns that prisoners might lose opportunities to redress abuses in court because private prison employees might not qualify as state actors, thereby making most constitutional and many statutory claims inapplicable.<sup>243</sup>

It is true that some of those fears have proven to be overblown. Most domestic courts have now concluded that private prison personnel are state actors for constitutional purposes and act under color of law thereby permitting § 1983 suits.<sup>244</sup> Indeed, private prison personnel may in fact face greater legal liability than government personnel, because the U.S. Supreme Court has concluded that private prison guards are not subject to immunity.<sup>245</sup> These guards are therefore more exposed both to suits seeking to vindicate constitutional norms and to ordinary tort suits.<sup>246</sup> Accordingly, the domestic example of prison privatization demon-

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civil rights suits. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559-60 (2003).

241. See Dolovich, *supra* note 3.

242. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

243. See Robbins, *supra* note 142, at 913 (stating that “[p]rison privatization ... raises concerns about the state action liability of the private contractor ...”).

244. See Metzger, *supra* note 138, at 1499.

245. *Richardson v. McKnight*, 521 U.S. 399, 412 (1997).

246. See *Jama v. Esmor Corr. Servs., Inc.*, 334 F. Supp. 2d 662, 688-89 (D.N.J. 2004); *Two Systems*, *supra* note 146, at 1882. In part for this reason, the Supreme Court recently refused to allow inmates to bring *Bivens* suits against corporations managing private prisons. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72-73 (2001).

strates that privatization does not intrinsically pose as great a risk to legal accountability as critics initially feared.<sup>247</sup>

Yet, there can be little doubt that constitutional checks on the behavior of state actors are far more robust than are the corresponding international law instruments. Moreover, in nearly every other domestic context courts have not been as willing to interpret the state action doctrine expansively and have therefore refused to consider employees of corporations under contract with the government to be state actors.<sup>248</sup> Thus, domestic privatization does in fact present a real loss of accountability most of the time.

In contrast, as we have seen, the opportunity for holding military actors accountable under international law is extremely limited. And although the lack of legal accountability for official military personnel and government officials is certainly not cause for celebration, it does mean that the risk of loss in legal accountability due to privatization will generally not be as great in the international setting as critics fear. Especially if courts are willing to apply an expansive interpretation of what counts as state action (just as U.S. courts have in the prison context and in ATCA cases so far), private actors may actually face greater legal accountability than governmental actors do under international law. In addition, as discussed below, privatization may also open up alternative modes of accountability.

## *2. Democratic Accountability*

Privatization of military functions undoubtedly helps insulate these functions from public scrutiny and oversight, at least to some degree. Indeed, this reduced accountability may well be a principal reason that governmental actors seek to privatize in the first place. For example, President Clinton was able to intervene in Kosovo to halt ethnic cleansing in part because he used so many private contractors in supporting roles and therefore risked fewer troop

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247. Of course, even if formal legal accountability is undiminished, privatization in the prison context may nevertheless pose serious problems for other reasons. Dolovich, *supra* note 3 (arguing that profit motive will put pressures on private prison operators to treat inmates less humanely than governmental prison operators).

248. See *supra* Part II.B.1.

deaths. KBR's contract alone reduced troop supply in the Balkans by an estimated 8,900.<sup>249</sup> Had more American troops been deployed (not to mention injured or killed), it would have been far more difficult to build and maintain public support for the military engagement. In Iraq, the increased use of private contractors has also dramatically reduced the U.S. military casualty figure, again with important political consequences. In addition, private military contracts between U.S. companies and foreign governments, negotiated with the blessing of the U.S. government, can allow the U.S. government to circumvent international prohibitions without inviting as much public scrutiny. For example, the U.S. encouraged MPRI to enter into contracts with Croatia and Sri Lanka during periods when those countries were ineligible to receive official U.S. military assistance.<sup>250</sup> In a somewhat analogous context, reports suggest that, in the so-called "war on terror," U.S. authorities may be farming out interrogation tasks to other governments known to use abusive tactics that would be politically or legally problematic if undertaken by U.S. military personnel.<sup>251</sup>

Oversight is also reduced because there is less transparency. For example, the Freedom of Information Act (FOIA) does not apply to the actions of private contractors.<sup>252</sup> Although FOIA does permit the public to request information about the terms of contracts, the contractors essentially have a veto over the release of contract terms if they contain "trade secrets and commercial or financial information obtained from a person and [are] privileged or confidential."<sup>253</sup> Thus, in many cases, the terms of the contracts are not publicly available. Even worse, the process by which contracts are awarded is not an open one. For example, many of the most significant Iraq contracts were awarded on a "no-bid" basis.<sup>254</sup>

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249. SINGER, CORPORATE WARRIORS, *supra* note 23, at 146.

250. *Id.* at 127, 131.

251. Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106.

252. See 5 U.S.C. § 552 (2000); 44 U.S.C. §§ 1501-1505, 1511 (2000); 44 U.S.C. §§ 2204-2207 (2000). For an argument that FOIA should be interpreted expansively to apply to government contractors, see Feiser, *supra* note 163.

253. 5 U.S.C. § 552(b)(4) (2000).

254. See Megan A. Kinsey, Note, *Transparency in Government Procurement: An International Consensus?* 34 PUB. CONT. L.J. 155, 161-62 (2004).

Nevertheless, the effect of privatization in the domestic context is potentially far greater because, again, the baseline is different. For example, democratic accountability over privately run prisons is dramatically lower than over publicly run facilities.<sup>255</sup> FOIA, which is far more robust in the domestic setting than in the international sphere, simply does not apply to private actors.<sup>256</sup> Likewise, many of the other legal rules designed to increase transparency in addition to FOIA—the APA’s judicial review provisions, and other so-called “sunshine laws”—do not apply to privately managed programs.<sup>257</sup> Particularly if the contractor is a privately-held corporation, there may be very little publicly available information about its activities. For example, the annual report on prison populations issued by the U.S. Department of Justice provides extensive information about the number of people incarcerated and addresses various prison management questions, but does not include data on the number of inmates held in privatized facilities.<sup>258</sup> In addition, the awarding of contracts is decided by the executive branch, with no independent deliberative process and little or no involvement from legislative officials.<sup>259</sup> Moreover, management and oversight decisions are increasingly being delegated to the private actors themselves.<sup>260</sup> There is thus less control by legislatures, leaving the public yet another step removed from the policy process.

Privatizing military functions, in contrast, will be unlikely to make quite so big a difference in the amount of democratic oversight because even those military operations that are *not* privatized can

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255. See Nicole Cásarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 268-91 (1995); see also J. Michael Keating, Jr., *Public over Private: Monitoring the Performance of Privately Operated Prisons and Jails*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 130, 132-54 (Douglas C. MacDonald ed., 1990) (describing mechanisms for oversight of private prisons).

256. Cásarez, *supra* note 255, at 270.

257. See 5 U.S.C. §§ 552; 551-559; 701-706 (2000).

258. U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2003 6-7 (Nov. 2004), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf> (charting populations in private facilities in each state but excluding private prison populations in data such as overcrowding).

259. See *generally* Cásarez, *supra* note 255, at 268-91 (discussing the lack of transparency as a result of prison privatization).

260. *Id.*

evade many transparency norms. To begin with, the APA judicial review provisions do not apply to the activities of the Defense Department,<sup>261</sup> so there is nothing lost on that score when functions are privatized. With respect to FOIA, even though requests can be made in order to gather information about military programs, such requests can be and often are refused under FOIA's national security exemption.<sup>262</sup> Such refusals can be reviewed by a court, such as in the recent case where a judge granted a FOIA request seeking information about the treatment of military detainees at Guantanamo naval base and elsewhere.<sup>263</sup> FOIA may, nonetheless, have less utility with respect to military actions than with respect to actions, say, in the domestic prison context. In addition, official government policies about media access during wartime, coupled with internal media conventions and practical limitations on overseas wartime reporting, mean that government actions in the military sector, particularly during wartime, are likely to receive less media scrutiny than domestic security activities.<sup>264</sup>

In addition, even without privatization, the legislative branch exercises far less oversight and control over military operations than over domestic law enforcement and prison operations. While the Constitution gives Congress a role in foreign affairs generally and military affairs specifically through the power of the purse, as well as the power to declare war and scrutinize executive branch policies, Congress often has not exercised these powers in a robust way.<sup>265</sup> For example, Congress has been unwilling to insist on obedience to the War Powers Resolution<sup>266</sup> in armed conflicts from

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261. The APA does not apply to military or foreign affairs. 5 U.S.C. § 553(a)(1) (2000).

262. 5 U.S.C. § 552(b)(1) (2000). For an argument that the current application of the national security exemption is overly deferential to agencies, see Christina E. Wells, "National Security" Information and the Freedom of Information Act, 56 ADMIN. L. REV. 1195 (2004).

263. ACLU v. Dep't of Def., 339 F. Supp. 2d 501, 505 (S.D.N.Y. 2004).

264. See Kevin A. Smith, *The Media at the Tip of the Spear*, 102 MICH. L. REV. 1329, 1332-41 (2004).

265. See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 82-83, 110 (2d ed. 1997); see also Tobias T. Gibson et al., *The Absence of the Sacred: Democracy in the Age of Militarism*, 2003 J. INST. JUST. INT'L STUD. 28, 28 (2003) (arguing that legislative control over military policy has decreased, in part due to fragmented oversight of large number of congressional committees). See generally HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990) (examining the role of Congress in decision making regarding national security).

266. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. § 1541 et

Grenada to Iraq.<sup>267</sup> Moreover, even the War Powers Resolution exempts from its strictures covert activities overseas,<sup>268</sup> which are governed by the less onerous requirements of the Intelligence Oversight Act<sup>269</sup> and related statutes.<sup>270</sup> Although this regime requires agencies to report to Congress, congressional scrutiny in this area is likely to involve secret committee hearings and reports not open to the broader public, further reducing transparency and broader democratic accountability.<sup>271</sup> And even then, agencies do not always fulfill their reporting obligations under these statutes.<sup>272</sup>

Finally, comparing military privatization with privatization of domestic security functions such as prisons reveals perhaps the most crucial distinction of all. Democratic accountability over military activities is vastly reduced, whether performed by governmental actors or by contractors, because many of the populations affected by our military activities are not U.S. citizens. Although the projection of U.S. military power may have profound consequences for these noncitizens and their societies, they cannot vote or make financial contributions to U.S. political parties.<sup>273</sup> To be sure, in the domestic context, many of the individuals affected by prison policy also do not have much of a voice. Inmates generally cannot vote and often face restrictions on participation in the democratic process

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seq. (1988)).

267. See HENKIN, *supra* note 265, at 110 (“[T]he Congress has not acted to secure Executive compliance [with the War Powers Resolution]—by new legislation, by exerting its power over the national purse, or by threat of impeachment.”).

268. See Lori Fidler Damrosch, *Covert Operations*, 83 AM. J. INT’L L. 795, 797 (1989).

269. 50 U.S.C. §§ 413-415 (2000).

270. For example, see the Boland Amendments, enacted as part of the Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (1983); Department of Defense Appropriations Act for Fiscal Year 1984, Pub. L. No. 98-212, § 775, 97 Stat. 1421, 1452 (1983) (restricting U.S. aid to the Contras in Nicaragua); 22 U.S.C. § 2414 (2000) (requiring President to report on military sales and foreign assistance).

271. 50 U.S.C. §§ 413-414 (2000) (allowing confidential reports to congressional committees of intelligence activities, anticipated activities, and the financing of intelligence activities).

272. “Executive failure to abide by congressional restrictions led to the Iran-Contra scandal in 1987-89.” See HENKIN, *supra* note 265, at 112.

273. Cf. David Cole, *Enemy Aliens*, 10 STAN. L. REV. 953, 957 (2002) (arguing that “[i]n the wake of September 11, citizens and their elected representatives have repeatedly chosen to sacrifice the liberties of noncitizens in furtherance of the citizenry’s purported security ... [b]ecause noncitizens have no vote, and thus no direct voice in the democratic process” and are therefore “a particularly vulnerable minority.”).

even once they are released.<sup>274</sup> At the same time, overseas populations affected by the U.S. military can, to the extent that they live in democracies, try to influence their political leaders to engage diplomatically in ways that reflect their preferences. Alternatively, they can support NGOs that critique U.S. policy.<sup>275</sup> Yet, the simple fact that those affected by U.S. military policies tend to be living abroad severely reduces the scope of democratic accountability. For all of these reasons, we can see that the baseline of accountability is already reduced in the international military context, making the turn to privatization somewhat less significant.

