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COMMENT

Beating Blackwater: Using Domestic Legislation to Enforce the International Code of Conduct for Private Military Companies

In the past decade, state use of private military companies (PMCs) has greatly expanded, sparked in large part by U.S. reliance on contractors in the wars in Afghanistan and Iraq. But several of the most horrific human rights abuses of the wars exposed the absence of a regulatory regime governing the conduct of PMCs, prompting an international movement to establish some kind of legal framework to promote accountability. After years of diplomatic negotiations, this resulted in 2010 in the creation of the International Code of Conduct for Private Security Service Providers (ICoC), which delineates the obligations of private companies.¹ The ICoC Association (ICoCA) was subsequently launched in September 2013 to certify that companies are meeting the Code's standards.

But while the development of a monitoring body is encouraging, ICoCA suffers from a critical shortcoming: it lacks any kind of serious enforcement mechanism. Because most commentary has focused on the Code's importance in codifying a new area of international law,² few have recognized that ICoCA's actual effectiveness hinges on the willingness of states to enact corresponding domestic legislation that can provide a system of enforcement. This Comment

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1. *About the ICoC*, INT'L CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS, http://www.icoc-psp.org/About_ICoC.html (last visited Feb. 5, 2014).
 2. See Whitney Grespin, *An Act of Faith: Building the International Code of Conduct for Private Security Providers*, DIPLOMATIC COURIER (July 19, 2012), <http://www.diplomaticcourier.com/news/topics/security/1233-an-act-of-faith-building-the-international-code-of-conduct-for-private-security-providers>; *ICoCA Launch Marks Significant Step to Improve Private Security Contractor Oversight*, HUM. RTS. FIRST (Sept. 18, 2013), <http://www.humanrightsfirst.org/2013/09/18/icoca-launch-marks-significant-step-to-improve-private-security-contractor-oversight>.

highlights this issue and argues that discrete domestic legal reforms modeled on the Foreign Corrupt Practices Act (FCPA) and International Traffic in Arms Regulations (ITAR) would enable the United States to galvanize compliance with the ICoC and ensure that the Association is able to serve its function.

Part I surveys the growth of private military companies and recent international efforts to regulate the industry. Part II argues that the ICoC suffers from the absence of a viable method of enforcement, and ICoCA, as it currently stands, provides an insufficient oversight mechanism. It shows how the alternative methods of enforcement that have been proposed thus far are either infeasible or of limited efficacy. Part III explores how the United States could bolster ICoCA through domestic legislation that draws from the approaches of the FCPA and ITAR. It also discusses how this could, in the long run, trigger changes in behavior on a global level.

I. THE NEED FOR AN INTERNATIONAL APPROACH TO REGULATION

After years of being maligned as mercenaries, private military contractors reemerged following the end of the Cold War. Weak states with few military capabilities turned to PMCs for help,³ and even the United States hired private firms to supplement its military operations in the 1990s in order to lower costs.⁴ This trend accelerated dramatically following the U.S. invasion of Afghanistan in 2001. Over the course of the Afghanistan and Iraq wars, the involvement of PMCs ballooned. Their role expanded from support activity to essential military functions, including combat,⁵ and by the later years of the wars, half of total U.S. personnel deployed in Iraq and Afghanistan were

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3. One of the most high profile examples of this was Sierra Leone's use of Executive Outcomes in 1995 to help defeat rebel guerrilla groups. See Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1119 (2004). Private companies were involved in many other conflicts in Africa in the 1990s, including in Zaire, Congo, and Equatorial Guinea. *Id.* at 1118-19.
 4. The value of U.S. Department of Defense contracts with PMCs between 1994 and 2002 was estimated at over \$300 billion. Adam Ebrahim, *Going to War with the Army You Can Afford: The United States, International Law, and the Private Military Industry*, 28 B.U. INT'L L.J. 181, 185 (2010); see P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 522 (2004). Private firms were also used in situations in which U.S. forces could not directly intervene. For instance, the State Department relied on MPRI, a PMC, to train the Croatian army in the mid-1990s. P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 119-25 (2003).
 5. See Michaels, *supra* note 3, at 1031-33 (discussing the use of private contractors to provide security for high-level Iraqi and American officials and to conduct offensive raids).

private contractors.⁶ However, this extensive involvement by private forces gave rise to some of the most heinous human rights abuses of the wars, including the 2007 Nisour Square shooting⁷ and the Abu Ghraib prison scandal.⁸ Upon coming to light, these incidents provoked domestic and international outrage and highlighted the legally ambiguous space in which contractors operated.

