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#### ***Can Self-Regulation Work?***

#### ***Lessons from the Private Security and Military Industry***

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## Abstract:

Various efforts have been undertaken in recent years to clarify the legal framework governing the outsourcing of security and military functions to private actors. While national and international legislation have made little progress, self-regulation has advanced steadily. The article provides the first normative assessment of self-regulation in the private security and military industry – and as such offers interesting insights for other industries that are transnational in reach and under-regulated by domestic, regional, and international law. Though industry critics tend to deplore the normative 'softness' of self-regulation and its voluntary nature, it appears to have shifted behavioral norms and triggered a compliance pull. Its weakness, I argue, lies elsewhere: regrettably, emerging self-regulatory schemes in the industry focus on monitoring (as opposed to sanctioning) and on corporate accountability (as opposed to individual accountability). To overcome these limitations, I suggest the adoption of an OECD-type model of governance for the private security and military industry. The model would combine the use of regional bodies at the monitoring level with an international supervisory body at the sanctioning level. Unlike existing regulatory schemes, the proposed model has the ability to monitor *and* sanction both corporations *and* their employees – something none of the proposals currently on the table contemplates.

At a time where many industries struggle to find optimal modes of governance, the Article draws attention to an industry where much creativity has been shown. Beyond the lessons learned for the regulation of war and security, the experience of the private security and military industry highlights the potential of a mode of governance that has somewhat fallen out of fashion, the benefits of involving certain non-state actors in law-making, and the need to reflect on the nature of the 'law' thus developed.

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[Security scholars and analysts often refer to Al Qaeda as a nimble and adaptive actor—attributes cited to point out Al Qaeda's survivability and the extraordinarily high level of harm it can periodically inflict on its enemies using innovation as a tool to ensure success. While Al Qaeda's ability to adapt and innovate is often assumed, it is rarely the subject of intense academic scrutiny on the part of international security scholars—a lacuna that applies to the study of terrorist innovation at large. This article seeks to deepen our understanding of terrorist innovation by adopting an influential framework from military innovation studies—the distinction between "top-down" and "bottom-up" processes. The framework is applied to the attacks of September 11, 2001—a case of terrorist innovation that, it is argued, exhibits signs of a synergistic interplay of both top-down and bottom-up innovation processes. The article contributes to our understanding of the nature of Al Qaeda, military innovation, and terrorist innovation alike, and concludes with suggestions to further the research agenda of military and terrorist innovation studies.]

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<sup>1</sup> I would like to thank the American Society of International Law for inviting me to present this article at its 2012 mid-year meeting and the panel's chair, Professor Laura Dickinson, for her insightful comments on a first draft; as well as the Institute for National Security and Counterterrorism at Syracuse University for inviting me to present this paper as part of the Carol Becker Middle East Speaker Series. I greatly benefited from my exchanges with the participants at both events. Any mistake is of course my responsibility only.

## Introduction

The private security and military industry has undergone a dramatic shift over the past decade – from an under-regulated sphere of activity to one where a plethora of self-regulatory schemes have emerged. Working jointly with public actors, the private security and military industry<sup>2</sup> has developed a sophisticated self-regulatory framework applicable to its activities.

This framework has been shaped by multi-stakeholder initiatives, industry associations, and corporate codes of conduct. In part because of the rapid pace at which these mechanisms developed, no serious attempt has been undertaken at assessing the normative outcome produced by emerging self-regulatory frameworks in the realm of war and security. And yet, the stakes are high. The private security and military industry plays a growing role in modern warfare, with private security and military contractors at times outnumbering soldiers on the battlefield.<sup>3</sup> The range and sensitivity of functions entrusted to these non-governmental actors heightens the need to reflect upon the regulatory changes that have impacted the industry.

Reflecting upon the achievements of the emerging regulatory framework governing war and security also has important ramifications for other industries. The financial sector, in particular, has been engaged in a vibrant debate over whether top-down or bottom-up approaches to regulation produce better results, over whether regional regulation by the European Central Bank

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<sup>2</sup> The *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict* ("Montreux Document") (2008), available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0078.File.tmp/Montreux%20Broschuere.pdf>, defines private military and security companies as "private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel." (Preface (9)(a)).

<sup>3</sup> See Moshe Schwartz and Joyprada Swain, *Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis* (2011), available at <http://www.fas.org/sgp/crs/natsec/R40764.pdf>, at 6.

is preferable to national regulation, and over whether self-regulation should be ruled out altogether given its failure to prevent the global financial crisis.<sup>4</sup> The innovative approach taken by the private security and military industry provides valuable insight on the future of self-regulation and global governance.