However, even if privatizing military functions does not dramatically reduce democratic accountability, the general lack of democratic accountability for military activities is troubling. Thus, we need to consider the argument that the United States has a democratic responsibility not only to its own citizens, but also, in some circumstances, to noncitizens who are affected by the exercise of U.S. power. That responsibility may not include extending the right to vote, but could include lesser obligations such as providing information or giving opportunities for participation and consultation. The responsibility may vary depending on the nature of control—when the United States is an occupying power, for example, the obligation may be far greater than when the United States is constructing a military base in a friendly country.<sup>276</sup> To be sure, the idea that the United States might have a democratic obligation to noncitizens overseas is a controversial one.<sup>277</sup> But in

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274. Forty-eight states and the District of Columbia do not allow inmates convicted of a felony to vote while incarcerated. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, <http://www.sentencingproject.org/pdfs/1046.pdf> (last visited Sept. 20, 2005). Thirty-five states prohibit felons from voting while on parole and thirty-one exclude felons on probation. *Id.* Once felons have completed their sentences, five states continue to deny all ex-offenders the right to vote and nine others deny the right to some ex-offenders. *Id.* In total, an estimated 4.7 million Americans currently cannot vote, either temporarily or permanently, as a result of a felony conviction. *Id.*

275. See Kenneth Anderson, *The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Nongovernmental Organizations*, 2 CHI. J. INT'L L. 371, 372 (2001) (describing increasing influence of international NGOs and arguing that such influence lacks democratic legitimacy).

276. See generally NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* (2004) (arguing for special moral obligations owed to Iraq by the United States as an occupying force).

277. Cf. Anderson, *supra* note 275, at 372-73 (assuming, in the context of arguing against

any event the current lack of democratic oversight with regard to either public or private actors engaging in military activities is striking.

For example, in the aftermath of the Abu Ghraib scandal there has been far too little democratic accountability over *either* the public *or* the private actors. Because the victims are noncitizens, they have less clout within the democratic process, although human rights groups have spoken out and lobbied on their behalf.<sup>278</sup> Congress has held hearings,<sup>279</sup> but it has not given the issue nearly the degree of attention that it deserves and notably has failed to establish an independent commission to investigate abuses, a step that some have strongly recommended.<sup>280</sup> While the military has itself initiated multiple investigations,<sup>281</sup> these inquiries were for the most part narrowly focused on specific operational units on the ground and therefore did not examine the role of high-level civilian officials. As a result, they did not “look fully at the *interaction* of military police and military intelligence, or the relationship between these Army units and personnel from the CIA, civilian contractors, special operations forces, and other agents in the field.”<sup>282</sup> Thus, as described previously, there is little democratic accountability with

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the democratic legitimacy of NGOs, that individuals possess democratic entitlements only *within* a particular state or policy).

278. See HUMAN RIGHTS FIRST, GETTING TO GROUND TRUTH, INVESTIGATING U.S. ABUSES IN THE “WAR ON TERROR,” (Sept. 2004), *available at* [http://www.humanrightsfirst.org/us\\_law/PDF/detainees/Getting\\_to\\_Ground\\_Truth\\_090804.pdf](http://www.humanrightsfirst.org/us_law/PDF/detainees/Getting_to_Ground_Truth_090804.pdf) [hereinafter GROUND TRUTH].

279. See *Treatment of Iraqi Prisoners: Hearing Before the S. Armed Servs. Comm.*, 106th Cong. (2004), at 2004 WL 1027359; *Army Inspector General’s Report Regarding Prisoner Abuse at Abu Ghraib: Hearing Before the S. Armed Servs. Comm.*, 106th Cong. (2004), *available at* 2004 WL 1634057; *Military Intelligence at Abu Ghraib Prison: Hearing Before the H. Armed Servs. Comm.*, 106th Cong. (2004), *available at* 2004 WL 2030770.

280. See Letter from Gen. David M. Brahms (Ret. USMC) and retired U.S. Military Leaders to President Bush (Sept. 8, 2004) (calling for independent and comprehensive commission to investigate detainee abuse), *available at* [http://www.humanrightsfirst.org/us\\_law/PDF/detainees/Military\\_Leaders\\_Letter\\_President\\_Bush\\_FINAL.pdf](http://www.humanrightsfirst.org/us_law/PDF/detainees/Military_Leaders_Letter_President_Bush_FINAL.pdf).

281. See TAGUBA REPORT, *supra* note 63; DAIG REPORT, *supra* note 205; FAY REPORT, *supra* note 205; SCHLESINGER REPORT, *supra* note 205; Memorandum from Dep’t of Interior Inspector Gen. to Assistant Secretary for Policy, Management and Budget, (July 16, 2004) [hereinafter DOI Memo], *available at* <http://www.oig.doi.gov/upload/CAI%20LETTER3.pdf> (providing Review of 12 Procurements Placed Under Gen. Servs. Admin. Fed. Supply Schedules 70 and 871 by the Nat’l Bus. Center); *see also* Dep’t of Defense, News Briefing, Background Briefing on Investigations at Abu Ghraib (Aug. 25, 2004), *at* <http://www.defense.gov/transcripts/2004/tr20040825-1222.html> (commenting on each investigation).

282. GROUND TRUTH, *supra* note 278, at 10.

regard to the actual military personnel, let alone the private contractors.

To be sure, privatization does exacerbate some of the failures of democratic accountability. Thus, for example, the public hearings that *did* take place concerning Abu Ghraib focused primarily on the military personnel implicated, not the private contractors.<sup>283</sup> Relatedly, information about the scope of private involvement in the abuse has been somewhat harder to obtain than information about the involvement of uniformed military personnel. The contracts with CACI and Titan, for example, were not awarded in an open bidding process and only recently became available.<sup>284</sup> While some of the executive branch internal reports have mentioned the problem of contractor abuse in passing, none has thoroughly investigated the role the contractors played in the abuse.<sup>285</sup> Similarly, while reporters have noted the involvement of private companies, stories have tended to focus more on public actors.<sup>286</sup> Thus, private actors, even in the military context, are at least a bit further below the radar than are official military personnel.

Accordingly, in both the foreign and domestic settings more work needs to be done to consider ways of replacing the feedback mechanism that democratic accountability would ordinarily provide. If a government program (whether administered directly or through private contractors) affects people who for whatever reason have no

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283. See *supra* note 279.

284. See *Agreement Between the Department of the Interior and CACI Premier Technology, Inc.*, No. NBCHA010005 (2000) [hereinafter DOI-CACI], available at [http://www.publicintegrity.org/docs/wow/CACI\\_ordersAll.pdf](http://www.publicintegrity.org/docs/wow/CACI_ordersAll.pdf).

285. Several of the reports noted that the contract interrogators participated in or failed to report abuse of detainees. See FAY REPORT, *supra* note 205, at 131-35; TAGUBA REPORT, *supra* note 63, at 48. Some of the reports also emphasized that many of the contract employees had received no training in U.S. military doctrine or interrogation techniques. See DAIG REPORT, *supra* note 205, at vi, 87-89; SCHLESINGER REPORT, *supra* note 205, at 69; FAY REPORT, *supra* note 205, at 47-52. One report concluded that the military had “no training to fall back on in the management, control, and discipline of these personnel.” FAY REPORT, *supra* note 205, at 19. These reports, however, did not focus extensively on the civilian contractors, and the Department of Interior report focused primarily on problems in the contracting process, rather than on ways in which the contract terms and structures could have helped to prevent abuse of detainees. DOI Memo, *supra* note 281.

286. Many articles have, of course, been written about the role of private contractors in the abuse. See, e.g., Liptak, *supra* note 204; Ellen McCarthy, *Interior Dept. Inquiry Faults Procurement*, WASH. POST, July 17, 2004, at E3.

way of responding or providing a check on governmental action, it may make sense to build alternative mechanisms that would fulfill a similar role. Such mechanisms may take the form of independent ombudspersons, auditors, or tribunals whose job it would be to seek out opinions from among affected populations. Or there may be other ways to construct a process that would require consideration of how the governmental (or privatized) action is actually working on the ground. Indeed, we might conceive of the relationship as similar to a trust, where the contractors are like trustees who must take into account the interest of the beneficiaries and not just the trust settlor.<sup>287</sup> Or NGOs might be given a greater oversight role. In any event, this is an area that should be a focus of future international legal scholarship, particularly in a world where transnational activity is so common.

### *3. Contractual Accountability*

We have seen that privatization of military functions does not necessarily decrease the degree of accountability provided by formal legal mechanisms or through the oversight of the democratic process itself. Yet, that seemingly “good” news is achieved only by acknowledging that there are shockingly few avenues of accountability over even governmental actors. So, if one is concerned about ensuring that there are at least some mechanisms by which private military contractors can be held accountable for violating public law norms, where can one turn? In the next two sections, I argue that contractual and institutional accountability provide two possibilities.

Turning to contractual accountability, examples involving domestic privatization suggest that the government contracts themselves can serve as a mode of accountability by including provisions that require providers of government services to follow some or all of the various laws and rules that would bind the corresponding government actors. 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

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287. See generally Robert H. Sitkoff, *An Agency-Cost Theory of Trust Law*, 89 CORNELL L. REV. 621, 623-32 (applying agency cost theory to trust law and arguing that trust law is better suited to understanding three-way relationships than contract law).

inmates' rights.<sup>288</sup> Contractors must also meet rigorous performance standards. Thus, under the model contract for private prison management drafted by the Oklahoma Department of Corrections, contractors must meet such standards for security, meals, and education.<sup>289</sup> They must also certify that the training provided to personnel is comparable to that for state employees<sup>290</sup> and conduct "continuous self-monitoring," using a comprehensive self-monitoring plan approved by the Oklahoma Department of Corrections.<sup>291</sup> In Texas, contractors must abide by similar terms and, in addition, must "establish performance measures for rehabilitative programs and develop a system to assess achievement and outcomes."<sup>292</sup>

To be sure, incorporating public law norms and requiring self-evaluation does not ensure compliance. The norms, despite being fleshed out by performance standards, still remain open to interpretation, and self-evaluation does not necessarily translate into obedience to these norms. Commentators have suggested that these practices could be enhanced by provisions that would require monitoring either by a state-appointed contract manager and/or independent third party groups, as well as public reporting requirements.<sup>293</sup> In addition, the contracts could allow for prisoners or other interested groups to sue as third-party beneficiaries.<sup>294</sup>

Despite the imperfections of domestic contracting, it is far superior to the contracting process for military functions. The agreements between the U.S. Department of the Interior and CACI give some sense of the problem. For Abu Ghraib, the intelligence personnel were hired under a standing "blanket purchase agree-

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288. See generally Keating, *supra* note 255, at 139 (detailing efforts to set standards for acceptable correctional practice).

289. See, e.g., Okla. Dep't of Corr., *Correctional Services Contract*, art. 5 [hereinafter *Oklahoma Contract*], available at <http://www.doc.state.ok.us/Private%20Prisons/98cnta.pdf> (last visited May 21, 2005).

290. *Id.* at arts. 6.3-6.4.

291. *Id.* at art. 5.19.

292. See Freeman, *supra* note 6, at 634-35 (describing contract between private corporation and State of Texas).

293. *Id.* at 635-36.

294. *Id.* In some cases such contracts may already be a source of third-party beneficiary rights. See *Owens v. Haas*, 601 F.2d 1242, 1250 (2d Cir. 1979) (holding that federal prisoner benefiting from contract between federal government and Nassau County may sue under contract).

ment” between the Department of the Interior and CACI, negotiated in 2000.<sup>295</sup> 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.<sup>296</sup> In 2003, eleven task orders, worth \$66.2 million were entered,<sup>297</sup> none of which was the result of competitive bidding. The orders specify that CACI will provide interrogation support and analysis work for the U.S. Army in Iraq, including “debriefing of personnel, intelligence report writing, and screening/interrogation of detainees at established holding areas.”<sup>298</sup> Significantly, however, they do not expressly require that the private contractor interrogators comply with international law norms such as the Torture Convention or that they receive training in such norms—training that U.S. military interrogators would normally receive.<sup>299</sup> Indeed, an Army Inspector General report concluded that 35% 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.<sup>300</sup>

These contracts also do little to impose structural features to aid in accountability. There is no requirement that contractors engage in self-evaluation, for example, or that they meet performance benchmarks, and there are no graduated penalties for noncompliance. Indeed, although the employees implicated in the abuses at Abu Ghraib no longer work at CACI,<sup>301</sup> it is unclear whether government actors even so much as stepped up their supervision of the contracts as a result of the scandal. Not only did the government not terminate the contracts, CACI actually received a contract

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295. See DOI-CACI, *supra* note 284.

296. See *infra* note 318 and accompanying text.

297. CACI Int’l Inc. Work Orders Nos. 000035D004, 000036D004, 000037D004, 000038D004, 000064D004, 000067D004, 000070D004, 000071D004, 000072D004, 000073D004, 000080D004, issued under DOI-CACI, *supra* note 284, available at [http://www.publicintegrity.org/docs/wow/CACI\\_ordersAll.pdf](http://www.publicintegrity.org/docs/wow/CACI_ordersAll.pdf) (last visited Sept 20, 2005).

