

# MILITARY LAWYERS, PRIVATE CONTRACTORS, AND THE PROBLEM OF INTERNATIONAL LAW COMPLIANCE

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## I. INTRODUCTION

It is by now no secret that the United States government depends on private contractors to guard military facilities, es-

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cort convoys, conduct interrogations, train soldiers, and provide logistical support.<sup>1</sup> Indeed, by 2008 the ratio of contractors to uniformed troops in Iraq was approximately 1 to 1,<sup>2</sup> and this ratio is likely to increase further as the U.S. military draws down its forces there. Meanwhile, contractors remain a significant part of the U.S. government's operations elsewhere and are likely to be a continuing presence for the foreseeable future.<sup>3</sup>

Private military contractors have been implicated in multiple instances of human rights violations, corruption, and waste.<sup>4</sup> Yet, private contractors are likely to become a perma-

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1. Not surprisingly, this trend has spawned a burgeoning literature. *See, e.g.*, DEBORAH D. AVANT, *THE MARKET FOR FORCE* (2005); LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE* (forthcoming 2010) [hereinafter DICKINSON, *OUTSOURCING WAR AND PEACE*]; *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* (Jody Freeman & Martha Minow eds., 2009); PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007); Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 *YALE J. INT'L L.* 383 (2006); Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, WM. & MARY L. REV. (2005); P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military*, in *FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES* (Simon Chesterman & Chia Lenhardt eds., 2007).

2. CONG. BUDGET OFFICE, *CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ* 8, 13 (2008), available at <http://www.cbo.gov/ftpdocs/96xx/doc9688/08-12-IraqContractors.pdf>.

3. *See* MOSHE SCHWARTZ, CONGRESSIONAL RESEARCH SERVICE, *DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS* 9-10 (2008), available at <http://www.fas.org/sgp/crs/natsec/R40764.pdf> (noting that the percentage of DOD contractors in Afghanistan exceeded the percentage deployed in any conflict in U.S. history).

4. For example, when stories surfaced that U.S. military personnel had abused detainees at Abu Ghraib prison in Iraq, it soon became clear that private contractors employed by CACI, Inc. and working under an agreement with the Department of the Interior had participated in the abuse. *See* MAJ. GEN. ANTONIO TAGUBA, *ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE*, 26, 36, 48 (2004) (discussing the involvement of CACI employees at Abu Ghraib); SEYMOUR M. HERSH, *CHAIN OF COMMAND* 32-34, 61 (2004); Joel Brinkley & James Glanz, *Contractors in Sensitive Roles, Unchecked*, *N.Y. TIMES*, May 7, 2004, at A15 (noting that two contract workers were implicated in the prison abuses). Outside the human rights context, Kellogg Brown & Root'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." Warren Hoge, *U.N. Criticizes Iraq Occupation Oil Sales*, *N.Y. TIMES*, Dec. 15, 2004, at A21. In addition, the chief

ment part of the military landscape. Indeed, in testimony before Congress in January 2007, General David Petraeus made clear that the U.S. military would not be able to function in Iraq at all without contract security personnel.<sup>5</sup>

The key question, therefore, is not, should there be contractors but rather, how can we make it more likely that contractors will respect core human rights norms? And on this question, it will not be sufficient merely to focus on the degree to which these contractors are formally governed by international and domestic law. Certainly there are some gaps in our current legal framework that could usefully be amended to address the rise of contractors.<sup>6</sup> But the problem is much less about the formal legal framework and much more about the subtle ways in which norm compliance actually operates on the ground. After all, legal rules are often followed not because of the formal existence of a norm, but because of more inchoate processes involving how much the legal norm is internalized by relevant actors. This is particularly true with regard to international law, which is less likely to be enforced through the use of coercive force.

Accordingly, instead of focusing solely on reforming formal international legal norms to make them better apply to contractors, we need to understand how international legal norms are currently inculcated within the uniformed military, and then see whether those institutional structures are less

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civilian contracting official for the Army Corps of Engineers has publicly accused the Army of granting preferential treatment to KBR (through its parent company, Halliburton) in awarding contracts in Iraq and Bosnia, in violation of U.S. contracting regulations. 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. For a broader discussion of the threats contractors may pose to public law values, see generally DICKINSON, *OUTSOURCING WAR AND PEACE*, *supra* note 1.

5. *Nomination of Lt. Gen. David H. Petraeus to be General and Commander, Multi-National Forces, Iraq: Hearing Before the S. Comm. on Armed Services*, 110th Cong. (2007) (statement of Gen. Petraeus), available at [http://dpc.senate.gov/dpcdoc.cfm?doc\\_name=or-110-1-13#Link3](http://dpc.senate.gov/dpcdoc.cfm?doc_name=or-110-1-13#Link3) (“[T]here are tens of thousands of contract security forces and ministerial security forces that do in fact guard facilities and secure institutions and so forth that our forces . . . would otherwise have to guard and secure, and so that does give me reason to believe that we can accomplish the mission in Baghdad. . .”).

6. For a longer discussion of possible reforms, see DICKINSON, *OUTSOURCING WAR AND PEACE*, *supra* note 1.

present (or indeed are undermined entirely) in the private military context. This article draws on qualitative empirical data to begin addressing these issues. I summarize conclusions drawn from a series of interviews I conducted with U.S. military lawyers in the Judge Advocate General (JAG) Corps.<sup>7</sup> These lawyers, embedded with troops in combat and consulting daily with commanders, have, to a large degree, internalized the core values inscribed in international law—respect for human rights<sup>8</sup> and the imposition of limits on the use of force<sup>9</sup>—and seek to operationalize those values. Of course, the lawyers are not always successful, and it would be simplistic to assume that their accounts prove that the U.S. military always obeys international law. But their stories strongly indicate that the presence of lawyers on the battlefield can help produce military decisions that are more likely to comply with international legal norms.

Drawing on this study, I suggest that differences in organizational structure and institutional culture (and not just differences in the applicable legal regime) may be principal reasons that the rise of private military firms threatens core rule of law values. In particular, the use of contractors may jeopardize certain aspects of military culture, both because the intermingling of contractors and uniformed troops on the battlefield

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7. For a more detailed account of this interview data, see DICKINSON, *OUTSOURCING WAR AND PEACE*, *supra* note 1.

8. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Preamble, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

9. *See, e.g.*, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter “Geneva Convention I”]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter “Geneva Convention II”]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter “Geneva Convention III”]; 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 “Geneva Convention IV”]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter “Additional Protocol I”]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter “Additional Protocol II”].

may weaken public values within the military, and because contractors operating outside the military chain of command may themselves develop a different organizational culture and set of values that come to predominate in conflict and post-conflict situations as contractors assume ever-greater responsibilities. Thus, if we are to address how to maintain public law values in an era of privatization, we must take seriously the question of organizational structure and culture, its importance, and the ways it might be shaped.

Part II of this article draws on my study of JAG lawyers operating in Iraq to focus on the role that organizational structure has played in the effectiveness of these attorneys. Part III then describes ways in which this military culture is undermined in the context of private military contractors. Part IV takes up the daunting question of how we might go about trying to reform the organizational structure and institutional culture within these contractor firms.

By taking issues of organizational structure and institutional culture seriously, we can see that fostering greater compliance may sometimes be less a matter of writing new treaty provisions or increasing the activity of international courts and more a matter of subtly influencing organizations and the norms they inculcate. And while such a task is extraordinarily difficult, it is only by focusing on such organizational reforms that we can begin to address a world where states are not the only relevant agents of international law compliance and where private corporations with radically varying institutional structures are frequently the agents of human rights protection or violation.

