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REGULATING THE PRIVATIZED SECURITY INDUSTRY: THE PROMISE OF PUBLIC/PRIVATE GOVERNANCE

*Laura A. Dickinson**

As governments around the world increasingly turn to contractors to provide government services in the sphere of military and foreign affairs, significant problems of accountability arise. Traditional public governmental mechanisms of regulation and accountability, as well as accountability through litigation, are often inadequate or unavailable. International legal instruments similarly offer only minimal enforcement of human rights or other public-regarding norms, and in any event they may not always apply to nonstate actors. As a result, we must find new forms of public/private governance and oversight in this rapidly expanding area of military and quasi-military operations.

The widespread role of contractors in the wars in Afghanistan and Iraq highlights these challenges.¹ At many times during these conflicts, the ratio of contractors to troops hovered around one to one, reflecting a huge shift in the way the U.S. government projects its power overseas.² As the Commission for Wartime Contracting has documented, the U.S. government increased the use of contractors at the same time that it radically reduced the number of contracting oversight personnel, weakening the kind of managerial oversight that can help prevent abuses.³ Although many contractors performed their jobs admirably—and indeed many gave their lives in what is a generally untold story of sacrifice during these wars—when some did commit abuses there were very few workable accountability mechanisms on the back end.⁴ The

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¹ LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS* 1–22 (2011).

² *See id.* at 1–40.

³ COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG., *DEFENSE AGENCIES MUST IMPROVE THEIR OVERSIGHT OF CONTRACTOR BUSINESS SYSTEMS TO REDUCE WASTE, FRAUD, AND ABUSE* 7 (2009), *available at* http://cybercemetery.unt.edu/archive/cwc/20110929221533/http://www.wartimecontracting.gov/docs/CWC_SR1_business-systems_2009-09-21.pdf.

⁴ *See* Daphne Eviatar, *3 Years After Blackwater Massacre in Iraq, Contractors Still Lack Accountability and Oversight*, *DAILY KOS* (Sept. 16, 2010, 8:30 AM), <http://www.dailykos.com/story/2010/09/16/902433/-3->

debarment system⁵ is notoriously ineffectual,⁶ and criminal cases have often stalled due to botched evidence-gathering, jurisdictional gaps, and other problems.⁷

In my own work, I have long argued that, to the extent that we care about ensuring that contractors respect core public values such as human rights, we should look toward new modes of accountability and constraint to protect those values.⁸ In particular, the human rights community has sometimes tended to focus on the creation of new treaties to address nongovernmental actors, or they have limited their vision to tackling governmental misconduct rather than misconduct by private contractors. While such efforts are tremendously important, I have suggested that there are other innovative accountability mechanisms that are equally (if not more) important, such as reforming the

Years-After-Blackwater-Massacre-in-Iraq-Contractors-Still-Lack-Accountability-and-Oversight; *see also* JENNIFER K. ELSEA & NINA M. SERAFINO, CONG. RESEARCH SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 23 (2007), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA470189>.

⁵ The U.S. government uses the suspension and debarment system to protect its interests from bad actors performing U.S. government contracts. FAR 9.402(b) (2012). Except in compelling circumstances, *see id.* 9.405(a), 9.405-1(a), a contractor who is suspended or debarred is prohibited from obtaining future federal government contracts. *Id.* 9.405(a). Suspensions and debarments in the United States arise from either an agency's discretionary decision, *id.* 9.406-2, a statutory mandate, or, in some instances, an agency's de facto action. Agency officials may impose discretionary suspensions and debarments after a finding of wrongdoing such as fraud, bribery, making false statements, or repeated performance failures. *See, e.g., id.* 9.406-2(a)(3) (providing for debarment for making false statements); *id.* 9.406-2(b)(1)(i)(B) (providing for debarment for repeated performance failures); *see also id.* 9.406-2(b)(1) (referring to Pub. L. No. 100-690, § 102 Stat. 4181 (1988) (codified as amended at 41 U.S.C. §§ 701-707 (2006))) (providing for discretionary debarment for drug use). Statutory suspension and debarments are automatic sanctions arising from violations of certain laws, sometimes resulting in an indictment or conviction. *See, e.g.,* 10 U.S.C. § 2408(a)(1) (2012) (prohibiting any individual convicted of fraud or felonies arising out of a contract with the Department of Defense from involvement with future defense contracts); 21 U.S.C. § 862 (2012) (prohibiting, with limited exception, drug trafficking convicts from receiving federal benefits, including federal contracts); 33 U.S.C. § 1368 (2006) (setting forth environmental water standards); 2 C.F.R. § 1532.1100 (2013) (laying out the agency's accompanying suspension and debarment regulatory administration). De facto debarments arise when an agency blacklists a contractor, either pursuant to a particular law, *see, e.g.,* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 841(a)(1)(A), 125 Stat. 1298, 1510 (2011) ("Prohibition on Contracting with the Enemy in the United States Central Command Theater of Operations"), or through a permanent finding that a contractor is nonresponsible, *see, e.g.,* MG Altus Apache Co. v. United States, 111 Fed. Cl. 425, 451 (2013) (finding that the agency's permanent finding that a contractor was nonresponsible, resulting in blacklisting of the contractor, was reasonable).

⁶ COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG., *supra* note 3.

⁷ *See* DICKINSON, *supra* note 1, at 43.

⁸ *See, e.g., id.*, at 39.

terms of the contracts themselves, developing codes of conduct, and building a variety of governmental and nongovernmental accreditation regimes.⁹

Now, we have a promising example pushing in some of these new directions. The human rights community, partnering with industry and government, has produced a voluntary International Code of Conduct for Private Security Service Providers (hereinafter “ICoC” or “the Code”),¹⁰ along with a proposed governance and oversight mechanism in order to enforce the Code.¹¹ Both the Code and oversight mechanism are the product of many years of dedicated work by what may seem to be an unlikely partnership of actors in a strikingly open and transparent process.¹² The resulting mechanism has yet to take effect, but its parameters are sufficiently established that a preliminary evaluation is appropriate.¹³

In this Article, I first describe the development of both the Code and its accompanying oversight mechanism as well as some of the key features of this regime. Then, I evaluate the emerging regime and its potential to reflect and promote core public values. Such values include, substantively, the values of human dignity embedded in human rights and humanitarian law, as well as the procedural values of global administrative law: public participation, transparency, and accountability. And I will examine both the process by which this regime was created and the substantive terms and enforcement mechanism of the regime itself. In the end, although we will need to wait to see how this Code is ultimately implemented and enforced, I conclude that it holds a great deal of promise both as an accountability mechanism for private military contractors and as a model for future public/private accountability regimes. Significantly, as compared to other voluntary industry codes of

⁹ *Id.* at 40–68; see also Kateryna L. Rakowsky, Note, *Military Contractors and Civil Liberty: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. C.R. & C.L. 365, 375–77 (2006).

¹⁰ INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS (2010), http://www.icoc-ppsp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf [hereinafter ICoC].

¹¹ INT’L CODE OF CONDUCT FOR PRIVATE SEC. SERV. PROVIDERS’ ASS’N, ARTICLES OF ASSOCIATION (2013), http://www.icoc-ppsp.org/uploads/ICoC_Articles_of_Association.pdf [hereinafter ARTICLES OF ASSOCIATION].

¹² See SWITZ. FED. DEP’T OF FOREIGN AFFAIRS, FACT SHEET: INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS 2 (2011), http://www.icoc-ppsp.org/uploads/Fact_Sheet_ICoC_November_2011.pdf [hereinafter FACT SHEET] (noting that the ICoC process involved private security companies, industry associations, governmental representatives, and various humanitarian and nongovernmental organizations).

¹³ See ARTICLES OF ASSOCIATION, *supra* note 11.

conduct, this regime creates the possibility for greater oversight, accountability, and independent monitoring. Although it is too soon to tell whether the ICoC framework will be effective in practice, it may, in time, offer a useful roadmap for other industries where formal legal mechanisms are insufficient.

I. THE ICOC REGIME

The ICoC regime began as an initiative of the Swiss government, in partnership with the International Committee of the Red Cross (ICRC), to respond to ambiguities regarding the applicability of international humanitarian law (IHL) to contractors.¹⁴ The Swiss, who have a unique history with the ICRC and feel a special obligation to promote and protect IHL, convened a group of experts, government representatives, civil society groups, and industry actors to consider the issues.¹⁵ A series of meetings and conversations resulted in the Montreux Document, a statement of principles that did not purport to be a new treaty, but rather derived principles from existing treaties and applied them specifically to contractors.¹⁶

It became clear that more was needed, however, to provide guidance and oversight to private security contractors, and so a further initiative to establish an international code of conduct for the industry was launched. The Swiss convinced the United States and the United Kingdom to work with leaders of the private security industry and various human rights groups over a period of several years to develop both a substantive code of conduct and a governance mechanism to implement the code. The resulting drafting group, called the “Association” for purposes of the ultimate Code, maintains ultimate authority to implement the Code’s provisions.¹⁷

A. *The ICoC’s Substantive Provisions*

The Code itself is a strikingly detailed and comprehensive document that explicitly applies key principles of human rights and humanitarian law to

¹⁴ See *ICoC Timeline*, INT’L CODE CONDUCT FOR PRIV. SEC. SERV. PROVIDERS, http://www.icoc-ppsp.org/ICoC_Timeline.html (last visited Dec. 13, 2013).

¹⁵ See *The Montreux Document on Private Military and Security Companies*, SWITZ. FED. DEP’T FOREIGN AFF., <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html> (last visited Dec. 13, 2013).

¹⁶ See *id.*

¹⁷ See *About the ICoC Association*, INT’L CODE CONDUCT FOR PRIV. SEC. SERV. PROVIDERS, http://www.icoc-ppsp.org/ICoC_Association.html (last visited Dec 13, 2013).

private security contractors. This is significant because the treaties from which these principles are derived are often ambiguous about their applicability to nongovernmental actors. As such, the ICoC fills important gaps in international law without the need for a long and laborious treaty-revision process. Instead, companies that sign on to the Code agree to respect these core principles.¹⁸ Moreover, the Code spells out the companies' obligations in detail.¹⁹ And, beyond requiring companies simply to make normative commitments, the Code goes further and obligates signatories to reform particular organizational and procedural practices to implement the Code.²⁰

An in-depth description of a few of these normative commitments gives a flavor of the specificity and detail of the document. For example, the Code clearly prohibits companies from engaging in excessive force, explicitly stating that company personnel shall not "exceed what is strictly necessary, and should be proportionate to the threat and appropriate to the situation."²¹ Similarly, companies undertake to ensure that their personnel do "not use firearms against persons except in self-defence or [in] defence of others against the imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life."²² To the extent that company personnel assist a government's law-enforcement authority, signatory companies agree to require personnel to comply with all applicable international and domestic law and, at "a minimum, with the standards expressed in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)."²³ As with other sections of the Code, the use-of-force provisions cover situations involving armed conflict, when international humanitarian law would ordinarily govern, as well as during peacetime, when international human rights law would dominate.²⁴

The prohibition of torture and cruel, inhuman, and degrading treatment is similarly precise. The Code does not speak to these terms directly, instead

¹⁸ ICoC, *supra* note 10, ¶ 16 ("Signatory Companies agree to operate in accordance with the principles contained in this Code.").

