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# Proposal for a Treaty to Apply the Foreign Corrupt Practices Act Solution to the Corporate Criminal Problem in Private Military and Security Companies

EVYENIA ZAFERIS\*

“[T]ragedy.”<sup>1</sup> “[M]assacre.”<sup>2</sup> “[M]aiming of innocents.”<sup>3</sup> These are just a few of the words used to describe the events of September 16, 2007, which occurred in Nisour Square, an affluent neighborhood of Baghdad, Iraq.<sup>4</sup> Automatic weapons, heavy machine guns, grenade launchers and sniper fire were used to inundate a crowded traffic circle.<sup>5</sup> Depicted as a scene of horror and confusion, dozens of Iraqis took cover from the downpour of metal coming from American armored trucks.<sup>6</sup> What at first glance appears to be an unfortunate reality of war all too common on the battlefield, in actuality portrays a criminal act against Iraqi civilians perpetrated by U.S. contractors.

On that day, Blackwater security guards killed seventeen Iraqi civilians, including a nine-year-old boy, and wounded many others.<sup>7</sup> The

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\* Evyenia (Nia) Zaferis, Loyola Law School, Los Angeles, Juris Doctor, May 2018. *Chief Articles Editor*, Loyola of Los Angeles International & Comparative Law Review, Volume 41. Many thanks to my parents and brother, Ernie, for their unwavering support and love. A special thank you to my DC family for introducing me to our justice system, inspiring me to be my best self, and always having my back.

1. Nicky Woolf, *Former Blackwater Guards Sentenced for Massacre of Unarmed Iraqi Civilians*, THE GUARDIAN, (Apr. 14, 2015), <https://www.theguardian.com/us-news/2015/apr/13/former-blackwater-guards-sentencing-baghdad-massacre>.

2. *Id.*

3. *Id.*

4. *Blackwater Incident: What Happened*, BBC NEWS (Dec. 8, 2008), <http://news.bbc.co.uk/2/hi/7033332.stm>.

5. James Risen, *Before Shooting in Iraq, a Warning on Blackwater*, N.Y. TIMES (June 29, 2014), <http://www.nytimes.com/2014/06/30/us/before-shooting-in-iraq-warning-on-blackwater.html>; Matt Apuzzo, *Blackwater Guards Found Guilty in 2007 Iraq Killings*, N.Y. TIMES (Oct. 22, 2014), <http://www.nytimes.com/2014/10/23/us/blackwater-verdict.html>.

6. Apuzzo, *supra* note 5.

7. Risen, *supra* note 5; Apuzzo, *supra* note 5.

four individuals ultimately held responsible were among the nineteen Blackwater guards in a convoy providing security for U.S. State Department officials in Iraq.<sup>8</sup> While Blackwater claimed its employees acted in self-defense,<sup>9</sup> at the ten-week long trial back on U.S. soil, no witnesses testified they saw the guards come under fire.<sup>10</sup>

Nearly seven years after the killings, three of the guards were found guilty of manslaughter charges in U.S. federal court and subsequently sentenced to thirty years in prison.<sup>11</sup> The team's sniper, who was the first to open fire, was convicted on a separate charge of first-degree murder and later sentenced to life in prison.<sup>12</sup> It should be noted that in August 2017, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit ordered a new trial for the sniper and ruled that the three guards be resentenced.<sup>13</sup>

But what about the company? Despite becoming the subject of multiple U.S. Justice Department investigations, Blackwater and its executives effectively "survived."<sup>14</sup> However, public outrage over what has marked a "bloody nadir" in America's war in Iraq did contribute to the company's ultimate demise.<sup>15</sup> Eventually Blackwater lost its government contracts and was "renamed, sold and renamed again"<sup>16</sup>— a seemingly small price to pay when four of its employees will be spending decades behind bars. As it stands today, there is no effective way to hold the executives of companies like Blackwater responsible for the actions of the men they breed and rely upon.

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8. Spencer S. Hsu & Victoria St. Martin, *Four Blackwater Guards Sentenced in Iraq Shootings of 31 Unarmed Civilians*, THE WASH. POST (Apr. 13, 2015), [https://www.washingtonpost.com/local/crime/four-blackwater-guards-sentenced-in-iraq-shootings-of-31-unarmed-civilians/2015/04/13/55b777e0-dee4-11e4-be40-566e2653afe5\\_story.html](https://www.washingtonpost.com/local/crime/four-blackwater-guards-sentenced-in-iraq-shootings-of-31-unarmed-civilians/2015/04/13/55b777e0-dee4-11e4-be40-566e2653afe5_story.html); see also Amy Davidson, *A Life Sentence for a Blackwater Murder*, THE NEW YORKER (Apr. 14, 2015), <http://www.newyorker.com/news/amy-davidson/a-life-sentence-for-a-blackwater-murder>.

9. *Iraq Battle Was Self-Defense, Security Firm Says*, CNN (Sept. 18, 2007), <http://www.cnn.com/2007/WORLD/meast/09/17/iraq.main/index.html>.

10. Hsu & St. Martin, *supra* note 8; see also Matt Apuzzo, *Witnesses Testify Against Ex-Blackwater Colleagues in Case of 2007 Iraq Killings*, N.Y. TIMES (July 15, 2014), [https://www.nytimes.com/2014/07/16/us/politics/witnesses-testify-against-ex-blackwater-colleagues-in-case-of-2007-iraq-killings.html?\\_r=0](https://www.nytimes.com/2014/07/16/us/politics/witnesses-testify-against-ex-blackwater-colleagues-in-case-of-2007-iraq-killings.html?_r=0).

11. Woolf, *supra* note 1.

12. *Id.*

13. Spencer S. Hsu, *Murder Conviction in Blackwater Case Thrown Out, Other Sentences Overturned*, THE WASH. POST (Aug. 4, 2017), [https://www.washingtonpost.com/local/public-safety/murder-conviction-in-blackwater-case-thrown-out-other-sentences-overturned/2017/08/04/a14f275c-792e-11e7-9eac-d56bd5568db8\\_story.html?utm\\_term=.4dfe4af1c635](https://www.washingtonpost.com/local/public-safety/murder-conviction-in-blackwater-case-thrown-out-other-sentences-overturned/2017/08/04/a14f275c-792e-11e7-9eac-d56bd5568db8_story.html?utm_term=.4dfe4af1c635).