## II. MILITARY LAWYERS ON THE BATTLEFIELD

Organizational theorists have long recognized that group norms and internal organizational structures can further (or hinder) an organization's goals, as well as the goals of individuals within organizations.<sup>10</sup> Of particular importance to this

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10. *See, e.g.*, THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991) [hereinafter NEW INSTITUTIONALISM]; ORGANIZATIONAL ENVIRONMENTS: RITUAL AND RATIONALITY (John W. Meyer & W. Richard Scott eds., updated ed. 1992) [hereinafter ORGANIZATIONAL ENVIRONMENTS]; ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND (Oliver E. Williamson ed., 1995) [hereinafter

article's analysis is the question of how best to ensure that compliance agents within an organization—such as lawyers—can most effectively bring about compliance with central rules and values of the firm as well as various public norms. Significantly, organizational theory suggests such agents will tend to be most effective under the right conditions: (1) the accountability agents must be integrated with other, operational employees; (2) the agents must have a strong understanding of, and sense of commitment to, the rules and values being enforced; (3) they must be operating within an independent hierarchy; and (4) they must be able to confer benefits or im-

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ORGANIZATION THEORY]; JAMES G. MARCH, DECISIONS AND ORGANIZATIONS (1988); JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS (2d ed. 1958); W. RICHARD SCOTT, ORGANIZATIONS (5th ed. 2003); HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR (2d ed. 1957); SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM (1984); Edward L. Rubin, *Images of Organizations and Consequences of Regulation*, 6 THEORETICAL INQUIRIES L. 347 (2005).

Of course, these theorists are a diverse bunch, and they span multiple disciplines. See, e.g., Rubin, *supra* (surveying the literature). In law, organization theory is most associated with scholars who study the role of professionalization and professional organizations on the activity of lawyers. See, e.g., ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION (Deborah Rhode ed., 2000); RICHARD L. ABEL, AMERICAN LAWYERS (1991). Other significant scholarship utilizing organizational theory can be found in: economics, see, e.g., DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990); OLIVER WILLIAMSON, THE MECHANICS OF GOVERNANCE (1996); sociology, see, e.g., ORGANIZATIONAL ENVIRONMENTS, *supra*, at 261; political science, see, e.g., Terry M. Moe, *The Politics of Structural Choice: Toward a Theory of Public Bureaucracy*, in ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 116 (Oliver E. Williamson ed., 1990); and anthropology, see, e.g., Mary Douglas, *Converging on Autonomy: Anthropology and Institutional Economics*, in ORGANIZATION THEORY, *supra*, at 98. These varied theorists also study a variety of institutional settings, from corporations and private associations to public bureaucracies. See, e.g., Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, in ORGANIZATION THEORY, *supra*, at 154; Edward Rock & Michael Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619 (2001); ABEL, *supra*, at 143-50; MEYER & SCOTT, *supra*. Thus, it is difficult to generalize about this literature, and a detailed survey is beyond the scope of this article. Instead, I will focus on some of the core structural features within organizations that this literature has identified as important in helping to ensure a culture of compliance with external norms, such as legal rules.

pose penalties on employees based on compliance.<sup>11</sup> Uniformed military lawyers—the career judge advocates—are essentially the compliance unit within the military. These lawyers work to ensure that commanders and troops obey the rules of engagement, which are the rules that operationalize the law of armed conflict in a particular war or occupation. The core public value undergirding this body of law is the principle that the use of force, even in an armed conflict, must be limited. Specifically, troops may not target civilians, and the use of force must be proportional to the risk or danger present. Military lawyers are essential to inculcating this public value into military culture.

Interviews with more than twenty uniformed military lawyers who served primarily in Iraq and Afghanistan indicate that the current military structure includes all four elements of a successful compliance unit that were discussed above.<sup>12</sup> Judge advocates mingle with operational employees, the commanders and troops on the battlefield. They help devise the rules of engagement and train troops in those rules, both before they deploy and on the battlefield. At the same time, they provide ongoing advice to commanders and commanders' staff on the battlefield. As a consequence, the legal rules they seek to enforce become more salient throughout the organization. And the lawyers report that they frame the rules using language that describes those rules as supporting the broader goals of the organization: military effectiveness. These lawyers describe a strong sense of commitment to these rules and the values that underlie them. And while the uniformed lawyers face some challenges in establishing credibil-

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11. I draw these factors generally from TAYLOR, *supra* note 10, and Rubin, *supra* note 10, though neither work lays the four factors out in precisely this formulation.

12. I interviewed twenty judge advocates, most of whom had served in either Iraq or Afghanistan (or both) during the previous five years and who had encountered private military contractors. I received permission from the Army JAG School in Virginia, and many of the interviews were conducted at the school in April 2007. Most of the interviewees had been in the JAG Corps for approximately eight years and were at the school for their second round of training. Several additional judge advocates were identified for interview through the so-called snowball method: they were mentioned by one or more of the initial interviewees. A few had served in other conflicts, including the first Persian Gulf war and the conflict in the Balkans in the 1990s.

ity, an independent chain of command—which obliges the lawyers to report incidents, serves as a basis for supplemental guidance in the field, and governs a promotion scheme that is separate from that of operational employees—helps bolster the lawyers' independence and objectivity. Furthermore, uniformed lawyers play a key role in ensuring that commanders impose sanctions on rule breakers within the military justice system. These sanctions include both administrative penalties such as a loss in pay or rank, as well as more severe criminal sanctions. Of course, even having all of these organizational features in place is no guarantee of norm compliance, but there is evidence to suggest that the military lawyers do exert a very real impact on military operations. My interview data is described in far more detail elsewhere,<sup>13</sup> but here I underline four basic elements of organizational structure in the U.S. military that seem most relevant to creating an effective culture of compliance with international law norms.

A. *Integration of Accountability Agents with Operational Employees*

The U.S. military has, since Vietnam, vastly expanded the role of judge advocates in the field. Judge advocates now serve alongside commanders on the battlefield, giving advice on a range of issues from troop discipline to fiscal decision-making to vetting targets to interpreting rules of engagement. Indeed, during the Iraq war the army has actually further developed the role of the judge advocates. Accordingly, military lawyers who once served primarily at the higher, division level and above, now work with commanders in the field down to the brigade level.

Judge advocates based in Iraq and Afghanistan describe assuming a wide variety of roles: they might investigate, prosecute, or defend soldiers in criminal matters or matters of military discipline, train troops on emerging issues involving the rules of engagement, and provide a range of operational legal advice to commanders. The precise set of legal questions addressed depends in part, of course, on the level of the assignment. The division level, for example, includes multiple lawyers who are likely to specialize in particular areas of law, all

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13. See DICKINSON, *OUTSOURCING WAR AND PEACE*, *supra* note 1, ch. 6.

reporting to a division judge advocate who supervises the lawyers and provides advice to the division commander. At the brigade level, in contrast, there are usually only one or two lawyers handling all matters that might arise.

Importantly, the JAG lawyers are supposed to be directly consulted on a wide variety of operational decisions. As one judge advocate who served in Baghdad described it, “All targets are supposed to be cleared through us.”<sup>14</sup> And, as he further noted, “It’s a big job because you can’t shoot at a lot of stuff in Baghdad.”<sup>15</sup> Another judge advocate reported that “[the operational law issues that arose] tended not so much to be targeting issues but rather issues related to troops in contact [with civilians], and self defense.”<sup>16</sup> As an example, this judge advocate described an incident in which “a Bradley [tank] was hit by a . . . car bomb”:

Everyone survived. They left the weapons and the documents in the back of the car. There were some tough decisions to make. . . . Some people were looking at taking the weapons and wanted to know whether under the ROE [Rules of Engagement] we were allowed to do it. [I determined that it was permissible under the ROE of the time]. I helped the commander with the decision matrix.<sup>17</sup>

This judge advocate further observed that, “Not all situations are rehearsed; you can’t train for everything. That’s why it was important that I was on the scene. You involve yourself in the fight.”<sup>18</sup>

Training is also an important part of the operational role. As one judge advocate noted, the training pre-deployment is “extensive.”<sup>19</sup> And as another put it, “We spend a lot of time training up our kids. . . . They get [the rules of engagement] beaten into their heads at the start,” before they deploy.<sup>20</sup> “Then, they get more training in Kuwait,” just before they

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14. Interview with JAG Officer #7 (Oct. 17, 2007).

15. *Id.*

16. Interview with JAG Officer #8 (Oct. 16, 2007).

17. *Id.*

18. *Id.*

19. *Id.*

20. Interview with JAG Officer #7 (Oct. 17, 2007).

enter the theater.<sup>21</sup> And when they are on the battlefield, they receive yet more training in the appropriate limits on the use of force. Moreover, at each stage, the training goes beyond a recitation of the rules and involves detailed discussion (and sometimes role-playing) about specific scenarios likely to arise on the particular battlefield in question. As one judge advocate described, it's not merely training in the classroom: "We go through scenarios, we practice, and see what happens."<sup>22</sup> The judge advocates also give updated refresher courses to troops in theater and revise both the training scenarios and the rules of engagement themselves to reflect conditions on the ground.