In response, the United States enacted several reforms to ensure that contractors were held accountable for their actions.⁹ The Military Extraterritorial Jurisdiction Act (MEJA), originally passed in 2000, was expanded in 2004 to allow contractors supporting Defense Department missions abroad to be prosecuted for crimes that would result in more than one year of imprisonment if they were committed within the United States.¹⁰ And in 2007, Congress amended the Uniform Code of Military Justice (UCMJ) to subject private contractors to the system of courts-martial should they engage in misconduct.¹¹ Few individuals have been prosecuted under the new

6. Chandler Harris, *As Wars Draw Down, Overseas Contracting Builds Up*, CLEARANCEJOBS.COM: DEFENSE NEWS & CAREER ADVICE (Oct. 30, 2012), <http://news.clearancejobs.com/2012/10/30/as-wars-draw-down-overseas-contracting-builds-up> (“DOD data reveals that from FY2008 to FY2011, contractors in Iraq and Afghanistan represented 52 percent of the total force . . .”). The Pentagon relied so heavily on PMCs in Iraq that even at the height of the surge, the number of private contractors in Iraq exceeded the number of combat troops. T. Christian Miller, *Contractors Outnumber Troops in Iraq*, L.A. TIMES, July 4, 2007, <http://articles.latimes.com/2007/jul/04/nation/na-private4>.
7. Charles Tiefer, *No More Nisour Squares: Legal Control of Private Security Contractors in Iraq and After*, 88 OR. L. REV. 745, 754 (2009) (describing how Blackwater guards fired into a crowd in Baghdad’s Nisour Square and killed seventeen unarmed civilians).
8. An Army investigation concluded that six employees of Titan and CACI, two prominent PMCs, either participated in the abuse or failed to report it. The Army generals who conducted the investigation recommended that the Justice Department prosecute the six individuals. See Joel Brinkley & James Glanz, *The Struggle for Iraq: Civilian Employees; Contract Workers Implicated in February Army Report on Prison Abuse Remain on the Job*, N.Y. TIMES, May 4, 2004, <http://www.nytimes.com/2004/05/04/world/struggle-for-iraq-civilian-employees-contract-workers-implicated-february-army.html>; Renae Merle & Ellen McCarthy, *6 Employees from CACI International, Titan Referred for Prosecution*, WASH. POST, Aug. 26, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A33834-2004Aug25.html>. In addition to these incidents, there have been many other allegations of abuse. See John Hendren & Mark Mazzetti, *U.S. Charges Contractor over Beating of Afghan Detainee*, L.A. TIMES, June 18, 2004, <http://articles.latimes.com/2004/jun/18/world/fg-cia18>.
9. See Tiefer, *supra* note 7, at 755-56.
10. JENNIFER ELSEA, MOSHE SCHWARTZ & KENNON H. NAKAMURA, CONG. RESEARCH SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS AND OTHER ISSUES 23-25 (2008), <http://www.fas.org/sgp/crs/natsec/RL32419.pdf>.
11. *Id.* at 25-26.

provisions, but the reforms went some way toward bringing U.S. military contractors under U.S. law.¹²

The issue, however, has grown well beyond the activities of contractors employed by the United States. The U.S. wars have changed the landscape elsewhere by giving rise to massive multinational PMCs and also legitimating their use. This global industry is now estimated to have gross revenue of over \$100 billion per year,¹³ and these companies are not closing shop just because the U.S. wars are ending. Instead, these sophisticated enterprises have shifted their focus to other lucrative regions.¹⁴

For this reason, the absence of a clear legal framework to govern the conduct of multinational PMCs is highly problematic.¹⁵ Domestic legal reforms, such as those enacted by the United States, have helped to hold private contractors participating in U.S. military operations accountable, but they do little to regulate the global PMC industry for two reasons. First, MEJA and the UCMJ can only be used to prosecute individuals. When companies providing military services act illegally, no clear statutory basis exists to hold

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12. Only twelve people, few of whom were military contractors, have been charged under MEJA since its inception. *Id.* at 25; see also Peter Singer, *Frequently Asked Questions on the UCMJ Change and Its Applicability to Private Military Contractors*, BROOKINGS (Jan. 12, 2007), <http://www.brookings.edu/research/opinions/2007/01/12defenseindustry-singer> (“MEJA . . . has proven to be pretty much mythical in application to the contractor world . . .”).
 13. Arjun Sethi, *Military Contracting: Our New Era of Corporate Mercenaries*, GUARDIAN, Jan. 23, 2013, <http://www.guardian.co.uk/commentisfree/2013/jan/23/military-contracting-corporate-mercenaries>.
 14. For instance, in 2011, Reflex Responses, a new company created by Erik Prince, the founder of Blackwater, signed a \$529 million deal with the United Arab Emirates to create a specialized foreign battalion for the UAE. Mark Mazzetti & Emily B. Hager, *Secret Desert Force Set up by Blackwater's Founder*, N.Y. TIMES, May 14, 2011, <http://www.nytimes.com/2011/05/15/world/middleeast/15prince.html>. PMCs constitute some of the largest private employers and have a growing presence in Latin America, the Middle East, Asia, and Africa. G4S alone operates in over 125 different countries. See Luke McKenna & Robert Johnson, *A Look at the World's Most Powerful Mercenary Armies*, BUS. INSIDER (Feb. 26, 2012, 8:37 AM), <http://www.businessinsider.com/bi-mercenary-armies-2012-2>.
 15. While many contractors have served honorably, the secrecy with which they operate and the absence of formal training make PMCs acting without oversight more likely to commit transgressions. Allegations of misconduct by private contractors have been abundant during both the U.S. wars and other missions. For instance, in 2006, employees of a South African PMC were accused of plotting a coup in the Democratic Republic of the Congo. Craig Timberg, *Congo Holding 3 Americans in Alleged Coup Plot*, WASH. POST, May 25, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/24/AR2006052401591.html>; see also Michaels, *supra* note 3, at 1089 (explaining why “[c]ivilian contractors . . . cannot necessarily be expected . . . to exercise the . . . authority, judgment, or lethal force entrusted to soldiers” (footnote omitted)).