14. Apuzzo, *supra* note 5.

15. *Id.*

16. *Id.*

## INTRODUCTION

The use of Private Military and Security Companies (PMSCs), like Blackwater, has grown exponentially over the years.<sup>17</sup> While efforts are made to regulate the conduct of these companies, no uniform method of enforcement or punishment for wrongdoing exists across all states. This article focuses on creating a solution to the lack of corporate criminal accountability for PMSCs. Specifically, this article suggests an international treaty that calls upon states to create domestic legislation modeled after the United States' Foreign Corrupt Practices Act (FCPA). The legislation would allow states to prosecute these corporations for egregious crimes and human rights violations perpetrated by contractors extraterritorially, just as the FCPA allows the U.S. to prosecute the bribery of foreign officials.

While the FCPA is not entirely unique in its existence as a domestic statute with the ability to criminalize conduct overseas, it has proven to be an effective means of doing so.<sup>18</sup> A treaty is necessary because while the United States could implement such legislation on its own, that is not enough to ensure that other states will follow suit. Leading the way for others has its limits, and a treaty would allow individual states to give input as to the exact language to be incorporated, as well as the precise prosecutorial mechanism.

Part I will explore the background of PMSCs and the reasons for their rise in prominence over the years, especially noting the historically profit-driven motivation of private military actors, primarily mercenaries. Part II will discuss a few of the various and unsuccessful ways the international legal community has attempted to address the issue of regulating PMSCs. And Part III will describe how the FCPA came into existence, detail what it prohibits and explain why it provides a model that can be adapted and implemented by states in their own domestic laws in order to regulate PMSCs. Part III also recognizes recent efforts made by the United States to criminalize corporate wrongdoing. Part IV examines some of the practical details of this proposed treaty, such as jurisdiction and superior liability.

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17. *See infra* Section I.C.

18. *See infra*. Section III

## I. BACKGROUND OF PRIVATE MILITARY AND SECURITY COMPANIES

### A. *Historical Background of Profit-Driven Military Actors*

While “private, profit-driven military actors” are nearly as old as war itself, the “modern private security industry is unprecedented in its scale and sophistication.”<sup>19</sup> Throughout history, from Ancient Times in Mesopotamia and Greece, into the Middle Ages and even somewhat during the Age of Reason, employing private warriors was a significantly widespread practice.<sup>20</sup> Historically, the term “mercenary” has been “understood to mean an individual hired to exercise violence on behalf of its client(s) in return for financial gain.”<sup>21</sup> Notably, the meaning of the word mercenary is said to be dependent on the “spirit of the age.”<sup>22</sup>

Whatever the meaning, it is agreed upon that division of labor and specialization of skill are considered significant milestones in humankind.<sup>23</sup> Those with the ability to carry out specialized functions both efficiently and effectively became “indispensable for human society.”<sup>24</sup> The fact that war can be considered a “constant in human history” and armed conflicts have “formed an integral part of the human condition,” those possessing specialized skills in carrying out military activities have been able to sell their services for centuries.<sup>25</sup> Unsurprisingly, “individuals fighting in wars for remuneration—mercenaries—have always formed an integral part of the social and political history of warfare.”<sup>26</sup> These mercenaries could market their services not only to “local rulers and other wealthy persons,” but also to “foreign customers.”<sup>27</sup>

The idea that a mercenary’s allegiance was contingent upon monetary compensation, as opposed to national loyalty and obedience,<sup>28</sup> contributed to the negative connotation surrounding the practice. Mercenaries have been referred to as “hired killers,” “dogs of war,” or even “heartless soldiers of fortune.”<sup>29</sup> However, mercenaries are not alone in their for-profit related condemnation.

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19. HANNAH TONKIN, STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT 6 (2011).

20. See EVGENI MOYAKINE, THE PRIVATIZED ART OF WAR 47-58 (2015).

21. *Id.* at 47.

22. M.P.W. BROUWERS, MERCENARIES AND LAW 2 (2011).

23. MOYAKINE, *supra* note 20, at 47.

24. *Id.*

25. *Id.* at 48.

26. *Id.*

27. *Id.*

28. BROUWERS, *supra* note 22, at 1.

29. *Id.*

That is, naval warfare has roots in financial motivation as well. Specifically, the use of privateers, prevalent since the Middle Ages, was eventually banned by a treaty in 1856, known as the Declaration of Paris.<sup>30</sup> Privateers were “privately owned and operated ships, licensed to cruise the oceans, forcibly capture enemy merchant vessels and cargo, and bring them back to port, where the captured property was auctioned and a share granted to the privateer’s owner, who divided it by contract with the crew.”<sup>31</sup> The incentive to overreach is evident from the nature of the practice itself. The obvious greed factor, coupled with the difficulty in regulating conduct on the open sea, led to the ultimate abolition of privateering.

While almost all European powers had renounced privateering by the mid-nineteenth century, the United States declined to do so.<sup>32</sup> In fact, the U.S. government refused to sign the Declaration of Paris, “declaring that privateering was crucial to its national security.”<sup>33</sup> This was in part because during the War of 1812, the “principal U.S. offensive strategy at sea was to interfere with enemy commerce.”<sup>34</sup> In order to execute that approach, the government “relied upon several hundred privateers,” and only a “mere twenty-two publicly owned naval cruisers”—interestingly, the “private forces captured eight times as many enemy vessels as did the public ones.”<sup>35</sup> Despite its apparent effectiveness, eventually, “the practice just dropped out of view;” however, the United States never “formally or officially abandon[ed] privateering.”<sup>36</sup>

### *B. Mercenaries and the Law*

Much like its refusal to sign the 1856 Declaration of Paris, the United States has not ratified the United Nations Mercenary Convention.<sup>37</sup> Before diving into the UN Mercenary Convention itself, it is important to first understand the evolution of international law as it relates to mercenaries, beginning with the Hague Conventions of 1899 and 1907. These international “peace conferences were characterized” by

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30. Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1, 1 (2007).

31. *Id.* at 2.

32. *Id.* at 50.

33. *Id.* at 2.

34. *Id.*

35. *Id.* at 3-4.

36. *Id.* at 4.

37. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Dec. 4, 1989, 2163 U.N.T.S. 75 [hereinafter UN Mercenary Convention] (listing names of states, and dates of signature and ratification).

their “purely humanitarian concern[s],” which translated into two principles built on “solving disputes in a peaceful manner, instead of acting by means of aggression.”<sup>38</sup> An “obligation to respect neutrality [was] codified” and the “rights and duties of neutral powers and persons in land warfare” were set out in the Hague Convention of 1907.<sup>39</sup> “Provisions against the recruitment of mercenaries on national territory were included” in the Convention because a state allowing its territory to be used for such purposes was “deemed in support of a belligerent,” and thus potentially “drawn into a conflict” in which it has no interest.<sup>40</sup> Articles 4, 5 and 17 provide some of the obligations of neutral states, like outlawing both the formation of corps of combatants and the opening of recruitment agencies on the “territory of a neutral power to assist the belligerent.”<sup>41</sup>

The “attitude of the international community towards mercenaries changed” after the establishment of the United Nations, following World War II.<sup>42</sup> This shift can be attributed to the recognition of the “right to self-determination,” as set forth in the main purposes and principles of the UN Charter.<sup>43</sup> While the creation of the UN Charter brought about changes to the “law regulating the use of force in international politics,” a “legal development” as it related to mercenaries did not occur at this time due to preoccupation with the Cold War.<sup>44</sup>

The 1960s brought a heightening of the international community’s interest in mercenaries, specifically due to decolonization in Africa.<sup>45</sup> Initially, the response was limited to merely “reaffirming the implications of article 2(4)” of the UN Charter, which states:

All members shall refrain in their international relations from the threat or use of force against a territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations.<sup>46</sup>

However, by the late 1960s the UN General Assembly declared, “that the use of mercenaries against national liberation movements fighting for independence in colonial territories is a criminal act.”<sup>47</sup> And

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38. BROUWERS, *supra* note 22, at 3.

39. *Id.*

40. *Id.*

41. *Id.* at 4.

42. *Id.*

43. U.N. Charter art. 1, ¶ 2; *see also* BROUWERS, *supra* note 22, at 4.

44. BROUWERS, *supra* note 22, at 4.

45. *Id.* at 4-5.

46. *Id.* at 5; U.N. Charter art. 2, ¶ 4.

47. BROUWERS, *supra* note 22, at 5.

in 1970, the UN General Assembly adopted a declaration that confirmed a state's "duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state."<sup>48</sup> A few years later, the legal status of a mercenary was defined by the General Assembly in 1973:

[T]he use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and mercenaries should accordingly be punished as criminals.<sup>49</sup>

The next significant development in the legal status of mercenaries was the 1977 Additional Protocol I to the Geneva Conventions of 1949, which "illustrated the legal position of mercenaries" in Article 47.<sup>50</sup>

It is important to note, "Additional Protocol I only applies to international armed conflicts."<sup>51</sup> Additionally, while the International Committee of the Red Cross believes "Article 47 is customary international humanitarian law," the United States does not consider it to be of "customary legal status."<sup>52</sup> To be classified as a mercenary, one must meet all six requirements as set forth below. Article 47(2) states:

- (2) A mercenary is any person who:
  - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
  - (b) does, in fact, take a direct part in the hostilities;
  - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
  - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
  - (e) is not a member of the armed forces of a Party to the conflict; and
  - (f) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.<sup>53</sup>

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48. *Id.*

49. *Id.*

50. *Id.* at 6.

51. *Id.*

52. *Id.*

53. Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47, June 8, 1977, 1125 U.N.T.S. 3.

The language of the definition has received criticism for its “tightly drawn” nature,<sup>54</sup> and understandably so. On its face, this specific and narrow definition leaves much room for an individual to argue against his classification as a mercenary. For example, legally proving an alleged mercenary’s motivation sounds like a near impossible feat.

Several efforts were made to explicitly address the mercenary problems in Africa. Specifically, the 1972 Organization of African Unity (OAU) Convention for the Elimination of Mercenaries in Africa, was “primarily aimed to stop mercenaries from Europe” from “fight[ing] in conflicts all over Africa.”<sup>55</sup> These mercenaries were “instructed and paid by minority governments of Rhodesia and South Africa.”<sup>56</sup> Much like the UN resolutions discussed above, “this Convention also made states responsible for the prohibition and punishment of mercenary activities taking place in their jurisdiction.”<sup>57</sup> Furthermore, in contrast to the “traditional view that states are individually accountable,” this Convention emphasized a “collective responsibility towards accountability” by “placing an obligation on individuals who meet its requirement.”<sup>58</sup> This requirement can be met by satisfying the criteria as laid out in the Convention’s own definition of a mercenary; additionally, the requirement can be met by “fulfill[ing] the criteria of those people who recruit or assist mercenaries through training, financial support, or by preventing alleged mercenaries to be prosecuted.”<sup>59</sup>

Following the 1972 OAU Convention and the trial of several captured alleged mercenaries in Angola, the Draft Convention of the Prevention and Suppression of Mercenarism was created by the International Commission of Inquiry on Mercenaries in 1976.<sup>60</sup> One of the most significant things to come out of this Convention hails from Article 4, which “deprived mercenaries of the status of being a lawful combatant,” thus not affording captured mercenaries the “protected status of [a] prisoner-of-war.”<sup>61</sup> This idea was later incorporated into the 1977 Geneva Additional Protocol I.<sup>62</sup> Shortly after Additional Protocol I was adopted, the OAU adopted the 1977 Convention for the Elimination of

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54. See BROUWERS, *supra* note 22, at 10.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 10–11.

60. See BROUWERS, *supra* note 22, at 11.

61. *Id.* at 12.

62. *Id.*

Mercenarism in Africa.<sup>63</sup> The definition of mercenary in the 1977 OAU Convention differs from the definition provided in the 1972 Convention in that it integrates the six criteria from Additional Protocol I, notwithstanding some differences in formulation.<sup>64</sup>

Ultimately, the UN Mercenary Convention, originally called the “International Convention against the Recruitment, Use, Financing, and Training of Mercenaries,” was adopted in April of 1989 and entered into force in October of 2001.<sup>65</sup> As mentioned above, the United States is not a party to this Convention;<sup>66</sup> further, none of the permanent members of the UN Security Council, China, Russia, the United Kingdom and France, are parties to the Convention either.<sup>67</sup>

Naturally, the UN Mercenary Convention contains a definition of mercenary—the definition is effectively the same as the one found in Additional Protocol I, with a minor exception that can be found in a later article within the Convention.<sup>68</sup> Critics have noted the “similarities in the definition[s]” translate to “similar problems;” they have also pointed out that the “cumulative criteria” makes it nearly “impossible to apply the legal definition of a mercenary to an alleged mercenary.”<sup>69</sup> Additionally, the definition applies to both international armed conflicts, as well as internal armed conflicts.<sup>70</sup> The Convention has received criticism because of the “low number of state parties,” but it is almost understandable because many states do not wish to “delegate any control over their national security”<sup>71</sup>—much like the United States’ stance on privateering. Other concerns include the difficulty associated with proving motivation, touched on above, as well as a “lack of enforcement mechanism and the lack of monitoring procedures.”<sup>72</sup>

### C. Modern-day PMSCs

As mentioned above, after the 1960s, “norms against the use of mercenaries began to manifest themselves.”<sup>73</sup> At that time, international law was confronted with the ongoing challenge of attempting to regulate

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63. *Id.*

64. *Id.*

65. UN Mercenary Convention, *supra* note 37.

66. *See id.*

67. *Id.*; *see also* BROUWERS, *supra* note 22, at 14.