298. CACI Int’l Inc. Work Order No. 000071D004, *id.* at 6.

299. *Id.*

300. DAIG REPORT, *supra* note 205, at 87-89.

301. See CACI, CACI in Iraq: Frequently Asked Questions [hereinafter CACI in Iraq], [http://www.caci.com/iraq\\_faqs.shtml](http://www.caci.com/iraq_faqs.shtml) (last visited May 21, 2005); CACI, CACI SAYS THE FAY REPORT CLEARLY SHIFTS FOCUS OF BLAME AWAY FROM ITS EMPLOYEE NAMED IN A PREVIOUS REPORT (Aug. 26, 2004), available at [http://www.caci.com/about/news/news2004/08\\_26\\_04\\_NR.html](http://www.caci.com/about/news/news2004/08_26_04_NR.html).

*extension* for interrogation services.<sup>302</sup> Finally, although the Department of Defense Inspector General (DOD IG) and its subsidiary Inspectors General have the authority to monitor waste, fraud, and other aspects of contract performance,<sup>303</sup> the contract contains no provision for outside monitoring by independent groups.

A broader review of the publicly available contracts for military services between U.S. authorities and private organizations operating in Iraq and Afghanistan reveals similar deficiencies. Shockingly, the contracts tend not to include substantive terms that might impose accountability for violating *any* of the three norms previously discussed: human dignity, rational nonarbitrary governance, and anticorruption.<sup>304</sup> Moreover, most of these contracts were negotiated in secret, without competition, on a “no bid” basis.<sup>305</sup> In many cases it is impossible for the public or a watchdog group even to obtain the text of the contracts, either because government officials have kept them secret for security reasons<sup>306</sup> or because the contractors have exercised what is essentially a veto, under FOIA, for certain types of commercial information.<sup>307</sup> Problems posed by secrecy are reinforced by problems of conflicts of interest because many of the contracts are awarded to firms run by former government personnel. Indeed, a recent study by The Center for Public Integrity reports that sixty percent of the companies that received contracts in Iraq or Afghanistan “had employees or board members who either served in or had close ties to the executive branch for Republican and Democratic administrations, for members of Congress of both parties, or at the highest levels of the military.”<sup>308</sup>

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302. See CACI in Iraq, *supra* note 301.

303. The Inspector General Act, 5 U.S.C. app. §§ 6, 8(c) (2000).

304. See CACI Work Orders, *supra* note 297 (detailing intelligence services to be provided by CACI); Agreement Between the Department of Defense and Dataline, Inc., No. GS DASW01-03-F-0640 (Apr. 15, 2003), *available at* <http://www.publicintegrity.org/wow/docs/Dataline.pdf> (detailing military communications support to be provided); Agreement Between the Department of Defense and Environmental Chemical Corp., No. W912DY-04-D-0008 (Feb. 27, 2004), *available at* <http://www.publicintegrity.org/wow/docs/EnvironmentalChemicalCorporation-Munitions.pdf> (contracting for munitions removal).

305. See Kinsey, *supra* note 254, at 161-62.

306. 5 U.S.C. § 552(b)(1) (2000).

307. *Id.* § 552(b)(4) (2000).

308. See THE CENTER FOR PUBLIC INTEGRITY, WINNING CONTRACTORS, U.S. CONTRACTORS

The contracts' payment structure enhances these difficulties. Government contracts generally fall into one of three categories: (1) fixed price, in which the government and the contractor decide on a price to which the contractor is bound, even if costs run over;<sup>309</sup> (2) time and materials, in which the government and contractor agree on an hourly rate that includes labor, materials, and overhead;<sup>310</sup> and (3) cost-reimbursement, in which the government reimburses the contractor for costs incurred in providing a service, plus a fee that is calculated as a percentage of the cost.<sup>311</sup> Congress, the Government Accountability Office, and other commentators have expressed concern that cost-reimbursement contracts (also termed "cost-plus" contracts), lead to waste and overcharging because of the way payment is structured.<sup>312</sup> Under the cost-plus system, companies have an incentive to inflate the costs of services so that their fee, typically measured as a percentage of this cost, is as high as possible.<sup>313</sup> Even worse, some cost-plus contracts are structured so that the government agrees to pay a fixed fee *regardless* of performance, which dramatically reduces or eliminates incentives either to provide effective performance *or* to control costs.<sup>314</sup> Despite these serious problems with cost-plus contracts, they are widespread in military contracting. Indeed, The Center for Public Integrity estimates that the highest value contracts awarded in the last two years in Iraq and Afghanistan—including those for military services—all are cost-plus contracts.<sup>315</sup>

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REAP THE WINDFALLS OF POST-WAR RECONSTRUCTION, (Oct. 30, 2003) <http://www.publicintegrity.org/wow/report.aspx?aid=65> [hereinafter WINNING CONTRACTORS].

309. Federal Acquisition Regulations System, 48 C.F.R. §§ 16.201-16.207.3 (2004). The majority of government contracts are fixed price contracts. See W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION § 16.3, at 429 (3d ed. 2003).

310. 48 C.F.R. §§ 16.601-16.603-04.

311. *Id.* §§ 16.301-16.307.

312. For a critique of cost reimbursement contracts, see THE CENTER FOR PUBLIC INTEGRITY, OUTSOURCING GOVERNMENT, SERVICE CONTRACTING HAS RISEN DRAMATICALLY IN THE LAST DECADE, (Oct. 30, 2003) <http://www.publicintegrity.org/wow/report.aspx?aid=68> [hereinafter OUTSOURCING GOVERNMENT]. Cost reimbursement contracts do contain an estimated total cost and a cost ceiling that cannot be exceeded without the contracting officer's approval. 48 C.F.R. § 16.301-1. Under the FAR, cost reimbursement contracts can only be utilized when costs cannot be estimated with sufficient accuracy. *Id.* § 16.301-2.

313. OUTSOURCING GOVERNMENT, *supra* note 312.

314. *Id.*

315. *Id.*

Many of the military contracts are also indefinite delivery or indefinite quantity (ID/IQ) contracts, leading to further problems.<sup>316</sup> Under this structure, the government awards a relatively open-ended contract that does not specify how many services or goods will be necessary or the dates upon which they will be required.<sup>317</sup> These additional details are specified in subsequent task orders.<sup>318</sup> Of course, such contracts may sometimes be necessary, because the government cannot know in advance precisely what will be required or for how long.<sup>319</sup> Normally, however, when such contracts are negotiated the government is contracting with several companies at a time, and because these companies are forced to compete against each other to fill each task order the government is therefore more likely to receive a good price.<sup>320</sup> In contrast, the ID/IQ contracts in Iraq—again including the military contracts—often go to one contractor only, inevitably leading to monopolistic pricing practices.<sup>321</sup> In fact, the DOD's own IG has strongly criticized the agency for overuse of such contracts, in part for this reason.<sup>322</sup> And several of these contracts have been the subjects of investigations for waste and fraud. For example, the DOD IG published a study concluding that, of the twenty-four Iraq contracts investigated, twenty-two did not follow federal contracting rules.<sup>323</sup> Likewise, the senior contract

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316. The Abu Ghraib intelligence contract, for example, was a contract of this type. *See supra* note 295 and accompanying text.

317. ID/IQ contracts are governed by 48 C.F.R. §§ 16.500-16.506. For a discussion of ID/IQ contracts, see Karen DaPonte Thornton, *Fine Tuning Acquisition Reform's Favorite Procurement Vehicle, the Indefinite Delivery Contract*, 31 PUB. CONT. L.J. 383 (2002).

318. *See* 48 C.F.R. § 16.504.

319. *See* Thornton, *supra* note 317, at 387.

320. *Id.*

321. *Id.* at 387, 390, 419.

322. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEFENSE, DOD USE OF MULTIPLE AWARD TASK ORDER CONTRACTS, AUDIT REP. NO. 99-116 (Apr. 2, 1999) [hereinafter TASK ORDER CONTRACTS]. The report concluded that "[c]ontracting officials engaged in questionable procurement practices which resulted in DOD paying more for services procured under multiple award contracts. Contracting officials justified awarding task orders to desired contractors at higher prices by identifying minor technical differences...." *Id.* at 10; *see also* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEFENSE, MULTIPLE AWARD CONTRACTS FOR SERVICES, AUDIT REP. NO. D-2001-189, at i (Sept. 30, 2001) ("Contracting organizations continued to direct awards to selected sources without providing all multiple award contractors a fair opportunity to be considered.")

323. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEFENSE, ACQUISITIONS: CONTRACTS AWARDED FOR THE COALITION PROVISIONAL AUTHORITY BY THE DEFENSE CONTRACTING

officer for the Army recently made a public statement charging that contracts with KBR for military services in Iraq and the Balkans violated contract regulations and threatened “the ‘integrity of the federal contracting program,’” in part because KBR representatives were present at a meeting setting contract terms and the no-bid exception was used too broadly.<sup>324</sup> Yet, in an illustration of just how difficult it will be to reform the contracting process, this critic was recently demoted, reportedly as a result of leveling these criticisms.<sup>325</sup>

Oversight of military contracts may also be lax because of the sheer number and scope of the contracts and the staffing shortages in government offices charged with such oversight.<sup>326</sup> The DOD IG study concluded that more than half of the Iraq contracts had not been adequately monitored.<sup>327</sup> This fact is not surprising, given that the Defense Department’s acquisition workforce was reduced by more than half between 1990 and 2001, while the department’s contracting workload increased by more than twelve percent.<sup>328</sup> In addition, those who are assigned to monitor contract performance are often inadequately trained.<sup>329</sup> Also, in an ironic twist, private contractors themselves are often hired to write the procedural

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COMMAND-WASHINGTON, REP. NO. D-2004-057, at 28-29 (Mar. 18, 2004) [hereinafter COALITION PROVISIONAL AUTHORITY]. The FAR lays out procedures for performance-based contracts. Such contracts provide for a base fee and then an additional award based on performance. 48 C.F.R. § 16.305. The government evaluates performance based on set criteria, and then makes a unilateral decision as to the award amount. *Id.* § 16.405-2; see OUTSOURCING GOVERNMENT, *supra* note 312. Because of the broad application of exceptions in the military context, such as an allowance for no-bid contracts in the case of emergency, and staffing shortages as discussed above, these provisions have less effect than they otherwise might.

324. See Eckholm, *supra* note 75. The contracting official contends that Army officials retaliated against her for her criticisms, excluding her from key meetings. *Id.*

325. See Witte, *supra* note 75.

326. For a searing indictment of the government’s failure to oversee military contractors and that failure’s role in the Abu Ghraib atrocities, see Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POLY REV. 549, 570-72 (2005).

327. COALITION PROVISIONAL AUTHORITY, *supra* note 323, at 24.

328. COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, SOURCING AND ACQUISITION, REP. NO. GAO-03-771R, at 1 (May 23, 2003); see also OUTSOURCING GOVERNMENT, *supra* note 312. For a detailed discussion on depletion of the acquisition workforce, see David A. Whiteford, *Negotiated Procurements: Squandering the Benefit of the Bargain*, 32 PUB. CONT. L.J. 509, 555-57 (2003).

329. Whiteford, *supra* note 328, at 555-57.

rules governing contracting rules and monitoring protocols, thus leading to further conflict-of-interest problems. For example, the DOD handbook on the contracting process was drafted by none other than MPRI itself.<sup>330</sup> Finally, because authority to issue military contracts is dispersed across multiple agencies, interagency communication issues and conflict-of-interest problems can impede oversight.<sup>331</sup> Indeed, officials at the various agencies often use different methods to calculate the costs of contracts, and these methods may also vary from those used by the companies themselves.<sup>332</sup> In addition, because agencies can earn fees for facilitating other agencies' contracts but are not adequately held to account for monitoring those contracts, agencies have incentives to sponsor other agencies' contracts but little incentive to supervise them.<sup>333</sup> These arrangements can lead to abuse, as at Abu Ghraib. Indeed, CACI was hired to perform interrogation services through a Defense Department task order under an existing contract between CACI and the Department of the Interior.<sup>334</sup>

Using the domestic private prison context as a model for building accountability mechanisms into military contracts, it seems that such contracts should include, at a minimum, clear requirements that contractors abide by international human rights and humanitarian law standards applicable to government actors and receive training at least equivalent to that received by government actors. More of these agreements could also include specific performance benchmarks and requirements for self-evaluation and monitoring. Although the various agency IGs and contract officers have a nominal role overseeing many of the contracts, their ability to engage in meaningful monitoring would be increased through better

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330. See SINGER, *CORPORATE WARRIORS*, *supra* note 23, at 123-24.