¹⁹ *See id.* ¶¶ 28–43 (establishing general commitments of signatories to the Code and enumerating specific principles regarding the conduct of personnel, including the use of force, detention, apprehension, and sexual exploitation).

²⁰ *See id.* ¶¶ 16–27.

²¹ *Id.* ¶ 30.

²² *Id.* ¶ 31.

²³ *Id.* ¶ 32.

²⁴ *See id.* ¶¶ 30–32.

referencing current international law.²⁵ However, the Code makes clear that, “[f]or the avoidance of doubt, torture and other cruel, inhuman or degrading treatment or punishment, as referred to here, includes conduct by a private entity which would constitute torture or other cruel, inhuman or degrading treatment or punishment if committed by a public official.”²⁶ The Code further elaborates that this obligation is non-derogable, emphasizing that “[c]ontractual obligations, superior orders” or other “exceptional circumstances,” such as armed conflict or other public emergencies, “can never be a justification for engaging in torture or other cruel, inhuman or degrading treatment or punishment.”²⁷

In addition, the Code devotes considerable attention to other violations of human rights and humanitarian law. For example, companies agree to prohibit their personnel from engaging in sexual exploitation and abuse, gender-based violence, human trafficking, slavery, forced labor, child labor, and discrimination.²⁸ The Code also prohibits company personnel from engaging in detention unless a government contract specifically allows it, and in any event makes clear that all detainees must be treated humanely and in accord with the international law applicable to their status.²⁹ Finally, the Code makes clear that company personnel may not “take or hold any persons except when apprehending persons to defend themselves or others against an imminent threat of violence, or following an attack or crime” against the company or clients.³⁰

Of course, as the history of bills of rights demonstrates, it is sometimes easier to sign sweeping statements of principle than it is to build mechanisms that will create actual enforcement on the ground. To that end, the ICoC goes further, requiring companies not only to state their adherence to these humanitarian and human rights norms, but also to make commitments regarding internal management and governance to ensure implementation of the Code. First, signatory companies undertake to incorporate the Code “into Company policies and internal control and compliance systems and integrate it into all relevant elements of their operations.”³¹ In addition, they make quite

²⁵ *Id.* ¶ 21.

²⁶ *Id.* ¶ 35.

²⁷ *Id.* ¶ 36. In this regard, the Code goes further than some articulations of international law, which imply that torture is non-derogable but that cruel, inhuman, and degrading treatment may not be.

²⁸ *Id.* ¶ 22.

²⁹ *Id.* ¶ 33.

³⁰ *Id.* ¶ 34.

³¹ *Id.* ¶ 44.

specific commitments to engage in critical organizational practices and procedures. For example, they commit to vet and train employees extensively.³² As to vetting, notably, companies agree to “establish and maintain internal policies and procedures to determine the suitability of applicants, or Personnel, to carry weapons as part of their duties.”³³ These procedures include checks to ensure personnel have not been convicted of a crime “that would indicate that the individual lacks the character and fitness to perform security services” pursuant to the Code.³⁴ The checks must also establish that personnel or prospective personnel have not been dishonorably discharged, had employment terminated for violations of one of the principles contained in the Code, or had a history of other conduct that “brings into question their fitness to carry a weapon.”³⁵

As to training, companies agree to ensure that all personnel performing security services are aware of the Code and relevant international and national law.³⁶ With respect to weapons training in particular, the Code provides that companies must ensure that personnel carrying weapons have received appropriate training for the specific weapon in question, that personnel receive regular and recurrent training, and that the training includes specific instruction on the rules regarding the use of force.³⁷ The Code further extends these requirements to subcontractors.³⁸ Thus, companies that sign the Code agree that if the subcontractor cannot fulfill the vetting and training requirements in the Code, the primary contracting company “will take reasonable and appropriate steps to ensure that all selection, vetting and training of subcontractor’s Personnel is conducted in accordance with the principles contained in this Code.”³⁹ Relatedly, firms agree that the explicit terms of contracts with individual employees contain key principles laid out in the Code.⁴⁰

³² *Id.* ¶¶ 45–49.

³³ *Id.* ¶ 48.

³⁴ *Id.* ¶ 48(a). The Code further lists specific disqualifying crimes: “battery, murder, arson, fraud, rape, sexual abuse, organized crime, bribery, corruption, perjury, torture, kidnapping, drug trafficking or trafficking in persons.” *Id.* ¶ 48.

³⁵ *Id.* ¶ 48(d). In addition, companies agree to exercise general due diligence in employee selection, *id.* ¶ 45; to refrain from hiring individuals under the age of eighteen to perform security functions, *id.* ¶ 46; and to require applicants to authorize access to prior employment records. *Id.* ¶ 49.

³⁶ *Id.* ¶ 55.

³⁷ *Id.* ¶ 59.

³⁸ *Id.* ¶ 51. The Code’s definition section includes subcontractors within the scope of “implementation.” *Id.* § B.

³⁹ *Id.* ¶ 51.

⁴⁰ *Id.* ¶ 52.

Other important provisions concern obligations to manage weapons⁴¹ and the materiel of war⁴² responsibly, and to report certain Code violations.⁴³ The Code is particularly stringent in requiring signatory companies to prepare an incident report “documenting any incident involving its Personnel that involves the use of any weapon.”⁴⁴ The report must include the time and location of the incident, the identity and nationality of any persons involved, any injuries or damage sustained, an account of the circumstances, and a description of measures the company has taken in response.⁴⁵ The report must be submitted to the client and, where warranted, other competent authorities.⁴⁶ Similarly, the Code details reporting obligations in the case of torture or cruel treatment.⁴⁷ Companies must require personnel to report any known or suspected “acts of torture or other cruel, inhuman or degrading treatment or punishment” to the client and competent authorities in either the host country or the country of nationality of the victim or perpetrator.⁴⁸

Finally, the Code obligates each signatory to establish internal grievance procedures for both its own employees and third parties to invoke in cases of alleged Code violations.⁴⁹ This provision is somewhat vague as to precisely what those procedures must be, but it does specify that “[p]rocedures must be fair, accessible and offer effective remedies, including recommendations for the prevention of recurrence.”⁵⁰ The companies must post details on their websites regarding how third parties can invoke the procedures, and they must investigate allegations promptly, keep records of proceedings (which must be turned over to competent authorities when appropriate), cooperate with official investigations, and provide whistleblower protections for employees who report in good faith.⁵¹ As with the prohibition against torture, these provisions fill gaps in domestic U.S. law (and possibly the laws of other countries), which tends not to protect whistleblowers from the private sector as vigorously as governmental employees.

⁴¹ *Id.* ¶¶ 56–58.

⁴² *Id.* ¶¶ 60–62.

⁴³ *Id.* ¶ 63.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* ¶ 37.

⁴⁸ *Id.*

⁴⁹ *Id.* ¶ 66.

⁵⁰ *Id.* ¶ 67(a).

⁵¹ *Id.* ¶ 67(b)–(g).

B. *Enforcement of the ICoC*

Although, as summarized above, the ICoC is normatively quite robust, it does not contain a formal enforcement mechanism. Nevertheless, by signing the Code, companies do affirm that they “have sufficient financial capacity in place” to cover any liabilities for damages.⁵² And, significantly, they acknowledge that the ICoC is merely the first step in the establishment of a true oversight and governance regime. Indeed, by signing the Code, companies agree that within eighteen months, the overall association of governmental and nongovernmental stakeholders will “[e]stablish objective and measurable standards for providing Security Services based upon this Code,” as well as “[e]stablish external independent mechanisms for effective governance and oversight.”⁵³ Specifically, the companies commit to support the process for creating a true oversight mechanism, and, once it is established, they agree to “become certified by and submit to ongoing independent Auditing and verification by that mechanism.”⁵⁴

Obviously, the robustness of this oversight mechanism will be crucial to the overall effectiveness of the Code as a whole. Therefore, it is worth taking some time to consider how this mechanism will be created. The relevant document that lays out the features of the governance and oversight mechanism is the Charter for the Oversight Mechanism of the International Code of Conduct for Private Security Service Providers, and it is now in its finalized form.⁵⁵ The Charter lays out four primary functions: (1) governance of the mechanism itself; (2) certification of member companies; (3) performance assessment of member companies through a combination of self-reporting, information from public and other available sources, and independent monitoring; and (4) grievance processes.⁵⁶ The final draft pulls back from more robust language, contained in earlier drafts, specifying independent performance assessment of companies in the field.⁵⁷ But the overall framework still allows for at least some independent monitoring of companies on the ground and holds promise as a meaningful regime of oversight and accountability.

⁵² *Id.* ¶ 69.

⁵³ *Id.* ¶ 7.

⁵⁴ *Id.* ¶ 8.

⁵⁵ ARTICLES OF ASSOCIATION, *supra* note 11.

⁵⁶ *Id.*

⁵⁷ Compare *id.* art. 11, with Second Draft of the Charter for the Oversight Mechanism of the International Code of Conduct for Private Security Service Providers, art. 11 (Jan. 30, 2013), http://www.icoc-psp.org/uploads/ICoC_Draft_Articles_of_Association_January_30_-_final.pdf [hereinafter Second Draft].