Surprisingly, analysis of the innovative and fast-paced regulatory developments in the private security and military industry has remained limited. Whenever conducted, it has focused on the nature of self-regulation as such, with a focus on its 'soft' normative character and on the absence of appropriate oversight.<sup>5</sup> This paper advocates a repositioning of the critique. From a regulatory perspective, the private security and military industry has succeeded in enhancing transparency and participation – two important characteristics of successful global governance schemes.<sup>6</sup> This progress must be acknowledged for any critique to be credible. That said, skeptics are correct to say that more needs to be done. This paper seeks to identify what "more" means in the context of the regulation of private war and security. First, it means more sanctioning – beyond the mere expulsion or suspension of non-compliant actors from self-governance schemes. Second, it means broadening the reach of the regulation to individual contractors, alongside state and corporate accountability.

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<sup>4</sup> See, for example, Alex Cukierman, *Reflections on the Crisis and on its Lessons for Regulatory Reform and for Central Bank Policies*, 7 *Journal of Financial Stability* 26 (2011); Eric Helleiner and Stefano Pagliari, *The End of Self-Regulation? Hedge Funds and Derivatives in Global Financial Governance* in *GLOBAL FINANCE IN CRISIS: THE POLITICS OF INTERNATIONAL REGULATORY CHANGE* 74 (Eric Helleiner, Stefano Pagliari, Hubert Zimmermann, eds.) (Routledge, 2012).

<sup>5</sup> See, for example, Renée de Nevers, *(Self) Regulating War?: Voluntary Regulation and the Private Security Industry*, 18 *Security Studies* 479, 516 (2009) ("[a]s it is currently configured, this industry does not lend itself to obligatory self-regulation"); and Caroline Holmqvist, *Private Security Companies, The Case for Regulation*, SIPRI Paper No.9 (2005), at 50 ("[T]he same general concern applies here as with many other self-regulation schemes: that such instruments will become (or be perceived as) an alternative to the development of enforceable (legal) instruments.")

<sup>6</sup> Benedict Kingsbury, Nico Krisch, and Richard Stewart, *The Emergence of Global Administrative Law*, 68 *EJIL* 15, 61 (2005) (emphases added).

I propose a regulatory model that would achieve these two goals. The proposed model builds on the industry's most recent attempt at improving governance (the *Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Providers*, herein after "the Charter")<sup>7</sup> as well as on the experience of other globally-regulated sectors. It consists of a multi-level regulatory regime – combining the use of national bodies at the monitoring level with the use of an international body at the sanctioning level. Importantly, it enables monitoring *and* sanctioning of companies *and* contractors alike – something none of the proposals currently on the table contemplates.<sup>8</sup>

Because the emergence of non-traditional regulation in the realm of war and security has remained largely unnoticed among regulation experts – and its normative impact largely under-explored by legal experts – this article provides the first in-depth attempt at tackling important questions arising out of this noteworthy regulatory development. Have recent and groundbreaking steps undertaken in the realm of self-regulation succeeded in enhancing compliance with the law? How is such regulation perceived by major industry players? Has the private security and military industry found the right equilibrium?

The contributions of the paper are thus far-reaching – not only in identifying mechanisms best suited to monitor compliance in the private security and military industry but also in designing optimal methods of regulation in global governance more generally. In the midst of a debate

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<sup>7</sup> *Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Service Providers* (2013), available at [http://www.icoc-psp.org/uploads/ICoC\\_Articles\\_of\\_Association.pdf](http://www.icoc-psp.org/uploads/ICoC_Articles_of_Association.pdf).

<sup>8</sup> All existing self-regulatory schemes in the private security and military industry focus on state and corporate accountability, and contemplate dismissal as the main, if not only, sanction for non-compliance. See ISOA (*supra* note 70, Section 14.2), and IGOM, *supra* note 44, Section IX (F)(2)(b) (companies could re-apply for admission two years after losing their membership). Other instruments fail to mention sanctions altogether. See UN Draft Convention, *supra* note 118.

over the creation of "hybrid sources of law" by non-state actors,<sup>9</sup> this study also offers timely reflections on the feasibility and the benefits of involving certain non-state actors in law-making.

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<sup>9</sup> See Anthea Roberts and Sandesh Sivakumaran, *Lawmaking by Non-state Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 Yale J. Int'l L. 107 (2012).

## Part I – The Private Security and Military Industry as a Case Study in Self-Regulation

Self-regulation in the private security and military industry has developed at a rapid pace, often beyond the expectations of the industry's main actors and observers. It has also advanced faster than other efforts to regulate the industry (mainly national and international legislation). The key achievement of self-regulatory schemes lies in the crystallization of industry-wide standards and enhanced mechanisms designed to monitor compliance with these standards. Even if much progress remains to be made to ensure that non-compliant actors are held accountable, the industry provides an interesting case study in self-regulation.<sup>10</sup>

In the private security and military industry, self-regulation<sup>11</sup> has reached beyond what is traditionally regarded as industry regulation.<sup>12</sup> Traditional "self-regulation" – typified by European "guilds" – is characterized by industry participants reaching understandings on common goals, acceptable norms of conduct and organizational structure. Self-regulation in the private security and military industry today encompasses both *private* regulation and *hybrid* public-private regulation. Examples of private regulation include regulation by industry

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<sup>10</sup> It is important to note that this article does not analyze how market conditions affect self-regulation but, rather, takes an institutional look at self-regulation (i.e., how is it carried out, what are the characteristics of self-regulatory schemes).