331. The DOD has taken more and more control over reconstruction and emergency relief functions, normally the province of USAID. See THE CENTER FOR PUBLIC INTEGRITY, *CONTRACTORS: IRAQ*, at <http://www.publicintegrity.org/wow/bio.aspx?act=pro&fil=IQ> (last visited Sept. 20, 2005) (compiling all Iraq reconstruction contracts) [hereinafter *IRAQ—ALL AGENCIES*]. The State Department, meanwhile, manages the contract with DynCorp to provide Iraqi police training. *Id.* The State Department's Bureau of Population, Refugees, and Migration (PRM) manages refugee assistance funds. See U.S. Dep't of State, Bureau of Population, Refugees, and Migration, <http://www.state.gov/g/prm> (last visited Sept. 21, 2005).

332. WINNING CONTRACTORS, *supra* note 308.

333. Schooner, *supra* note 326, at 567-72.

334. *Id.*

staffing and increased use of graduated penalties. For example, the government could, as it does in some domestic contexts, specify that when a contractor is not performing well under the contract, government monitoring can increase, and, if problems rise to a certain level, the government can actually take over or rescind the contract. Contracts could also provide for fines when contract employees engage in abuses.<sup>335</sup> In addition, as in the prison context, contracts could entrust outside, independent groups with the responsibility for monitoring performance.<sup>336</sup> Though security concerns might make such monitoring impractical in some circumstances, under the Geneva Conventions the International Committee of the Red Cross (ICRC) already plays a monitoring role for government-run detention facilities during wartime.<sup>337</sup> Thus, a contract could specify that the ICRC also would monitor a privately run facility. Finally, also drawing from the domestic context, independent entities could provide accreditation, certifying that private contractors have offered proof that they will comply with the laws of war and human rights standards as well as the norms of rational, nonarbitrary provision of services.<sup>338</sup>

Of course, contractual accountability is not a panacea. Oversight may be lax, contractors may figure out ways to file effective compliance reports rather than to actually comply with provisions, and courts are a cumbersome and costly enforcement tool. Also, the added costs of compliance and oversight may, in some circumstances, swallow the purported benefits of privatization in the first place. Nevertheless, at the very least international law scholars might fruitfully learn from domestic efforts to enhance contractual accountability.

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335. For an argument that military contracts should contain terms allowing the imposition of fines when contract employees engage in various types of misconduct, see Vernon, *supra* note 34, at 391-92.

336. See Freeman, *supra* note 6, at 634-35.

337. See Civilians Convention, *supra* note 111, at art. 143.

338. Accreditation is particularly prevalent in the privatized health care setting where some governments require that private managed care organizations must be certified by independent organizations such as the National Center for Quality Assurance to be eligible to receive Medicaid funding. See SARA ROSENBAUM ET AL., EXECUTIVE SUMMARY, NEGOTIATING THE NEW HEALTH SYSTEM: A NATIONWIDE STUDY OF MEDICAID MANAGED CARE CONTRACTS, at v-vi (2d ed. 1998).

#### 4. *Internal Institutional Accountability*

As discussed previously, the internal institutional culture of an organization or corporation as well as its internal disciplinary system may profoundly affect the likelihood that its personnel will observe public-regarding norms of behavior. Unlike the three accountability mechanisms just surveyed, however, privatization of military functions *does* substantially affect the degree of institutional accountability. This is because militaries, and in particular the U.S. military, have distinctive institutional cultures that can impose strong internal sanctions for wrongdoing. This institutional culture is very different from that found in most military contractor firms.

The U.S. military is a rigidly hierarchical organization that transcends the ordinary hierarchies of civilian bureaucracy. Scholars have written extensively about the hierarchical nature of the military and its culture of obedience, loyalty, and honor, a culture that members of the military consciously construct.<sup>339</sup> Moreover, because of the chain of command system, the U.S. military is different from an ordinary bureaucracy in which authority and responsibility is sometimes fragmented and dispersed horizontally.<sup>340</sup>

This hierarchical structure ensures that internal sanctions have a good deal of force, because those lower down the chain of the command constantly seek the approval of those higher up the chain and must submit to their authority. The military also has its own internal justice system, set forth in the Uniform Code of Military Justice (UCMJ), which provides for the punishment of military personnel for military infractions as well as crimes that could be tried in civilian courts.<sup>341</sup> In addition, local commanders have a good deal of discretion to discipline members of their units for noncriminal infractions of military policy. Obedience to commanders is

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339. See, e.g., SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 19 (1957); Sir John Winthrop Hackett, *The Military in the Service of the State*, in *WAR, MORALITY, AND THE MILITARY PROFESSION* 107, 108-11 (Malham M. Wakin ed., 1979).

340. See ARENDT, *supra* note 114, at 246-48 (criticizing lack of accountability within German Nazi bureaucracy due to fragmented nature of authority).

341. Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2000).

enhanced due to the combination of “up or out” advancement requirements<sup>342</sup> and a performance review system in which immediate supervisors are responsible for the work of their underlings.<sup>343</sup> Moreover, because internal status within the hierarchy is a significant factor for many military personnel, superiors can impose status-based sanctions, such as reassignment, demotion, firing, and dishonorable discharge and know that such sanctions will have real impact. Although the hierarchical structure may sometimes stifle dissent, limit participation in policymaking, and inhibit reporting of abuses, it is designed to enhance compliance with the norms that are widely accepted throughout the chain of command, and there are significant internal institutional penalties for infraction of those norms.

From the post-Vietnam War era until September 11, 2001, the U.S. military had a tradition of inculcating international humanitarian law norms throughout its ranks. For example, the U.S. military actively trains its personnel in the laws of war. Army handbooks specifically prohibit torture and other forms of mistreatment of prisoners of war or other detainees.<sup>344</sup> Military interrogators receive extensive training in the laws of war and are taught not to use excessive force during interrogations.<sup>345</sup> Even during combat, military lawyers are often called upon to clear targets in advance to ensure that attacks will not inflict an unacceptable amount of collateral damage.<sup>346</sup> Given that the military hierarchy does not reward dissent, the fact that military lawyers were among the first to condemn President Bush’s proposal to establish military commis-

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342. If individuals are not promoted within set time periods, they must leave the service. 10 U.S.C. §§ 627, 630-632 (2000); DEP’T OF DEFENSE INSTRUCTION, 1320.13, COMMISSIONED OFFICER PROMOTION REPORTS AND PROCEDURES pt. E2 (1996).

343. See L. Neal Ellis, Jr., *Judicial Review of Promotions in the Military*, 98 MIL. L. REV. 129, 129-30 (1982); Turley, *supra* note 149, at 62.

344. See DEP’T OF THE ARMY, INTELLIGENCE INTERROGATION, FIELD MANUAL 34-52, at ch. 1 (Sept. 28, 1992).

345. See, e.g., Declaration of Peter Bauer Filed in Support of Plaintiffs’ Motion for Preliminary Injunction Against CACI International, Saleh v. Titan, 353 F. Supp. 2d 1087 (S.D. Cal. 2004) (No. 04 CV 1143) (containing statement of trained U.S. military interrogator describing extensive training required for military interrogators), available at [http://www.ccrny.org/v2/legal/september\\_11th/docs/CACI\\_InjunctionExhibitsDtoJ.pdf](http://www.ccrny.org/v2/legal/september_11th/docs/CACI_InjunctionExhibitsDtoJ.pdf) (last visited Sept. 20, 2005).

346. See James E. Baker, *When Lawyers Advise Presidents in Wartime*, NAVAL WAR C. REV. 11, 13-21 (Winter 2002) (outlining target approval process during Kosovo conflict).

sions to try terrorism suspects and Pentagon proposals to allow harsh interrogation techniques indicates the extent to which international humanitarian law norms are taken seriously within the military bureaucracy.<sup>347</sup>

When norms are not widely shared within the institution or are ambiguous, however, it may be difficult for the military to impose internal institutional sanctions to enforce them, and soldiers may be hesitant to report abuses or punish offenders. Indeed, many commentators suggest that the abuses at Abu Ghraib took place because proposed changes in interrogation policies—reflected in legal memos such as those from the Office of Legal Counsel<sup>348</sup> and the Defense Working Group<sup>349</sup> setting forth a narrow definition of torture and identifying a military necessity exception to the use of coercive interrogation tactics—at best created ambiguity about the acceptable limits on interrogation tactics and at worst authorized coercive practices.<sup>350</sup> Ambiguous norms coupled with the hierarchi

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347. For example, in January and February 2003, even before the Abu Ghraib scandal became public knowledge, Judge Advocate Generals from the Army, Navy, Air Force, and Marines for the Air Force wrote a series of six memoranda expressing alarm about the use of “extreme interrogation techniques” against suspected terrorists. See Balkinization, JAG Memos, at <http://balkin.blogspot.com/jag.memos.pdf> (last visited Sept. 20, 2005); see also Neil A. Lewis, *Military’s Opposition to Harsh Interrogation Techniques Is Outlined*, N.Y. TIMES, July 28, 2005, at A21. Similarly, even military prosecutors have objected to the anti-defendant bias of the military commissions. See Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. TIMES, Aug. 1, 2005, at A1 (“As the Pentagon was making its final preparations to begin war crimes trials against four detainees at Guantánamo Bay, Cuba, two senior prosecutors complained in confidential messages last year that the trial system had been secretly arranged to improve the chance of conviction and to deprive defendants of material that could prove their innocence.”). The military bureaucracy is not monolithic, however, and military lawyers may represent a somewhat insular subculture that is particularly committed to international humanitarian law.

348. See Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>, rescinded by Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General (Dec. 30, 2004), available at <http://www.justice.gov/olc/dagmemo.pdf>.

349. DEPT’ OF DEFENSE, WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (Mar. 6, 2003), available at <http://www.npr.org/documents/2004/dodmemo030306.pdf>.

350. See, e.g., *Hearing on the Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States Before the S. Comm. on the Judiciary*, 109th Cong. (2005),

cal command structure may have created a disincentive to report abuses, because subordinates could not be sure whether the practices were acceptable to those above them in the chain of command. By contrast, if the policy had more clearly forbidden such abuse, reporting would not have carried the same risks and may even have been favored. Because of the organizational structure of the military, bright line rules such as a clear policy forbidding torture are particularly important.<sup>351</sup>

Despite the unfortunately mixed signals emanating from the military hierarchy regarding interrogation techniques, military authorities nevertheless have imposed penalties carrying real consequences. Nine uniformed military personnel have been charged, and eight have been convicted or struck plea bargains thus far.<sup>352</sup> It is true that some of those convicted have received no jail time,<sup>353</sup> and that thus far no high-ranking officials have been charged with abuse. The military has conducted numerous investigations, though, into the abuses at Abu Ghraib and elsewhere.<sup>354</sup> Due to the status-based culture of the military, the significance of the nonincarceration penalties that the institution has imposed should not be underestimated.<sup>355</sup>

Against this backdrop, it is clear that privatizing military functions is likely to undermine the culture of institutional accountability that does exist. Private military support contractors who operate in the field are not subject to commanders' authority but rather are controlled by the terms of their contract.<sup>356</sup> In addition, the local commander has no authority to mete out punishments for disciplinary infractions, and contractors cannot be tried under the

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available at 2005 WL 40553 (statement of Harold Hongju Koh, Dean and Gerard C. and Bernice Latrobe Smith Professor of Int'l Law, Yale Law School); David Luban, *Liberalism and the Unpleasant Question of Torture*, 91 VA. L. REV. (forthcoming 2005) (manuscript at 35-41, on file with author).

351. See Luban, *supra* note 350 (manuscript at 29).

352. Reid, *supra* note 216.

353. Associated Press, *Prosecutors Revise Charges Against Guard in Prison Case*, N.Y. TIMES, Feb. 20, 2005, at A18.

354. See *supra* note 281 and accompanying text.

355. For example, General Karpinski, the officer in charge of the facility at the time the abuse took place, has been reprimanded and denied opportunity for promotion. HERSH, *supra* note 62, at 40-41.

356. See Vernon, *supra* note 34, at 382-84.

UCMJ.<sup>357</sup> As a result, military commanders must seek contract officers' approval before giving an order to support teams on the battlefield, thereby creating logistical and tactical difficulties.<sup>358</sup> In any event, the private employees are fundamentally accountable only to the institutions that employ them.

To be sure, just as military bureaucracies are not all alike, neither are private military corporations. Yet, even if we look at each of the three types of firms identified previously we can see that, though they vary, they are all likely to have weaker modes of institutional accountability and less respect for and internalization of the norms of human rights and humanitarian law than the U.S. military itself. For example, though they are often run by former military personnel, military consulting firms such as MPRI have an entirely different incentive structure from the U.S. military and operate under far fewer institutional and political constraints. In particular, MPRI is now owned by institutional investors,<sup>359</sup> and profit pressures may make the firm less responsive to the imperatives of international legal norms. While many of the employees may have received training in the military and thus may have imbibed its norms and values, the principles of international law may hold less sway in the face of potential profits. Indeed, MPRI has been cited by the International Criminal Tribunal for the Former Yugoslavia (ICTY) as being potentially implicated in war crimes based on its training of the Croatian army.<sup>360</sup> In addition, just the fact that firms such as MPRI are able to hire former military officers at high prices may erode the impact of status-based sanctions such as firing and demotion within the military itself: a disgraced officer need not live with the disgrace because he or she can now jump to a private firm.<sup>361</sup>

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357. See *supra* note 226 and accompanying text.