As to the first function, overarching governance authority rests not in the overall Association, but in a twelve-member Board of Directors, with four directors drawn from each constituency group: industry, government, and civil society.⁵⁸ The Charter lays out criteria and processes for entities from within each constituency group to become members of the regime (although some of these criteria and processes remain within the Board's discretion to develop after the regime is established).⁵⁹ Entities from within each group then select the Board members from that group.⁶⁰ All members may participate in a general meeting,⁶¹ but it is the Board of Directors that is the primary decision-maker for the governance mechanism.⁶² The Board, which generally is to make decisions by a majority of eight (including a minimum of two votes from each stakeholder group), controls the budget, lays out procedures, and appoints an Executive Director and Secretariat, who in turn oversee the day-to-day operations of the governance regime.⁶³

Second, the oversight mechanism is meant to govern the certification of companies who have signed the Code. The Charter provides that independent monitors, accredited by the Board, are to conduct a review to examine each company's systems and processes to make sure it is doing everything it said it would do when it signed the Code.⁶⁴ The precise certification requirements and processes remain to be worked out by the Board.⁶⁵ The Charter permits the Board to rely on independent international standards if the Board recognizes that the standards are consistent with the Code, and, at the same time, allows the Board to specify "any additional information relevant to the human rights and humanitarian impact of operations it deems necessary for assessing whether a company's systems and policies meet the requirements of the Code and its readiness to participate in the Association."⁶⁶

This reference to outside standards is significant in part because of a parallel effort, independent of the ICoC, to set standards for the industry through the American National Standards Institute (ANSI) and the

⁵⁸ ARTICLES OF ASSOCIATION, *supra* note 11, arts. 3.1, 7.2.

⁵⁹ *Id.* art. 3.

⁶⁰ *Id.* art. 7.2.

⁶¹ *Id.* art. 6.

⁶² *Id.* arts. 7.1, 8.

⁶³ *Id.* arts. 7, 9.

⁶⁴ *See id.* art. 12.

⁶⁵ *See id.* art. 11.

⁶⁶ *Id.* art. 11.2.1.

International Standards Organization (ISO).⁶⁷ One of the questions during the development of the Charter has been to what extent these other certifications would be sufficient to qualify a private security firm for certification under the ICoC regime. Certainly, requiring companies to satisfy multiple certification processes could be costly. However, if these other processes can simply substitute for independent certification under the ICoC, it is unclear what bite the ICoC will have, particularly if the substantive certification criteria of the ICoC are in any respect more stringent than the alternatives. The Charter, in its most recent draft, essentially punts on this question by leaving it up to the Board to resolve.⁶⁸ However, by suggesting that certification by another standards organization could get a firm partway to ICoC certification,⁶⁹ the drafters of the Charter seem to be seeking to strike a compromise by harnessing the efficiencies of certification through other organizations, while allowing for additional requirements distinct to the ICoC certification regime.

Third, it is clear from the Charter that the Code is not simply a voluntary self-regulatory system. Instead, the Charter envisions some degree of ongoing independent evaluation of companies' performance,⁷⁰ although that function is a bit less well-defined than it was in previous drafts.⁷¹ As in the case of certification, the Charter charges the Board with developing additional procedures.⁷² But the Charter itself lays out in broad strokes what process is envisioned. The overall association of stakeholders is "responsible for exercising oversight of Member companies' performance under the Code, including through external monitoring, reporting and a process to address alleged violations of the code."⁷³ Member companies must provide the Association with "a written assessment of their performance pursuant to a transparent set of criteria covered by necessary confidentiality and nondisclosure arrangements."⁷⁴ In addition to these self-assessments, "field based review" may be authorized on the basis of "a human rights risk assessment" in order to "assess the human rights impacts of company

⁶⁷ See ASIS INT'L, ANSI/ASIS PSC.1-2012, MANAGEMENT SYSTEM FOR QUALITY OF PRIVATE SECURITY COMPANY OPERATIONS—REQUIREMENTS WITH GUIDANCE, (2012), http://www.acq.osd.mil/log/PS/p_vault/Item_1997-PSC_1_STD.PDF.

⁶⁸ ARTICLES OF ASSOCIATION, *supra* note 11, art. 11.

⁶⁹ *Id.* art. 11.2.1.

⁷⁰ See *id.* art. 12 (enumerating various oversight procedures and providing that a method to address violations of the Code shall be established).

⁷¹ See Second Draft, *supra* note 57, arts. 11, 12.

⁷² See ARTICLES OF ASSOCIATION, *supra* note 11, art. 12.2.

⁷³ *Id.* art. 12.1.

⁷⁴ *Id.* art. 12.2.2.

operations.”⁷⁵ These assessments are to be conducted by gathering information from public sources such as clients, local authorities, affected communities, and other relevant groups and individuals, using established human rights methodologies.⁷⁶ It remains unclear precisely who will conduct the “field-based review,” and much will depend on the efficacy of these types of on-the-ground assessments.

In response to the information gathered through these various means, the Charter requires the Secretariat of the Association to engage in dialogue with member companies to help improve performance of ICoC obligations both in general and with respect to specific concerns.⁷⁷ The Board is also charged with reviewing performance and compliance issues, and may do so either at the referral of the Executive Director or on its own initiative.⁷⁸ In cases of noncompliance with the ICoC, the Board may request a specific company to take corrective action.⁷⁹ If the company does not do so, the Board may impose sanctions, which can include suspension or termination of membership.⁸⁰ The Charter requires the Association to publicly report, at least annually, on its monitoring activities and, in general, to promote the objectives of Code compliance.⁸¹

Finally, the Association is charged with facilitating the resolution of grievances brought by company personnel or third parties.⁸² The Charter provides that aggrieved individuals may submit claims to the Secretariat, and the claims must contain specific allegations of conduct that would violate the Code and allege harm to one or more claimants.⁸³ The Charter requires the Secretariat to inform the claimant of available fair and effective grievance procedures, including those within the company in question.⁸⁴ If the claimant alleges that the company’s grievance mechanism is “not fair, not accessible, [or] does not or cannot offer an effective remedy,” then the Secretariat itself may review that allegation.⁸⁵ If the Secretariat determines that the company’s

⁷⁵ *Id.* art. 12.2.3–4.

⁷⁶ *See id.* art. 12.2.1–4.

⁷⁷ *Id.* art. 12.2.5.

⁷⁸ *Id.* art. 12.2.6.

⁷⁹ *Id.* art. 12.2.7.

⁸⁰ *Id.* arts. 12.2.7, 13.2.7.

⁸¹ *Id.* art. 12.3.

⁸² *Id.* art. 13.1.

⁸³ *Id.* art. 13.2.1.

⁸⁴ *Id.* art. 13.2.2.

⁸⁵ *Id.* art. 13.2.3.

grievance mechanism does not comply with the Code, the Secretariat may recommend corrective action to the company and may refer the claim “to another[] identified fair and accessible grievance procedure that may offer an effective remedy.”⁸⁶ The Board may also make such a recommendation, which may include, specifically, “cooperation with the Association’s good offices, the provision of a neutral and confidential mediation process, or other arrangements that may assist the Member company to offer an effective remedy as required by paragraphs 66 and 67 of the Code.”⁸⁷ The Association may not, however, impose specific awards.⁸⁸ The Charter further requires that, throughout the process, companies are “expected to cooperate in good faith, consistent with applicable law and contractual requirements.”⁸⁹ If the Board determines that the company is not doing so, it may impose sanctions on the firm, including suspension or expulsion from the Association.⁹⁰

The Association’s role in facilitating grievances is perhaps the least well-developed aspect of the governance regime. For example, it is unclear precisely what criteria the Board or Secretariat will use to determine whether a company’s internal grievance process is adequate. As noted above, a claimant may allege that a company’s grievance procedure is “not fair, not accessible, [or] does not or cannot offer an effective remedy,” but this language is vague.⁹¹ The Code also states that the internal grievance process must include “recommendations for the prevention of recurrence,” must “facilitate reporting,” must “publish details” of the grievance process on a website, and must “investigate allegations promptly, impartially and with due consideration to confidentiality.”⁹² The Board will thus have a good deal of discretion in determining precisely how the review of internal grievance mechanisms will work and how stringent the application of these criteria will ultimately be.

Likewise, it is still unclear what kind of alternative grievance mechanism the Board will recommend if it determines that a company lacks an effective internal company process. Apart from general language that “[t]his may include cooperation with the Association’s good offices, the provision of a neutral and confidential mediation process, or other arrangements that may

⁸⁶ *Id.* art. 13.2.4.

⁸⁷ *Id.* art. 13.2.5.

⁸⁸ *Id.*

⁸⁹ *Id.* art. 13.2.7.

⁹⁰ *Id.* arts. 12.2.7, 13.2.7.

⁹¹ *Id.* art. 13.2.3.

⁹² ICOC, *supra* note 10, ¶ 67.

assist the Member company to offer an effective remedy,” there is little guidance for the Board.⁹³ Mediation must be “neutral and confidential,” but multiple types of mediation could be used, and it is also unclear who the mediators will be or how they will be chosen.⁹⁴ The language suggesting “cooperation with the Association’s good offices” and “other arrangements” is even less clear.⁹⁵

A final lingering, open question is the relationship between any grievance process and the official civil or criminal proceedings that may be available in the host country, the client state, or the country of nationality of the victim or alleged perpetrator. The Charter provides that the mere existence of parallel proceedings does not *necessarily* suspend the ICoC’s grievance process, but the Board is to consider such proceedings and retains the discretion to “suspend or otherwise limit the complaints process as necessary and appropriate in order to avoid serious prejudice to any such investigations or proceedings or party thereto.”⁹⁶

Certainly deference to parallel proceedings may sometimes be appropriate. For example, in the case of the Baghdad Nisour Square shooting by Blackwater guards working for the U.S. State Department, multiple investigations by multiple governments and government agencies complicated prosecutorial efforts by tainting evidence.⁹⁷ Moreover, informal settlements and mediation awards might interfere with civil litigation. In some U.S. tort cases against contractors, for example, courts have suggested that remedies outside the tort system, such as military compensation payments to victims under the Foreign Claims Act, might strengthen the arguments for a broad interpretation of contractor immunity and preemption doctrines.⁹⁸

The ICoC and the Charter acknowledge these issues, signaling that the Board and Association should be mindful of potential problems.⁹⁹ And, of course, it would be cause for concern if settlements through the ICoC process were used to relieve a party of tort liability later. On the other hand, tort

⁹³ ARTICLES OF ASSOCIATION, *supra* note 11, art. 13.2.5.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* art. 13.2.10.

⁹⁷ DICKINSON, *supra* note 1, at 55.

⁹⁸ *See, e.g.,* Saleh v. Titan Corp., 580 F.3d 1, 8 (D.C. Cir. 2009) (identifying availability of alternative compensation for victims under Foreign Claims Act as one rationale for broad approach to contractor immunity and preemption doctrines that would preclude tort litigation).

⁹⁹ ARTICLES OF ASSOCIATION, *supra* note 11, art. 13.2.10.

litigation has not so far been a particularly fruitful avenue of redress for victims of contractor abuse overseas,¹⁰⁰ and the ICoC grievance mechanisms may prove to be a more effective remedy over time. But as with other key aspects of the grievance facilitation process, both documents essentially leave these questions to be resolved another day.