Significantly, this intense integration of lawyers with officers and troops on the battlefield appears to be essential to the lawyers' ability to inject legal norms and values into the decision-making process. Indeed, the lawyers emphasize that their position on the battlefield gives them the opportunity to interact with officers and troops at the moment that decisions are made, and the lawyers are also in the room when commanders and staff lay out battle plans.

Moreover, according to the judge advocates, the integration of lawyers and troops enhances the lawyers' credibility, because it demonstrates they are participating in a common mission; although they are lawyers, they are soldiers first and foremost. As one judge advocate noted, "When you're a JAG at the brigade level, you have to assume a soldier role, not just a lawyer role. You don't earn trust unless you do the soldier part."<sup>23</sup> As this judge advocate emphasized, "We used to look at the lawyers like the doctors," who didn't play a combat role. But now, "the lawyers sit in the room" when the combat decisions are made: "When there's a military decision-making process in place, the lawyer should be there. If you are involved, everyone can see the value added. The staff and the commander see you as part of the team rather than a weenie lawyer."<sup>24</sup>

Indeed, many judge advocates noted that prior combat experience before becoming a lawyer helped them to build

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21. *Id.*

22. Interview with JAG Officer #8 (Oct. 16, 2007).

23. Interview with JAG Officer #5 (Oct. 16, 2007).

24. *Id.*

trust with commanders and their staffs once they assumed the role of lawyer. And a number of judge advocates specifically stressed the need to go out in the field with troops and be with them in dangerous situations. As one lawyer explained, “If [there was an issue involving] troops in contact, if [there was a] developing situation, my job was to be there, . . . not in the back . . . listening to the radio waiting until something happened.”<sup>25</sup>

It is precisely this kind of co-mingling of accountability agents and operational employees that, according to organizational theory, increases the effectiveness of these agents. Instead of being walled off from the rest of the organization, judge advocates speak with commanders and their staffs about the rules of engagement every day in the thick of battle, thereby increasing general awareness of the importance of these rules, as well as engaging in discussions about how best to interpret them. As one judge advocate recounts, “My brigade commander was brilliant, and he expected alternative views. . . . If an IED went off, and we were going to respond, he wanted to know, ‘Is it a good shoot or a bad shoot.’ . . . [And if] I had concerns, he listened to me.”<sup>26</sup> This kind of integral involvement of lawyers in core decisions gives greater depth and meaning to the legal rules.

To be sure, the judge advocates face challenges in building credibility and rapport in the field. As one noted, “Some people see lawyers as difficult. . . . [So, they engage in] tough guy banter, and make lawyer jokes. They see lawyers as making us less effective.”<sup>27</sup> Another acknowledged that, in the field, commanders and staff only include judge advocates in the decision-making process “50 percent of the time.”<sup>28</sup> In addition, there is the problem of “forum shopping: [A commander or staff officer might] request an opinion from three different JAGs.”<sup>29</sup>

For these reasons, one judge advocate, a professor at the Army’s Judge Advocate School, noted that the school actually

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25. *Id.*

26. Interview with JAG Officer #5 (Oct. 16, 2007).

27. Interview with JAG Officer #2 (Oct. 16, 2007).

28. Interview with JAG Officer #18 (Feb. 12, 2007).

29. Interview with JAG Officer #6 (Oct. 16, 2007).

teaches “building rapport.”<sup>30</sup> The professors emphasize in the classroom that “all law is in an operational environment.”<sup>31</sup> Each judge advocate should, therefore, seek to:

build a relationship with everyone in [the commander’s] staff. Hopefully, they come to you. Hopefully they do it before they take action. Hopefully you’ve vetted [their plans]: you can say something like, “All three causes of action look legal, [but the third is riskier from a legal perspective].”<sup>32</sup>

Putting such advice into action, one judge advocate described his approach in similar terms: “If there were three options on the table, and all were legal, I might say something like, ‘This option is close to the line, this one is safe, and this one is in the middle. As long as the option is legal, I’m there to ensure you accomplish the mission.’”<sup>33</sup>

Thus, we see the judge advocates carefully translating their legal advice into operational terms, making it clear to commanders that the JAG’s job is not to say “No,” but rather to help their commanders achieve their objectives for the mission. As one judge advocate put it, “You can’t be Dr. No.”<sup>34</sup> Even if a particular course of action posed legal problems, “our job was to give an alternative course of action that would accomplish the goal without the legal concerns.”<sup>35</sup> As another judge advocate put it, “[I] wanted to help my commander get to yes.”<sup>36</sup> Similarly, another reported that his job was “finding a way to yes . . . your first response shouldn’t be no.”<sup>37</sup> Rather, “you should think, ‘How can I help my commander accomplish the objective?’”<sup>38</sup> If there’s a legal problem, “then you say, ‘OK you want to do x, but why do you want to do x—maybe it’s better to try something else.’”<sup>39</sup>

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30. *Id.*

31. *Id.*

32. *Id.*

33. Interview with JAG Officer #8 (Oct. 16, 2007).

34. *Id.*

35. *Id.*

36. Interview with JAG Officer #2 (Oct. 16, 2007).

37. Interview with JAG Officer #3 (Oct. 16, 2007).

38. *Id.*

39. *Id.*

B. *Commitment of Accountability Agents to Legal Rules and Underlying Values*

The judge advocates expressed a strong sense of commitment to the legal rules applicable in theater and the underlying values they reflect. Indeed, they seem to see their role as the guardians of ethics within the military, and all those interviewed tended to describe their role in similar terms. Thus, one judge advocate said that uniformed lawyers have an “ethical duty” to protect the applicable rules and laws, including the rule regarding the use of force.<sup>40</sup> Another reported that “JAGs in the army push to inject ethics” into the conduct of a military conflict.<sup>41</sup> Indeed, “when [your] job is to fight and kill, you try to do it with some sense of integrity . . . you want the army to be able to say that.”<sup>42</sup> A third judge advocate described his role as standing for “integrity and to be the commander’s conscience, . . . not like an inspector general but rather an internal conscience.”<sup>43</sup> And yet another said, “We’re the organization’s ethics counsel.”<sup>44</sup>

This ethical role is viewed as having both an internal and external component: it encourages integrity within the military, and it also advances the military’s mission in the eyes of the broader public in the United States and elsewhere in the world. As one judge advocate expressed:

The linchpin that holds us together at the end of the day is that the rule of law has to exist where citizens believe in equal protection, fairness, equity, justice. [We] make sure it exists within the military, and through leverage within our own organization to other countries we’re trying to help, from demonstration.<sup>45</sup>

With respect to the internal culture, another judge advocate noted that “sometimes JAGs get jaded. . . . [They see] all the crap . . . that there are criminals, child molesters, and child pornographers in the military” just like everywhere else.<sup>46</sup>

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40. Interview with JAG Officer #2 (Oct. 16, 2007).