68. BROUWERS, *supra* note 22, at 14.

69. *Id.*

70. *Id.*

71. *Id.* at 15.

72. *Id.* at 16.

73. MOYAKINE *supra* note 20, at 59.

and limit the scope of the problem.<sup>74</sup> Many ex-soldiers sold their expertise to “states, rebel movements, or companies functioning in dangerous areas of the world, such as Latin America and Africa.”<sup>75</sup> The early 1990s mark the emergence of PMSCs as they are known today.<sup>76</sup> Various rationales are cited for the “rapid growth and consolidation of the industry.”<sup>77</sup>

The end of the Cold War is regularly acknowledged as the impetus for the proliferation and expansion of the private military and security market. Global order changed dramatically after the fall of the Soviet Union, which “had major consequences for the global market of force with its supply and demand of military and security services.”<sup>78</sup> Three of the consequences are oft-cited. First, the “world experienced an increase in the levels of global violence and the occurrence of many conflicts” after the United States and the Soviet Union “ceased to provide order and to exercise control over the regions of instability,” because of fears of nuclear proliferation.<sup>79</sup> Second, many “non-State conflict groups, such as terrorist organizations, rebel movements and drug cartels emerged” worldwide, making it difficult for the international community “to regulate and to suppress them.”<sup>80</sup> Third, the end of the Cold War “led states to downsize their armed forces.”<sup>81</sup> Consequently, numerous professional soldiers were available for hire, and many of them had little to offer outside of their military skills.<sup>82</sup> Many weak nations “sought help from privately run organizations providing military and security services” because they were unable to “effectively exercise control over their sovereign territories” or “secure their borders.”<sup>83</sup>

Another reason for the rise of PMSCs is embedded within “modern warfare itself.”<sup>84</sup> Changes and innovations required the need for experts, and private companies were able to offer the “best technology and expertise.”<sup>85</sup> “Information dominance and technical expertise” became critical to modern warfare.<sup>86</sup> Further, the “privatization revolution,” which came about in the 1980s, “created fertile ground for privatizing

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74. *Id.*

75. *Id.*

76. Tonkin, *supra* note 19, at 13.

77. *Id.*

78. MOYAKINE, *supra* note 20, at 60.

79. *Id.*

80. *Id.*

81. TONKIN, *supra* note 19, at 13.

82. *Id.*

83. MOYAKINE, *supra* note 20, at 61.

84. *Id.*

85. *Id.* at 61–62.

86. *Id.* at 62.

many governmental functions” and the “establishment of private enterprises capable of carrying them out.”<sup>87</sup>

The idea of privatizing government functions is “currently a matter of fact.”<sup>88</sup> Putting a number on the amount of spending associated with government contractors would undoubtedly be a herculean task, at least as far as the United States is concerned. As for American PMSC spending in particular, the number is in the billions and regularly accounts for a significant portion of the federal budget.<sup>89</sup> From 2007-2012 alone, the Department of Defense spent approximately \$160 billion on private security contractors for various services in Iraq and Afghanistan.<sup>90</sup> War is a business, and quite a lucrative one for PMSCs. At the end of the day, PMSCs are “for-profit enterprises” with the “main motivation of...maximizing their financial gain,” like any other private company.<sup>91</sup>

Unlike their mercenary predecessors, today’s PMSCs have an “obvious corporate structure, are tied to corporate holdings and financial markets, and have the main motive of maximizing business rather than individual profit.”<sup>92</sup> However, it is that very corporate structure that remains unregulated, or at most self-regulated, as touched on more below. The corporate greed and the desire to increase profits through bigger and better contracts is exactly why these companies’ leaders need to be held accountable when their subordinates commit atrocious crimes.

## II. INTERNATIONAL AND DOMESTIC EFFORTS TO REGULATE

Over the years, efforts have been made to address the various issues posed by PMSCs. Unfortunately, none of these efforts have chiefly focused on holding the corporations themselves, or their leaders, responsible for the criminal acts perpetrated by their underlings. Rather than create specific mechanisms for punishing wrongdoing, states have instead concentrated on compiling guidelines and recommendations for good practice, such as the Montreux Document, discussed more fully

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87. *Id.*

88. *Id.* at 62–63.

89. See David Isenberg, *Showing the Private Military Contracting Sector the Money, Redux*, THE HUFFINGTON POST (Dec. 2, 2011, 12:47 PM), [http://www.huffingtonpost.com/david-isenberg/military-contracting\\_b\\_1123328.html](http://www.huffingtonpost.com/david-isenberg/military-contracting_b_1123328.html).

90. Amol Mehra, *Who’s Guarding Whom? Private Security Contractors and the Need for Government Action*, THE HUFFINGTON POST (July 22, 2014, 4:01 PM), [http://www.huffingtonpost.com/amol-mehra/whos-guarding-whom-privat\\_b\\_5606148.html](http://www.huffingtonpost.com/amol-mehra/whos-guarding-whom-privat_b_5606148.html); see also MOSHE SCHWARTZ & JENNIFER CHURCH, CONG. RESEARCH SERV., R43074, DEPARTMENT OF DEFENSE’S USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS: BACKGROUND, ANALYSIS, AND ISSUES FOR CONGRESS 2 (2013).

91. MOYAKINE, *supra* note 20, at 67.

92. *Id.* at 68.

below.<sup>93</sup> Other international attempts include the creation of the International Code of Conduct for Private Security Service Providers, which is a multi-stakeholder initiative aimed mostly at the self-regulation of PMSCs.<sup>94</sup> While this approach is idyllic, it is not the most practical or concrete method to attacking the problem. The United States, however, has endeavored to tackle the matter by implementing domestic legislation in the form of the Military Extraterritorial Jurisdiction Act (MEJA).<sup>95</sup> Despite MEJA's good intentions, it too falls short of providing a proper solution and is rarely employed.