II. ANALYSIS

In order to examine the efficacy of the governance regime established by the ICoC and the Charter, we need to analyze how well the regime seems to reflect and protect core public values. Such values include both the fundamental goals of public participation, transparency, and accountability embodied in global administrative law, as well as the substantive human-dignity values embodied in human rights and humanitarian law.¹⁰¹ Of course, any analysis is tentative at this point because the regime is not yet operational¹⁰² and, as discussed above, some important aspects of the grievance process in particular remain to be fleshed out.¹⁰³ Nevertheless, some preliminary observations are possible. In this Part, I describe the core values I believe we should use as metrics for analysis and then measure the ICoC process and its substantive provisions against those metrics. I conclude that the early indicators are promising, albeit preliminary, whether measured with regard to the process for creating the ICoC regime or the substantive provisions of the Code itself.

A. Core Public Values

For the purpose of this analysis, I have chosen to focus on a few core public values, both procedural and substantive. First, we can analyze the ICoC with regard to the values of public participation, transparency, and accountability, the principal values of global administrative law. Benedict Kingsbury, Nico Krisch, and Richard Stewart have argued that increased global interdependence

¹⁰⁰ See, e.g., *Saleh*, 580 F.3d at 5 (adopting broad theory of federal preemption of tort claims arising on a battlefield); *Carmichael v. Kellogg, Brown, & Root Servs., Inc.*, 572 F.3d 1271, 1282–83 (11th Cir. 2009) (affirming the district court’s dismissal of the claim against a contractor on political question grounds). *But see* Brent Kendall, *Contractor’s Torture Settlement a Milestone: Payment of \$5.28 Million at Abu Ghraib in Iraq Underscores Legal Risk for Firms in War Zones*, WALL STREET J., Jan. 10, 2013, at A7 (detailing a large settlement between private military contractors and detainees abused at the Abu Ghraib prison in Iraq).

¹⁰¹ See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 16 (2005).

¹⁰² See *supra* notes 10–13 and accompanying text.

¹⁰³ See *supra* notes 91–96 and accompanying text.

has spawned a global administrative space.¹⁰⁴ They suggest that an administrative law framework attuned to the global sphere might offer a means of analyzing forms of transnational public and private power, and they suggest that these three values lie at the core of this framework.¹⁰⁵ Public participation, which has long been a central preoccupation of administrative law, is perhaps the most important value here. And significantly, the administrative law view of public participation is not simply concerned with making sure a voting polity ratifies all governmental decisions. Rather, it focuses on ensuring that there is some sort of dialogue, even if informal, between the government and the governed to act as a check on power and guard against the possibility of capture by interest groups.

Public participation is particularly complex in the global, transnational space. Of course, fundamental democratic principles would seem to dictate that domestic publics should be permitted to participate in the decision-making of their own governments. However, this simple idea is hard enough to effectuate in the modern administrative state with regard to *governmental* actors.¹⁰⁶ Indeed, the Administrative Procedure Act (APA) itself, through its notice-and-comment process, was an overarching attempt to provide meaningful public involvement in a new era in which legislatures had delegated multiple activities to enormous administrative agencies.¹⁰⁷ Yet critics have charged that the APA framework does not afford meaningful participation. Public choice scholars have long suggested that the framework allows agency capture by narrow interests.¹⁰⁸ And empirical studies have demonstrated that entities with concentrated interests, such as certain sectors of industry, are more likely to spur agency officials to change their policies.¹⁰⁹ Indeed, it could be argued that

¹⁰⁴ Kingsbury et al., *supra* note 101, at 26.

¹⁰⁵ See *id.* at 29 (“The focus of the field of global administrative law is not, therefore, the specific content of substantive rules, but rather the operation of existing or possible principles, procedural rules, review mechanisms, and other mechanisms relating to transparency, participation, reasoned decisionmaking, and assurance of legality in global governance.”).

¹⁰⁶ See DICKINSON, *supra* note 1, at 102–44; Laura A. Dickinson, *Privatization and Accountability*, 7 ANN. REV. L. SOC. SCI. 101, 117 (2011).

¹⁰⁷ For a careful overview of the history leading to the enactment of the APA, see George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. L. REV. 1557, 1561–80 (1996).

¹⁰⁸ See, e.g., Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 513 (1988).

¹⁰⁹ See, e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 87–88 (2006) (finding that EPA respondents found it likely that the White House “sought changes” that both reflected agency capture by business interests and yet furthered the national interest).

little meaningful input takes place through the formal structure at all and that most of the relevant inputs occur *before* the formal notice-and-comment time frame.¹¹⁰

But whatever the difficulties of administrative delegation to public agencies, they are compounded when governments delegate important functions to private contractors. This is, in a sense, a “double delegation” (from legislator to agency to contractor) that tends to further reduce the spaces for participation.¹¹¹ And, when we are talking of governments (or contractors) acting abroad, we have the additional question of whether such actors are in any way obligated to provide *foreign* publics an opportunity to participate in decision-making that affects them.¹¹² Indeed, there is a robust debate about the precise obligations of international institutions to offer opportunities for public participation in their processes (beyond simply the involvement of representatives from individual governments).¹¹³

For the purposes of this Article, I assume that the government that is projecting its power overseas has some obligations to provide for participation of its own citizens in the decisions regarding the projection of that power. Perhaps more controversially, I also assume that some measure of public

¹¹⁰ See, e.g., Dorit Rubenstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 321, 358 (2009) (arguing that the effectiveness of notice-and-comment procedures is in doubt because much of the meaningful work takes place before the procedures begin).

¹¹¹ See Paul R. Verkuil, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 23–25, 31, 46 (2007); Peter Lindseth, *Agents Without Principals? Delegation in an Age of Diffuse and Fragmented Governance*, in *REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW* 107, 108–09 (Fabrizio Cafaggi ed., 2006); Gillian E. Metzger, *Private Delegations, Due Process, and the Duty to Supervise*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 291, 293 (Jody Freeman & Martha Minow eds., 2009).

¹¹² See Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT’L L. 383, 419 (2006).

¹¹³ For example, Robert Dahl has suggested that public participation values are inevitably undermined by delegations to international organizations, and therefore such delegations are only justified if the need for interdependence and cooperation outweighs the loss of participation. Robert A. Dahl, *Can International Organizations Be Democratic? A Skeptic’s View*, in *DEMOCRACY’S EDGES* 19 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999); see also Kenneth Anderson & David Rieff, ‘*Global Civil Society*’: *A Sceptical View*, in *GLOBAL CIVIL SOCIETY* 2004/5, at 26, 32 (Mary Kaldor et al. eds., 2005). Others, such as Richard Falk and Andrew Strauss, refuse to accept this loss of public participation and argue for forms of global democracy. Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT’L L. 191, 193, 195 (2000). Ruth Grant and Robert Keohane attempt to strike a middle ground, arguing that global democracy is unworkable but that international organizations are subject to democratic checks through limits on delegated authority. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 32–33 (2005).

participation by foreign publics in decisions by foreign governments or international organizations affecting their populations is at least beneficial, if not obligatory. The case for such participation is particularly strong in situations in which the foreign government or international government has jurisdiction and control over a local population—for example in a refugee camp or detention facility—or where the local government is ineffectual and the foreign government or international organization (whether acting through contractors or directly) assumes a quasi-governmental role.¹¹⁴

Transparency is a second core value in the global administrative space. Indeed, transparency can be conceptualized both as an end in itself and as a central element of political participation and accountability because transparency helps to maintain a feedback loop between government actors and those affected by government policy, despite the fact that agency officials do not themselves stand for election. In the United States, the Freedom of Information Act (FOIA),¹¹⁵ other sunshine laws,¹¹⁶ and whistleblower protections¹¹⁷ help protect the value of transparency. In the foreign affairs arena, these statutory frameworks balance the need for information to enable informed public participation in decision-making with the countervailing need for secrecy to protect national security.¹¹⁸ Scholars have suggested that transparency protections in the transnational space are also critical to foster dialogue and reasoned decision-making.¹¹⁹ This is because some international organizations and less formal international associations are notoriously

¹¹⁴ See, e.g., Dickinson, *supra* note 112, at 398–99 (detailing abuses by private military contractors and aid workers in the context of West African refugee camps).

¹¹⁵ Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) (2012).

¹¹⁶ See, e.g., Georgia Open Meetings Law, GA. CODE ANN. § 50-14-1 (2013) (requiring state and local government bodies to conduct their meetings so that the public can review and monitor elected officials).

¹¹⁷ See, e.g., Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (codified as amended in chapter 23 of 5 U.S.C.) (enhancing existing protections for federal employees who disclose information related to agency misconduct).

¹¹⁸ For example, FOIA exempts matters that are “specifically authorized . . . by an Executive order to be kept secret in the interest of national defense or foreign policy” and are “properly classified” as such. 5 U.S.C. § 552(b)(1)(A). In addition, the CIA, the National Security Agency, and a few other agencies are allowed to exempt their working files from the search and review requirements of FOIA. *Id.* § 552(b)(1)–(7). Yet, despite these exceptions, the statute has paved the way for the release of numerous documents that have shed light on government security practices. See Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1055–56 (2008) (describing a variety of security-related revelations that have emerged through FOIA requests).

¹¹⁹ See, e.g., Kingsbury et al., *supra* note 101, at 37–39.

opaque,¹²⁰ and transparency is therefore an important metric for evaluating such entities.¹²¹

The final administrative law value is accountability, and so we must ask whether, and to whom, agencies, institutions, or contractors are held accountable. As I have written elsewhere, however, accountability, though often invoked as a value, is rarely defined, particularly in the literature on privatization.¹²² I have therefore suggested that we should disaggregate two forms of accountability that are often muddled: accountability as redress and accountability as managerial oversight.¹²³

In the first form of accountability, an authoritative individual or entity imposes a penalty if a person or organization has failed to comply with a particular rule or standard.¹²⁴ This form of accountability is essentially backward-looking, involves a specific sanction, and occurs at a relatively discrete moment in time (though it could have deterrent effects in the future).¹²⁵ When people speak of accountability, they often mean it in this sense: the idea that there is somewhere to go after the fact to punish wrongdoers and “hold them accountable.”¹²⁶ Political scientists¹²⁷ and lawyers¹²⁸ typically refer to accountability in this way.

¹²⁰ For a discussion of the veiled practices of the Berne Union and the Basel Committee on Banking Supervision, see Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 202 n.318, 203 (2005).

¹²¹ See, e.g., Kingsbury et al., *supra* note 101, at 37–39.

¹²² Dickinson, *supra* note 106, at 104.