41. Interview with JAG Officer #5 (Oct. 16, 2007).

42. *Id.*

43. Interview with JAG Officer #2 (Oct. 16, 2007).

44. Interview with JAG Officer #8 (Oct. 16, 2007).

45. Interview with JAG Officer #4 (Oct. 16, 2007).

46. Interview with JAG Officer #5 (Oct. 16, 2007).

This lawyer emphasized that the judge advocate's role is important so that the military itself as well as the broader public can see that the organization is "not controlled by criminals."<sup>47</sup> Thus, when a general testifies in Congress, "we want to be able to say we do everything right . . . [and take] the moral high ground."<sup>48</sup> As another judge advocate stressed, "[W]e can only fight the global war on terror by holding onto our core values, [and by] establishing the rule of law."<sup>49</sup>

### C. *The Need for an Independent Hierarchy*

Judge advocates describe another feature that enhances their effectiveness in the field: the ability to seek what they call "top cover" through an independent chain of command within the JAG corps. This path of alternate authority, separate from the commander to whom the judge advocate is assigned, provides a backup in cases when a commander may be reluctant to listen to the assigned judge advocate. Thus, a judge advocate working with a brigade commander, for example, might seek the advice of a judge advocate at a higher level in the chain of command, such as the staff judge advocate assigned to the division commander (to whom the brigade commander reports). As one judge advocate noted:

[You might seek] top cover if you want higher-level support. It's common if your commander doesn't seek your advice, or if you advise your commander that the course of action he wants to take is a violation of law. It's relatively common for a judge advocate at the brigade level, for example, to seek advice from the lawyer at the division or corps level and ask, 'Could you look at this and see if I'm right?'<sup>50</sup>

This judge advocate emphasized, however, that the practice "could be abused if the judge advocate routinely seeks such opinions."<sup>51</sup>

Numerous other judge advocates described using the practice of top cover. One judge advocate explained, "We do have a system [within the judge advocate's corps] . . . [in

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47. *Id.*

48. *Id.*

49. Interview with JAG Officer #4 (Oct. 16, 2007).

50. Interview with JAG Officer #6 (Oct. 16, 2007).

51. *Id.*

which] your commander's commander has a lawyer."<sup>52</sup> This judge advocate noted that it is sometimes helpful "to talk to lawyers at higher headquarters."<sup>53</sup> The more senior lawyer can provide further ammunition in arguments with the commander or, through the senior lawyer's commander, influence the lower-level commander. As one judge advocate recounts, "If I disagreed with my commander, I could go to the division staff judge advocate, who was a friend."<sup>54</sup> He explained that "talking to the division staff judge advocate" was most useful if "you had a horrible relationship with your commander or you disagreed."<sup>55</sup> And though he acknowledged that "the staff judge advocate might say that you're wrong," he also said that "if you're right, the staff judge advocate could talk to the brigade commander."<sup>56</sup>

The ability to report incidents up an independent chain of command appears to give judge advocates extra leverage in trying to persuade commanders to follow a particular course of conduct. For example, one judge advocate described how his ability to report independently helped him convince a reluctant commander to report an incident of potential abuse. As this judge advocate noted, "You can go through the divisional chain, if you need to. . . . Sometimes you can win an argument [with the commander] if you say you have to report. . . . You may burn a bridge, but it's necessary."<sup>57</sup> According to this judge advocate, though it was "understandable" that the commander did not want to report, "I told him I had to report it up to the division, and he understood."<sup>58</sup>

Finally, it is significant that performance reviews and promotion decisions regarding individual judge advocates are primarily the responsibility of senior uniformed lawyers, not the commander for whom the judge advocate is working. According to the judge advocates, the commanders to whom they are assigned do provide performance evaluations. But, in addition, the more senior supervising judge advocate in the field also contributes an important evaluation. As one judge advo-

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52. Interview with JAG Officer #12 (Oct. 16, 2007).

53. *Id.*

54. Interview with JAG Officer #5 (Oct. 16, 2007).

55. *Id.*

56. *Id.*

57. Interview with JAG Officer #1 (Oct. 16, 2007).

58. *Id.*

cate noted, “I worked directly for G3 [my commander], but my rating chain of command was through the Supervising Judge.”<sup>59</sup> This structure helps insulate the judge advocates and gives them a greater sense of independence.

#### D. *The Importance of Authority to Impose Sanctions*

In protecting the public values that are embedded in military rules, judge advocates wield a strong stick: they have the ability to investigate soldiers who violate those rules and, in appropriate cases, to recommend that those soldiers be brought before courts in the military’s internal justice system, where they may be tried and punished. Indeed, the ability of uniformed military lawyers to refer miscreants to this system is one of the most significant differences between judge advocates and corporate counsel or other organizational accountability agents, who lack the ability to invoke a criminal justice system internal to their organization. Corporations and bureaucracies do not have their own criminal courts. Corporate counsel typically do not have the authority to recommend that employees be penalized within the organization for rule infractions—and in most cases may not even disclose such infractions to civilian criminal authorities. The closest analogy would be to corporations or bureaucracies that have internal dispute resolution mechanisms that can impose non-criminal sanctions on employees who break the rules.

The uniformed military lawyer’s ability to invoke the internal military justice system extends not merely to criminal acts, but also to acts in violation of military rules that would, while not ordinarily rising to the level of a crime, undermine military discipline.<sup>60</sup> Accordingly, in any given case a judge advocate can recommend that a commander initiate either a general court-martial procedure, which allows for the full range of penalties including jail time, or a more abbreviated Article 15 proceeding, which permits weaker administrative

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59. Interview with JAG Officer #7 (Oct. 17, 2007).

60. See, e.g., 10 U.S.C. § 889 (2006) (disrespect toward superior commissioned officer); 10 U.S.C. § 892 (2006) (failure to obey any lawful general order or regulation); 10 U.S.C. § 912 (2006) (drinking on duty); 10 U.S.C. § 915 (2006) (malingering).

penalties,<sup>61</sup> such as reductions in pay or rank, or dishonorable discharge.<sup>62</sup> The judge advocates are therefore central enforcers of military discipline. In the field, judge advocates are present at all stages of the law: they seek to shape behavior in advance by advising commanders, staff, and troops. And when violations occur, they can initiate punishment.

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It is, of course, impossible to say for certain how effective the four organizational features summarized above actually are in protecting public law values on the ground, and the perceptions of the judge advocate lawyers interviewed are bound to be somewhat self-serving. Nevertheless, my study does shed some light on this question. For example, one measure of whether judge advocates help protect public values (such as the rules limiting the use of force) is whether they are actually able—at least on occasion—to guide commanders away from behavior that would undermine those values. While judge advocates take care not to describe their role as saying “no” to commanders, many were able to give examples of cases in which they had been able to persuade commanders not to follow a particular course for legal reasons. As one judge advocate observed, in most circumstances in which a legal issue arises, “It’s a plan that’s just not well thought out, so . . . you try to work around the problem.”<sup>63</sup> Another judge advocate recounted advising his commander to take a more restricted response after an IED went off at the base.<sup>64</sup> Likewise, on another occasion a commander wanted to respond to a hand grenade attack, and the judge advocate reports, “I did not say ‘no,’ [but rather] I said [the response] was not legal.”<sup>65</sup>

To be sure, the judge advocates described difficulties that might arise in steering commanders away from legally questionable actions. A number of judge advocates brought up the

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61. See 10 U.S.C. § 815 (2006) (authorizing commanding officers to impose certain disciplinary punishments for minor offenses without the intervention of a court-martial).

62. See 10 U.S.C. §§ 815, 856, 858 (2006) (discussing possible court-martial and administrative penalties).

63. Interview with JAG Officer #3 (Oct. 16, 2007).

64. Interview with JAG Officer #5 (Oct. 16, 2007).

65. *Id.*

case of Haditha, an incident from 2005 in which marines allegedly fired unprovoked on Iraqi civilians as revenge after their compatriot was killed by a roadside bomb.<sup>66</sup> In that case, many of the lawyers noted that the battalion unit's lawyer, Captain Randy Stone, did not report the misconduct. As one judge advocate noted, the system "didn't work at Haditha" because the "judge advocate didn't encourage the commanding officer to investigate."<sup>67</sup> The marines ultimately court-martialed Captain Stone, as well as three other officers, including the commanding officer, Lt. Col. Jeffrey R. Chessani, of the Third Battalion, First Marines.<sup>68</sup> Although the charges against Stone (as well as two of the other three officers charged), were ultimately thrown out,<sup>69</sup> many of the judge advocates interviewed criticized him for going astray. As one judge advocate noted, "The JAG got charged for a cover-up because he didn't tell—he went native."<sup>70</sup> According to this advocate, "[Stone's] loyalty to the command trumped his ethical duty, and because he was in combat with them, it was very difficult."<sup>71</sup>

Despite some lapses, there is ample evidence that military authorities do discipline soldiers who use excessive force. For example, a recent report on detainee abuse cases concluded that one-third of the uniformed military personnel implicated in such abuse were recommended for courts-martial or other disciplinary proceedings, and most of those personnel received criminal or administrative penalties.<sup>72</sup> While the report criticizes the military for not punishing more soldiers and for failing to punish high-ranking officers, the percentage of troops punished is much higher than it is for, say, military contractors. Indeed, of twenty contractors implicated in the cases

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66. See Paul Von Zeilbauer, *Marines' Trials in Iraq Killings are Withering*, N.Y. TIMES, Aug. 30, 2007, at A1 (describing the incident and the subsequent trial); Interview with JAG Officer #5 (Oct. 16, 2007).