358. See Vernon, *supra* note 34, at 382-84.

359. The conglomerate L3 purchased MPRI in 2001. See THE CENTER FOR PUBLIC INTEGRITY, MILITARY PROFESSIONAL RESOURCES INC., <http://www.publicintegrity.org/wow/bio.aspx?act=pro&ddlc=39> (last visited Sept. 20, 2005).

360. See Garmon, *supra* note 23, at 335-37; Raymond Bonner, *War Crimes Panel Finds Troops 'Cleansed' the Serbs*, N.Y. TIMES, Mar. 21, 1999, at A11.

361. See Craig Gordon, *The \$150,000 Warriors: Pentagon Hopes Bonuses Will Keep Special Operations Officers from Being Lured by Outside Firms*, NEWSDAY, Feb. 13, 2005, at A5.

Military support firms such as KBR have even fewer cultural ties to the military, even though former military officials may fill senior management positions. Moreover, as with the consulting firms, the profit motive may encourage practices that undermine the rules and regulations that shape behavior within the U.S. military. For example, following a U.S. military regulation that limits the number of troops allowed to gather in one place at mealtimes could have prevented many of the deaths caused by a December 2004 insurgency bombing of a troop mess hall in Iraq. Because a private firm ran the mess hall and did not follow the U.S. military regulation, more troops were allowed to gather, ultimately increasing the number of casualties.<sup>362</sup> Such firms similarly do not use the same scrutiny as the U.S. military to investigate the backgrounds of employees for possible security risks.<sup>363</sup>

Finally, military provider firms, which supply actual combat services to governments, tend to have a culture that is the least constrained by norms of international law and is the furthest removed from the kind of rule-based hierarchies found in the professionalized military of the United States and other democratic countries. To be sure, many employees of military provider firms, such as the now defunct Executive Outcomes and Sandline International, come from organized militaries. These are often militaries with extensive records of human rights abuses, however, such as the South African Defense Forces during the apartheid era.<sup>364</sup> Employees of these companies are often known for their free-wheeling, adventurous, non-rule-bound style.<sup>365</sup> They are the new mercenaries, renamed as military provider firms in an attempt to convey a greater professionalization but with strong ties to the mercenary culture that has been associated with a swashbuckling insouciance for centuries, a lack of connection to a national identity

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362. In discussing the incident, retired Lt. Col. Ralph Peters observed that “what’s clearly happened in Iraq is we violated our own rules about troop dispersion in wartime. I suspect it has to do with outsourcing. This mess hall, mess facility, chow hall was run by a contractor. And, instead of security, what we saw was convenience and efficiency.” *The NewsHour with Jim Lehrer: Struggle for Security* (PBS television broadcast Dec. 22, 2004).

363. See Brinkley & Glanz, *supra* note 63.

364. See Rubin, *supra* note 73, at 44-46.

365. *Id.* at 44-47.

or set of values, a commitment to personal profit, and a willingness to violate laws, norms, and values to make money.<sup>366</sup>

It seems clear, therefore, that the use of such mercenaries and private military corporations will substantially lessen the internal institutional checks on behavior that we still see in the U.S. military. To be sure, the shift in internal institutional accountability due to privatization may not be the same in all contexts. For example, some militaries may be intensely hierarchical but not accept the norms of international humanitarian law, in which case a shift to a private corporation that also does not have a culture of respect for such norms will not make an enormous difference. Nonetheless, in contrast to highly structured militaries that do inculcate respect for international humanitarian law norms, the use of military support, provider, and advice firms does represent a significant change in internal institutional accountability.

### *B. Foreign Aid*

As with the military functions described above, the privatization of foreign aid has far less impact on legal liability than privatization in roughly analogous domestic contexts, such as health care and welfare. This is again because the baseline of legal accountability—even for direct government aid—is much lower in the international context than it is with regard to domestic services. Moreover, as with the military example, an exploration of potential alternative modes of accountability may help mitigate concerns about increasing privatization, though as we will see, foreign aid contracts currently offer far less accountability than the analogous domestic contracts. When considering the provision of aid, violations of norms against waste, corruption, and rational delivery of services are particularly applicable, and the following sections will therefore focus on accountability for violations of these norms, though I will make reference to norms of human dignity where appropriate.

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366. See SINGER, *CORPORATE WARRIORS*, *supra* note 23, at 37.

### 1. *Legal Accountability*

Suppose that private aid workers, operating under contracts with the U.S., the UN, and other governments, set up refugee camps in Africa to provide aid to victims of war or atrocities fleeing their home country. In these camps, refugees receive food, medical care, shelter, and other forms of basic humanitarian aid. Further assume that, as in the aid efforts after the Rwandan genocide, aid workers make poor decisions about aid distribution, due to the lack of an effective early warning system, proliferation of aid organizations, poor coordination, a faulty distribution system, a lack of clear standards or best practices for aid provision, and untrained and inexperienced personnel.<sup>367</sup> Finally, suppose that as a result of these problems, individuals who would otherwise have received medical care or essential food are left to die of illness or malnutrition.

In this scenario, whether the aid was provided by private aid organizations or directly by governments, the prospects of legal accountability would be virtually nonexistent. First, there is no clear right of foreign aid recipients to receive aid, or, once it is provided, to receive such aid in a nonarbitrary fashion. Although economic, social, and cultural rights might be deemed to include rights to the goods and services necessary to provide a minimum social safety net, these rights are typically conceived of as rights against one's own state, not foreign aid donors.<sup>368</sup> Moreover, impoverished governments are usually given considerable leeway in how they fulfill these rights: best efforts and reasonable progress are often deemed sufficient, and there is, accordingly, no clear affirmative substantive right to the actual provision of goods.<sup>369</sup>

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367. See *International Response*, *supra* note 100, at ch. 6, pt. 2.

368. ICESCR, *supra* note 108. For an overview of the treaty's framework and its core protections, see generally MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, A PERSPECTIVE ON ITS DEVELOPMENT* (1995). See also Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462 (2004) (analyzing the proposal to establish a mechanism for adjudication of individual complaints under the ICESCR).

369. See Dennis & Stewart, *supra* note 368, at 491-93 (describing Committee on Economic, Social, and Cultural Rights as interpreting the obligations of states under the treaty to provide affirmative rights such as food, housing, and health care in an increasingly robust way).

Some scholars have attempted to locate a right to humanitarian aid within the Geneva Conventions, but this interpretation is not widely accepted.<sup>370</sup> On the other hand, even if there is no clear affirmative right to receive foreign aid, there could conceivably be a right, once aid is being provided, to have such aid delivered in a nonarbitrary, non-corrupt fashion. Indeed, the aid community, responding to the failures of the Rwandan relief effort, has now developed guidelines and standards for the provision of relief,<sup>371</sup> and some have argued that these guidelines and standards should be enforced as rights of aid beneficiaries.<sup>372</sup> Nevertheless, there is by no means widespread agreement on this point even within the aid community, let alone a treaty or binding agreement among states.<sup>373</sup>

Because there is no clear right, either against state or private actors, there is virtually no possible avenue of legal accountability. Directly administered governmental aid programs often consist of either cash transfers to foreign governments or to NGOs.<sup>374</sup> In such circumstances, a suit alleging abuses conceivably could be brought within the domestic legal systems of the recipient countries, but court systems in those countries are often ill-equipped to address such cases, even assuming that the domestic law recognized a right to receive aid. In any event, remedies against foreign government personnel would almost certainly not be available. It is worth noting that there is now one exception to this lack of legal accountability.

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370. See Michel Agier & Françoise Bouchet-Saulinier, *Humanitarian Spaces: Spaces of Exception*, in HUMANITARIAN ACTION, *supra* note 93, at 297, 307-08.

371. See INT'L COMM. OF THE RED CROSS, THE CODE OF CONDUCT FOR THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT AND NON-GOVERNMENTAL ORGANIZATIONS IN DISASTER RELIEF (1995) [hereinafter RED CROSS CODE], available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JMNB> (establishing voluntary principles for humanitarian aid delivery, including nondiscrimination, transparency, and accountability to donors and beneficiaries); THE SPHERE PROJECT, HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN DISASTER RESPONSE (2004) [hereinafter SPHERE CHARTER], available at [http://www.sphereproject.org/handbook/hdbkpdf/hdbk\\_hc.pdf](http://www.sphereproject.org/handbook/hdbkpdf/hdbk_hc.pdf) (setting forth voluntarily enforceable principles that aid beneficiaries are entitled a "duty of care"—defined to include minimum standards of impact, such as water supply, sanitation, nutrition, food, shelter, and health services, and minimum standards for the process of providing aid, such as the requirement that personnel must be qualified—and a "duty of impartiality"—defined to mean that the aid cannot fuel conflict); Jacobs, *supra* note 101, at 3-5; Stockton, *supra* note 100.

372. See Stockton, *supra* note 100.

373. See *id.*

374. See Duffield, *supra* note 89, at 146.

For aid provided under World Bank auspices, recipients can bring claims of aid mismanagement before specially constituted tribunals.<sup>375</sup> Apart from this new venue, however, there is little opportunity for legal recourse. Thus, if private contractors provide the aid instead of state actors, little will change for the aid recipients with regard to legal accountability mechanisms. Legal recourse is unlikely in either scenario.

In the domestic U.S. setting, the result of privatization is much more significant. Although there is still no underlying right to receive aid, when the government does choose to provide assistance such as health care or welfare to needy populations, arbitrary provision of that aid is subject to legal remedy.<sup>376</sup> Privatization in the domestic context, therefore, reduces the prospects for relief because the right to nonarbitrary provision of services applies only to state actors. Accordingly, claimants would need to demonstrate that there is enough of a connection between the government and the private provider to satisfy the state action doctrine, and, as previously discussed,<sup>377</sup> courts are increasingly unwilling to recognize such a connection.<sup>378</sup>

The main difference, therefore, between the international and the domestic context is not the existence of an underlying right to the goods or services in question,<sup>379</sup> but rather the existence of a right to have those aid programs, once launched, administered in a rational and nonarbitrary manner. In the foreign aid context, the population receiving the aid has not been accorded such a right, and although the domestic population of the aid-giving country might well have an interest in making sure its government acts rationally in providing aid abroad, there is not likely to be any way to pursue such an interest in a legal forum.

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375. See Lori Udall, *The World Bank and Public Accountability: Has Anything Changed?*, in *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS* 391, 392-93 (Jonathan A. Fox & L. David Brown eds., 1998).

376. See *Goldberg v. Kelly*, 397 U.S. 254, 261-66 (1970).

377. See *supra* notes 138-41 and accompanying text.

378. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982) (holding that a private nursing home's decision to reassign a Medicaid patient to a lower level of care was not subject to judicial review under the Fourteenth Amendment because the decision was not state action).

379. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (stating that the Constitution confers "no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property").

## 2. *Democratic Accountability*

Privatizing foreign aid likewise does not reduce the scope of democratic accountability nearly as much as privatizing analogous domestic functions, again because the baseline of accountability is already low, even for direct governmental aid. It is true, of course, that U.S. citizens can try to influence the provision of government aid to foreign countries through the democratic process. Moreover, such aid programs are theoretically subject to FOIA, inspector general oversight, and whistleblower protection statutes.<sup>380</sup> But public oversight of direct cash transfers to foreign governments may actually be weaker than the scrutiny that private organizations receive.<sup>381</sup> In addition, although a number of NGOs and private groups regularly lobby Congress to fund particular aid efforts,<sup>382</sup> foreign aid does not appear to be a high priority issue for domestic voters. Most Americans assume that we give far more aid than we actually do,<sup>383</sup> and the issue does not typically rise to the forefront of political debate. Thus, the likelihood of democratic accountability even for direct government aid is limited. As a result, the degree of scrutiny will likely depend solely on whether the aid includes cooperative arrangements with oversight bodies in the recipient countries.<sup>384</sup>

Because of this low baseline, when aid is provided by private actors funded with taxpayer money, the degree of democratic accountability is not dramatically altered. For example, the transparency of the process, a key component of democratic accountability, is not significantly reduced. To be sure, FOIA requests will probably not be able to provide a window on the actual

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380. See *supra* notes 150-53 and accompanying text.

381. The USAID Inspector General, for example, must rely on the domestic oversight system within the recipient country. See USAID OFFICE OF INSPECTOR GEN. SEMIANNUAL REP. 14 (Apr. 1, 2004-Sept. 30, 2004), available at <http://www.usaid.gov/oig/public/semiann/sarc0409.pdf> [hereinafter USAIDIG SEMIANNUAL REPORT].