the whole company liable.¹⁶ Additionally, these laws fail to address the industry's increasingly global presence. The United States is no longer the only, or even the primary, consumer for private security providers. Consequently, laws that impose liability only for misdeeds occurring alongside Department of Defense missions do not adequately constrain the conduct of PMCs abroad.

Accordingly, since the mid-2000s, the international community has sought to fill the void by constructing a global regime that can better monitor these companies, ensure compliance with human rights norms and international humanitarian law, and hold violators accountable. The first such effort was led by the Swiss government and the International Committee of the Red Cross, which resulted in the completion of the Montreux Document in 2008.¹⁷ The document provides a list of best practices that states should implement to manage PMCs.¹⁸ Forty-nine countries have become signatories to date.¹⁹ Yet Montreux's efficacy has been limited both because it does not create any binding commitments and because it is directed at PMC behavior in armed conflicts, which constitutes only a fraction of PMC activities.²⁰

Montreux was followed by a more ambitious multi-stakeholder initiative, which led to the creation of the International Code of Conduct for Private Security Service Providers. The ICoC outlines the obligations of private security companies under international law and specifies rules that ought to govern the use of force and vetting procedures for subcontractors.²¹ Unlike earlier initiatives, the ICoC has been signed by over 708 companies worldwide and has garnered significant support from states and nongovernmental organizations.²² The creation of the Code is a promising step in the effort to ensure that private military companies respect human rights and comply with international law. Nonetheless, its current effectiveness is limited because it lacks a viable enforcement mechanism.

16. See ELSEA ET AL., *supra* note 10, at 23-27.

17. *The Montreux Document*, INT'L COMMITTEE RED CROSS (Aug. 2009), http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

18. *Id.*

19. *Participating States of the Montreux Document*, SWISS FED. DEP'T FOREIGN AFF. (last updated Nov. 12, 2013), <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html>.

20. See Amol Mehra, *Bridging Accountability Gaps—The Proliferation of Private Military and Security Companies and Ensuring Accountability for Human Rights Violations*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 323, 328 (2010).

21. *About the ICoC*, *supra* note 1; see also Daniel Warner, *Establishing Norms for Private Military and Security Companies*, 40 DENV. J. INT'L L. & POL'Y 106, 116 (2012).

22. See sources cited *supra* note 2.

II. THE INADEQUACY OF ICOCA

If the ICoC is to fulfill its goal of constructing a global governance system to regulate private military companies, it must be meaningfully enforced. The ICoC Association was launched in September 2013 in order to provide an oversight mechanism for the Code. States and human rights organizations lauded the formation of ICOCA as a groundbreaking step in regulating the industry. The State Department even announced that it “anticipates incorporating membership in the ICoC Association as a requirement in the bidding process” for all future diplomatic security contracts.²³ Membership is open to all companies, civil society groups, and states that agree to adhere to the Code.

The Association is led by a Board of Directors empowered to monitor and certify the compliance of signatory companies.²⁴ The Board is chosen by the vote of all members and consists of twelve individuals, with four members coming from PMCs, four from civil society organizations, and four from states.²⁵ ICOCA’s charter calls for in-field assessments of company practices and consultation between the Board and companies whose practices are found to violate the Code.²⁶ It also establishes a complaint procedure through which allegations of misconduct can be reported.²⁷ While these are surely positive developments, it is difficult to see how they will be able to engender compliance with the Code’s strict requirements without any punitive mechanisms. The absence of a judicial body or forum where PMCs can be held accountable if they persist in violating norms makes adherence to the Code largely voluntary.