### A. *The Montreux Document*

The Montreux Document is the result of a joint-initiative launched by Switzerland and the International Committee for the Red Cross.<sup>96</sup> The Swiss initiative, finalized in September 2008, "brought together [seventeen] governments from various regions of the world and drew upon the knowledge of industry representatives, academic experts and non-governmental organizations."<sup>97</sup> According to the Document itself, this is the first time an "intergovernmental statement clearly articulates the most pertinent international legal obligations with regard to PMSCs."<sup>98</sup> The Document also claims to debunk the "prevailing misconception that private contractors operate in a legal vacuum."<sup>99</sup>

Essentially, the Montreux Document is "intended to promote respect for international humanitarian law and human rights law whenever PMSCs are present in armed conflicts."<sup>100</sup> The Document emphasizes that it is "not legally binding," but rather it "contains a compilation of relevant international legal obligations and good practices."<sup>101</sup>

Part One of the Document focuses on the pertinent international legal obligations. This section begins by "highlight[ing] the responsibilities of three types of States: Contracting states (countries that hire PMSCs), Territorial States (countries on whose territory PMSCs

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93. See *infra* Section II.A.

94. See *infra* Section II.B.

95. See *infra* Section II.C.

96. TONKIN, *supra* note 19, at 35.

97. *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, INT'L COMM. OF THE RED CROSS 5 (Aug. 2008), [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf) [hereinafter *Montreux Document*].

98. *Id.* at 5.

99. *Id.*

100. *Id.* at 31.

101. *Id.*

operate) and Home States (countries in which PMSCs are based).”<sup>102</sup> Part One concludes with a note on “Superior Responsibility.”<sup>103</sup> Specifically, it reads:

Superiors of PMSC personnel, such as:

- a) governmental officials, whether they are military commanders or civilian superiors, or
- b) directors or managers of PMSCs, may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. Superior responsibility is not engaged solely by virtue of a contract.<sup>104</sup>

Despite the fact that it does not offer a mechanism through which to do so, the inclusion of this portion on superior responsibility bolsters the idea that those in positions of power and authority should also be held accountable.

Part Two of the Document contains a non-exhaustive list of non-legally binding “good practices that aims to provide guidance and assistance to States in ensuring respect for international humanitarian law and human rights law.”<sup>105</sup> In light of the fact that in recent years, both the United States and Israel “have contested the general applicability of [human rights law] to armed conflict,” this public affirmation that international humanitarian law and human rights law apply concurrently in armed conflict is particularly significant.<sup>106</sup>

For the purposes of this article, three of the “good practices” are especially noteworthy. Good Practice number 19 states:

- To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing:
- a) corporate criminal responsibility for crimes committed by the PMSC, consistent with the Contracting State’s national legal system;
  - b) criminal jurisdiction over serious crimes committed by PMSC personnel abroad.<sup>107</sup>

Good Practice number 71 contains identical language to number 19, with the exception of replacing “Contracting State’s” with “Home

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102. *Id.*

103. *Id.* at 15.

104. *Id.*

105. *Id.* at 16; see also Faiza Patel, *A Primer on Legal Developments Regarding Private Military Contractors*, LAWFARE BLOG (July 18, 2014, 4:30 PM), <https://www.lawfareblog.com/primer-legal-developments-regarding-private-military-contractors>.

106. TONKIN, *supra* note 19, at 145.

107. *Montreux Document*, *supra* note 97, at 19.

State's."<sup>108</sup> Good Practice number 49 also contains very similar language, but is in reference to "Territorial State's."<sup>109</sup> These suggestions coincide quite well with the idea of creating a criminal statute with extraterritorial jurisdiction, which will be discussed later.

### *B. International Code of Conduct for Private Security Service Providers*

As a sort of follow-up to the Montreux Document, the International Code of Conduct for Private Security Service Providers (ICoC) was created in 2010.<sup>110</sup> While also the brainchild of the Swiss, this project differed from the Montreux Document in that it was more "industry driven."<sup>111</sup> The ICoC was launched with the "over-arching objectives to articulate human rights responsibilities of private security companies (PSCs), and to set out international principles and standards for the responsible provision of private security services, particularly when operating in complex environments."<sup>112</sup> As a "multi-stakeholder process," it involved representatives from a number of private companies, industry associations, civil society organizations, as well as "government representatives from the United States, the United Kingdom, Canada, Afghanistan, Switzerland and the Council of the European Union."<sup>113</sup> The ICoC was finalized in November 2010, and was initially signed by fifty-eight private security companies.<sup>114</sup> By September 2013, 708 companies had "formally committed to operate in accordance with the Code of Conduct."<sup>115</sup>

Section B of the ICoC contains a number of definitions that are "applicable to the activities of 'Private Security Companies' (PSCs) that have signed and agreed to operate in compliance with" the Code's principles and standards.<sup>116</sup> According to the Code, a PSC is "any Company whose business activities include the provision of Security Services either on its own behalf or on behalf of another, irrespective of

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108. *Id.* at 27.

109. *Id.* at 24.

110. CORINNA SEIBERTH, PRIVATE MILITARY AND SECURITY COMPANIES IN INTERNATIONAL LAW 159, 161 (2014).

111. *Id.*

112. *History*, INT'L CODE OF CONDUCT ASS'N, <https://icoca.ch/en/history> (last visited Oct. 20, 2017).

[hereinafter *History*].

113. SEIBERTH, *supra* note 110, at 161.

114. *History*, *supra* note 112.

115. *Id.*

116. ICoC, The International Code of Conduct for Private Security Service Providers, Section B. Definitions, available at [https://icoca.ch/en/the\\_icoc](https://icoca.ch/en/the_icoc) [hereinafter Section B. Definitions]; SEIBERTH, *supra* note 110, at 162.

how such Company describes itself.”<sup>117</sup> Security Services are defined as the “guarding and protection of persons and objects, such as convoys, facilities, designated sites, property or other places (whether armed or unarmed), or any other activity for which the Personnel of Companies are required to carry or operate a weapon in the performance of their duties.”<sup>118</sup>

Notably, even though the Code builds upon the foundations of the Montreux Document, there is no uniform use of terminology.<sup>119</sup> Moreover, the Montreux Document itself explicitly “avoids any strict delimitation between private military and private security companies,” specifically acknowledging the lack of a “standard definition” of “what is a military company” versus “what is a security company.”<sup>120</sup> The Montreux Document reasons that “many companies provide a wide range of services” which can spread across the two categories, going on to say that labeling is less relevant than the “specific services” a company “provides in a particular instance.”<sup>121</sup> That idea is reflected in the Code’s definition of PSC, specifically through the “irrespective of” language cited above.<sup>122</sup> The Code does not use the term Private Military and Security Company (PMSC) but uses the term Private Security Companies (PSC); this is likely because from an industry perspective, being labeled as a PMSC still carries the negative connotation of the mercenary-like military companies active in the 1990s.<sup>123</sup>

The ICoC “process foresaw the establishment of an independent mechanism for governance and oversight” from jump street.<sup>124</sup> A “multi-stakeholder committee” was formed, “supported by working groups on different subject areas,” and the “final oversight mechanism was endorsed by agreement in the form of Articles of Association at a drafting conference in February 2013.”<sup>125</sup> While the development of a monitoring body is encouraging, the ICoCA is criticized for “lack[ing] any kind of serious enforcement mechanism.”<sup>126</sup> More than anything else, the ICoC “itself embodies the policy commitment to respect human rights.”<sup>127</sup>

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117. Section B. Definitions, *supra* note 116.