<sup>11</sup> Self-regulation covers a wide range of institutional arrangements, with varying degrees of governmental autonomy, legal force, and scope within the relevant industry. Self-regulation may be defined as "policymaking by non-legislative public and private actors independently from political actors' intervention." (Adrienne Héritier and Dirk Lehmkuhl, *Introduction: The Shadow of Hierarchy and New Modes of Governance*, 28 J. Pub. Pol'y 1, 3 (2008). See also, Anthony Ogus, *Rethinking Self-Regulation*, 15 Oxford J. L. Studies 97, 99-100 (1995) (preferring to refer to self-regulation as "a spectrum containing different degrees of legislative constraints, outsider participation in relation to rule formulation or enforcement (or both), and external control and accountability."); and Neil Gunnigham and Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 Law & Policy 363, 366 (1997) (who recommend to think of self-regulation as "typologies of social control, ranging from detailed government command and control regulation to 'pure' self-regulation, with different points on the continuum encapsulating various kinds of co-regulation.")

<sup>12</sup> Industry self-regulation may be understood as a common set of understandings among participants in a particular industry or profession regarding norms of conduct, organization, limitations on activity and collective debt. See, for example, Anil K. Gupta and Lawrence J. Lad, *Industry Self-Regulation: An Economic, Organizational and Political Analysis*, 8 Academy of Management Review 416, 417 (1983) (defining industry self-regulation as "a regulatory process whereby an industry-level, as opposed to governmental- or firm-level, organization (such as a trade association or a professional society) sets and enforces rules and standards relating to the conduct of firms in the industry.")



associations and the adoption of codes of conduct by individual companies.<sup>13</sup> But the public-private initiatives have probably been most visible – including an array of notable achievements: the *Voluntary Principles on Security and Human Rights* ("Voluntary Principles") in 2000;<sup>14</sup> the *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict* ("Montreux Document") in 2008;<sup>15</sup> the *International Code of Conduct for Private Security Service Providers* ("ICoC") in 2010;<sup>16</sup> and the *Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Providers* ("Charter") in 2013.<sup>17</sup>

The multiplication and growing sophistication of self-regulatory schemes in the industry can be attributed in part to sustained criticism of alleged abuses, lack of oversight and accountability, and general public disapproval of outsourcing core military and security functions. In this climate, industry players sought a way to gain legitimacy by showing that they were bound by certain norms of conduct. The absence of a readily applicable regulatory framework made this very difficult. Domestic legal systems had long failed to provide a solution. Whenever the outsourcing of private security and military services was regulated in one state, companies would simply choose to operate from another state. At least theoretically, formal avenues of international regulation (chiefly via the UN) would seem to be best placed to regulate such activity. However, in practice, formal avenues could not keep track with the unprecedented

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<sup>13</sup> In this sense see Renée De Nevers, *The Effectiveness of Self-Regulation by the Private Security and Military Industry*, 30 J. Pub. Pol'y 119, 221 (2010) ("To date, PMSC self-regulation has relied primarily on codes of conduct established by industry trade associations.")

<sup>14</sup> Voluntary Principles on Security and Human Rights (adopted in December 2000, available at [http://www.voluntaryprinciples.org/files/voluntary\\_principles.pdf](http://www.voluntaryprinciples.org/files/voluntary_principles.pdf)).

<sup>15</sup> Montreux Document, *supra* note 2. For other examples, see Daphné Richemond-Barak, *Regulating War: A Taxonomy in Global Administrative Law*, 22 Eur. J. Int'l L. 1027 (2011).

<sup>16</sup> *International Code of Conduct for Private Security Service Providers* (2010), available at [http://www.icoc-ppsp.org/uploads/INTERNATIONAL\\_CODE\\_OF\\_CONDUCT\\_Final\\_without\\_Company\\_Names.pdf](http://www.icoc-ppsp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf).

<sup>17</sup> *Id.*

growth of the industry in the last two decades.<sup>18</sup> Taken together, the inadequacy of a solely domestic approach and the slow international response provided fertile terrain for self-regulation to emerge.

As self-regulation in the industry gained momentum, states and supranational organizations sought to influence its direction and substance. States have not only participated in but also initiated self-regulatory processes – often in cooperation with private actors (such as intergovernmental organizations and non-governmental organizations). Such was the case, for example, with the Swiss government and the International Committee of the Red Cross, which joined forces to build a multi-stakeholder initiative that evolved into the so-called Montreux Document. The involvement of states only increased the impetus for companies to become involved, later joined by NGOs, in the formulation of industry standards and practices.<sup>19</sup> In a short time, self-regulation has gained unprecedented support: as of August 2013, 46 states and the European Union have signed on to the Montreux Document, and over 600 hundred companies have signed on the widely accepted industry code known as the ICoC.<sup>20</sup>

The reach of self-regulation thus stands out in the context of the private security and military industry – particularly when contrasted with other modes of more formal administration. In the broader context of self-regulation generally, too, the experience of the private security and military industry stands out. The pace at which self-regulation emerged, the active role played by industry associations, and the broad-based consensus it has generated among public and private

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<sup>18</sup> Efforts to draft an international treaty have failed to produce any tangible results. Similarly, national states have not adopted particularly effective steps designed to regulate the outsourcing of private security and military services.