Various options have been proposed as alternative mechanisms to enforce the ICoC. The first of these is the adoption of a binding multilateral treaty that would require signatories to provide for domestic enforcement of the ICoC

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23. *State Department to Incorporate International Code of Conduct into Worldwide Protective Services Contracts*, U.S. DEP’T STATE (Aug. 16, 2013) [hereinafter *State Department*], <http://www.state.gov/r/pa/prs/ps/2013/08/213212.htm>.
 24. *Articles of Association*, INT’L CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS ASS’N 2-3, http://www.icoca.ch/assets/icoc-aoa_english2.pdf (last visited Feb. 13, 2014).
 25. *Id.* A General Assembly and a Secretariat body assist the Board in carrying out its certification and monitoring duties. Election to the Board is determined by the Assembly, in which each member of ICOCA receives one vote. *See id.* at 2, 6.
 26. *Id.* at 7-8; see also Elizabeth Holland, *New Charter Outlines Concrete Steps to Implement the International Code of Conduct for Private Security Contractors*, JDSUPRA (Apr. 11, 2013), <http://www.jdsupra.com/legalnews/new-charter-outlines-concrete-steps-to-i-79233>.
 27. *Articles of Association*, *supra* note 24, at 8-10.

provisions.²⁸ While such a treaty would likely be the most rigorous method of bolstering the ICoC, it is not a viable option for the near future. The international consensus that is required to achieve such a comprehensive treaty simply does not exist at this point, as demonstrated by the limitations of the Montreux effort.

Another option that has been floated is to leverage profits from government contracting to induce compliance with the Code's provisions. Because the United States, United Kingdom, and United Nations have all made government contract awards contingent on company membership in ICoCA, some argue that the potential loss of business opportunities will deter companies from disregarding the Code's obligations.²⁹ While this is a significant incentive, it is insufficient for two reasons. Firstly, because of the shrinking defense budgets in the United States and Western Europe,³⁰ the ability of the United States and its allies to sway the behavior of PMCs is limited. Many of the most lucrative business opportunities are likely to be found elsewhere,³¹ making the costs of losing U.S. and U.K. agency contracts

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28. See Huma T. Yasin, *Playing Catch-Up: Proposing the Creation of Status-Based Regulations to Bring Private Military Contractor Firms Within the Purview of International and Domestic Law*, 25 EMORY INT'L L. REV. 411, 485 (2011).
29. See Nils Rosemann, *International Code of Conduct for Private Security Providers: A Multi-Stakeholder Initiative of the 21st Century?*, INST. FOR HUM. RTS. & BUS. (Nov. 24, 2010), http://www.ihrb.org/commentary/guest/international_code_of_conduct_for_private_security_providers.html; State Department, *supra* note 23; see also Carey L. Biron, *Watchdog Body Will Oversee Private Military Contractors*, INTER PRESS SERVICE (Sept. 19, 2013), <http://www.ipsnews.net/2013/09/watchdog-body-will-oversee-private-military-contractors> (noting the "broad buy-in" of corporations and describing how many human rights groups anticipate that "the potential negative impact on contracts . . . will constitute significant motivation" for companies to comply with the ICoC).
30. See Steven Erlanger, *Shrinking Europe Military Spending Stirs Concern*, N.Y. TIMES, Apr. 22, 2013, <http://www.nytimes.com/2013/04/23/world/europe/europes-shrinking-military-spending-under-scrutiny.html>; *Squeezing the Pentagon*, ECONOMIST, July 6, 2013, <http://www.economist.com/news/united-states/21580460-wrong-way-cut-americas-military-budget-squeezing-pentagon>; Jon Swaine, *Britain's Defence Cuts Are of 'Critical Concern' to Special Relationship*, TELEGRAPH, July 31, 2013, <http://www.telegraph.co.uk/news/uknews/defence/10212763/Britains-defence-cuts-are-of-critical-concern-to-special-relationship.html>.
31. Countries with rapidly increasing military spending include China, Saudi Arabia, and Russia. See *China Defends Growing Military Spending*, AL-JAZEERA (Mar. 4, 2013, 9:37 AM), <http://www.aljazeera.com/news/asia-pacific/2013/03/20133472624414944.html>; Andrzej Wilk, *The Russian Army—The Priority for Putin's Third Term*, ISN ETH ZURICH (Aug. 12, 2013), <http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?lng=en&id=167923>; Dillon Zhou, *7 Countries Beefing Up Their Militaries in Today's More Dangerous World*, POLICYMIC (Feb. 22, 2013), <http://www.policymic.com/articles/27054/7-countries-beefing-up-their-militaries-in-today-s-more-dangerous-world>.

minimal compared to opportunities available in other regions. Given that many of the countries increasing military spending have checkered histories with respect to human rights,³² this is particularly worrisome. It is unlikely that these states will follow the United States's lead in requiring ICoCA membership for government contracts, especially if it results in higher prices. Consequently, many companies will simply opt to forgo the constraints of the ICoC. While the United States should continue to use its market power to leverage as much compliance as possible, this approach is therefore at best only a limited means of enforcement.