67. Interview with JAG Officer #2 (Oct. 16, 2007).

68. Von Zeilbauer, *supra* note 66, at A1; Interview with JAG Officer #5 (Oct. 16, 2007).

69. Von Zeilbauer, *supra* note 66, at A1.

70. Interview with JAG Officer #5 (Oct. 16, 2007).

71. *Id.*

72. HUMAN RIGHTS FIRST, BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 7 (2006), available at <http://www.humanrightsfirst.info/pdf/06425-etn-by-the-numbers.pdf>.

documented in the report, only one civilian faced criminal punishment.<sup>73</sup>

Uniformed judge advocates are also playing a broader role within the executive branch. For example, uniformed judge advocates were a powerful force behind revising Bush administration detainee treatment rules to prohibit torture and strongly criticized the limited due process protections afforded war on terror suspects brought before military commissions.<sup>74</sup> Indeed, numerous judge advocates have resigned rather than take part in proceedings before military commissions. For example, two Air Force prosecutors, Maj. John Car and Maj. Robert Preston, requested that they be reassigned rather than participate in the proceedings, having charged that fellow prosecutors were ignoring torture allegations, failing to protect exculpatory evidence, and withholding information from superiors.<sup>75</sup> More recently, Lt. Col. Darrel Vendeveld, a U.S. military prosecutor at Guantanamo, quit because his office suppressed evidence that could have cleared a client.<sup>76</sup> The interviews recounted here suggest that, at the very least, having an independent Judge Advocate General corps embedded with troops has some constraining effect by injecting public values into volatile wartime contexts.

### III. ORGANIZATIONAL STRUCTURE, INSTITUTIONAL CULTURE, AND THE PROBLEM OF PRIVATE MILITARY CONTRACTORS

By contrast, the interviews reveal that contractors largely fall outside this organizational accountability framework. While they may receive some training in the rules regarding the use of force, that training does not typically include updated advice on the battlefield about how the rules apply in

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73. *Id.* at 3.

74. For a discussion of the ways in which a military culture steeped in rules of law proved resistant to Bush administration initiatives, see Laura A. Dickinson, *Abu Ghraib: The Battle Over Institutional Culture and Respect for International Law Within the U.S. Military*, in JOHN E. NOYES, LAURA A. DICKINSON & MARK W. JANIS, *INTERNATIONAL LAW STORIES* 405 (2005) (explaining how the military often took the lead in criticizing the administration's response to Abu Ghraib and in restraining administration policies).

75. Jess Bravin, *Two Prosecutors at Guantanamo Quit in Protest*, WALL ST. J., Aug. 1, 2005, at B1.

76. *Guantanamo Prosecutor Steps Down*, BBC NEWS, Sept. 25, 2008.

specific scenarios likely to arise on that battlefield. Contractors also do not receive ongoing situational advice from military lawyers or even from private lawyers employed by the firm itself. Indeed, although the contract firms do employ lawyers, these lawyers do not typically spend time on the battlefield and do not have the same independent chain of command that is available to uniformed military lawyers. Finally, the accountability system that has applied to troops has not, at least until recently, been extended to contractors. Thus, the interviews suggest that many crucial, though subtle, mechanisms of compliance with public values are significantly weakened in the privatization process.

Judge advocates described a somewhat uneasy relationship between contractors and troops, and in particular, between security contractors and troops. Although they respected the willingness of these contractors to put themselves in danger, the judge advocates interviewed perceive security contractors to be more willing to shoot than troops and therefore worry about the impact of these contractors on the overall missions in Iraq and Afghanistan. As one judge advocate put it, "I have the impression that generally security contractors are a bunch of cowboys doing what they want, not following the rules, shooting people up," though he noted that when he left Iraq in February 2004, "I didn't necessarily have that impression at the time."<sup>77</sup> Another judge advocate described the security contractors as like "Hessians" and noted that, in particular, the "Blackwater guys were odd because they were like a paramilitary unit, comparable to mercenaries."<sup>78</sup>

Judge advocates also reported that the attitude of the contractors seemed to have a negative impact on the troops, in part because the contractors did not need to follow the same military discipline. As one judge advocate observed, "Blackwater gave the impression, 'We're going to do what we want and we don't have to follow the rules. We're not in America.'"<sup>79</sup> Such an attitude:

was bad for us because the soldiers saw it. I would talk to company commanders, with 6-9 years military experience, supervising young soldiers putting boots

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77. Interview with JAG Officer #3 (Oct. 16, 2007).

78. Interview with JAG Officer #5 (Oct. 16, 2007).

79. Interview with JAG Officer #8 (Oct. 16, 2007).

on ground, on the receiving end of insurgents. They could see the Blackwater guy drinking, on steroids, not following rules. It fostered discipline problems.<sup>80</sup>

This judge advocate further observed, “My brigade commander in the Green Zone was worried about the issue. Soldiers are held to a different standard. Soldiers couldn’t travel, but contractors could.”<sup>81</sup>

According to the judge advocates, the existence of contractors also undermined troop morale because contractor pay was often better. As one lawyer observed, “Young soldiers want to go work for contractors because they get paid a lot more. . . . They see contractors sporting cowboy boots and jeans, growing a beard, and buying a Harley afterwards.”<sup>82</sup> Another judge advocate reports that “quite a few of the soldiers just say, why not go work for them?”<sup>83</sup> Indeed, judge advocates observe that the pay disparities between troops and contractors have fostered retention and recruitment problems for the military. As one judge advocate commented about the use of contract interrogators, “A need for interrogation arose, and there weren’t enough military interrogators, so we reached out and hired contractors.”<sup>84</sup> As a result:

There was a domino effect. It paid well. So people would sign up to do military training, they would do three years in the military and then go work as contractors, where you can make 2, 3, 4 times as much as [a low-level soldier].<sup>85</sup>

As a consequence, “this created a challenge for recruiting/retaining military interrogators.”<sup>86</sup>

A number of judge advocates reported that individuals who had left the military because of discipline problems but were later hired by private firms to work as contractors. As one judge advocate observed, “There were plenty of stories that a guy working as a contractor got court-martialed when he was a platoon member, and now he’s back making \$100 grand [per

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80. *Id.*

81. *Id.*

82. Interview with JAG Officer #1 (Oct. 16, 2007).

83. Interview with JAG Officer #5 (Oct. 16, 2007).

84. Interview with JAG Officer #1 (Oct. 16, 2007).

85. *Id.*

86. *Id.*

year],” as compared to uniformed military specialists who only earn \$20,000.<sup>87</sup> As another judge advocate noted, “I used to hear that some of the contractor guys, security contractors and others, had been kicked out of uniform, not for serious disciplinary issues, but rather because they got administratively separated. Now they were making \$80,000 riding desk at [the Coalition Provisional Authority].”<sup>88</sup> Yet another judge advocate reported, “There are stories that circulate among the JAGs that a soldier who’s been kicked out of the army with a bad conduct discharge can turn around and earn twice as much working for a contractor.”<sup>89</sup> While, as the judge advocates acknowledge, these stories may be apocryphal, they reflect the unease that the judge advocates feel about the ability of contractors to flout military rules without suffering employment consequences.

Judge advocates who observed contractors in Iraq and Afghanistan question the degree to which those contractors respect core public values and, in particular, the values embodied in the rules regarding limits on the use of force. Judge advocates who served in areas frequented by contractors reported numerous incidents. One judge advocate who served in Baghdad in 2005-06 said that there were problems with security contractors using force “on a weekly basis if not more.”<sup>90</sup> Specifically, there were “shootings at checkpoints” and other incidents that suggested a “reckless disregard for Iraqi civilians.”<sup>91</sup> As this judge advocate noted, the Iraqi civilians “were very angry, and they came to us.”<sup>92</sup> This judge advocate also observed that the contractors’ use of force was very different from troops’ because “their mission was different, and they didn’t hesitate to shoot.”<sup>93</sup>

Finally, the judge advocates generally reported that the training of the private security contractors was not as extensive as for troops. As one judge advocate recounted, “We were told they received training in their own rules on the use of force. We were told that they received certification from their super-

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87. Interview with JAG Officer #8 (Oct. 16, 2007).