<sup>19</sup> See <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0069.File.tmp/Chair's%20summary%2082%20Kb.pdf>.

<sup>20</sup> See, respectively, <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html> and [http://www.icoc-psp.org/uploads/Signatory\\_Companies\\_-\\_August\\_2013\\_-\\_Composite\\_List2.pdf](http://www.icoc-psp.org/uploads/Signatory_Companies_-_August_2013_-_Composite_List2.pdf).

actors alike,<sup>21</sup> are noteworthy.<sup>22</sup> The innovative approach taken by the industry thus deserves more attention than it has received so far from regulatory experts.<sup>23</sup>

I present three types of self-regulatory initiatives undertaken in the private security and military industry: multi-stakeholder initiatives, industry associations, and company codes of conduct. Though different in nature, all three types of initiatives share certain basic characteristics: they are voluntary, have evolved at a rapid pace over the past decade, they tend to be transnational, and they are non-binding on their participants.

Because I have analyzed elsewhere the industry's fragmented regulatory framework,<sup>24</sup> my discussion here is brief and will focus primarily on recent developments, before moving on to an assessment of the normative outcome produced by emerging self-regulatory schemes.

## 1. Multi-stakeholder initiatives

Multi-stakeholder initiatives are characterized primarily by the joint involvement of public and private actors. In the private security and military industry, multi-stakeholder initiatives have

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<sup>21</sup> Gupta and Lad, *supra* note 12, at 421 (on the appeal of self-regulation when it offers benefits to the industry as a whole).

<sup>22</sup> Openly pursuing and developing regulation, such associations "embody contrary tendencies – the push of self-serving economic (or political) interests and the pull of moral aspirations." See Gunnigham and Rees, *supra* note 11, at 373.

<sup>23</sup> Objections to the use of this industry as a case study can be expected. The private security and military industry hardly resembles other and more traditional self-regulated sectors – like the chemical industry, the securities industry, or advertising. War and security constitute prerogatives of the state *par excellence*, and entail restrictions to human dignity and human freedom. Comparing telecommunications to war may thus seem problematic. Though the curtailment of human dignity, life and freedom by a profit-making enterprise has hindered the privatization of prisons (at least in Israel (see *Academic Center of Law and Business v. Minister of Finance*, HCJ 2605/05 (November 19, 2009)), it has not hindered security and military outsourcing. Serious reasons exist why the Israeli High Court's rationale for outlawing private prisons in Israel cannot be extended to war and security. See Daphné Richemond-Barak, *Rethinking Private Warfare*, 5 *Law and Ethics of Human Rights* 159, 171 (2011). At a more general level, the growth of the private security and military industry has marked the onset of the transformation of war into a business (almost) like any other. With private security and military firms operating on almost all battlefields and performing an increasingly broad array of functions on states' behalf, the state no longer holds an absolute monopoly on war and security. So much so that objections related to the *sui generis* nature of this industry should be dismissed.

<sup>24</sup> Richemond-Barak, *supra* note 15.

generally been undertaken by a combination of governments, private military companies, industry associations, and non-governmental organizations. The most notable of the multi-stakeholder initiatives undertaken to date are the Voluntary Principles (2000), the Montreux Document (2008), the ICoC (2010),<sup>25</sup> and the recent Charter (2013).

Chronologically, the first multi-stakeholder initiative impacting the industry was the adoption of the Voluntary Principles in 2000. Initiated by the British Foreign & Commonwealth Office and the U.S. Department of State, today the initiative counts 38 participants – including notably Canada, Colombia, Total, Amnesty International, and Human Rights First.<sup>26</sup>

The Voluntary Principles have been used by companies in the extractive industry to ensure the safety and security of their operations in volatile environments – while respecting human rights and humanitarian law. In particular, the Voluntary Principles set forth a set of standards – ranging from the use of force to the vetting and training of contractors<sup>27</sup> – to guide the conduct of companies in the use of (armed) private security services. These standards must be incorporated in contracts between participating companies and private security service providers.

Most importantly for our purposes, the Voluntary Principles contemplate monitoring at two levels.<sup>28</sup> At the company level, investigations into allegations of abusive or unlawful acts are encouraged, as are disciplinary measures sufficient to prevent and deter wrongdoing. In addition, the Voluntary Principles call for signatory companies to establish procedures for reporting

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<sup>25</sup> See ICoC, *supra* note 16. For more on this mode of governance in the industry, see Richemond-Barak, *supra* note 15.