Secondly, relying solely on the market could allow PMCs to essentially self-regulate while using ICoCA to legitimize their activities, akin to what has previously occurred. Over the past decade, private military companies formed several industry associations to deflect criticism and improve standards.³³ These associations put forth codes of conduct and were supposed to accredit member firms based on adherence to the codes. But in practice, their ability to regulate PMC behavior generally fell short of expectations. They maintained close ties to the executives running the companies,³⁴ whose desire to increase profits for their companies conflicted with their ability to serve as effective market monitors.³⁵ In the absence of any independent punitive power, many associations were essentially used to legitimize the industry and allow governments to bypass more rigorous checks, while leaving companies free to police themselves.³⁶

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32. For a sample of recent articles on human rights violations in these countries, see Ariel Cohen, *Putin's New 'Fortress Russia'*, N.Y. TIMES, Oct. 18, 2013, <http://www.nytimes.com/2012/10/19/opinion/putins-new-fortress-russia.html>; Christine Hauser, *Saudi Human Rights Record Comes Under New Scrutiny*, N.Y. TIMES: LEDE (Mar. 14, 2013, 7:22 PM), <http://thelede.blogs.nytimes.com/2013/03/14/saudi-human-rights-record-comes-under-new-scrutiny>; and Holly Yan, *Report: A Decade After Hussein, Iraq Still Grapples with Human Rights Abuses*, CNN (Mar. 11, 2013), <http://www.cnn.com/2013/03/11/world/meast/iraq-human-rights/index.html>.
 33. The most prominent of these were the Association of the Stability Operations Industry (formerly IPOA), the British Association of Private Security Companies, and the Private Security Company Association of Iraq. See Surabhi Ranganathan, *Between Complicity and Irrelevance? Industry Associations and the Challenge of Regulating Private Security Contractors*, 41 GEO. J. INT'L L. 303, 310-17 (2010).
 34. *Id.* at 334-37, 357-59 (explaining how their organizational structures "create[d] greater potential for 'capture' of institutional processes by particular members").
 35. See Stephanie M. Hurst, Note, "Trade in Force": *The Need for Effective Regulation of Private Military and Security Companies*, 84 S. CAL. L. REV. 447, 463 (2011) ("Because PMSCs are not bound to follow the Code or even to join ISOA, they can strategically choose not to join to avoid publication and investigation of their alleged abuses and the potential corresponding reputational damages.").
 36. See Ranganathan, *supra* note 33, at 309-10, 372-73 (describing how Aegis's ability to secure

ICoCA is better placed than these industry groups were to serve as an effective overseer, but without a stronger method of holding companies accountable for non-compliance, it risks a similar fate. Companies embraced the ICoc largely because their representatives were intimately involved in the drafting and discussion process.³⁷ While the inclusion of these parties has been key to ICoCA's success thus far, the dominance of PMCs in the Association risks sacrificing its independence. The overwhelming majority of the Association's members are companies. Because all members vote to elect the Board of Directors responsible for overseeing the companies,³⁸ the industry can exert significant influence over decisions regarding certification. With no potential for legal accountability, ICoCA could turn into another iteration of earlier industry associations.

The prospect of regulatory capture makes relying on the market insufficient to truly enforce the Code. For governments that have little interest in seriously regulating PMCs, which includes many of the countries increasing military spending discussed earlier, mandating ICoCA certification could allow them to claim compliance with international standards while forgoing meaningful checks on company behavior. And even for governments that have shown a genuine desire to prevent PMC misconduct, such as the United States and the United Kingdom, regulatory capture makes using market mechanisms illusory. If ICoCA membership is no longer a clear proxy for full adherence to the Code's rigorous provisions, governments will still be forced to conduct individualized assessments before making contracting decisions. These kinds of case-by-case comparisons can suffer from inconsistency and inattention, and obviate the advantages of an institution such as ICoCA. Thus, relying on the market, while appealing, is inadequate to enforce the ICoc.

membership in an alternative association meant that its market position did not suffer despite being refused membership by IPOA several times).

37. See André du Plessis, *The Global Code of Conduct for Private Security Companies: Why It Matters to Humanitarian Organisations*, HUMANITARIAN PRAC. NETWORK (June 2010), <http://www.odihpn.org/humanitarian-exchange-magazine/issue-47/the-global-code-of-conduct-for-private-security-companies-why-it-matters-to-humanitarian-organisations> (detailing how “the private security industry . . . has worked closely with the Swiss government in the early stages of elaboration of the Code”); *ICoc Temporary Steering Committee (TSC)*, INT'L CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS, http://www.icoc-psp.org/ICoc_Steering_Committee.html (last visited Feb. 13, 2014) (describing the composition of the Steering Committee that helped produce the Association, which includes several prominent members of the industry).
38. See *supra* note 25 and accompanying text.