118. *Id.*

119. SEIBERTH, *supra* note 110, at 163.

120. *Montreux Document*, *supra* note 97, at 38.

121. *Id.*

122. Section B. Definitions, *supra* note 116.

123. SEIBERTH, *supra* note 110, at 163.

124. *See History*, *supra* note 112.

125. SEIBERTH, *supra* note 110, at 162.

126. Reema Shah, *Beating Blackwater: Using Domestic Legislation to Enforce the International Code of Conduct for Private Military Companies*, 123 YALE L.J. 2559, 2559 (2014).

127. SEIBERTH, *supra* note 110, at 165.

The authority and effectiveness of the Code “depends on how closely it sticks to the scope of binding international law as its foundation and on the consequences that may arise from a breach of the Code.”<sup>128</sup> The former has been deemed “problematic because the Code not only formulates corporate human rights expectations,” but simultaneously “creates rights” by “providing rules on the use of force.”<sup>129</sup> This creates an issue as far as the ICoC being the “sole regulatory foundation,” because the “industry cannot promulgate its own rights with respect to the use of force.”<sup>130</sup> That is within the domain of the state, as the “holder of the monopoly on the use of force.”<sup>131</sup> Because the state determines the “limits of use of force for individuals,” it “must do the same for PMSCs.”<sup>132</sup>

Both the Montreux Document and the ICoC are steps in the right direction, but they are individually and collectively insufficient to entirely solve the PMSC regulation problem. Depending on state and corporate practice in response to the Montreux Document and the Code, it could create “pressure from within the industry for companies to comply with its provisions, to prevent negative impacts on human rights and to improve accountability for wrongful conduct beyond mere self-regulation.”<sup>133</sup> Nevertheless, the ICoC can “only indirectly address gaps and grey zones with respect to state obligations and only in the context of contracting practices, where it could become a prerequisite for contracting states.”<sup>134</sup> The ICoC merely has the potential to fill the gap of corporate responsibility by “implementing the responsibility to respect.”<sup>135</sup> However, as noted above, the ICoC “cannot replace additional domestic legislation on PMSCs, because the industry cannot give itself rights and duties, such rights and duties need to be firmly within international human rights law and authorized through domestic state legislation.”<sup>136</sup>

### *C. Military Extraterritorial Jurisdiction Act*

In an attempt to fill the jurisdictional gap left in the law for crimes committed by American civilians while accompanying the Armed Forces

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128. *Id.* at 166.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 190.

134. *Id.*

135. *Id.*

136. *Id.*

abroad,<sup>137</sup> Congress created the Military Extraterritorial Jurisdiction Act of 2000 (MEJA).<sup>138</sup> MEJA is the “primary statutory vehicle for criminal prosecution of private military contractors.”<sup>139</sup> Essentially, MEJA criminalizes conduct committed outside of the United States if such conduct would be considered an “offense punishable by imprisonment for more than one year” “had [it] been engaged within the special maritime and territorial jurisdiction of the United States.”<sup>140</sup> The law applies, in pertinent part, to conduct engaged in by those “while employed by or accompanying the Armed Forces outside the United States.”<sup>141</sup>

MEJA provides several definitions in section 3267.<sup>142</sup> For example, “employed by the Armed Forces outside the United States” is broken down by the categories of: (i) “a civilian employee;” (ii) “a contractor (including subcontractor at any tier);” or (iii) “an employee of a contractor (or subcontractor at any tier),” of either (1) “the Department of Defense” or (2) “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.”<sup>143</sup> The original language did not include any federal agencies beyond the Department of Defense, which is a clear limitation to the act’s reach.<sup>144</sup> However, even the 2004 amendment, which added the “other federal agency” language still poses restraints because of the clause pertaining to the support of the “mission of the Department of Defense.”<sup>145</sup> In fact, because the Blackwater guards involved in the 2007 Nisour Square massacre were technically under contract with the State Department, they could not be prosecuted under MEJA unless their employment in Iraq was related to supporting the Defense Department’s mission.<sup>146</sup>

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137. Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55, 55-56 (2001).

138. Military Extraterritorial Jurisdiction Act (MEJA), Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified at 18 U.S.C. §§ 3261-67) [hereinafter MEJA].

139. Christopher D. Belen, *Reigning in Rambo: Prosecuting Crimes Committed by American Military Contractors in Iraq*, 17 PENN. ST. INT’L L. REV. 169, 176 (2008).

140. *Id.* at 178.

141. MEJA § 3261(a)(1).

142. *Id.* § 3267.

143. *Id.*

144. *Id.*

145. See MEJA § 3267(1)(A); Belen, *supra* note 139, at 180.

146. Belen, *supra* note 139, at 182.

Interestingly enough, in the press release following the unsealing of the Blackwater guard's indictment, the Justice Department explicitly stated:

The indictment represents the first prosecution under the Military Extraterritorial Jurisdiction Act (MEJA) to be filed against non-Defense Department private contractors, which was not possible prior to the 2004 amendments to MEJA that specifically expanded the reach of MEJA to non-Defense Department contractors who provide services 'in support of the mission of the Department of Defense overseas.'<sup>147</sup>

While using MEJA was evidently successful in this situation, it is not as widely used as one might think. As of April 2008, the Justice Department had "received referrals of potential MEJA cases from both the Departments of Defense and State," but of those cases, only "twelve have resulted in the filing of a Federal indictment, information or complaint."<sup>148</sup> In a Senate Committee address, the Justice Department specifically noted the challenge of "investigating and prosecuting serious crimes in Iraq and Afghanistan."<sup>149</sup> While acknowledging that "investigations in any foreign country face particular difficulties of language, evidence collection, logistical support, and coordination with a sovereign power," the speaker went on to state that the "circumstances in Iraq and Afghanistan raise further obstacles," such as security risks and difficulty locating willing witnesses.<sup>150</sup> The speaker also attempted to use the "logistical challenges" as a sort of excuse as to why "investigations and prosecutions under MEJA may take significant time to complete."<sup>151</sup> Obviously, such hurdles are not easily overcome because the nature of any investigation overseas always poses a number of complicated issues. Regardless, MEJA has not proven to be the missing link in PMSC regulation.