88. Interview with JAG Officer #3 (Oct. 16, 2007).

89. Interview with JAG Officer #5 (Oct. 16, 2007).

90. Interview with JAG Officer #7 (Oct. 17, 2007).

91. *Id.*

92. *Id.*

93. *Id.*

visors, and there was a form.”<sup>94</sup> But, as this judge advocate observed, “There was no looking behind the forms.”<sup>95</sup> Under federal law, contractor employees must be certified as having no prior convictions for domestic violence, but judge advocates report that the certification process was “completely ineffective” because “while violence against women is a serious offense,” it is not the best indicator of whether someone will use a weapon properly in Iraq.<sup>96</sup> And as for whether third-country nationals had a criminal record or had even been convicted of war crimes, “no one was looking behind the veil on this.”<sup>97</sup>

To the extent that contractors had prior careers in the special forces, it is significant that “special forces units have drastically different rules” regarding the use of force.<sup>98</sup> In addition, prior training might be out of date, and security contractors do not seem to be receiving the kind of in-theater retraining that judge advocates provide to troops. This retraining offers realistic scenarios that reflect the ways in which the judge advocates have refined the rules based on the conditions in theater.<sup>99</sup> As one judge advocate noted, “It’s really important to re-set the training in context and to build up habits.”<sup>100</sup> The contractors, however, were outside the military training framework.<sup>101</sup> Indeed, another judge advocate who served in Iraq in 2005-06 reported that some of the security contractors themselves, once in theater, wanted more training in the rules regarding the use of force.<sup>102</sup> He noted that “a contractor came to us” to ask for such training.<sup>103</sup> Moreover, because incidents regarding the use of force by contractors were such a problem, “we set up meetings with the [Contract Officer Representative], and the issue was routed through the [Staff Judge Advocate].”<sup>104</sup> But, in the end, the conclusion was that “we

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94. Interview with JAG Officer #2 (Oct. 16, 2007).

95. *Id.*

96. *Id.*

97. *Id.*

98. Interview with JAG Officer #7 (Oct. 17, 2007).

99. *Id.*

100. Interview with JAG Officer #2 (Oct. 16, 2007).

101. *Id.*

102. Interview with JAG Officer #7 (Oct. 17, 2007).

103. *Id.*

104. *Id.*

couldn't do the training because it was outside of military jurisdiction."<sup>105</sup>

Finally, judge advocates expressed frustration with inequities regarding the accountability of troops, as compared to contractors, painting a picture of a system in which soldiers who commit serious crimes or who violate military rules face serious punishment, while contractors face little or no sanction. Soldiers, of course, are subject to the military justice system for disciplinary violations or serious crimes. Contractors, by contrast, are not bound by the same disciplinary rules. Moreover, though contractors are nominally subject to civilian criminal punishment back in the United States, those laws remain unenforced.<sup>106</sup> Thus, in practice, the most serious punishment an individual contractor might face is being fired and sent home. One judge advocate put the disparity in accountability in stark terms:

If a marine violated the rules, he'd be court-martialed and punished. There was an established process. The worst that would happen to a civilian contractor who was just as culpable would be that he'd be sent back home to California.<sup>107</sup>

This judge advocate further emphasized that the "unfairness of the process" was palpable.<sup>108</sup> While "service members were being held accountable for things across the board," contractors "were getting away with murder if you believed reports."<sup>109</sup> Another judge advocate suggested that the lack of accountability fueled further abuses: "If a contractor misbehaved, he knew he could cover it up."<sup>110</sup>

Judge advocates linked the disparities in accountability to troops' morale. As one commented, "Contractors can do anything—drink alcohol," and so on—but if "young soldiers go to the same place, do the same thing, the young soldiers will get punished, and the contractors won't."<sup>111</sup> One judge advocate

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105. *Id.*

106. See Laura A. Dickinson, *Mercenarism and Private Military Contractors*, in INTERNATIONAL CRIMINAL LAW 355, 369-75 (M. Cherif Bassiouni ed., 3d ed. 2008); see also DICKINSON, OUTSOURCING WAR AND PEACE, *supra* note 1, ch. 3.

107. Interview with JAG Officer #2 (Oct. 16, 2007).

108. *Id.*

109. *Id.*

110. Interview with JAG Officer #3 (Oct. 16, 2007).

111. *Id.*

gave as an example a case in which a marine translator and a contractor were accused of extorting money. The “marine involved went through the court-martial process, was sent to Camp Lejeune, and disciplined through the normal chain.”<sup>112</sup> For the contractor, by contrast, no disciplinary process existed. According to the judge advocate, “We restricted him in his quarters on the commander’s general authority.”<sup>113</sup> A subsequent report was sent to the Department of Justice, but nothing further happened.<sup>114</sup> As this judge advocate noted, “Ultimately we dropped it all. . . . We weren’t going to force it. . . . We weren’t going to keep calling.”<sup>115</sup> In the end, “we just debarred him from the base and eventually theater-wide.”<sup>116</sup>

#### IV. REFORMING THE ORGANIZATIONAL STRUCTURE AND INSTITUTIONAL CULTURE OF PRIVATE MILITARY CONTRACTORS

The picture painted above relies on the stories of uniformed judge advocates and is therefore incomplete. Yet, a smaller group of interviews with contractors, combined with accounts in government and media reports, strongly suggest that the contract firms do in fact lack the kind of well-developed internal organizational features that the military has constructed through the Judge Advocate General corps. Therefore, reform efforts are urgently needed. On the one hand, we could attempt to bring the contractors more within the organizational structure and culture of the military itself by expanding judge advocates’ authority over them. On the other hand, we could seek reform of the firms’ internal structures—either through voluntary measures or regulation—combined with efforts to establish broader industry-wide standards. Such reforms will be necessary to ensure that contractor employees better respect public law values.

##### A. *Organizational Structure and Contractors*

If, as discussed above, organizational structure and culture matter, then the next question is to determine what orga-

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112. Interview with JAG Officer #2 (Oct. 16, 2007).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

nizational structures are in place, either within contractor firms or industry-wide, to prevent and police abuses. Here the evidence is mixed, but tends to support the judge advocates' view that the contract firms do far less to prevent and police abuse than the military does.

First, it appears that few of the security contractor firms have accountability agents or ombudspersons who are charged with monitoring abuses and who are actually integrated in the field with operational employees, as the judge advocates are. While the firms typically rely on their general counsel for legal advice, the lawyers in these offices appear to remain primarily at headquarters rather than deploying in the field. Moreover, reporting processes are not clear. For example, in a case involving a private security company, Triple Canopy, one of whose employees allegedly shot unprovoked at two Iraqi cars, subsequent litigation raised questions about the firm's internal reporting and investigation methods. Two employees who eventually spoke up about the incident were fired, and they ultimately filed suit against the company, alleging wrongful termination. A jury decided in favor of the company, but the jury forewoman asserted:

Although we find for [Triple Canopy], we strongly feel that its poor conduct, lack of standard reporting procedures, bad investigation methods, and unfair double standards amongst employees should not be condoned. . . . [W]e do not agree with Triple Canopy's treatment of the plaintiffs.<sup>117</sup>

Although company representatives asserted that they did launch an investigation and that they fired the two employees precisely because they did not report the incident promptly enough, the jury statement suggests that the employees did not at the time have a clear internal accountability agent or ombudsperson to whom they could report or a clear set of guidelines to follow.

Second, the employees of these companies seem to lack a strong sense of even what the applicable laws and norms are, let alone have any great commitment to them. For example, in congressional testimony, Blackwater CEO Erik Prince ap-

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117. Tom Jackman, *Security Contractor Cleared in Two Firings*, WASH. POST, Aug. 2, 2007, at A15.

peared to have at best a murky understanding of the precise legal rules and regulations that governed his employees' use of force and available accountability mechanisms for the misuse of that force. Thus, he asserted that his employees were subject to punishment in military courts under the Uniform Code of Military Justice,<sup>118</sup> even though the military had not yet implemented recently enacted legislation extending military jurisdiction to contractors, and even though UCMJ jurisdiction over State Department—as opposed to Defense Department—contractors had still not been clearly established.