III. DOMESTIC ENFORCEMENT TO SPUR COMPLIANCE WITH THE ICoC

This Comment therefore proposes a third approach, which aims to be more rigorous than market mechanisms of limited efficacy but more feasible than concluding a multilateral treaty. By strengthening the domestic legal framework governing the conduct of private military companies, the United States can assist international enforcement efforts and bolster the credibility of ICoCA. More specifically, legislation modeled after the Foreign Corrupt Practices Act (FCPA) and International Traffic in Arms Regulations (ITAR) can be used, respectively, to directly regulate U.S.-based PMCs hired by foreign governments and to indirectly regulate many foreign PMCs. While some foreign companies would still be able to avoid U.S. laws, establishing such a framework would both force many of the industry's biggest companies to comply with the international norms and human rights standards outlined by the ICoC and lay the groundwork for the development of a more effective global regime.³⁹

In the coming years, many PMCs based in the United States are likely to be hired by foreign governments.⁴⁰ In order to hold them accountable for their actions on behalf of these governments, U.S. laws mandating adherence to ICoC standards⁴¹ must clearly apply to their conduct abroad. The FCPA demonstrates how this can be accomplished through an effective extraterritoriality provision—one that reaches all U.S. citizens, nationals, and residents, all U.S. companies, and all foreign companies that trade securities in the United States, regardless of the location of the illegal act.⁴² The FCPA

39. For a more extensive discussion of why doing so would advance U.S. foreign policy goals, see Michaels, *supra* note 3, at 1111-20, which describes how U.S. reliance on contractors “who are not comporting themselves well” threatens the success of certain missions and hurts our reputation in the eyes of both our allies and adversaries.

40. See *supra* notes 13-15, 30-32 and accompanying text.

41. The United States could alternatively create its own standards if it disagreed with certain provisions of the ICoC; as long as these are broadly similar to the ICoC's, this would still be a useful enforcement mechanism. The exact *substance* of domestic laws is therefore not the subject of this Comment; the rest of this Comment will assume for simplicity's sake that any U.S. legislation would mandate adherence to ICoC standards.

42. 15 U.S.C. §§ 78dd-1 to -3 (2012); see *Foreign Corrupt Practices Act*, O'MELVENY & MYERS 8, 14 (2009), http://www.ommm.com/files/upload/OMelvenyMyers_Sixth_Edition_FCPA_Handbook.pdf. Foreign nationals can also be prosecuted if any part of their prohibited conduct occurs in the United States. *Foreign Corrupt Practices Act*, *supra*, at 10 (“[P]hysical presence in the United States is not required to create jurisdiction. . . . [I]f U.S. mails and wires are used, the territory nexus is satisfied.”).

criminalizes bribery of foreign officials and requires companies to keep detailed records of their transactions.⁴³ It is rigorously enforced by the Department of Justice and Securities and Exchange Commission; violations of the law can trigger penalties of up to \$5 million and twenty years' imprisonment for individuals and \$25 million for corporations.⁴⁴ In recent years, the DOJ and SEC have also forced companies to disgorge profits earned through illegal transactions. This has resulted in record-setting penalties, including fines directed at Siemens for \$800 million and Halliburton for \$579 million.⁴⁵ The DOJ and SEC have been able to impose these penalties because both U.S. companies and foreign companies that trade securities in the United States have assets in the United States that can be readily fined.

A similar approach could be used to hold U.S.-based PMCs liable for misconduct abroad. Authority could be given to the DOJ to pursue civil and criminal actions against companies that depart from ICoC standards and commit an offense. Litigation would be conducted under the purview of Article III judges, who would be responsible for determining whether a transgression had occurred. By making any legislation clearly applicable to both foreign and domestic activities of U.S. companies, lawmakers could counter the presumption against extraterritoriality.⁴⁶ Because many of these companies have assets in the United States, coupling this extraterritorial scope with significant penalties for violations, as the FCPA did, would enable robust enforcement. This would ensure that companies that violate the Code are not only rebuked by ICoCA, but also held legally accountable. U.S. companies contracting with foreign governments would thereby be compelled to adhere to ICoC standards.

43. 15 U.S.C. §§ 78dd-1 to -3; see also *Foreign Corrupt Practices Act*, U.S. DEP'T JUST., <http://www.justice.gov/criminal/fraud/fcpa> (last visited Feb. 13, 2014).

44. See 15 U.S.C. § 78ff(a).

45. See Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 106-08 (2010) (listing prominent recent investigations); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 493-94 (2011) (noting recent record-setting penalties).