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147. Press Release, U.S. Dep't of Just., Five Blackwater Employees Indicted on Manslaughter and Weapons Charges for Fatal Nisur Square Shooting in Iraq (Dec. 8, 2008), <https://www.justice.gov/archive/opa/pr/2008/December/08-nsd-1068.html>.

148. *Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment Statement Before the S. Comm. on Foreign Relations*, 110th Cong. 3 (Apr. 9, 2008) (statement of Sigal P. Mandelker, Deputy Assistant Att'y Gen., Crim. Division, Dep't. of Just.) [hereinafter *Closing Legal Loopholes*].

149. *Id.* at 4.

150. *Id.*

151. *Id.*

### III. THE FOREIGN CORRUPT PRACTICES ACT AS A SOLUTION

As suggested above, the key to solving this problem is for states to each create domestic legislation modeled after the Foreign Corrupt Practices Act (FCPA), enforceable through a treaty.<sup>152</sup> The idea of a criminal statute with extraterritorial jurisdiction is nothing new. That being said, the FCPA has seen great success since it was first enacted by Congress in 1977, especially after its subsequent amendments.<sup>153</sup> Congress enacted the FCPA after discovering that several hundred corporations made “questionable or illegible payments” totaling an “excess of \$300 million to foreign officials for a wide range of favorable actions on behalf of the companies.”<sup>154</sup> The Act has two purposes, “to prohibit the bribery of foreign officials and to establish certain accounting requirements.”<sup>155</sup> Both the Justice Department and the Securities and Exchange Commission enforce the Act.<sup>156</sup>

The anti-bribery provisions prohibit the: (a) “use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to” not only to any foreign official or foreign political party, but also to:

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of

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152. This article chooses to focus on the FCPA as a solution because of the recent success of the Justice Department’s Fraud Section in the handling of FCPA cases.

153. ROBIN MILLER, *Construction and Application of Foreign Corrupt Practices Act of 1977*, in AMERICAN LAW REPORTS (2nd ed. 2005)

154. *Id.* §2.

155. *Id.*; The latter purpose (accounting transparency requirements) will not be discussed in great detail in this article.

156. *Id.*

such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.<sup>157</sup>

This language is relatively broad and all-encompassing of the conduct it seeks to not only punish, but also prevent. As expressed in a Senate Report and regularly quoted, “the criminalization of foreign corporate bribery will to a significant extent act as a self-enforcing, preventative mechanism.”<sup>158</sup> The self-disclosure component of the FCPA is critical to its success. The idea of “‘soft’ enforcement generally refers to a law’s ability to facilitate self-policing and compliance to a greater degree than can be accomplished through ‘hard’ enforcement alone.”<sup>159</sup> Codes of conduct and compliance, like the Montreux Document and the ICoC, are great in theory, but they need to work in conjunction with some kind of formal and legally binding enforcement mechanism. The FCPA provides a model that accomplishes both goals.

While prosecutors have pursued “corporate wrongdoers for FCPA violations,” there has also been a relatively recent push towards prosecuting individuals.<sup>160</sup> Lanny A. Breuer, the former Assistant Attorney General for the Justice Department’s Criminal Division called the FCPA program “very robust” and described it as typifying how crime is approached in corporate America.<sup>161</sup> The “aggressive prosecution of individuals” and the “prospect of significant prison sentences” should, in Breuer’s words, “make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations.”<sup>162</sup> Why shouldn’t that same sentiment be applied to corporate leaders that are at the helm of PMSCs? Without overgeneralizing, bribery, while a crime, pales in comparison to some of the heinous acts perpetrated by PMSC employees in the past, and truthfully, likely those that have yet to be committed.

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157. The Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §78dd (1977) (codified as amended at 15 U.S.C. §78d-1 (1998)) [hereinafter FCPA].

158. MIKE KOEHLER, THE FOREIGN CORRUPT PRACTICE ACT IN A NEW ERA 24-25 (2014); *The Success of “Soft Enforcement” In the U.K.*, FCPA PROFESSOR (Aug. 18, 2015) <http://fcpaprofessor.com/the-success-of-soft-enforcement-in-the-u-k/>.

159. Koehler, *supra* note 158 at 311.

160. Jay Holtmeier, Kimberly Parker, & Robin Witten, 2012: *Recent Trends in Foreign Corrupt Practices Act (“FCPA”) Sentencing*, LEXIS NEXIS: FCPA & COMPLIANCE LAW (Apr. 24, 2012, 4:16 PM), <https://www.lexisnexis.com/legalnewsroom/corporate/b/fcpa-compliance/archive/2012/04/24/2012-recent-trends-in-foreign-corrupt-practices-act-quot-fcpa-quot-sentencing.aspx?Redirected=true>

161. Lanny A. Breuer, Assistant Att’y Gen., Crim. Division, Dep’t. of Just., Address Before the American Bar Association National Institute on White Collar Crime (Feb. 25, 2010).

162. *Id.*

On September 9, 2015, Deputy Attorney General Sally Q. Yates of the Justice Department issued a memorandum entitled, “Individual Accountability for Corporate Wrongdoing.”<sup>163</sup> In keeping with the tradition of naming Justice Department policies after the deputy attorney generals who issue them, the individual accountability policy is commonly known as the “Yates Memo.”<sup>164</sup> This announcement has been called a “loudly voiced retread of DOJ’s long-standing expectation that individuals committing crimes, even well-heeled business magnates, should be prosecuted.”<sup>165</sup>

The memo itself “identified four principal goals: (1) deterring future illegal activity; (2) incentivizing change in corporate behavior; (3) ensuring the proper parties are held responsible for their actions; and (4) promoting public confidence in the justice system.”<sup>166</sup> These goals parallel the objectives of the proposed treaty. Corporate individuals and business leaders should not be treated any differently than anyone else who breaks the law. At a conference in May 2016, Yates said, “holding accountable the people who committed the wrongdoing is essential if we are truly going to deter corporate misdeeds, have a real impact on corporate culture and ensure that the public has confidence in our justice system.”<sup>167</sup> She went on to say, “[w]e cannot have a different system of justice—or the perception of a different system of justice—for corporate executives than we do for everyone else.”<sup>168</sup>

#### IV. DETAILS OF THE PROPOSED TREATY

While the idea of domestic legislation to be implemented by the treaty is modeled after the FCPA, the actual language of the legislation

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163. Memorandum from Sally Q. Yates, Deputy Att’y Gen., Department of Justice, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download>; see also *Individual Accountability*, U.S. DEPT. OF JUST., <https://www.justice.gov/dag/individual-accountability> [hereinafter *Individual Accountability*].