Employees of other security firms have likewise expressed confusion about the applicable law and appear to have a somewhat cavalier attitude about rule of law norms. For example, one of the two Triple Canopy employees who filed the lawsuit described above stated, “We never knew if we fell under military law, American law, Iraqi law, or whatever.”<sup>119</sup> Furthermore, “we were always told, from the beginning, if for some reason something happened and the Iraqis were trying to prosecute us, they would put you in the back of a car and sneak you out of the country in the middle of the night.”<sup>120</sup> Likewise, Isi Naucukidi, a former Triple Canopy employee also involved in the aforementioned shootings, said he ultimately left the company voluntarily because “I couldn’t stand what was happening. It seemed like every day they were covering something [up].”<sup>121</sup> The firm’s attitude, according to Naucukidi, is: “What happens here today, stays here today.”<sup>122</sup> Indeed, Naucukidi asserted that after the shooting, both the shift supervisors and other employees laughed as they sped away from the shooting, and one employee told the shift supervisor, “nice shot.”<sup>123</sup>

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118. See *Blackwater USA: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 97 (2007) (testimony of Erik Prince) (“Our men are not serving members of the U.S. military. . . . And I believe that is why they extended [the Uniform Code of Military Justice], not just to wars that were declared but also to contingency operations as well.”).

119. Steve Fainaru, *Four Hired Guns in an Armored Truck, Bullets Flying, and a Pickup and a Taxi Brought to a Halt. Who did the Shooting and Why? – A Chaotic Day On Baghdad’s Airport Road*, WASH. POST, April 15, 2007, at A1.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

Third, contract employees seem to receive insufficient training in applicable laws and rules, particularly those that govern the use of force. While such contracts often now require training, government reports and other investigations have suggested in numerous instances that this training has not been adequate. For example, General Fay's report in the wake of the Abu Ghraib incident concluded that a number of the contract interrogators had "little, if any, training on [the] Geneva Conventions," and little interrogation experience.<sup>124</sup> In 2005, the Special Inspector General for Iraq Reconstruction (SIGIR) found that the Aegis security firm—which held a three-year, \$293-million contract to provide a range of security and intelligence services to the Department of Defense in Iraq—had not complied with contract requirements, failing to properly vet Iraqi employees or to demonstrate that its operators were qualified to use the weapons they were issued.<sup>125</sup> The SIGIR concluded that "there is no assurance that Aegis is providing the best possible safety and security for government and reconstruction contractor personnel and facilities as required by the contract."<sup>126</sup>

Fourth, the fact that many companies use foreign labor complicates training and accountability efforts, as well as the broader effort to instill public law values. The market for security contractor labor is a truly global one, with firms hiring from dozens of countries around the world and with at least thirty countries represented among the security contractors in Iraq alone.<sup>127</sup> To be sure, contractors maintain that they use

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124. MAJ. GEN. GEORGE R. FAY, ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 51 (2004), *available at* <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>.

125. SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, REPORT TO CONGRESS 5 (APRIL 30, 2005), *available at* [http://www.globalsecurity.org/military/library/report/2005/sigir-apr05\\_report.pdf](http://www.globalsecurity.org/military/library/report/2005/sigir-apr05_report.pdf).

126. *Id.*

127. JENNIFER K. ELSEA, MOSHE SCHWARTZ & KENNON H. NAKAMURA, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 3 (2008) [hereinafter PRIVATE SECURITY CONTRACTORS IN IRAQ], *available at* <http://fas.org/sgp/cis/natsec/RL32419.pdf>. Indeed, of the roughly 8,600 security contractors directly employed by the Defense Department and State Department in Iraq as of May 2008—a figure that does not include subcontractors hired to protect reconstruction contractors or security contractors working for other agencies—7,503 were not U.S. citi-

well-established practices to train and supervise the third-country nationals (or TCNs, as they are often called). For example, Blackwater's President, Gary Jackson, has asserted that:

As far as the third-country nationals that we are required by United States government contract to use, we can't ask them to swear the same oath, but all of Blackwater's deploying professionals, both U.S. and third-country nationals, undergo extensive training in core values, leadership and human rights before they deploy. Each of them is issued a copy of the U.N.'s Universal Declaration of Human Rights in their native language to carry with them and remind them of their commitment to legal, moral and ethical standards.<sup>128</sup>

Likewise, Mark DeWitt, Triple Canopy's senior director of government affairs, has asserted: "We believe that Triple Canopy has developed a fairly sophisticated model for managing third-country national security guard forces."<sup>129</sup>

Yet in practice, training and vetting pose serious difficulties. For example, in 2005, the security firm Your Solutions sent 147 Chileans into conflict zones in Iraq. Twenty-eight of the recruits "broke their contracts and returned home early, claiming they received inadequate training and poor equipment."<sup>130</sup> And vetting is perhaps even more difficult. Many of the recruits have experience as police officers or soldiers in their home countries, but in some cases, that experience includes a role in the state apparatus of dictatorships or former

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zens. *Id.* at 9-11. Likewise, of the 1,400 security contractors working directly for the State Department in Iraq, 759 were not U.S. citizens, while 6,744 of the security contractors hired by the Defense Department were not U.S. citizens (5,061 were third-country nationals—citizens of neither the United States nor Iraq). *Id.*

128. Tim Weiner, *A Security Contractor Defends his Team, Which, He Says, Is Not a Private Army*, N.Y. TIMES, Apr. 29, 2007, at Week in Review 4, available at <http://www.nytimes.com/2007/04/29/weekinreview/29reading.html?scp=1&sq=A%20Security%20Contractor%20Defends%20his%20Team&st=cse> (quoting an interview by R. J. Hillhouse of Gary Jackson).

129. Patrick J. McDonnell, *Iraq Contractors Tap Latin America's Needy*, L.A. TIMES, Jan. 28, 2008, available at <http://www.truthout.org/article/iraq-contractors-tap-latin-americas-needy>.

130. Mike Hager, *Chile's Iraq Mercenaries Under Investigation by U.N. Group*, THE SANTIAGO TIMES, July 9, 2007, available at <http://latinoinurgent.blogspot.com/2007/07/santiago-times-chiles-iraq-mercenaries.html>.

dictatorships with a history of gross human rights violations. South African security contractors, for example, may have served in the apartheid regime and have engaged in attacks on the black population during that era.<sup>131</sup> Likewise, Blackwater has hired Chilean commandos, many of whom were trained in the military of the dictator Augusto Pinochet, whose regime tortured and disappeared thousands of dissidents.<sup>132</sup> And while some firms rely on U.S. embassy records to determine whether an individual has a past that might disqualify him or her from employment, these records may be incomplete. In addition, tensions among personnel may arise because the non-citizen employees from developing countries earn far less than their counterparts from developed nations such as the United States, Australia, and the United Kingdom.<sup>133</sup>

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131. For example, in a 2004 attack on the Shaheen Hotel, one of the security contractors killed was South African national Frans Strydom, a member of the Koevoet (Afrikaner for “Crowbar”), a counter-insurgency operation run by the South African Police Force that paid bounties for the bodies of blacks seeking independence during the 1980s. Louis Nevaer, *Hired Guns in Iraq May Have War Crimes Pasts*, PAC. NEWS SERVICE, May 3, 2004, [http://news.pacificnews.org/news/view\\_article.html?article\\_id=68c393b4db74f12d009eab2321704610](http://news.pacificnews.org/news/view_article.html?article_id=68c393b4db74f12d009eab2321704610).

Another South African security contractor who sustained serious injuries in this attack, Deon Gouws, was a former police officer who belonged to the notorious Vlakplaas death squad that terrorized blacks under the apartheid regime. The South African Truth and Reconciliation Commission granted amnesty to both Strydom and Vlakplaas after they had confessed to killing blacks and terrorizing anti-apartheid activists. Both men had been working for the firm Erinys, which had an \$80 million contract to protect oil installations. *Id.*

132. Jonathan Franklin, *US Contractor Recruits Guards for Iraq in Chile*, THE GUARDIAN, Mar. 5, 2004, at 14, available at <http://www.guardian.co.uk/world/2004/mar/05/iraq.chile/print>.