46. See 15 U.S.C. §§ 78dd-1(g), 78dd-2(i) for the specific statutory language used to establish this kind of nationality-based jurisdiction in the FCPA. An explicit provision for jurisdiction over company conduct in foreign territory is especially important in light of the Supreme Court's decision in *Kiobel*. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (holding that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application," which "mere corporate presence" fails to do).

Regulating foreign PMCs with no financial presence in the United States poses greater difficulty.⁴⁷ The FCPA model is not useful where entirely foreign PMCs contract with foreign governments. Because these companies are unlikely to hold assets in the United States, enforcing penalties for misconduct becomes challenging.⁴⁸ Given this, a more effective approach is to *indirectly* regulate foreign PMCs, by using their reliance on the expertise of former U.S. military officers to induce them to abide by U.S. laws. ITAR offers a helpful framework for how to do so. The regulations implement the Arms Export Control Act⁴⁹ and govern the import and export of defense-related products and services, including sensitive technology and munitions; violating the regulations can trigger hefty fines and imprisonment.⁵⁰ One of ITAR's key provisions prohibits Americans from training foreign militaries without State Department approval. Most PMC services, including non-combat and advisory functions, qualify as training foreign military forces and require State Department authorization.⁵¹ Yet this restriction on the activities of U.S. citizens is rarely enforced, because the Directorate of Defense Trade Controls, which is responsible for monitoring, is understaffed and overwhelmed with managing arms exports.⁵²

The United States could shape the overseas conduct of some foreign PMCs by making State Department approval of U.S. citizens' participation in PMC

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47. This is especially the case for companies that have specifically restructured themselves as foreign companies to evade U.S. laws, such as Reflex Responses, which Erik Prince created as a UAE company after Blackwater and its successors became mired in legal troubles in the United States. See Mazzetti & Hager, *supra* note 14. Another example is Sandline International, which registered as a Bahamas corporation despite being based in the United Kingdom to avoid stricter British regulations. See Hurst, *supra* note 35, at 469.
 48. Unlike the foreign companies that the FCPA typically levies fines on, foreign private security providers are unlikely to be listed on U.S. securities exchanges. See Charles J. Dunar III, Jared L. Mitchell & Donald L. Robbins III, *Private Military Industry Analysis: Private and Public Companies*, NAVAL POSTGRADUATE SCH. 3, 11 (Dec. 2007) (noting that "an overwhelming majority of firms are privately held and offered no financial information" and concluding that private firms constitute 91% of total firms).
 49. 22 U.S.C. §§ 2751–2799aa (2012).
 50. See International Traffic in Arms Regulations, 22 C.F.R. §§ 120.1, 120.9 (2013).
 51. *Id.* §§ 120.1, 120.2.
 52. See Congressman Brad Sherman, *Keynote Address at the Thirteenth Annual Satellite Industry Association Leadership Dinner*, SATELLITE INDUS. ASS'N 3 (Mar. 15, 2010), https://www.sia.org/wp-content/uploads/2010/RepSherman'sAddress03_15_2010.pdf (referring to the DDTC as "underfunded, understaffed, and outmoded," with "a backlog encompassing a fifth of all licenses for the year"); see also John C. Rood, *Improvements to the Defense Trade Export Control System*, U.S. DEP'T STATE (Feb. 26, 2008), <http://2001-2009.state.gov/t/us/rm/107505.htm>.

activity contingent on company compliance with ICoC standards. This could essentially be accomplished through agency action if greater resources were devoted to enforcement. U.S. persons seeking to provide defense services abroad already must obtain a State Department license to do so.⁵³ The Department could establish a policy of only granting licenses to U.S. citizens who are working for PMCs that adhere to the ICoC and are accredited by ICoCA. To ease the administrative burden of this approval system, the State Department could maintain a list of compliant companies, which citizens could then rely upon in making employment decisions. Coupling this licensing system with the possibility of civil and criminal prosecution if individuals are caught evading restrictions could effectively prevent Americans from offering their military know-how to foreign companies that fail to meet international standards.⁵⁴

Of course, this approach would not force foreign PMCs contracting with foreign governments to obey U.S. laws or hold them liable for failure to do so. Nonetheless, many foreign companies are heavily reliant on the unparalleled expertise of American former military officers.⁵⁵ In fact, for most companies, their employment of highly trained former U.S. officers is their most compelling sales pitch for obtaining business.⁵⁶ Consequently, while it is possible that some PMCs would choose to circumvent any restrictions by limiting their reliance on American personnel, this is unlikely to be the case across the industry. Many of the companies would likely opt to comply with ICoC standards in order to be able to continue hiring critical U.S. personnel.

Passing legislation modeled after the FCPA and ITAR would likely lead to changed practices in other countries as well. The FCPA helped bring about a dramatic change in attitudes toward corruption. Bribery has gone from being accepted as the cost of doing business in certain countries to being treated almost universally as unethical, illegitimate, and counterproductive for

53. See *Department of State Questions*, U.S. CUSTOMS & BORDER PROTECTION, at 1, http://www.cbp.gov/sites/default/files/documents/qstate_3.pdf (last visited Mar. 11, 2014).