¹²³ *Id.* at 103–04.

¹²⁴ *Id.*

¹²⁵ *Id.* at 104.

¹²⁶ *Id.* at 103–04 (internal quotation marks omitted).

¹²⁷ See, e.g., Grant & Keohane, *supra* note 113, at 29 (“Accountability, as we use the term, implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.”). The authors distinguish accountability from other forms of constraint, noting that accountability implies recognition of “the legitimacy of (1) the operative standards for accountability and (2) the authority of the parties to the relationship.” *Id.* Moreover, they emphasize that accountability mechanisms “always operate after the fact,” though even when they “operate *ex post* . . . [they] can exert effects *ex ante*.” *Id.* at 30.

¹²⁸ Administrative law scholar Jerry Mashaw also defines accountability in terms of redress. According to Mashaw, accountability includes “six important things: *who* is liable or accountable *to whom*; *what* they are liable to be called to account for; *through what processes* accountability is to be assured; by *what standards* the putatively accountable behavior is to be judged; and, what the potential *effects* are of finding that those standards have been breached.” Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 118 (Michael W. Dowdle ed., 2006). Mashaw’s definition gestures to a broad range of mechanisms and processes

In the second form of accountability, an authoritative individual or entity evaluates the performance of a person or organization and encourages that person to observe a particular rule or standard. “This form of accountability is essentially forward-looking, does not involve a particular sanction or penalty, and is ongoing.”¹²⁹ For example, when we commonly say that “elected officials should be ‘held accountable’ by the electorate they represent or that a supervisor holds her employees ‘accountable,’” we are invoking this second form of accountability.¹³⁰ “Here, accountability is not so much dependent on courts, tribunals, and other grievance bodies meting out punishment after the fact to redress specific infractions. Instead, managerial accountability entails some form of ongoing scrutiny over those carrying out an activity to ensure that those actors fulfill the purposes as specified.”¹³¹ Scholars and practitioners from the fields of business, public management, or economics often refer to accountability in this way.¹³²

Both types of accountability are, I would suggest, critical in the global space, and can be distinguished from the particular forms or mechanisms of accountability that implement them.¹³³ And both can be used as a measure of an organization or entity’s respect for public values.

Turning from a focus on administrative law values, we must also analyze the extent to which the ICoC regime conforms to core values of human dignity embodied in international human rights and humanitarian law. Obviously, such values are potentially threatened by security contractors who may use force and may therefore injure or kill soldiers or civilians. For example, we need look no further than the high-profile shootings in Baghdad’s Nisour Square in 2007, in which armed security guards from the private security firm

that various actors may use to implement accountability. But by focusing on judging behavior and an “effect” or consequence, Mashaw’s definition implies a discrete moment of adjudication and some type of sanction.

¹²⁹ Dickinson, *supra* note 106, at 103.

¹³⁰ *Id.* at 104.

¹³¹ *Id.*

¹³² For example, Mark Moore, a professor of public management, focuses on what he terms “public accountability,” which he defines as “a form of accountability that allows a collective to define its purposes and then to develop the technical means for determining the degree to which those purposes have been achieved.” Mark Moore, *Introduction to Symposium, Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212, 1225 (2003). In Moore’s concept, the “public” nature of the accountability is the fact that the collective has defined the purposes. *Id.* Determining whether a particular entity has performed those services is essentially a question of monitoring and oversight. *Id.*

¹³³ Dickinson, *supra* note 106, at 103 (“Such mechanisms may include, for example, litigation (criminal or civil), contractual arrangements, political accountability—including the related issues of transparency and participation—and institutional accountability based on the administrative and organizational structure and culture of the relevant institutional actor.”).

Blackwater, under contract with the U.S. State Department, fired into a crowd, killing civilians.¹³⁴ In addition, some firms may have engaged in practices that amount to human trafficking or forced labor.¹³⁵ Meanwhile, security company employees themselves may also potentially be placed at risk in danger zones.¹³⁶ And discrimination, harassment, or mere negligence on the part of company supervisors could infringe on employees' human dignity as well.¹³⁷ Because these risks could arise either during armed conflict—in which case international humanitarian law would apply—or in peacetime—when international human rights law would govern¹³⁸—it is necessary to focus on the values embodied in both bodies of law.

International human rights law and international humanitarian law protect human dignity in multiple ways. For example, both bodies of law prohibit certain acts, such as torture and cruel, inhuman, and degrading treatment.¹³⁹ Both bodies of law also limit killing or injuring others, though the standard varies depending on the context. International human rights law prohibits such acts except in the case of self-defense or as punishment for a crime after a fair trial with all the incidents of due process.¹⁴⁰ In contrast, during an armed conflict international humanitarian law allows parties to intentionally kill or injure combatants¹⁴¹ but prohibits intentional killing of civilians as well as inflicting disproportionate harm to civilians while targeting combatants.¹⁴²

¹³⁴ James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES, Oct. 3, 2007, at A1; David Johnston & John M. Broder, *FBI Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1.

¹³⁵ For an account of such practices committed by a broad array of military contractors (not merely security firms), see Sarah Stillman, *The Invisible Army*, NEW YORKER, June 6, 2011, at 56.

¹³⁶ Rod Nordland, *War's Risks Shift to Contractors*, N.Y. TIMES, Feb. 12, 2012, at A1.

¹³⁷ See Stillman, *supra* note 135, at 57.

¹³⁸ Rosa Brooks, *Protecting Rights in the Age of Terrorism: Challenges and Opportunities*, 36 GEO. J. INT'L L. 669, 674 (2005).

¹³⁹ International human rights law prohibits torture most notably in the Torture Convention. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85. The primary prohibition on torture during armed conflict is contained within what is referred to as "common article three," the shared article of all four Geneva Conventions, which in turn articulate the primary framework for regulating warfare and limiting harm to civilians during all forms of armed conflict. For one example of common article three, see Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950, for the United States Feb. 2, 1956).

¹⁴⁰ See, e.g., International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR] (setting forth the right to life).

¹⁴¹ See MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS 433–39 (2d ed. 2009) (discussing the Geneva Conventions and other international laws on the use of force).

¹⁴² *Id.*

Again, while the standards vary, both bodies of law also limit the act of detention.

International human rights law goes much further and provides for additional protections. These protections include, for example, bans on various forms of discrimination,¹⁴³ as well as human trafficking,¹⁴⁴ and forced labor.¹⁴⁵ At the same time, human rights law also guards human dignity by articulating numerous procedural due process rights in judicial proceedings.¹⁴⁶

Finally, I should note that, when I invoke these core public values of human dignity, participation, transparency, and accountability as benchmarks to evaluate the proposed ICoC and its proposed oversight mechanism, I recognize that some might object to labeling these values “public.” This is because, over the past fifty years, many values and rights that were once deemed public have been reframed or extended so that they apply well beyond the traditionally public sphere. Thus, for example, drawing on legal realism, many scholars and lawmakers in the civil rights era reconceived certain antidiscrimination rights as belonging to individuals regardless of whether the infringer was a policeman or a restaurateur.¹⁴⁷ Accordingly, it might seem anachronistic to try to privilege certain rights or values as quintessentially public.

By using the term “public values,” however, I do not intend to reinscribe a sharp or essential division between public and private spheres or to argue that the values shift from sphere to sphere. On the contrary, the whole point of regimes like the ICoC is to extend these public values so that they will apply to private contractors acting at the behest of governments. Thus, it is my position that the values remain core public values and that those values can and should be applied, regardless of whether the actor in question is public or private.

¹⁴³ See, e.g., ICCPR, *supra* note 140, art. 26 (recognizing that all persons deserve equal protection before the law).

¹⁴⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319.

¹⁴⁵ See ICCPR, *supra* note 140, art. 8.3 (“No one shall be required to perform forced or compulsory labor.”); see also Convention (No. 105) Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291 (“[T]his Convention undertakes to suppress and not to make use of any form of forced or compulsory labour . . .”).

¹⁴⁶ See, e.g., ICCPR, *supra* note 140, arts. 9, 14 (preserving due process rights for all persons subject to the Convention).

¹⁴⁷ See, e.g., Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 86–91 (1967).

B. *The ICoC and Public Values*

If we now turn to examine the ICoC and the governance mechanism in light of these core public values, we can see that, at least at this preliminary stage, they hold up quite well and show tremendous promise as a model of public/private governance. Here, it is important to look both at the process by which the regime was created and the substantive terms and structures of the regime itself.

1. *The Process of Creating the ICoC*

One of the distinctive features of the ICoC and its accompanying governance mechanism is how transparent and participatory the process of their creation has been. Initiated during a series of workshops and conferences in the spring of 2009, multiple stakeholders were present from the start.¹⁴⁸ Representing governments, the Swiss, as discussed earlier, convened the initiative,¹⁴⁹ but representatives from the U.S. and British governments (two of the largest employers of security contractors) were also involved up front.¹⁵⁰ Representing civil society, Human Rights First and the Center for the Democratic Control of Armed Forces (DCAF) co-hosted a briefing in New York in October 2009¹⁵¹ focused on identifying gaps in international law with regard to security contractors and suggesting an important role for the Code.¹⁵² Meanwhile, a broad array of industry associations issued a declaration in support of a code in June 2009, following a multi-stakeholder conference in Nyon, Switzerland.¹⁵³ Signed by Chris Grayling, of the Pan-African Security Association; Doug Brooks, of the International Peace Operations Association (now the International Stability Operations Association); and Andrew Bearpark, of the British Association of Private Security Companies,¹⁵⁴ the Nyon Declaration asserts industry consensus on the need for a code of conduct:

¹⁴⁸ See FACT SHEET, *supra* note 12, at 2 (noting that the ICoC process involved private security companies, industry associations, governmental representatives, and various humanitarian and nongovernmental organizations).

¹⁴⁹ *ICoC Timeline*, *supra* note 14.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Industry Statement from the Int'l Peace Operations Ass'n, British Ass'n of Private Sec. Cos., and Pan African Sec. Ass'n (June 6, 2009), http://www.icoc-psp.org/uploads/2009.06_-_Nyon_Declaration.pdf.

[T]he industry representatives now present at the conference consider it time to pursue and develop an international code of conduct for the companies themselves in all situations.

Following a collective process involving pertinent stakeholders, we have achieved a broad consensus that an international code of conduct must be compliant with Human Rights and IHL. Further, there is a clear necessity for effective oversight, accountability and operational standards in such a code.

. . . .