<sup>26</sup> See <http://www.voluntaryprinciples.org/participants/>. As of September 2013, the Voluntary Principles count 8 states, 11 NGOs, 22 companies, and 10 NGOs.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, Section 4.

allegations of wrongdoing to relevant local law enforcement authorities.<sup>29</sup> This two-prong monitoring mechanism – i.e. disciplinary measures within the company and/or resort to the authorities – goes beyond the company itself. But the Voluntary Principles fall short of establishing a dedicated international or local sanctioning body, relying instead on the companies themselves for sanctioning or referral to local law enforcement.

The next significant hybrid initiative was launched by Switzerland and the International Committee of the Red Cross in 2006. This was the first concerted and organized effort, received warmly by states,<sup>30</sup> the United Nations,<sup>31</sup> and the industry.<sup>32</sup> The initiative benefitted from the unique status of the ICRC and Switzerland, which acted as sponsors. Following a process which included extensive consultation with industry and civil society actors, the Montreux Document was adopted in 2008.<sup>33</sup> Non-binding but far-reaching,<sup>34</sup> the Montreux Document recalls states' existing obligations and establishes new 'good practices' primarily for states to respect humanitarian law and human rights law in their relationships with private security and military companies, for companies in the conduct of their operations, and for their personnel operating in

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<sup>29</sup> *Id.*, Section 4.

<sup>30</sup> In addition to the 17 states which participated in the drafting of the Montreux Document, 29 more states have expressed support to the Montreux Document since its release. See <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html>.

<sup>31</sup> The UN General Assembly and Security Council endorsed the Montreux Document and circulated it to member states in a joint resolution. See U.N. Doc. A/63/467 – S/2008/636 (October 6, 2008).

<sup>32</sup> The British Association of Private Security Companies notes on its website that it will ensure that the good practices of the Montreux Document are reflected in the future regulations issued by the association. Moreover, the BAPSC qualifies the adoption of the Montreux Document as "a milestone that clarifies the applicable law and thus contributes to strengthening compliance with IHL and respect for human rights." See [http://www.bapsc.org.uk/key\\_documents-swissInitiative.asp](http://www.bapsc.org.uk/key_documents-swissInitiative.asp). See also David Isenberg, *Bursting the Unaccountability Myth*, United Press International, October 10, 2008 (noting that the recommendation not to use contractor for activities requiring the use of force has raised some objections, but that the IPOA has welcomed the adoption of the Montreux Document and indicated that some of its members have begun implementing the "good practices").

<sup>33</sup> Montreux Document, *supra* note 2.

<sup>34</sup> James Cockayne, *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 13 J. Conflict Security L. 401, 404, 405 (2008) (noting that the Montreux Document's good practices are best understood as "a non-exhaustive compendium of illustrative good practice for states discharging their existing obligations." This is in contrast with the first part of the Montreux Document, Cockayne adds, which "provides a conservative statement of *lex lata*.")

high-risk environments.<sup>35</sup> Like the Voluntary Principles, the Montreux Document recommends the use of contracts to enhance compliance with international law and impose stricter standards on companies.

Though less ground-breaking than the Voluntary Principles in the realm of monitoring (it contemplates monitoring only at the company level – and no referral to law enforcement authorities), the Montreux Document broke new ground by setting clear and comprehensive industry standards. Most importantly, since its adoption, the Montreux Document has served as a platform for the development of other self-regulatory initiatives within the industry.<sup>36</sup>

Building on the success of the Montreux Document, the next stage in the development of industry-wide standards was to take the principles expounded therein (which, as noted, focused on states signatories) and have them endorsed by individual companies which would undertake to apply them. This was achieved through the adoption of the *International Code of Conduct for Security Service Providers*.<sup>37</sup> Endorsed by 58 companies at the time of its adoption in 2010, the ICoC now counts over 600 signatory companies.<sup>38</sup> It is an extension of the Montreux Document (companies must "endorse the principles of the Montreux Document" when signing on<sup>39</sup>) – only it is addressed to the private sector itself. That both the Montreux Document and the ICoC were convened by the Swiss government in consultation with a mix of public and private stakeholders strengthens the continuity and complementarity between the Montreux Document and the ICoC.

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<sup>35</sup> While Part I of the Montreux Document is entitled "Pertinent International Legal Obligations Relating to Private Security and Military Companies", Part II – reflecting its *de lege ferenda* character – is titled "Good Practices Relating to Private Security and Military Companies." See Montreux Document, *supra* note 2.

<sup>36</sup> See *supra* note 32.

<sup>37</sup> ICoC, *supra* note 16.

<sup>38</sup> See *supra* note 20.

<sup>39</sup> *Id.* para. 3.