382. See Elizabeth Becker, *With Record Rise in Foreign Aid Comes Change in How It Is Monitored*, N.Y. TIMES, Dec. 7, 2003, § 1, at 10.

383. Editorial, *Are We Stingy? Yes*, N.Y. TIMES, Dec. 30, 2004, at A22 (“According to a poll, most Americans believe the United States spends 24 percent of its budget on aid to poor countries; it actually spends well under a quarter of 1 percent.”).

384. USAIDIG SEMIANNUAL REPORT, *supra* note 381, at 14.

on-the-ground activities of the private entities—because they are not government actors—but FOIA requests could still be used to access the text of contracts.<sup>385</sup> For example, eight of the sixteen USAID contracts with private organizations for aid projects in Iraq can be downloaded from the USAID website.<sup>386</sup> Inspector General reports typically focus not only on the direct activities by governmental actors but on aid delivered under agreements with private entities as well.<sup>387</sup> Whistleblower protections also apply, along with private qui tam enforcement provisions, whether the whistleblower is employed by the government or a private contractor.<sup>388</sup>

In addition, USAID, the primary agency responsible for delivering foreign aid, has a long history of trying to provide information about, and to study the efficacy of, foreign aid, including aid delivered through Private Voluntary Organizations (PVOs). Indeed, each year the agency publishes a report on PVO aid.<sup>389</sup> The combination of USAID's relative transparency and the comparatively aggressive oversight of foreign aid by Congress means that far more information is available about private aid agreements than, for example, private military contracts.

On the other hand, although USAID's development assistance and emergency humanitarian relief funds are well documented, aid provided by other agencies—such as military assistance to foreign countries through the DOD or policing and international law enforcement assistance through the Department of State—is far less transparent. In addition, because aid is provided by so many different agencies, it is often difficult to locate comprehensive information about all aid programs connected to a particular location.<sup>390</sup> In post-conflict or conflict settings, such as Iraq and Afghanistan, the problem is particularly acute because security concerns and the blending of military missions and aid operations can make it more difficult to access information about the aid component.

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385. See *supra* notes 252-53 and accompanying text.

386. CONTRACTS AND GRANTS, *supra* note 80.

387. See, e.g., USAIDIG SEMIANNUAL REPORT, *supra* note 381, at 20-23.

388. 31 U.S.C. §§ 3730(b)(1), (c), (d), (h) (2000).

389. See, e.g., 2004 VOLAG REPORT, *supra* note 91.

390. See WINNING CONTRACTORS, *supra* note 308.

It is also worth noting that aid given to for-profit, as opposed to charitable, companies tends to be less open to public scrutiny. For example, the USAID Annual Report of aid provided through PVOs does not include for-profit aid providers.<sup>391</sup> In addition, for-profit entities can exercise the trade secrets exemption of FOIA, which in some cases serves to block agencies from even revealing the existence of some contracts.<sup>392</sup> This lack of transparency is a particular problem when, as in the Iraq reconstruction efforts, fifteen of the sixteen USAID contracts are with for-profit entities.<sup>393</sup>

Nevertheless, the transparency costs from privatizing foreign aid are small compared to those associated with the privatization of domestic government services that are roughly analogous to foreign aid, such as disaster relief, health care, education, and welfare. This is because the recipients of domestic aid, unlike in the foreign context, are themselves part of the democratic polity that is being taxed to pay for the aid. Thus, aid recipients and others who believe that aid is being provided in an irrational, arbitrary, or corrupt manner can register their concern at the ballot box, contact their representatives directly, or lobby them through interest groups. Certainly, some of the recipients of government-run programs, such as welfare recipients, do not have significant political clout. But the elderly (who receive health benefits under Medicare), families with children (who benefit from education), and those in a disaster area (potentially anyone) may have a more powerful political voice. In addition, as discussed above, the mechanisms designed to create transparency in order to enable public and legislative oversight, such as FOIA and the APA, are less robust with respect to private contractors.<sup>394</sup> Accordingly, when domestic aid is privatized, access to the democratic process is significantly reduced because the actors running the programs and, in some cases, making the relevant rules are no longer government personnel subject to democratic checks.

On the other hand, just because privatization of foreign aid does not result in as dramatic a loss in democratic accountability as domestic privatization does not mean that there is no cause for

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391. See 2004 VOLAG REPORT, *supra* note 91.

392. See 5 U.S.C. § 552(b)(4) (2000).

393. CONTRACTS AND GRANTS, *supra* note 80.

394. See *supra* note 258 and accompanying text.

concern. Indeed, the reason for the lesser impact of outsourcing in this context is the distressingly low level of accountability to begin with. This low level of accountability stems in part from the fact that those who are paying for the aid have little stake in its effective delivery because the aid is being received in a distant location. Conversely, the recipients of the aid, who are most likely to know and care about whether the aid is being distributed in a manner that is rational, fair, and free from corruption, have little or no voice within the democratic polity of the provider country.

Of course, addressing this sort of democratic deficit may be problematic because the recipients of foreign aid are by definition *not* members of the democratic polity of the provider country. Accordingly, some critics have argued that the only appropriate vehicle for aid beneficiaries to participate in the democratic process is within their own countries, by lobbying their diplomatic officials to take up any concerns about international issues on their behalf.<sup>395</sup> Such lobbying efforts, however, will often be unsuccessful, either because the local government is authoritarian, corrupt, or ineffectual (and therefore relatively impervious to democratic pressure), or because diplomats will be reluctant to bite the hand that feeds them by complaining about the way in which foreign aid is being delivered.

In order to address this problem, international NGOs might lobby in donor countries on behalf of aid beneficiaries. For example, Save the Children-UK partnered with the United Nations High Commissioner of Refugees to report on the abuses in the West African refugee camps and led the ensuing reform efforts.<sup>396</sup> Other organizations, such as Human Rights Watch, also issued reports to raise public awareness of the problem and to advocate change both within donor countries and at the UN.<sup>397</sup>

Nevertheless, given that foreign aid may have such a profound impact on beneficiaries' lives, it may also be appropriate for beneficiaries to participate in some way in the democratic processes

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395. See, e.g., Anderson, *supra* note 275, at 372.

396. SEXUAL VIOLENCE REPORT, *supra* note 95.

397. See, e.g., HUMAN RIGHTS WATCH, FORGOTTEN CHILDREN OF WAR: SIERRA LEONEAN REFUGEE CHILDREN IN GUINEA (1999), available at <http://www.hrw.org/reports/1999/guinea>; HUMAN RIGHTS WATCH, SEXUAL VIOLENCE WITHIN THE SIERRA LEONE CONFLICT (Feb. 26, 2001), available at <http://www.hrw.org/background/africa/sl-bck0226.htm>.

of donor countries. Indeed, the analogy of the private contractor to a trustee<sup>398</sup> might help capture this idea. For example, beneficiaries might at least be included in the design of aid programs.<sup>399</sup> In addition, beneficiaries could participate in the evaluation of such programs.<sup>400</sup> Moreover, this sort of minimal democratic participation could regularly be included as a requirement of the aid agreement itself.

### 3. *Contractual Accountability*

In the foreign aid context, government actors have consciously employed the vehicle of the aid agreement to try to impose a measure of accountability, at least with regard to norms against waste and corruption, and norms of rational and nonarbitrary provision of programs. Even with respect to these norms, however, accountability has often suffered due to poor oversight. In addition, foreign aid agreements have largely failed to incorporate norms of human dignity, which some domestic contracts have sought to include. Also, the accountability provided by these contracts is necessarily limited because the contractual oversight mechanisms are primarily concerned with making sure the contractor is accountable to the government providing the aid and, through the government, to taxpayers. Far less attention has been paid to the possibility that contractors might be made accountable to the foreign aid beneficiaries themselves.

The United States has been a leader in using contractual requirements to help ensure accountability in the provision of privatized foreign aid. With respect to corruption and fraud, an extensive array of statutory offenses provide a backdrop of legal accountability<sup>401</sup> that is supplemented by the highly detailed

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398. See *supra* note 287 and accompanying text.

399. To some degree, this practice has taken hold in the development aid context, but it has not yet reached the humanitarian aid setting. 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*, 17 J. REFUGEE STUD. 185, 186 (2004).

400. See *id.*

401. See, e.g., Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (2000); False Claims Act, 31 U.S.C. §§ 3729-3733 (2000). The False Claims Act also provides for private

regulatory framework of the Federal Acquisitions Regulation (FAR).<sup>402</sup> The FAR mandates a variety of specific procedures designed to minimize the possibility of fraud and corruption in the contracting process, and applies to many categories of aid agreements.<sup>403</sup> In addition, the various agencies charged with administering foreign aid—such as the Defense Department, the State Department, and USAID—have each developed additional regulations and supplementary procedures pursuant to various enabling acts.<sup>404</sup>

Taken together, this regulatory scheme prohibits bribes and payments to contracting officers<sup>405</sup> and provides a host of rules regarding conflicts of interest,<sup>406</sup> protection of whistleblowers,<sup>407</sup> standardization of accounting terms,<sup>408</sup> and various other contract award procedures, all of which are designed to ensure as much competition and openness as possible. The statutory and regulatory framework also includes provisions for independent monitoring through the inspectors general of the respective agencies<sup>409</sup> as well as for auditing of contracts by independent private accounting firms.<sup>410</sup> In the case of high-profile aid programs such as the Iraq reconstruction, further statutory requirements supplement these ordinary rules.<sup>411</sup>

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enforcement. 31 U.S.C. § 3730 (2000).

402. Federal Acquisitions Regulation, 48 C.F.R. ch.1 (2004).

403. *See, e.g.*, FAR 48 C.F.R. § 3.104-240-3 (2004) (prohibiting agency officials who leave government from working for contracting firm within one year of contract); FAR 48 C.F.R. § 3.2 (2004) (requiring contract term specifying for termination if contractor awarded gratuities to government personnel); FAR 48 C.F.R. § 16.2 (2004) (requiring open competition). A slightly different regulatory scheme applies to grants and cooperative agreements to private voluntary organizations. *See* 31 U.S.C. §§ 6301-6308 (2000); USAID AGENCY DIRECTIVES SERIES GRANTS AND COOPERATIVE AGREEMENTS TO NON-GOVERNMENTAL ORGANIZATIONS ch. 303, available at <http://www.usaid.gov/policy/ads/300/303.pdf> (July 23, 2002).

404. *See, e.g.*, Defense Federal Acquisition Regulation Supplement (DFARS), 48 C.F.R. ch.2 (2004); Department of State Acquisition Regulation (DOSAR), 48 C.F.R. ch. 6 (2004); USAID Acquisitions Regulation (AIDAR), 48 C.F.R. ch. 7 (2004).

405. *See, e.g.*, FAR 48 C.F.R. § 3.2 (2004).

406. *See, e.g.*, FAR 48 C.F.R. § 3.1 (2004).

407. *See, e.g.*, FAR 48 C.F.R. § 3.9 (2004).

408. *See, e.g.*, FAR 48 C.F.R. § 31 (2004).

409. *See supra* note 152 and accompanying text.

410. *See* USAIDIG SEMIANNUAL REPORT, *supra* note 381, at 13.

411. *See* Knight & Jun Jin, *supra* note 170, at 5-8.

Yet, despite this extensive statutory and regulatory framework, aid programs are often relatively unmonitored because many of the oversight requirements tend not to be applied in emergency situations, which are, of course, the times when relief efforts and post-reconstruction aid tend to be most needed. Thus, in many foreign aid contexts, the ordinary contracting procedures, such as competitive bidding, are waived,<sup>412</sup> and contracts that involve far less government oversight—such as the cost-plus agreements that were notorious in Iraq<sup>413</sup>—become the norm.

In addition, although the statutory and regulatory framework provides for monitoring, monitors are often provided with insufficient resources. In Iraq, although USAID has responsibility for approximately \$3.6 billion in reconstruction projects,<sup>414</sup> the agency had only four contract monitoring personnel on the ground as of March 2003, and by September 2004 that number had increased only to eight.<sup>415</sup> In fact, due to the difficulties of monitoring contracts with so little staff, USAID determined to contract out the monitoring function itself!<sup>416</sup>

Other agencies responsible for Iraq contracting, such as the DOD and the now-dismantled Iraq Coalition Provisional Authority (CPA), have also devoted very few resources to contract oversight. A recent report notes that the “CPA hadn’t 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.”<sup>417</sup>

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412. In practice, one way these requirements are avoided is through the use of blanket purchase order agreements, in which task orders can be issued under preexisting contracts. See *supra* notes 296-98 and accompanying text.