We see this process as an opportunity to enhance our ability to address broader stakeholder concerns and to serve all our clients, government and otherwise, in a transparent, professional and ethical manner.¹⁵⁵

When it came to developing the specific provisions of the code of conduct, again a broad array of groups participated. The first version of the Code, released in January 2010, was initially drafted by the Swiss government along with its partners, the Geneva Academy of International Humanitarian Law and Human Rights (ADH) and DCAF.¹⁵⁶ However, this draft was the product of a “series of workshops and consultations with industry associations, corporations, the governments of the United Kingdom and the United States, other stakeholders and relevant experts.”¹⁵⁷ Multiple stakeholders were given the opportunity to comment on, and give input on, the draft.¹⁵⁸ For example, the U.S. Institute of Peace hosted a meeting in February 2010 for the purpose of enabling civil society and humanitarian relief organizations to provide comments.¹⁵⁹ And, in an April 2010 meeting “to provide an update to participants on the Draft Code,” participants included representatives from governments and international organizations, practitioners with a security background, nongovernmental clients of private security firms, civil society groups (both those that employ security firms and those that seek a watchdog role), and academics.¹⁶⁰

The Code-writing process involved many drafts, with multiple opportunities for diverse stakeholders to comment. For example, in the

¹⁵⁵ *Id.*

¹⁵⁶ *ICoC Timeline, supra* note 14.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

summer of 2010, the initial draft, which had been circulated widely and discussed at multiple conferences and events, received thirty-seven written comments spanning nearly two hundred pages.¹⁶¹ The second draft went through a similarly rigorous process of evaluation and discussion in a series of conferences and workshops.¹⁶² Some of these gatherings focused on specific constituencies, such as a September 2010 meeting that “invited representatives of the industry and governments, with the objective to explain the importance of the Code to industry and allow them [to participate in] the drafting.”¹⁶³ The process culminated in a conference in Geneva in November 2010, at which the final draft was adopted.¹⁶⁴ Fifty-eight security companies signed the Code immediately,¹⁶⁵ and as of September 2013, there are 708 signatories,¹⁶⁶ a truly impressive degree of industry buy-in and participation.

The drafting process for the governance and oversight mechanism involved a similarly broad array of stakeholders from government, industry, and civil society.¹⁶⁷ A steering committee, selected after the November 2010 conference by each stakeholder group, supervised the project.¹⁶⁸ Committee members included representatives from industry, civil society, and government: from industry, Mark DeWitt (Triple Canopy), Andrew Nicholson (Drum Cussac), Brent Wegner (GardaWorld), and Sylvia White (Aegis); from civil society, Chris Albin-Lackey (Human Rights Watch), Nils Melzer (Geneva Center for Security Policy), Meg Roggensack (Human Rights First), and James Cockayne (independent); from government, Josh Dorosin (U.S. Department of State), David Dutton (Australian Department of Foreign Affairs and Trade), and Paul McGrade (U.K. Foreign Commonwealth Office).¹⁶⁹ The steering committee issued a work plan and time line, and then formed three working groups to focus on the specific issues of (1) assessment, reporting, and internal and

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *International Code of Conduct for Private Security Service Providers Signatory Companies*, INT’L CODE CONDUCT FOR PRIV. SEC. SERV. PROVIDERS (Sept. 1, 2013), http://www.icoc-ssp.org/uploads/Signatory_Companies_-_September_2013_-_Composite_List-1.pdf [hereinafter *ICoC Signatory Companies*].

¹⁶⁷ *ICoC Timeline*, *supra* note 14.

¹⁶⁸ *Id.*

¹⁶⁹ *ICoC Temporary Steering Committee (TSC)*, INT’L CODE CONDUCT FOR PRIV. SEC. SERV. PROVIDERS, http://www.icoc-ssp.org/ICoC_Steering_Committee.html (last visited Dec. 13, 2013) [hereinafter *Steering Committee*].

external oversight; (2) resolution of third party grievances; and (3) governance mechanism structures and funding.¹⁷⁰

The Steering Committee met regularly over the next two years, and, as in the case of the Code itself, held multiple events allowing stakeholders to give feedback.¹⁷¹ In addition, each working group consulted with experts and provided the public with an opportunity to comment on the draft.¹⁷² Moreover, significant changes were made, based on these comments.¹⁷³ Final agreement was reached on February 22, 2013, regarding the Charter for the oversight mechanism.¹⁷⁴ The next step is to establish this mechanism, which was formally launched in Geneva in September of 2013,¹⁷⁵ and to begin hiring staff.

Despite this extensive, broad-based input, participation could perhaps have been even wider. For example, the governments represented on the steering committee for the oversight mechanism consisted entirely of Western, developed countries (the United States, the United Kingdom, and Australia).¹⁷⁶ Many leading host countries, such as Iraq, were notably absent, as were countries from the developing world more generally. Industry representation on the steering committee likewise consisted of companies headquartered in the developed world.¹⁷⁷ Although many large conferences and smaller meetings were held, all were in Western, developed countries (Switzerland, the United States, and the United Kingdom).¹⁷⁸ A meeting in Africa, the Middle East, Asia, or South America would likely have added a different mix of voices

¹⁷⁰ Temp. Steering Comm. for the Int'l Code of Conduct for Private Sec. Serv. Providers, *Work Plan*, INT'L CODE CONDUCT FOR PRIV. SEC. SERV. PROVIDERS (May 11, 2011), http://www.icoc-pp.org/uploads/ICOCWorkPlan-final_11_May_2011.pdf [hereinafter *Work Plan*].

¹⁷¹ *ICoC Timeline*, *supra* note 14.

¹⁷² FACT SHEET, *supra* note 12, at 2–4.

¹⁷³ See *Comments on the Draft Charter*, INT'L CODE CONDUCT FOR PRIV. SEC. SERV. PROVIDERS, http://www.icoc-pp.org/uploads/Comments_Draft_Charter_ICoC.pdf (last visited Dec. 13, 2013).

¹⁷⁴ *International Code of Conduct for Private Security Service Providers—Consensus on Oversight Mechanism*, SWITZ. FED. DEP'T FOREIGN AFF. (Feb. 22, 2013), <http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=47889>.

¹⁷⁵ *About the ICoC Association*, *supra* note 17.

¹⁷⁶ See *ICoC Timeline*, *supra* note 14.

¹⁷⁷ Triple Canopy has its headquarters in the United States, *Locations*, TRIPLE CANOPY, <http://www.triplecanopy.com/company/locations/> (last visited Dec. 13, 2013), the headquarters of Aegis and Drum Cussac are located in the United Kingdom, *Contact*, AEGIS, <http://www.aegisworld.com/contact> (last visited Dec. 13, 2013); *Global Presence*, DRUM CUSSAC, <http://www.drum-cussac.com/globalpresence.aspx> (last visited Dec. 13, 2013), and Garda Global is headquartered in Canada, *Locations*, GW, <http://www.garda-world.com/locations/> (last visited Dec. 13, 2013).

¹⁷⁸ *ICoC Timeline*, *supra* note 14.

and perspectives. In addition, private clients of security firms—often large, multinational corporations such as those in the extractive industries—were mostly absent from the process. Although at least one meeting apparently included such corporations,¹⁷⁹ the primary conceptualization and drafting of the Code and oversight mechanism were undertaken by others, despite the fact that these corporations will likely be major employers of private contractors subject to the Code, and they could also ultimately help fund the oversight regime. Accordingly, greater involvement from this group would likely have been beneficial.

Nevertheless, it is difficult to deny that participation overall in the development of the Code and oversight mechanism was extraordinarily broad. Multiple stakeholder groups jointly led the initiative at every turn.¹⁸⁰ And while only Western, developed countries served on the steering committee, these countries are, in practice, the leading governmental clients for security firms. Although industry representation on the steering committee was similarly skewed, the companies that have now signed the Code are much more diverse, with headquarters on five continents.¹⁸¹ Moreover, there were at least two meetings designed to reach out to an even broader array of firms,¹⁸² and the adoption of the Code was delayed for several months in part to enable African firms to evaluate the Code at the annual conference of African security firms.¹⁸³ By holding numerous conferences, workshops, and informal discussions with a wide range of groups and individuals, the convenors ensured broad input.

The process was also strikingly transparent. The convenors established a public website with news of meetings and workshops.¹⁸⁴ On the website, they provided the agendas for many of these events,¹⁸⁵ as well as relevant

¹⁷⁹ *Id.*

¹⁸⁰ See FACT SHEET, *supra* note 12, at 2 (noting the various categories of actors involved in the process).

¹⁸¹ See INT'L CODE CONDUCT FOR PRIV. SEC. SERV. PROVIDERS, http://www.icoc-ppsp.org/Home_Page.html (last visited Dec. 13, 2013) [hereinafter *ICoC Homepage*] (providing a map of contractor headquarters by country).

¹⁸² See *ICoC Timeline*, *supra* note 14 (meetings in September 2010 in London and Washington, D.C.).

¹⁸³ See, e.g., Discussion Document, Meeting for Finalizing Code of Conduct (Sept. 29–30, 2010), http://www.icoc-ppsp.org/uploads/2010.09.29_-_Geneva.pdf (last visited Dec. 13, 2013).

¹⁸⁴ See *ICoC Homepage*, *supra* note 181.

¹⁸⁵ See, e.g., Workshop Agenda, Ctr. for Democratic Control of Armed Forces, Working Towards an International PMSC Code of Conduct (Apr. 17, 2009), http://www.icoc-ppsp.org/uploads/2009.04.19_-_Agenda_CoC_Workshop_II_Geneva.pdf.

documents such as concept papers.¹⁸⁶ For steering committee meetings, they provided the time line for,¹⁸⁷ and agendas and minutes from, each meeting.¹⁸⁸ In addition, they developed and published the steering committee's internal rules and procedures,¹⁸⁹ as well as guidelines for the working groups.¹⁹⁰ And the steering committee published a detailed plan of work and time frame for that plan.¹⁹¹

Particularly noteworthy is what amounted to a public notice-and-comment process for both the Code and the Charter regarding the oversight mechanism. In both cases, the convenors circulated multiple drafts via e-mail to stakeholders and, in addition, posted the drafts on the website.¹⁹² In addition, the convenors gave the public the opportunity to provide written comments, as well as more informal input at various meetings, workshops, and conferences.¹⁹³ These comments—including comments from thirty-seven entities responding to the draft Code,¹⁹⁴ and from forty entities responding to the draft Charter¹⁹⁵—are publicly available on the website. In the case of the Charter, the Temporary Steering Committee provided not only the comments but an account of the Committee's response to each comment as reflected in the second draft of the Charter.¹⁹⁶

Thus, it is difficult to imagine a substantially more transparent process for developing the Code and Charter. Perhaps the convenors could have provided information identifying the individuals and entities in attendance at the various meetings. In some cases, as for the temporary steering committee meetings, the

¹⁸⁶ See, e.g., *Concept Paper: Areas Requiring Further Consideration for the ICoc*, INT'L CODE CONDUCT FOR PRIV. SEC. SERV. PROVIDERS, http://www.icoc-psp.org/uploads/TSC_Concept_Paper-final_2011May.pdf (last visited Dec. 13, 2013).