Like the Montreux Document, the main objective of the ICoC is in standard-setting. Its declared purpose is "to set forth a commonly-agreed set of principles for [Private Security Providers] and to establish a foundation to translate those principles into related standards as well as governance and oversight mechanisms."<sup>40</sup> It succeeds in establishing standards in areas such as recruiting, subcontracting or using force. Unlike the Montreux Document, however, the ICoC goes beyond standard-setting, and sets the stage for the establishment of enforcement mechanisms.<sup>41</sup>

Signatory companies are required to

"work with states, other Signatory Companies, Clients and other relevant stakeholders after initial endorsement of this Code to, within 18 months (...) [e]stablish external independent mechanisms for effective governance and oversight, which will include Certification of Signatory Companies' compliance with the Code's principles and the standards derived from the Code, beginning with adequate policies and procedures, Auditing and Monitoring of their work in the field, including Reporting, and execution of a mechanism to address alleged violations of the Code's principles or the standards derived from the Code".<sup>42</sup>

To fulfill this important goal, the ICoC set up a tripartite Steering Committee and three working groups to work on assessment, reporting and internal/external oversight; third party complaints; and the independent governance and oversight mechanism.<sup>43</sup> All included representatives of the industry, civil society, and governments, representing unprecedented cooperation among these disparate groups. Following lengthy deliberations and consultations, the Steering Committee

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<sup>40</sup> *Id.* para. 5.

<sup>41</sup> *Id.*, Preamble (7). See also Preamble (8) (noting that the ICoC was conceived as "the first step in a process towards full compliance" which would include a "governance and oversight mechanism").

<sup>42</sup> *Id.*

<sup>43</sup> See *Concept Paper: Areas Requiring Further Consideration for the ICoC* (2011), available at [http://www.icoc-ppsp.org/uploads/TSC\\_Concept\\_Paper-final\\_2011May.pdf](http://www.icoc-ppsp.org/uploads/TSC_Concept_Paper-final_2011May.pdf).

and its working groups delivered the *Draft Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Providers*.<sup>44</sup> The final document, the Charter, constitutes the third and important step in a process that began only four years earlier with the adoption of the Montreux Document.<sup>45</sup>

The Charter embodies the industry's most recent and tangible attempt to date to "promote, govern and oversee implementation of the [ICoC] and to promote the responsible provision of security services and respect for human rights and national and international law in accordance with the Code".<sup>46</sup> Like the Montreux Document and the ICoC, the Charter was elaborated jointly by states, civil society, and companies under the auspices of the Swiss government.

The participatory element permeates the entire scheme, from the admission of companies, to the composition of its organs and decision-making processes. Member companies, civil society organizations and states may discuss matters of regulation and make non-binding recommendations.<sup>47</sup> This type informal horizontal arrangement is a welcome addition to the regulatory framework – which has so far lacked transnational networks and coordination arrangements.<sup>48</sup> The Board of Directors, which is responsible for enforcing the ICoC, also comprises members of all stakeholder groups.<sup>49</sup> The participation of civil society organizations and states in the scheme is actively encouraged – alongside companies of course. Civil society

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<sup>44</sup> This document is known in the industry as "IGOM". Adopted in 2012, it is available at [http://www.icoc-psp.org/uploads/Draft\\_Charter.pdf](http://www.icoc-psp.org/uploads/Draft_Charter.pdf) (it has since then been replaced by the Charter, see *supra* note 7). See also *Explanatory Note on the Draft Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Providers* ("Explanatory Note"), available at [http://www.icoc-psp.org/uploads/Explanatory\\_Note.pdf](http://www.icoc-psp.org/uploads/Explanatory_Note.pdf) (indicating that the oversight mechanism was developed by the steering committee over twelve months of work, during which it held 18 meetings, and the working groups held 26 meetings over the course of the summer 2011).

<sup>45</sup> See Charter, *supra* note 7.

<sup>46</sup> Charter, *supra* note 7, Article 2.

<sup>47</sup> *Id.*, Article 6.2.

<sup>48</sup> Richemond-Barak, *supra* note 15, at 1040.

<sup>49</sup> *Id.*, Article 7.2.



organizations may participate provided they have "a demonstrated institutional record at the local, national, or international level of the promotion and protection of human rights, international humanitarian law or the rule of law."<sup>50</sup> States and intergovernmental organizations may also participate if they have expressed support for the Montreux Document and the ICoC and participate in relevant meetings and events.<sup>51</sup> (That conditions are imposed upon states to participate in the process reveals the extent to which the role of the state as a regulator has changed – a point on which I elaborate further in Part IV.)

When joining in, companies do not yet accede to full membership status. Until they are certified – a process designed to assess whether a company's policies meet the ICoC's principles and that a company is monitoring compliance with the code properly<sup>52</sup> – companies enjoy provisional membership. Member companies have ongoing reporting obligations and must thereafter subject themselves to independent auditing and verification of their performance.<sup>53</sup>

Allegations of violations of the ICoC may be submitted by way of "fair and accessible grievance procedures that offer effective remedies."<sup>54</sup> The Charter envisages a complaint mechanism, allowing any party having suffered harm as a result of an ICoC violation by a Member Company to lodge a complaint.<sup>55</sup> Sanctions taken against non-compliant companies, as deemed necessary by the Board, may include the suspension or the termination of a company's membership.<sup>56</sup> Sanctioning, too, involves the participation of all three groups of stakeholders: eight Board

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<sup>50</sup> *Id.*, Article 3.3.3.