413. For criticism of the lack of open bidding on the Iraq contracts, see CENTER FOR RESPONSIVE POLITICS, REBUILDING IRAQ—THE CONTRACTORS, [http://www.opensecrets.org/news/rebuilding\\_iraq/index.asp](http://www.opensecrets.org/news/rebuilding_iraq/index.asp) (last visited Sept. 21, 2005). For an opposing view, see Jeffrey Marburg-Goodman, *USAID’s Procurement Contracts: Insider’s View*, 39 *PROCUREMENT L.* 10 (2003).

414. See *CONTRACTS AND GRANTS*, *supra* note 80.

415. See Shane Harris, *AID Plans to Contract Out Oversight of Iraq Contracts*, *GovExec.COM*, May 20, 2003, at <http://www.govexec.com/dailyfed/0503/052003h1.htm>.

416. See *id.*

417. Ed Harriman, *Where Has All the Money Gone?*, *LONDON REV. OF BOOKS*, July 7, 2005,

One former CPA official, Alan Grayson, has argued that, as a result of poor oversight, “contracts were made that were mistakes, and were poorly, if at all, supervised” and that “money was spent that could have been saved, if we simply had the right numbers of people.”<sup>418</sup> As an example, he cites two \$16 million contracts awarded by USAID to the firm Custer Battles to provide security for the Baghdad airport and the distribution of Iraqi dinars—despite the fact that the firm had virtually no experience in security service.<sup>419</sup> Indeed, Custer Battles employees reportedly chartered a flight to Beirut with \$10 million in new Iraqi dinars in their luggage—which were promptly confiscated by Lebanese officials.<sup>420</sup> Although the contracts contained enough vague terms to raise red flags, they were virtually unsupervised because of staffing shortages.<sup>421</sup> Though it surely would have been expensive to devote a staff person to supervise this one contract exclusively, such a step would actually have saved at least \$4 million.<sup>422</sup> Indeed, according to a former employee, the company took advantage of this lack of oversight by setting up sham Cayman Islands subsidiaries to submit invoices, and by regularly overcharging for materials—in one case billing the United States \$10 million for materials that it purchased for \$3.5 million.<sup>423</sup>

With respect to the norm of rationality, the United States has led the way in requiring “results-based” accountability of its private aid providers through contractual terms. Indeed, USAID, perhaps motivated in part by the need to justify its activities to an increasingly skeptical Congress, was one of the first agencies in the United

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at 4, 5.

418. *S. Democratic Policy Comm. Hearing, An Oversight Hearing on Waste, Fraud, and Abuse in U.S. Government Contracting in Iraq*, 109th Cong. 4 (2005) (Statement of Alan Grayson, Former CPA Official) [hereinafter SDPC Hearing], available at <http://democrats.senate.gov/dpc/dpchearing.cfm?A=19>.

419. *Id.* at 1 (statement of Alan Grayson).

420. *Id.* at 1-2 (statement of Alan Grayson).

421. *Id.* at 3-4 (statement of Franklin Willis).

422. *Id.* at 4 (statement of Franklin Willis). Of course, the lack of oversight may have a more cynical explanation: it permits private contractors (who may have powerful connections within government) to reap profits without significant constraints.

423. *Id.* at 2 (statement of Alan Grayson). The employee has since claimed the benefit of whistleblower protections and has filed a private enforcement suit under the False Claims Act. *Id.* at 2-3 (statement of Alan Grayson).

States to take then Vice President Al Gore's "Reinventing Government" message to heart. Under this "results-based" approach, the agency performs self-evaluations of each program's efficacy, and private aid providers are contractually obligated to evaluate themselves as well.<sup>424</sup> Indeed, in the 1980s, even before the "reinventing government" movement, USAID launched a series of studies to determine the effectiveness of its aid programs,<sup>425</sup> and evaluations are now seen as central to all of its activities. Every private voluntary organization aid project is thus evaluated, either by USAID, the organization, or both.

Nevertheless, the evaluation process has posed challenges. For example, by their very nature, results-based contracts raise difficult questions about how best to measure output. Such criteria may be relatively easy to quantify if the project involves simply building a bridge or dam, but are very difficult to capture if the project involves intangibles, such as fostering human development or building civil society.<sup>426</sup> Likewise, short-term results, such as whether food aid was delivered, are much easier to measure than longer-term systemic effects on poverty, education, and so on. As a consequence, results-based contracts tend to put more emphasis on short-term delivery of services rather than longer-term impact.<sup>427</sup> Even more fundamentally, because contracting for emergency humanitarian relief tends to happen quickly and with very small staffs, many such contracts do not actually contain any results-based requirements. With regard to Iraq, for example, a review of the publicly available USAID contracts reveals that only a few set forth specific performance benchmarks or requirements.<sup>428</sup>

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424. See generally USAID, RESULTS-ORIENTED ASSISTANCE: A USAID SOURCEBOOK, available at <http://www.usaid.gov/pubs/sourcebook/usgov> (last visited Sept. 20, 2005).

425. See JUDITH TENDLER, TURNING PRIVATE VOLUNTARY ORGANIZATIONS INTO DEVELOPMENT AGENCIES: QUESTIONS FOR EVALUATION (1982).

426. See Smillie, *At Sea in a Sieve?*, *supra* note 23, at 10. For a discussion of the ways in which output requirements can often undermine broader goals (because actors design gear programs to the output benchmarks) in the context of Thatcherite privatization in England, see generally MICHAEL POWER, THE AUDIT SOCIETY (1997).

427. Smillie, *At Sea in a Sieve?*, *supra* note 23, at 10-11.

428. See AGREEMENT BETWEEN USAID AND BECHTEL, INC., IRAQ INFRASTRUCTURE RECONSTRUCTION—PHASE II, No. SPU-C-00-04-00001-00 (Jan. 4, 2004), available at <http://www.usaid.gov/iraq/contracts/iirii.html>; AGREEMENT BETWEEN USAID AND BEARINGPOINT, INC., ECONOMIC RECOVERY, REFORM, AND SUSTAINED GROWTH, No. RAN-C-00-

Finally, two other factors tend to limit contractual accountability in the foreign aid context. First, the framework of accountability incorporated within foreign aid contracts makes it clear that the type of “accountability” sought is primarily accountability to the contracting government agency and, implicitly, to the taxpayers of the government providing the aid. Accordingly, there is again little effort to consider the accountability of foreign aid providers to the actual beneficiaries of the foreign aid.<sup>429</sup> To be sure, the overarching goals of the U.S. government—for example, to promote successful development or provide humanitarian relief—may be consonant with the ultimate goals of aid beneficiaries. But because the reporting requirements are tailored to meet the needs of the U.S. contracting agency, non-U.S. entities may actually have difficulty competing for contracts because they are not as well versed in all of the requirements and may not have the resources to provide the necessary documentation.<sup>430</sup> This difficulty for non-U.S. entities is problematic because at least when an aid contract is awarded to a company or nonprofit organization within the country receiving the aid, there will be *some* local participation in the aid process, not to mention greater benefits to the local economy. Yet even then, the ultimate recipients of the aid are rarely consulted to determine whether they believe the aid efforts to be successful.

Second, accountability under foreign aid contracts is limited because such contracts rarely address norms of human dignity. Few contracts, for example, contain provisions that require contractors to comply with international human rights or humanitarian norms

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03-00043-00 (July 25, 2003), *available at* <http://www.usaid.gov/iraq/contracts/errsg.html>; AGREEMENT BETWEEN USAID AND SKYLINK AIR AND LOGISTICS SUPPORT (USA), INC., AIRPORT ADMINISTRATION, No. DFD-C-00-03-00026-00 (May 5, 2003), *available at* <http://www.usaid.gov/iraq/contracts/aa.html>; AGREEMENT BETWEEN USAID AND ABT ASSOCIATES, INC., PUBLIC HEALTH, No. RAN-C-00-03-0001-00 (Apr. 30, 2003), *available at* <http://www.usaid.gov/iraq/contracts/ph.html>; AGREEMENT BETWEEN USAID AND BECHTEL, INC., CAPITAL CONSTRUCTION, No. EEE-C-00-03-00018-00 (Apr. 17, 2003), *at* <http://www.usaid.gov/iraq/contracts/cc.html>; AGREEMENT BETWEEN USAID AND CREATIVE ASSOCIATES INTERNATIONAL, INC., PRIMARY AND SECONDARY EDUCATION, No. EDG-C-00-03-00011-00 (Apr. 11, 2003), *available at* <http://www.usaid.gov/iraq/contracts/pse.html>; AGREEMENT BETWEEN USAID AND RESEARCH TRIANGLE INSTITUTE, LOCAL GOVERNANCE, No. EDG-C-00-03-00010-00 (Apr. 11, 2003), *available at* <http://www.usaid.gov/iraq/contracts/lg.html>.

429. Development aid may be an exception. *See supra* note 399 and accompanying text.

430. *See* Smillie, *United States*, *supra* note 81, at 257-58.

or to receive training in this area. Of the USAID contracts with aid providers in Iraq, none of the eight that are publicly available addresses such issues.<sup>431</sup> Certainly not all types of aid are likely to raise concerns about norms of dignity, but some aid settings are particularly problematic. For example, as noted above, those providing humanitarian relief to refugees or internally displaced persons living in camps may exercise almost complete control over their beneficiaries, leading to the possibility of abuse.<sup>432</sup> Likewise, when the foreign assistance involves privately contracted police officers or when the contractors are working in highly dangerous and unstable post-conflict settings such as Iraq, experience has demonstrated that violations of the norms of human dignity are more likely.<sup>433</sup> Thus, for at least some contracts, provisions concerning such norms might be useful.

Compared to roughly analogous contracts in the domestic context, contractual accountability for foreign aid contracts could certainly be improved. First, foreign aid contracts could specify performance terms and establish clear benchmarks. Second, provisions could allow for increased monitoring when certain conditions are not met or when it otherwise looks as if the contract is not being performed satisfactorily. Third, foreign aid contracts could begin to use outside accrediting organizations—as is now common in the domestic health care setting<sup>434</sup>—to ensure that private aid providers are qualified. While there is no foreign aid equivalent to the domestic health care accreditor NCQA, the Sphere Humanitarian Charter and Minimum Standards in Disaster Response, developed by a consortium of humanitarian aid organizations, aims to establish best practices in the provision of such aid by nonprofits, including specific guidelines for field operations, training, and self evaluation.<sup>435</sup> Contracting agencies, therefore, could require that aid organizations agree to the Sphere guidelines in order to receive contracts.<sup>436</sup> Indeed, the contracts could explicitly incorporate these guidelines, thereby

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431. *See supra* note 428.

432. *See* SEXUAL VIOLENCE REPORT, *supra* note 95.

433. *See* Yeoman, *supra* note 45.

434. *See supra* notes 185-86 and accompanying text.

435. *See* SPHERE CHARTER, *supra* note 371.

436. *Id.* Although for-profit organizations cannot officially join Sphere, contracting agencies could require such organizations to follow the Sphere guidelines in fulfilling contracts.

transforming them from non-binding voluntary standards into mandatory contractual terms. Finally, where contractors are likely to exercise any form of physical control over beneficiaries, contracts could incorporate international human rights and humanitarian law norms by requiring personnel to receive training in such norms and to abide by them.

The domestic context may also provide some useful examples of contracts that would allow for beneficiary participation in contract design and evaluation. For example, Wisconsin's contracts with managed care organizations to provide health care to Medicare and Medicaid recipients include provisions for participation by community groups.<sup>437</sup> Similarly, foreign aid contracts could require aid organizations to consult with beneficiary populations in the design and implementation of programs. Some USAID field offices already consult with beneficiary populations during the negotiation of development aid contracts.<sup>438</sup> Such consultation, however, is less common in the humanitarian aid and post-conflict reconstruction contexts and for agencies other than USAID.<sup>439</sup> In any event, an explicit contractual requirement would go a long way toward facilitating consultation with beneficiary populations. As discussed above, such a requirement could help effectuate through contract a broader form of democratic accountability that would include the idea that aid providers should be accountable to aid beneficiaries.

Finally, the use of more explicit contractual terms could help to establish a measure of legal accountability, regardless of the problems posed by state action requirements. In the domestic context, for example, some private contractors providing aid may offer individual complaint mechanisms.<sup>440</sup> Although these aid providers are not generally subject to the state action requirement and are therefore immune from constitutional review,<sup>441</sup> such contractual provisions do allow for notice and an opportunity to be heard, thereby incorporating aspects of the constitutional due process guarantees. Similar complaint mechanisms likewise could

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437. See Freeman, *supra* note 6, at 624-25.

438. See generally Kaiser, *supra* note 399 (discussing how to facilitate measuring the impact of aid programs).

439. See *id.*

440. See Metzger, *supra* note 138, at 1494.

441. See *supra* notes 138-41 and accompanying text.

be included in foreign aid contracts to help enable beneficiaries to challenge gross abuses. As noted above, the World Bank is beginning to experiment with just this type of tribunal.<sup>442</sup> The domestic setting may thus provide useful models for trying to assure some measure of contractual accountability over foreign aid providers.