164. Joan E. Meyer, *1 Year After Yates Memo: The DOJ’s Yates-Lite Approach*, LAW360, (Oct. 19, 2016), <https://www.law360.com/health/articles/841773/1-year-after-yates-memo-the-doj-s-yates-lite-approach>.

165. *Id.*

166. George Horn, *The Yates Memo – DOJ Issues Questions and Answers*, NAT’L L. REV. (Mar. 16, 2017), <http://www.natlawreview.com/article/yates-memo-doj-issues-questions-and-answers>; see also Catherine Greaves, *DOJ Stresses Individual Accountability in New “Yates Memo,”* 12 A.B.A. HEALTH L. SEC. ESOURCE, [http://www.americanbar.org/publications/aba\\_health\\_esource/2015-2016/october/yatesmemo.html](http://www.americanbar.org/publications/aba_health_esource/2015-2016/october/yatesmemo.html)

167. *Individual Accountability*, *supra* note 163; see also Sally Quinlan Yates, Deputy Att’y Gen., Dept. of Just., Remarks at the New York University Program on Corporate Compliance and Enforcement (Sept. 10, 2008), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school> (speech in its entirety).

168. *Id.*

would need to be drafted. This article will not suggest specific wording; however, some ideas as to the basis of jurisdiction and superior liability are outlined below.

Notably, the “FCPA’s anti-bribery provisions can apply to conduct both inside and outside the United States.”<sup>169</sup> The “alternative jurisdiction” provision, enacted in 1998, “expanded the jurisdictional coverage of the Act by establishing an alternative basis for jurisdiction, that is, jurisdiction based on the nationality principle.”<sup>170</sup> The FCPA also applies foreign nationals that “either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States.”<sup>171</sup> Thus, the FCPA utilizes both a territorial and nationality-based approach to jurisdiction. The use of both allows for broader enforcement. Such an approach should be emulated by states enacting the legislation mandated by the proposed treaty.

Holding superiors accountable for the actions of their subordinates is fairly common across the legal field. As far as the law of war is concerned, the Rome Statute of the International Criminal Court contains a specific article that details the “responsibility of commanders and other superiors.”<sup>172</sup> Article 28 reads accordingly:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by

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169. DEP’T. OF JUST., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 11, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [hereinafter FCPA RESOURCE GUIDE].

170. *Id.* at 12.

171. *Id.* at 11.

172. Rome Statute of the International Criminal Court, art. 28, July 17, 1998, 2187 U.N.T.S. 90. [hereinafter Rome Statute].

subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.<sup>173</sup>

While the exact wording would need to be adjusted, this language can serve as not only a kind of authority, but even a template of sorts for the proposed legislation. Despite the fact that this article is contained within the Rome Statute, which admittedly does not exactly have universal ratification, that does not undermine the useful nature of this idea—holding superiors responsible—which was in fact agreed upon by a large number of states.<sup>174</sup>

Corporate executives and supervisors should be held accountable just as military commanders are under Article 28 of the Rome Statute. Considering that PMSCs have undeniable militaristic ties, especially today in their prevalence in areas of armed conflict in the Middle East, such accountability is far from an illogical leap.

## CONCLUSION

Private Military and Security Companies are not going anywhere any time soon. They are part of a multi-billion dollar industry, with roots tracing back centuries. While horrific events like the tragedy at Nisour Square are thankfully few and far between, there is really no way to know what kinds of crimes are being committed regularly by PMSC employees all over the world. Why wait for another massacre or grave injustice to occur? The approach should be proactive, not reactive.

The FCPA was intended to promote compliance from within, much like the efforts set forth by the Montreux Document and the ICoC. However, the latter two are seriously lacking an effective enforcement system. What good are suggestions, guidelines, and good practices if there are no real consequences for noncompliance? There is arguably no real incentive to self-regulate and comply without the fear of prosecution

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173. *Id.*

174. Rome Statute, *supra* note 172.

looming in the bounds. This mentality can be observed in the Justice Department's robust usage of the FCPA to prosecute offenders and seek high prison sentences as a deterrent for future wrongdoers.

States creating their own domestic legislation, with both territorial and national jurisdiction, will allow not only the perpetrators of such acts to be more readily prosecuted, but through language similar to Article 28 of the Rome Statute, will also allow their superiors to face consequences. A treaty requiring states to create this legislation allows for uniformity across all states, ensuring that the playing field is as balanced and fair as possible.

Why prosecute the superiors? Whether they are the supervisor on duty in a protection detail convoy or an executive interfacing with government agencies and negotiating huge contracts, they can easily be just as responsible and there should be a way to hold them accountable. The same way the bosses of individuals who bribe foreign officials are charged, so should the commanders of PMSC employees. While it is likely easier to prove that a supervisor on the ground "knew or should have known" from an evidentiary standpoint, the executives are just as culpable. Further, the amount of money involved is not without significance. Corners are cut when people seek to maximize profits and reduce costs.

The proposed treaty would ideally prevent atrocities like what happened in Nisour Square from ever happening again because the fear of personal liability would be so strong. The threat of prosecution may be just the push PMSC's need to police themselves and work towards compliance with not only the various guidelines already in place, but also the laws that would be implemented following the proposed treaty. Perhaps this will lead to increased training for personnel, both tactically and culturally. There is undoubtedly an expansive cultural disconnect between contractors, these pseudo-military operators, and the dignitaries they often protect, as well as the civilians they interact with. It would not be surprising if such a divide were to contribute to potential acts of violence perpetrated by PMSC contractors. Furthermore, the fact that many PMSC employees are former military members themselves opens the door to a discussion of mental illness, especially post-traumatic stress disorder, as seen in far too many soldiers post-service.<sup>175</sup> Maybe this

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175. *Veterans Statistics: PTSD, Depression, TBI, Suicide.*, VETERANS AND PTSD (Sept. 20, 2015), <http://www.veteransandptsd.com/PTSD-statistics.html>; see also INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY, (Terri Tanielian & Lisa H. Jaycox eds., 2008).

treaty will mark a movement toward helping former veterans turned private contractors get the help they need.

Whatever policy implications result, the vast majority of them would be overall beneficial. Ultimately, this proposed treaty provides a way to uniformly close the gap that exists between the regulation and prosecution of PMSCs. Moreover, it would seemingly for the first time allow superiors, at times equally as culpable as those that “pull the trigger,” to be held to answer as well. But more than anything, it would be the final step towards global regulation and accountability that the international community attempted to solve through efforts like the Montreux Document and the ICoC.