<sup>51</sup> *Id.*, Article 3.3.2.

<sup>52</sup> *Id.*, Article 11. The certification process has yet to be fully worked out. Once obtained, certification remains valid for three years (Article 11.3).

<sup>53</sup> *Id.*, Article 12.

<sup>54</sup> *Id.*, Article 13.1.

<sup>55</sup> *Id.*, Article 13.2.1.

<sup>56</sup> *Id.*, Article 13.2.7. Note that under IGOM, the company was prohibited from reapplying to the Mechanism for two years unless otherwise determined by the Board (IGOM, *supra* note 44, Section IX (F)(2)(b)). This provision does not exist in the Charter – which mentions suspension or termination without any further detail.

members must vote in favor of sanctions, including at least two representatives of each stakeholder group (companies, civil society and governments).<sup>57</sup>

As can be seen, much has been accomplished since the Voluntary Principles, which led the way to the adoption of more visible, broad-based, and sophisticated multi-stakeholder initiatives. Both the Montreux Document and the ICoC succeeded in elaborating industry-wide standards, which the Charter seeks to have implemented through the creation of certification and monitoring mechanisms. The Montreux process not only united the industry but also achieved an outcome deemed relatively satisfactory *outside* the industry. While success is not a foregone conclusion – the contemplated monitoring mechanism remains insufficient, under-developed, and unimplemented – it nevertheless represents a ground-breaking attempt at institutionalizing compliance with industry standards.

## **2. Industry associations**

Alongside the major progress made by multi-stakeholder initiatives, industry associations have assumed a growing role in developing and promoting self-regulation. This change carries important significance, as industry associations are best placed to establish baseline standards, educate, provide commonality of norms, and create peer-pressure – leading to the internalization of these norms at the industry level. But the potential of industry associations as regulators was not readily apparent at first. Early on, the role of associations was limited to serving as a forum of discussion on issues of common interest. With time, industry associations became instrumental to the elaboration of a common set of standards by requiring all members of the

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<sup>57</sup> *Id.*, Article 7.6.

association to subscribe to a code of conduct.<sup>58</sup> Though industry codes are generally not enforceable, they contain moral standards used to guide the corporate behavior of the member companies.<sup>59</sup>

Industry associations have also, and perhaps most importantly, helped move self-regulation forward by participating in multi-stakeholder initiatives. The largest association is also the one that has been most involved in shaping regulation. Formerly known as the International Peace Operations Association, in 2010 it was renamed the International Stability Operations Association ("ISOA") a decade after its establishment.<sup>60</sup> It has 41 members including industry leaders DynCorp International and Olive Group.<sup>61</sup> The association has assisted in the elaboration of industry standards since its creation in 2001, including in the development and drafting of the ICoC.<sup>62</sup> The ISOA also works to promote and improve existing regulatory instruments applicable to the industry.<sup>63</sup> It prides itself on having "done much to improve accountability by

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<sup>58</sup> See Surabhi Ranganathan, *Between Complicity and Irrelevance? Industry Associations and the Challenge of Regulating Private Security Contractors*, 141 Geo. J. Int'l L. 303 (2010) (analyzing the influence of industry associations in the industry).

<sup>59</sup> See generally, Jürgen Friedrich, *Codes of Conduct* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (OUP, 2008); and Mark Schwartz, *The Nature of the Relationship between Corporate Codes of Ethics and Behavior*, 32 J. Bus. Ethics 247 (2001). Codes developed by industry associations usually go beyond, but do not substitute themselves for, existing legislation. See, for example, Nils Rosemann, *CODE OF CONDUCT: TOOL FOR SELF-REGULATION OF PRIVATE MILITARY AND SECURITY COMPANIES 5* (Geneva Center for the Democratic Control of Armed Forces, 2008).

<sup>60</sup> Press release (October 25, 2010), available at <http://www.prnewswire.com/news-releases/international-stability-operations-association-ipoas-new-name-105686208.html> (noting that the change was made as part "of a progressive effort to ensure the support and participation of all key actors in the Stability Operations Industry, including private firms, non-governmental organizations, and governmental and commercial clients.") As noted on the association's website, the goal of the ISOA is to promote ethical standards of companies active in the industry, to engage in a constructive dialogue with policy-makers about the growing and positive contribution of these firms to the enhancement of international peace, development, and human security, and to inform the concerned public about the activities and role of the industry.

<sup>61</sup> For a list of ISOA members, see <http://www.stability-operations.org/index.php>

<sup>62</sup> See [http://www.stability-operations.org/?International\\_COC](http://www.stability-operations.org/?International_COC).