#### 4. *Internal Institutional Accountability*

As in the military context, any comprehensive evaluation of accountability in the provision of foreign aid must take into account the internal institutional cultures of the various entities providing the aid. Such analysis reveals that privatization does not necessarily lead to reduced internal institutional accountability. Indeed, in some cases, private organizations might provide *more* internal accountability than governmental bureaucracies. Much depends, of course, on the specific nature of the organization in question. Important distinctions might be drawn between types of organizations, and thus this section will contrast the institutional cultures of for-profit and nonprofit corporations. Such a distinction is particularly useful to draw because it has been the subject of existing research, though, obviously, other distinctions may also be important. For example, religious-based charitable organizations may be more likely to hold their members accountable for violations of some norms but less likely to hold them accountable for others. In addition, the culture of such organizations may vary based on the type of faith (e.g., Muslim charities might have different priorities from Christian ones), and their priorities may vary depending on the type of conflict (e.g., whether the aid is being provided for a conflict with religious dimensions).<sup>443</sup> It is also worth noting that aid organizations are diverse, and any attempt to categorize inevitably leads to oversimplification.<sup>444</sup> Much more work needs to be done to examine the more subtle variations in institutional accountability mechanisms. We can, however, at least begin to make some

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442. See *supra* note 375 and accompanying text.

443. For a discussion of religious NGOs providing aid in Sudan, see Marc Lavergne & Fabrice Weissman, *Sudan: Who Benefits from Humanitarian Aid*, in HUMANITARIAN ACTION, *supra* note 93, at 137, 154.

444. See Gordenker & Weiss, in GLOBAL GOVERNANCE, *supra* note 79, at 33-40.

observations about the types of organizations that are more likely to have institutional cultures that inculcate respect for the norms of human dignity, rational governance, and/or anti-corruption, and support the ideal of accountability.

*a. Nonprofits/Nongovernmental Organizations*

In the international context, nonprofit organizations (or more commonly, NGOs)<sup>445</sup> may be more likely than government bureaucracies and for-profit corporations to foster an internal organizational culture that promotes accountability for potential violations of the norms of human dignity. Indeed, despite the variety of these groups, NGOs do tend to share some general attributes. For example, individuals who work for NGOs tend to be passionately committed to values and ideals, and they may be willing to work for far lower pay than they might receive from jobs in the private sector or the government.<sup>446</sup> Moreover, the individuals working within these organizations, and the organizations themselves, often consider themselves to be part of a transnational community or global civil society.<sup>447</sup> As such, even groups who do not have an explicit mission to promote human rights tend to be familiar with, and committed to, the provisions of international human rights and humanitarian law.<sup>448</sup> NGOs are also known for their willingness to openly criticize governments for violations of such norms.<sup>449</sup> Indeed, some NGOs are so concerned with human rights that they worry that forging any kind of alliance with governments could undermine that commitment.<sup>450</sup> However, NGO culture may be *less* conducive to accountability with respect to norms of rational and nonarbitrary provision of services. This is because NGOs tend to have a generally

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445. See generally Gordenker & Weiss, GLOBAL GOVERNANCE, *supra* note 79, at 33-34 (defining NGOs).

446. See *id.* at 36.

447. See generally Sally Engle Merry, *Constructing a Global Law: Violence Against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941 (2003) (describing NGO participation in drafting of Convention on the Elimination of All Forms of Discrimination Against Women).

448. See *id.* at 950.

449. See Gordenker & Weiss, *in* GLOBAL GOVERNANCE, *supra* note 79, at 39.

450. See Gordenker & Weiss, *supra* note 23, at 37.

nonhierarchical, action-oriented posture that places a premium on the speedy provision of aid.<sup>451</sup> Although such an internal culture may sometimes be useful, it may also lead to poor coordination with other aid organizations and governments, and poor coordination may in turn result in both costly duplication of some efforts and total failure to serve more pressing needs.<sup>452</sup> Indeed, the organizational culture of NGOs may make it difficult for them to work with governments, both those providing funding and those in charge of the populations in need of aid.<sup>453</sup> As one commentator has noted with respect to the relationship between intergovernmental organizations and NGOs, it is a relationship between “bureaucracy and the free spirits.”<sup>454</sup> Of course, the relatively freewheeling nature of NGO culture does make NGOs capable of connecting with individuals and groups at the grassroots level of recipient countries, an ability that is often cited as a key reason for the increased use of NGOs as aid providers.<sup>455</sup> At the same time, this quality may make NGOs less likely to engage in self-evaluation or to develop a culture of accountability to support the rational and successful provision of aid.

Multiple studies over several decades have indicated that NGOs do not effectively evaluate the success of their own programs and are even “hostile to learning.”<sup>456</sup> Many organizations take as “articles of faith” the assumption that they are effective in reaching the poor, fostering grassroots participation, using money wisely, and employing innovative approaches—all of which can be questioned as an empirical matter.<sup>457</sup> In addition, they tend to view measures of accountability, in the form of benchmarks and standards, as impossible in the area of providing aid, where success is very

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451. Smillie, *Change in Mind-set*, *supra* note 90, at 185.

452. *See International Response*, *supra* note 100.

453. Gordenker & Weiss, *supra* note 23, at 34.

454. Antonio Donini, *The Bureaucracy and the Free Spirits: Stagnation and Innovation in the Relationship Between the UN and NGOs*, in *GLOBAL GOVERNANCE*, *supra* note 79, at 83.

455. *See Smillie, Change in Mind-set*, *supra* note 90, at 185.

456. *See Smillie, At Sea in a Sieve?*, *supra* note 23, at 21-24.

457. *See id.*

difficult to measure.<sup>458</sup> Such a position may mean, however, that they fail to impose any form of internal accountability at all.<sup>459</sup>

In recent years, NGOs have taken some measures to assess critically the effectiveness of their aid efforts. For example, they have formed coordination networks, such as InterAction in the United States, to ensure that aid is distributed in emergency situations in a way that does not lead to waste and duplication.<sup>460</sup> These networks have also developed codes of conduct for NGOs within their networks. For example, the InterAction code lays out a set of “PVO standards” that NGOs voluntarily follow.<sup>461</sup> Similar codes have been promulgated by other NGO networks.<sup>462</sup> Yet these codes are often replete with “platitudes and generalities, with no mention whatsoever of compliance, monitoring, complaints procedures, and verification.”<sup>463</sup> Thus, despite these efforts, the institutional culture of NGOs is unlikely to foster robust accountability with regard to efficient, nonarbitrary administration of government services.

*b. For-Profit Firms*

In contrast to NGOs and government agencies that are steeped in international human rights and humanitarian law, for-profit groups are far less likely to have an institutional culture focused on accountability for violations of norms of human dignity. This difference partly reflects the obvious point that for-profit companies are motivated by profit rather than a sense of “mission.” And because for-profit firms pay higher salaries than NGOs and government agencies, individual employees are less likely to be motivated primarily by passion and respect for the values inherent in the provision of aid and services.

It is true, of course, that in recent years the corporate responsibility movement has sought to change corporate culture to increase

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458. *See id.*

459. *See id.*

460. *See* INTERACTION, PRIVATE VOLUNTARY ORGANIZATION STANDARDS, <http://www.interaction.org/pvostandards> (last visited Sept. 20, 2005).

461. *See* Smillie, *At Sea in a Sieve?*, *supra* note 23, at 24.

462. *See id.*

463. *See id.*

respect for human rights. For example, corporations have engaged in voluntary self-regulation, promoted internal education, and agreed to abide by international human rights norms.<sup>464</sup> More research is needed, however, to assess whether these efforts have produced concrete effects within corporate bureaucracies. Certainly, just as there are a variety of NGOs, corporations vary considerably and have disparate institutional cultures.<sup>465</sup> In addition, as in the military context, many of the individuals who join for-profit aid organizations spent time working in the government sector, so there is a good degree of permeability between the two cultures. As a whole, however, for-profit companies are likely to be less attentive to the norms of human rights, international humanitarian law, and anticorruption as a core feature of their activities. It is not surprising, then, that corporate aid providers have been implicated in human rights abuses on several occasions, such as the DynCorp sex trafficking scandal in Bosnia discussed above.<sup>466</sup>

By contrast, the for-profit corporate world is far *more* likely than NGOs or government bureaucracies to have a culture that values rational and nonarbitrary management of programs. Likewise, for-profit corporations are more likely to impose institutional sanctions for the failure to meet performance targets. Here, the profit motive, channeled through the discipline of the market, helps to enforce a degree of rational management of programs and to ensure accountability for failure to do so.<sup>467</sup>

Of course, there are instances in which the market fails to exercise the requisite discipline, particularly when conditions of competition and perfect information do not exist. For example,

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464. See Ratner, *supra* note 119, at 531-34; see also Kinley & Tadaki, *supra* note 124, at 952-58.

465. See, e.g., Jem Sponzo, Corporate Social Responsibility in Nigeria 2-6 (2004) (unpublished manuscript on file with author).

466. See Yeoman, *supra* note 45.

467. For example, in the health care context, advocates of privatization argue that private managed care organizations will have an incentive to cut costs and waste, which will lead to better care; for example, such organizations will be inclined to promote preventive treatments. Such arguments might be construed as claims that private firms operating under the discipline of the market will have greater incentives to act in a rational and nonarbitrary way than bureaucracies. See, e.g., Robert A. Berenson & Dean M. Harris, *Using Managed Care Tools in Traditional Medicare—Should We? Could We?*, 65 LAW & CONTEMP. PROBS. 139, 143-44 (2002).

undisclosed no-bid cost-plus contracts are subject to monopoly pricing and waste because the accountability imposed by the market is greatly reduced (or eliminated). Nevertheless, for-profit companies that enter into government contracts are more likely to maintain some mechanisms of institutional accountability to ensure the rational provision of services.

Much more work is needed to analyze with precision the various types of organizations that provide foreign aid and the institutional cultures that these organizations bring to the job. Only by doing so can we identify which organizations are most likely to do the job (or at least some aspects of it) well and which may require additional monitoring or incentives to be truly effective. Ultimately, if governments are going to continue doling out foreign aid through private contractors, they should know more about those contractors and the internal institutional accountability they bring to the job.

#### CONCLUSION

The past two decades have seen a quiet revolution in the way the United States and other countries act abroad. Privatization, long a fixture of the domestic American scene, has gone global. International law scholars must take up the challenge of privatization by studying it as a distinct phenomenon, with its own particular obstacles and opportunities. Merely arguing that formal international law instruments should be expanded to apply to private contractors is not enough. Given the weak enforcement mechanisms of international law, such a strategy, though necessary, is likely to have only limited impact.

This Article has therefore proposed a different approach. Drawing on the extensive domestic administrative law literature on privatization, this Article has sought to identify an array of accountability mechanisms that might provide additional strategies for retaining crucial public values in an era of private contracting. First, with regard to legal accountability, despite the state-centered focus of international law, private contractors may still be sued under the Alien Tort Claims Act (with its more relaxed conception of state action), prosecuted in domestic courts for violating ordinary criminal law statutes, and subjected to municipal contract or tort remedies.

Second, mechanisms to ensure some measure of democratic accountability—conceived broadly to include accountability to those most affected by the governmental acts—could be built into the contracts that are the engine of privatization. Third, a wide variety of contractual terms—from specific benchmarks, to training and other procedural requirements, to compliance regimes—can be included in government contracts and then enforced by a combination of government oversight, independent monitoring, and new industry standards. Fourth, the internal institutional culture of bureaucratic, corporate, and organizational entities can be harnessed and shaped to encourage compliance with public norms. Finally, each of these approaches can be used to reinforce the others.

None of these mechanisms is perfect, however. The legal avenues remain regrettably meager, democratic participation requirements (even limited ones) may be unwieldy and normatively unpalatable, contract compliance and oversight are expensive and often unsuccessful, and internal institutional accountability may or may not have a substantial disciplining effect. And of course, any attempt to build mechanisms of public accountability into a privatization regime threatens to wipe out the purported efficiency gains of privatization altogether.

Yet, for international law scholars who must grapple daily with the limited enforcement power of international legal institutions, privatization actually provides an important opportunity because the moment of contracting is always a moment when oversight is possible. Scholars could conceive of the contract relationship as the creation of a trust, in which the trustee contractor is accountable to both the government that authorizes the trust and the beneficiaries who are most affected. Such creative use of private law principles may even provide greater avenues of accountability than the application of public international law norms to state actors.

Most important, both administrative law and international law scholars must enter into a creative dialogue with each other. They must recognize that the privatization of foreign affairs is now an entrenched trend around the world. Together they must develop possible approaches for holding private contractors accountable for their actions. Only through a systematic understanding of privatiza-

tion in the international sphere can public norms and values be maintained in a world of government for hire.