133. The typical salary for Peruvians, for example, is \$1,000 a month (or \$33 per day), compared to the \$500 per day that top-end guards from Great Britain, the United States, or Australia might earn. McDonnell, *supra* note 129. To be sure, the salary often far exceeds what the workers might earn domestically, and some employees are enthusiastic about their experiences and the pay. One father of two from Peru who earns about \$200 per month said, “Iraq was a good time for me. . . . I just wish I could go back. . . . I never ate so much!” *Id.* And the work of the TCNs typically differs from that of their higher-paid Northern and Western counterparts; rather than guarding diplomats as they travel throughout the country, the TCNs from developing countries typically perform “static” security, “staffing checkpoints and guard towers, searching visitors, and keeping alert.” *Id.* Yet for Ugandan security guards working for the firm SOC-SMG, the pay disparities between them

### B. *Possibilities for Reform*

The four obstacles discussed above may in the end render it impossible to build within contractor firms an institutional culture that sufficiently protects core public law values. Nevertheless, following the example of the Judge Advocate General corps, we might try to mandate—via contract or regulation—a more direct role for governmental accountability agents. Thus, the judge advocates, and perhaps other accountability agents such as contract monitors, might assume an expanded role in training, interacting with, and disciplining contractors.

Congress has already taken a step in this direction by expanding the jurisdiction of military courts to allow contractors to be tried under the Uniform Code of Military Justice.<sup>134</sup> Under the military's guidelines, judge advocates now have the authority to investigate and prosecute cases of contractor misconduct.<sup>135</sup> This authority remains limited, however, as judge advocates cannot bring a case unless central command approves.<sup>136</sup> In addition, the authority appears to apply only to

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(\$3.33 per hour) and their American employees are problematic. A number of Ugandans have sued the company in Uganda, claiming that they were misled about their contract terms. Guy Raz, *US Contractors Rely on Third-World Labor*, NPR, Oct. 10, 2007, <http://www.npr.org/templates/story/story.php?storyId=15124608>.

134. The 2007 National Defense Authorization Act extends the jurisdiction of the Uniform Code of Military Justice, 10 U.S.C. § 801-946 ("UCMJ"), to apply "[i]n time of *declared war or a contingency operation*" to "persons serving with or accompanying an armed force in the field." Pub. L. No. 109-364, § 552, 120 Stat. 2217 (codified as amended at 10 U.S.C. § 802(a)(10) (2007)) (emphasis added to new text). A "contingency operation" is defined more broadly than a declared war and includes, for example, a military operation designated by the Secretary of Defense as an operation in which the Armed Forces may become involved in hostilities or military actions against an enemy of the United States or against an opposing military force, or that results in a call, order, or retention on active duty of members of the uniformed services by the President during a time of war or national emergency. 10 U.S.C. § 101(a)(13) (2007). Thus, contractors can now be subject to prosecution by court-martial for violating the UCMJ if they serve with or accompany an armed force in the field in a contingency operation, such as Operation Iraqi Freedom or Operation Enduring Freedom in Afghanistan.

135. See Michael R. Gordon, *Military Role Overseeing Contractors Tested in Iraq*, N.Y. TIMES, Apr. 6, 2008, at A16, available at <http://www.nytimes.com/2008/04/06/world/middleeast/06contractor.html> (noting that in 2006 Congress granted the military authority to charge contractors accompanying the armed forces into the field).

136. *Id.*

contractors supporting a Department of Defense mission.<sup>137</sup> Military oversight now exists, but it is only a last resort, meant to apply when the civilian justice system does not work.

Perhaps even more significantly, judge advocates now can assume more authority over contractors, even before the commission of an offense. The Department of Defense has moved in this direction recently by issuing a rule that would require security contractors to receive training from judge advocates.<sup>138</sup> The State Department has, in the wake of several shootings, gone farther and adopted a rule requiring that agency diplomatic security personnel ride along with all State Department security contractors whose mission requires them to travel (as opposed to monitoring stationary sites).<sup>139</sup> The new State Department rule would thus achieve greater integration of agency accountability agents, which, as we have seen, appears to be one institutional feature that tends to cause increased compliance.

While important, these reforms remain baby steps. For example, even under the State Department's rule, the judge advocates accompanying contractors do not have the authority to impose sanctions and they do not have an independent hierarchy with clout in the upper echelons of the contractor firm. Thus, a more ambitious approach would be to try to recreate the full panoply of organizational features for contractors that the military created post-Vietnam for its own personnel. Such features could be mandated either through terms in the contracts with private firms or through direct regulation. And though it is debatable how best to implement these insti-

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137. See John Stafford & David Goodwin, *Revised Rules for Battlefield Contractors*, NAT'L DEF. MAG., Aug. 2008, <http://www.nationaldefensemagazine.org/archive/2008/August/Pages/RevisedRulesforBattlefieldContractors.aspx> (“[the Military Extraterritorial Jurisdiction Act], which applied only to Defense Department contractors when first enacted in 2000, was later expanded . . . [in fiscal year 2005] to apply to contractors of all federal agencies supporting the Defense Department”).

138. Kara M. Sacilotto, *DoD Issues Final Rule on Law of War Training and Disclosure Obligations*, Weily Rein LLP, Jan. 16, 2009, available at <http://www.wileyrein.com/publications.cfm?sp=articles&id=4878>.

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

tutional features outside the uniformed military context,<sup>140</sup> it is clear that this is an area that should be considered seriously in any effort to reform the contracting process.

Rather than seeking more commingling of government accountability agents with contractor employees, another possible reform approach would seek to encourage or compel contractors themselves to institute processes that would help establish the organizational or professional culture necessary to protect public values. Thus, through governmental regulation or independent industry efforts, contract firms might create internal organizational structures to enhance compliance with the public law norms and values this article has discussed. Such efforts would involve firms adopting the kinds of reforms that the military adopted post-Vietnam with regard to its judge advocates. These efforts include requiring contractors to establish compliance units or hire ombudspersons who would accompany operational employees in theater, advise commanders, report through an independent chain of command, and have authority to confer benefits and impose punishments. In short, the idea would be to create within firms themselves a cadre of lawyers who would be analogous to the judge advocates within the military. More broadly, the industry as a whole—either independently or by means of government regulation—might seek to professionalize the conduct of contractor employees through ethical codes, accreditation schemes, and the like. Interestingly, the International Peace Operations Association, the trade association for military contractors, has actually welcomed at least some of these reforms and attempted to create professional norms.

Thus, although the obstacles are enormous, both the organizational theory literature and the on-the-ground observations of military lawyers suggest that when we think about reforming the private military contractor process, we cannot ignore organizational culture and institutional structure. Indeed, it is likely that these sorts of reforms, if they could be enacted, would run deeper and last longer than any other possible reforms that have been suggested to rein in military con-

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140. The devil, as always, is in the details. For example, even trying to figure out what the appropriate norms should be is likely to become tangled in the difficulties of inter-agency coordination among agencies whose own organizational cultures stand far apart.

tractors. Accordingly, a serious consideration of how organizational culture can be linked to compliance suggests that, instead of focusing exclusively on new treaties or new international judicial rulings seeking to formally extend norms to contractors, we might instead look to how best to alter organizational structure and institutional culture within private security firms.

## V. CONCLUSION

The use of private military contractors is not likely to end anytime soon. Accordingly, if we are to maintain core human rights values in military operations, we must address how best to build the organizational structures and internal institutional cultures within these firms that are most likely to effectuate these values. And in approaching this difficult task, it will not be enough to reform our formal laws to make them applicable to contractors or to expand court jurisdiction to hold contractors accountable. In addition, we need to think about the more inchoate, but perhaps even more salient, ways that a culture of respect for human rights norms is actually created and maintained in military organizations.

This study of military lawyers on the battlefield demonstrates some of the mechanisms by which such a culture can be established. Though obviously not perfect, the system created since Vietnam—through which highly trained military lawyers are embedded with troops, advising commanders on the battlefield, answering to their own independent chain of command, and invested with the authority to impose sanctions—has had real impact. Significantly, none of these organizational features currently exists within privatized firms. Thus, reform is urgently needed. But these reforms must go beyond conventional legal frameworks and work towards deeper organizational and institutional change. Only through such an approach can we begin to address the challenges posed by a world of privatized military force.