¹⁸⁷ *Steering Committee*, *supra* note 169.

¹⁸⁸ See, e.g., *Minutes, Temporary Steering Committee Meeting (Jan. 16–18, 2013)*, http://www.icoc-psp.org/uploads/2013.01.16_-_Minutes_TSC.pdf.

¹⁸⁹ THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS (ICoC) FRAMEWORK FOR THE STEERING COMMITTEE (2011), http://www.icoc-psp.org/uploads/ICoC_Steering_Committee_Rules_-_Final.pdf.

¹⁹⁰ *Guidance on Working Groups*, INT'L CODE CONDUCT FOR PRIV. SEC. SERV. PROVIDERS, http://www.icoc-psp.org/uploads/ICoC_TSC_Working_Group_Guidelines_05-04-2011_-_Final.pdf (last visited Dec. 13, 2013).

¹⁹¹ *Work Plan*, *supra* note 170.

¹⁹² *ICoC Timeline*, *supra* note 14.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Comments on the Draft Charter*, *supra* note 173.

¹⁹⁶ *Id.*

minutes do identify the participants.¹⁹⁷ In other cases, the website might provide the agenda for, and speakers at, a meeting without identifying the stakeholder participants.¹⁹⁸ But these are minor criticisms. Overall, the process has been a model of transparency and inclusion.

Indeed, with respect to both transparency and participation, the process for drafting the Code and Charter fares as well as, if not better than, domestic rulemaking. For example, the Administrative Procedure Act's notice-and-comment requirements mandate that agencies provide notice of proposed rulemaking and give the interested public time to comment.¹⁹⁹ As we have seen, during the process to draft the Code and Charter, the convenors likewise provided both adequate notice and ample opportunity to comment.²⁰⁰ Indeed, the convenors went further than domestic rulemaking, which does not in all cases require that public meetings be held.²⁰¹ And the process far exceeded what foreign policy agencies such as the Department of Defense and State Department typically provide.²⁰² Though little discussed, these agencies do engage in some rulemaking that falls within at least broad contours of the APA.²⁰³ But in many cases these agencies do not follow the procedures scrupulously,²⁰⁴ and it is unclear how many rules the agencies decline to

¹⁹⁷ See, e.g., Minutes, Temporary Steering Committee Meeting (Nov. 28–30, 2012), http://www.icoc-ppsp.org/uploads/2012.11.28_Activities_TSC_November.pdf (identifying participants at the meeting).

¹⁹⁸ See, e.g., Workshop Agenda, Ctr. for Democratic Control of Armed Forces, Working Towards an International PMSC Code of Conduct (May 8, 2009), http://www.icoc-ppsp.org/uploads/2009.05.08_-_Agenda_CoC_Workshop_III_Geneva.pdf.

¹⁹⁹ 5 U.S.C. § 553 (2012). Thus, under the primary default procedures contained in § 553(b)(3) of the APA, an agency must first provide public notice of any contemplated rulemaking activity by publishing, in the Federal Register, “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” Next, under § 553(c), the agency must offer interested persons an opportunity to participate through the submission of written comments. Unlike some of the legislative proposals that Congress rejected, the APA does not require the agency to hold a public hearing. Then, upon issuing a final rule, the agency must include a “concise general statement of [the rule’s] basis and purpose.” *Id.* Because courts have relied on legislative history that suggests Congress wanted this statement to explain the final regulations, preambles to final rules “tend to be more comprehensive than concise, including detailed discussions of the regulations’ goals and methods, negative comments received, and the agency’s responses thereto.” Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1733 (2007).

²⁰⁰ See *supra* notes 192–96 and accompanying text.

²⁰¹ See discussion *supra* note 199.

²⁰² Laura A. Dickinson, *Administrative Law and the Foreign Policy Agencies* (2013) (unpublished manuscript) (on file with author); see also David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187 (2010).

²⁰³ See Dickinson, *supra* note 202.

²⁰⁴ *Id.* Indeed, even other agencies such as the Treasury Department fail to follow the notice-and-comment procedures scrupulously. See, e.g., Hickman, *supra* note 199, at 1730.

submit to the process altogether, as there are broad exemptions for military and foreign policy functions.²⁰⁵ Moreover, according to empirical studies, even when agencies follow the procedural requirements of the APA to the letter, public participation in rulemaking through the notice-and-comment process often has minimal impact on substantive rules.²⁰⁶ In contrast, as discussed above, the comments on the Code and Charter resulted in significant changes to the regime.²⁰⁷

The opportunity for the public to participate and the transparency of the process were also arguably greater than in many treaty-drafting initiatives. Because treaties are agreements between and among states, civil society organizations and industry groups often do not have a seat at the negotiating table, even though they may be allowed to sit in and comment on some aspects of the proceedings.²⁰⁸ Moreover, what goes on inside the negotiating room is often secret. Here, not only did civil society organizations and industry groups participate in public conferences to discuss drafts, they actually helped direct the process.

2. *The ICoC's Substantive Provisions*

The regime also fares well if measured for its normative commitment to human dignity, public participation, transparency, and accountability.

a. *Human Dignity*

As described above, the Code provides a robust set of protections regarding human dignity.²⁰⁹ It offers clear, specific, and detailed articulations of multiple critical norms.²¹⁰ And it explicitly applies international human rights law and international humanitarian law to contractors,²¹¹ even though contractors often

²⁰⁵ See 5 U.S.C. § 553(a) (2012).

²⁰⁶ See Hickman, *supra* note 199; Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 58 (2013). Public participation through the notice-and-comment process is more likely to have an impact if those advocating for a particular change to a rule have a concentrated interest. See Bressman & Vandenberg, *supra* note 109, at 51.

²⁰⁷ See *supra* note 173 and accompanying text.

²⁰⁸ To be sure, some scholars have critiqued such broad-based participation as antidemocratic. The argument is that only official governmental representatives, selected or appointed through official democratic processes, can legitimately speak for a polity. To allow other groups a seat at the table could undermine the democratic framework.

²⁰⁹ See *supra* notes 18–30 and accompanying text.

²¹⁰ See ICoC, *supra* note 10, ¶ 30.

²¹¹ See *id.* ¶ 3.

occupy a gray area in the international instruments themselves.²¹² Furthermore, in contested areas such as defining torture, the Code takes an aggressive approach.²¹³ If the oversight and enforcement mechanisms end up having teeth, then there is little doubt that the Code would be a huge step forward in extending core norms of human dignity to the entire security contractor industry.

b. Public Participation

The regime also provides significant opportunities for participation from multiple stakeholders. First, the Board itself is composed of members from each stakeholder group (civil society, industry, and government).²¹⁴ Each group is equally represented and has the responsibility of electing its particular Board members.²¹⁵ Moreover, the voting structure ensures that no voting block formed by two stakeholder groups can push through policy over the objection of the third.²¹⁶ This is because decisions are made by a majority vote of at least eight Board members, but in addition at least two Board members from each stakeholder group must support the decision.²¹⁷ While this provision could lead to a stalemate, it ensures that the development of the Code and its oversight mechanism continues to have support from government, industry, and human rights NGOs.

In addition, beyond the Board, there are opportunities for broad participation. At regular meetings, the regime offers members from each stakeholder group the chance to consult with one another, the Board, and the Secretariat.²¹⁸ To date, industry representation is extraordinarily extensive, including 708 companies from 79 countries and territories on 5 continents.²¹⁹ It still remains to be seen how many governments will be involved in the regime, and how broad civil society representation will be. But unlike the process for drafting the Code and the Charter, where non-Western countries and NGOs were not particularly involved,²²⁰ the regime in operation contemplates no

²¹² See *supra* notes 18–20 and accompanying text.

²¹³ See ICoC, *supra* note 10, ¶¶ 35–37.

²¹⁴ ARTICLES OF ASSOCIATION, *supra* note 11, art. 3.1.

²¹⁵ *Id.* art. 7.2.

²¹⁶ *Id.* art. 7.6.

²¹⁷ *Id.*

²¹⁸ *Id.* art. 6.2.

²¹⁹ ICoC Signatory Companies, *supra* note 166.

²²⁰ See *supra* 171–79 and accompanying text.

limits regarding the participation of such governments and civil society groups.²²¹

As noted above, one key stakeholder group that does not yet have a clear seat at the table in the regime is the group of corporations, such as those in the extraction industries, that regularly employ private security contractors. These corporations do not have a role in the regime comparable to the three primary stakeholder groups.²²² Nevertheless, the Charter does provide that the Board may adopt rules to grant “observer status” to other stakeholder groups, and specifically mentions “non-state clients,” as one such group.²²³ Thus, such entities can at least have a role in the process, albeit a less central one. In any event, the broad participation agreement contemplated by the ICoC is a model of multi-stakeholder deliberation and involvement.

c. Transparency

The regime is also extraordinarily transparent, particularly when compared to the opaque quality of many multilateral transnational agreements. This transparency has two components: first, the ICoC imposes significant transparency requirements on its members;²²⁴ and, second, the Association’s own processes are designed to remain reasonably transparent.²²⁵

To become members of the Association administering the ICoC, governments and international organizations must agree to comply with the Montreux process, which requires them to “commit to provide information related to their implementation of the Montreux Document and the Code, including the development of their domestic regulatory framework for PSC activities.”²²⁶ Thus, such governments will need to publicly disclose their progress (or lack thereof) in developing domestic regulatory structures for the security contractor industry.

For their part, civil society groups wishing to participate will need to demonstrate that they have a strong record of promoting international human

²²¹ See ARTICLES OF ASSOCIATION, *supra* note 11, art. 3.1.

²²² See *id.* (establishing three stakeholder pillars, none of which are dedicated to such corporations).

²²³ *Id.* art. 3.4.

²²⁴ See ICoC, *supra* note 10, ¶ 53 (requiring signatory companies to maintain records for seven years and mandating access to such records unless impermissible by law).

²²⁵ See, e.g., ARTICLES OF ASSOCIATION, *supra* note 11, arts. 9.3, 10.1 (designating the Secretariat as being responsible for maintaining all records and establishing an advisory forum open to all participants regardless of membership status).