54. Such a scheme would be similar to how ITAR violations are punished. See 22 C.F.R. § 127.3 (“Any person who willfully [v]iolates [these regulations] shall upon conviction be subject to a fine or imprisonment, or both . . .”).

55. This includes some of the most prominent international PMCs. At MPRI, “ninety-five percent of its employee pool formerly served in the U.S. Army.” Yasin, *supra* note 28, at 458. Even Reflex Responses, which primarily recruits soldiers from Latin America and Africa, relies on former U.S. military officers to provide critical operational and training expertise for the company. See Mazzetti & Hager, *supra* note 14.

56. See Bryan Bender, *From the Pentagon to the Private Sector*, BOS. GLOBE, Dec. 26, 2010, http://www.boston.com/news/nation/washington/articles/2010/12/26/defense_firms_lure_retired_generals.

economic growth.⁵⁷ This evolution in norms resulted in the passage of the OECD Anti-Bribery Convention in 1999, which has since been ratified by forty countries.⁵⁸ The Convention requires signatories to enact domestic legislation criminalizing bribery of foreign officials and monitors each country's subsequent execution. Furthermore, the FCPA has prompted U.S. companies to pressure other countries to pass analogous legislation so as to level the playing field for their own businesses.⁵⁹ Together, these two developments have prompted widespread reforms abroad.⁶⁰

While there are important differences between building a global anti-corruption regime and a PMC regulatory regime, the progress the FCPA has made illustrates how rigorous U.S. enforcement of ICoC standards could eventually galvanize greater enforcement abroad. By engendering greater compliance with the Code's provisions, domestic legislation could solidify norms of behavior among PMCs. And by penalizing U.S.-based PMCs for violations, it could create a profit incentive for these companies to urge other countries to pass similar reforms. In conjunction, these changes could help bring about more effective global regulation of PMCs.

Although ITAR has had a more limited impact on the development of international norms because the regulations only apply to U.S. exporters, they have changed the behavior of many defense-related companies in a way that has had ripple effects throughout the industry. Because the regulations impose a duty on companies to come forward and disclose breaches of ITAR to the government,⁶¹ and impose significant penalties for failing to do so, many munitions manufacturers have implemented internal checks to more rigorously monitor compliance.⁶² Greater scrutiny of the activities of companies that train

57. See Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 *IND. INT'L & COMP. L. REV.* 1, 3-10 (2013).

58. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, *ORG. FOR ECON. COOPERATION & DEV.*, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (last visited Mar. 3, 2014).

59. See Spahn, *supra* note 57, at 4-6.

60. See Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 *VA. J. INT'L L.* 1, 23-31 (2012). The passage of the U.K. Bribery Act in 2010 is a notable example; it is the strictest such measure in the world. Spahn, *supra* note 57, at 21.

61. 22 C.F.R. § 127.12 (2013).

62. For instance, Lockheed Martin now regularly appoints special officers to monitor internal compliance with regulations. See Lockheed Martin Corp. (Dep't of State July 24, 2008) (consent agreement), http://pmdotc.state.gov/compliance/consent_agreements/pdf/LockheedMartinCorp_ConsentAgreement_o8.pdf.

foreign militaries would likely spur similar norms of internal corporate policing among PMCs as well.

By using the FCPA and ITAR as models, the United States could provide for the first truly meaningful enforcement of the ICoC, and thereby hold PMCs accountable for a much wider range of activities than those covered by MEJA and the UCMJ. While current congressional gridlock makes passing this kind of legislation difficult, there are reasons to be optimistic that this proposal can nonetheless be implemented in large part. The FCPA was similarly ambitious and encountered significant opposition, but still managed to pass.⁶³ And the alterations to ITAR could be enacted through executive orders instead of legislation, thereby circumventing the need for congressional involvement. In conjunction, these changes could in the long term trigger substantial changes in behavior globally.

CONCLUSION

The establishment of ICoCA is an important development in building a legal framework to govern the global conduct of PMCs. Yet it suffers from the same weakness that has hampered earlier efforts to regulate PMCs on a multinational scale: the absence of a viable enforcement mechanism. Through stronger domestic legislation that borrows from the approaches of the FCPA and ITAR, the United States could ensure greater compliance with the Code and bolster the credibility of ICoCA as it seeks to establish a global governance regime for PMCs.

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63. There were serious disagreements between the executive branch and factions of Congress as to the scope of the problem and the appropriate solution. Moreover, a vocal business lobby was vehemently opposed to the bill, arguing that it would place U.S. businesses at a competitive disadvantage. An unlikely political coalition was nevertheless able to secure its passage. See Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929 (2012).

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