²²⁶ *Id.* art. 3.3.2.

rights or humanitarian law and that they operate independent from both government and industry.²²⁷ This provision helps ensure that the civil society groups involved are true watchdogs and not mere fronts for government or industry masquerading as NGOs. Such independent monitoring aids transparency because these groups, if they are truly independent, are far more reliable whistleblowers should the ICoC or its oversight mechanism begin to devolve into something ineffective.

Finally, the contractor firms, to be certified under the ICoC, must issue a “written, public declaration of their intent to adhere to the Code,”²²⁸ as well as provide evidence to the Board that supports the declaration.²²⁹ As part of their compliance, these firms must publish grievance procedures on their websites,²³⁰ and “undertake to be transparent regarding their progress towards implementing the Code’s principles.”²³¹ Most importantly, as noted above, certified firms are subject to robust reporting requirements concerning use-of-force incidents,²³² internal oversight procedures,²³³ and mechanisms for addressing grievances.²³⁴ These reports can form the basis for a far more transparent system for addressing potential problems related to private security contractors than has been the norm so far.

As to the Association’s own processes, the ICoC requires the group to develop procedures for certification,²³⁵ performance assessment,²³⁶ and facilitation of grievances.²³⁷ It is anticipated that these procedures will be public, providing transparent criteria for performance assessment.²³⁸ In addition, after undertaking a performance assessment of a particular company, “the Board may issue a public statement on the status or outcome of the Association’s review of a Member company.”²³⁹ And, with regard to grievance procedures, the Board is expected to publish public “guidance to Members on

²²⁷ *Id.* art. 3.3.3.

²²⁸ *Id.* art. 11.2.3.

²²⁹ *Id.* art. 11.2.1–2.

²³⁰ ICoC, *supra* note 10, ¶ 67(b).

²³¹ *Id.* ¶ 8.

²³² *See id.* ¶ 37.

²³³ *See id.* ¶ 6(d) (requiring members to establish and maintain an internal governance framework).

²³⁴ *See id.* ¶ 66.

²³⁵ *See* ARTICLES OF ASSOCIATION, *supra* note 11, art. 11.1.

²³⁶ *See id.* art. 12.

²³⁷ *See id.* art. 13.

²³⁸ *Id.* art. 12.2.2.

²³⁹ *Id.* art. 12.2.9.

best practice and compliance”²⁴⁰ with requirements involving their obligation to establish fair and accessible internal grievance procedures,²⁴¹ publish them on a website,²⁴² investigate claims promptly,²⁴³ keep records,²⁴⁴ cooperate with parallel investigations,²⁴⁵ take disciplinary action,²⁴⁶ and provide whistleblower protections.²⁴⁷

Finally, “[t]he Association will report publicly, no less than annually, on its activities” pertaining to reporting, monitoring, and performance assessment.²⁴⁸ Moreover, as an independent legal entity with legal capacity governed by Swiss law,²⁴⁹ the Association may have additional transparency requirements as provided by Swiss law. The Swiss government will also publicly list all signatory companies.²⁵⁰ This combination of provisions ensures a striking degree of transparency, both with regard to the crucial activities of the private security firms and the governance process itself.

d. Accountability

As discussed previously, accountability encompasses both managerial accountability, which involves creating institutional and organizational structures that embed accountability in a forward-looking manner, and accountability as redress, which looks to after-the-fact punishment mechanisms.²⁵¹ Here, I discuss the ways that the ICoC and Charter feature both forms of accountability.

i. Managerial Accountability

The certification requirements impose some forms of managerial accountability. Participating firms must certify that they meet the Code obligations, which require the company to have internal managerial controls to

²⁴⁰ See *id.* art. 13.3.

²⁴¹ See *id.* art. 13.1.

²⁴² ICoC, *supra* note 10, ¶ 67(b).

²⁴³ *Id.* ¶ 67(c).

²⁴⁴ *Id.* ¶ 67(d).

²⁴⁵ *Id.* ¶ 67(e).

²⁴⁶ *Id.* ¶ 67(f).

²⁴⁷ *Id.* ¶ 67(g).

²⁴⁸ ARTICLES OF ASSOCIATION, *supra* note 11, art. 12.3.

²⁴⁹ *Id.* art. 1.1.

²⁵⁰ ICoC, *supra* note 10, ¶ 70.

²⁵¹ See *supra* notes 122–32 and accompanying text.

ensure compliance.²⁵² Signatory companies commit “to take steps to establish and maintain an effective internal governance framework in order to deter, monitor, report, and effectively address adverse impacts on human rights.”²⁵³ In addition, companies agree “to establish and/or demonstrate internal processes to meet the requirements of the Code’s principles and the standards derived from the Code.”²⁵⁴

Meanwhile, the Association and Board agree to “[e]stablish external independent mechanisms for effective governance and oversight, which will include Certification . . . , Auditing[,] and Monitoring of [the companies’] work in the field.”²⁵⁵ Significantly, such ongoing auditing and performance assessment will be conducted by outside entities,²⁵⁶ which is likely to affect significantly the internal governance and accountability mechanisms of the firms. Indeed, auditing is defined as

a process through which independent auditors, accredited by the governance and oversight mechanism, conduct on-site audits, including in the field, on a periodic basis, gathering data to be reported to the governance and oversight mechanism which will in turn verify whether a Company is meeting requirements and if not, what remediation may be required.²⁵⁷

Finally, the Charter also requires ongoing monitoring and performance assessment by the Board and Association itself. Thus, companies need to provide regular written self-assessments to the Board and Association,²⁵⁸ and “[t]he Association shall be responsible for exercising oversight of Member companies’ performance under the Code, including through external monitoring, reporting and a process to address alleged violations of the code.”²⁵⁹ Moreover, if the Association is concerned about a firm’s compliance, field missions may be authorized,²⁶⁰ and the Secretariat shall review information obtained and engage in dialogue with the firm regarding possible reforms.²⁶¹ The Board can also intervene and conduct reviews of firms, either

²⁵² ICOC, *supra* note 10, ¶ 8.

²⁵³ *Id.* ¶ 6(d).

²⁵⁴ *Id.* ¶ 8.

²⁵⁵ *Id.* ¶ 7(b).

²⁵⁶ *Id.*

²⁵⁷ *Id.* § B.

²⁵⁸ ARTICLES OF ASSOCIATION, *supra* note 11, art. 12.2.2.

²⁵⁹ *Id.* art. 12.1.

²⁶⁰ *Id.* art. 12.2.3.

²⁶¹ *Id.* art. 12.2.4.

on the recommendation of the Executive Director or on its own initiative.²⁶² The Board can also request corrective action and can ultimately suspend a firm or terminate its membership,²⁶³ which may make it more difficult for the firm to obtain future contracts.

ii. Accountability as Redress

As described previously, the Code creates a series of procedures by which use of force and other questionable incidents are reported, investigated, and adjudicated.²⁶⁴ First, signatory companies are required to report all incidents involving the use of a weapon.²⁶⁵ This report is submitted to the client and competent authorities, though as of yet it is unclear whether the Association or Board will also receive a copy.²⁶⁶ In addition, companies must establish an internal grievance process that is fair, accessible, and offers effective remedies.²⁶⁷ They must publish details of their procedures, investigate allegations promptly, keep records of the investigations, cooperate with official investigations, take appropriate disciplinary action, and provide whistleblower protections.²⁶⁸ This is a far more robust set of accountability mechanisms than exists currently with regard to private security contractors.

The Association itself is also empowered to take steps to “support Member companies” in their obligations under the Code to resolve grievances through their internal mechanisms.²⁶⁹ Thus, the Secretariat can receive claims from company personnel and third parties.²⁷⁰ The Secretariat can then communicate with claimants regarding available grievance procedures.²⁷¹ If a claimant alleges that a company’s procedure is not fair, not accessible, or does not offer an effective remedy, the Secretariat can review that allegation.²⁷² After such a review, the Secretariat enters a dialogue with the company, and if the grievance process is deemed inadequate, the Secretariat can recommend corrective action and/or suggest referral to another “fair and accessible

²⁶² *Id.* art. 12.2.6.

²⁶³ *Id.* art. 13.2.7.

²⁶⁴ *See supra* Part I.B.

²⁶⁵ ICOC, *supra* note 10, ¶ 63.

²⁶⁶ *Id.*

²⁶⁷ *Id.* ¶ 67(a).

²⁶⁸ *Id.* ¶ 67.

²⁶⁹ ARTICLES OF ASSOCIATION, *supra* note 11, art. 13.1.

²⁷⁰ *Id.* art. 13.2.1.

²⁷¹ *Id.* art. 13.2.2.

²⁷² *Id.* art. 13.2.3.

grievance procedure that may offer an effective remedy.”²⁷³ For its part, the Board may request referral, which could “include cooperation with the Association’s good offices, the provision of a neutral and confidential mediation process, or other arrangements that may assist the Member company to offer an effective remedy.”²⁷⁴ And of course, as previously mentioned, if a company does not cooperate sufficiently, the Board can impose sanctions or suspend the company’s certification.²⁷⁵

Thus, the regime, while not itself subjecting noncompliant contractors to formal civil or criminal sanctions, has far more robust compliance and accountability mechanisms than many other voluntary industry-driven codes of conduct. Significantly, much of the monitoring is from independent outside entities, and the ultimate sanction of banishment from the regime may render firms ineligible to receive lucrative contracts, particularly if governments agree only to hire certified security contractors.

CONCLUSION

Of course, the governance and oversight mechanism for the ICoC, while formally launched in September 2013, is not yet fully operational. Much will ultimately depend on how the various compliance and grievance procedures are implemented and enforced. It is certainly possible that the opportunity will be lost, and the Code provisions will become mere paper aspirations. Further review will obviously be necessary.

However, many of the components are in place for a relatively robust public/private oversight regime. Most importantly, the ICoC is a true public/private partnership; it is not just industry self-regulation. Both the process for drafting the Code and Charter and the ongoing Board structure ensure that governments and human rights NGOs remain at the table, which will presumably help ensure the Code is implemented with the serious compliance energy originally envisioned.

Thus, in a world fraught with violence and the possibility for abuse, where oversight has been virtually nonexistent, we now see emerging a true effort to demand accountability. Developed in a comparatively quick, transparent, and participatory process, a mechanism is emerging that has the chance to provide

²⁷³ *Id.* art. 13.2.4.

²⁷⁴ *Id.* art. 13.2.5.

²⁷⁵ *Id.* art. 13.2.7.

real oversight and encourage institutional reform of an industry that has been difficult to tame through the classic means of international and domestic law. This in itself is an important advance, and it also suggests a roadmap for other public/private governance and oversight partnerships that might be considered in the future.