<sup>63</sup> See <http://www.stability-operations.org/index.php>.

promoting high operational and ethical standards of firms active in the Peace and Stability Industry."<sup>64</sup>

As noted above, a major contribution of the ISOA to industry regulation has been its code of conduct, which members of the association must abide by.<sup>65</sup> The code elaborates standards applicable to ISOA members operating in conflict and post-conflict environment, regardless of where that may be.<sup>66</sup> Though not legally binding, the code positions itself as a law-infused document:

"Signatories will be guided by all pertinent rules of international humanitarian and human rights laws including as set forth in: Universal Declaration of Human Rights (1948), Geneva Conventions (1949), Convention Against Torture (1975), Protocols Additional to the Geneva Conventions (1977), Chemical Weapons Convention (1993), Voluntary Principles on Security and Human Rights (2000), Montreux Document on Private Military and Security Companies (2008), International Code of Conduct for Private Security Providers (2010), UK Bribery Act (2010)."<sup>67</sup>

The association's code of conduct calls on its members to report serious infractions to relevant authorities<sup>68</sup> and cooperate with official investigations into allegations of misconduct.<sup>69</sup>

Individuals and organizations may lodge complaints against an ISOA member for violations of

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<sup>64</sup> See <http://www.stability-operations.org/index.php#3>.

<sup>65</sup> ISOA Code of Conduct, available at <http://www.stability-operations.org/index.php> (the original version of the code was adopted in 2001 and the most recent one in 2011. That was the code's thirteenth version). For more on the code, see Richemond-Barak, *supra* note 15.

<sup>66</sup> *Id.*, Preamble.

<sup>67</sup> *Id.*, Preamble.

<sup>68</sup> *Id.*, Section 3.3.

<sup>69</sup> *Id.*, Section 3.2.

the ISOA code of conduct.<sup>70</sup> Regrettably, the sanction for non-compliance remains limited to dismissal from the association.<sup>71</sup> Under its most recent iteration, the code also requires ISOA members to "maintain the standards laid down in the ISOA Code of Conduct *in addition to the standards and provisions of Signatories' codes of conduct.*"<sup>72</sup> This new reference echoes the trend towards the adoption of individual codes of conduct by companies. Over a decade after it came into existence, the association has come to view itself not only as the guardian of its code of conduct, but also as the body best placed to ensure that companies abide by their own internal codes and regulations. Ultimately, it suggests that industry associations could play a role in regulating self-regulation in the industry.<sup>73</sup>

In parallel to the Washington-based ISOA, the BAPSC (British Association of Private Security Companies), its UK equivalent, continues to play an important role.<sup>74</sup> Like the ISOA, its impact on self-regulation is twofold: first, by way of its code of conduct,<sup>75</sup> and, second, due to its involvement in regulatory initiatives such as the Montreux process.<sup>76</sup>

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<sup>70</sup> See <http://www.stability-operations.org/index.php>; and [http://stability-operations.org/form\\_standards\\_complaint.php](http://stability-operations.org/form_standards_complaint.php). Complaints must be lodged by submitting a form to the association's Chief Liaison Officer of the Standards Committee, who is an employee of the ISOA and is not affiliated with any company.

<sup>71</sup> ISOA Code of Conduct, *supra* note 65, Section 14.2.

<sup>72</sup> *Id.*, Section 14.1 (emphasis added).

<sup>73</sup> See Gupta and Lad, *supra* note 12, at 416.

<sup>74</sup> Andrew Bearpark and Sabrina Schulz, *The Future of the Market*, in (Simon Chesterman and Chia Lehnardt, eds.) FROM MERCENARIES TO MARKET 240, 247 (OUP, 2007). It is important to note that a third Iraq-based association (the Private Security Company Association of Iraq) was dismantled in late 2011. The association's website notes that "[t]he PSCAI was an industry-driven response to a highly ambiguous environment in the war-torn Iraq. Now, with the complete departure of United States Forces, and the direct oversight of PSCs by the Government of Iraq, the need for the PSCAI has withered." See <http://www.psc.ai.org/>.

<sup>75</sup> *Id.*

<sup>76</sup> See <http://www.bapsc.org.uk/?keydocuments=swiss-initiative>.

### 3. Company codes of conduct

A third level of internalization – beyond the multi-stakeholder initiatives and the industry-led efforts detailed above – is illustrated by the adoption of company codes of conduct.<sup>77</sup> These generally incorporate the principles expounded by the multi-stakeholder initiatives and echo the views of industry associations. Through the adoption of codes of conduct, and by virtue of its involvement in multi-stakeholders initiatives, the private sector has positioned itself as an agent of regulation.<sup>78</sup>

In the broader context of global governance, reactions to codes of conduct have generally been mixed. Critics argue that these codes of conduct amount to no more than window-dressing, "self-serving industry rhetoric", and have no real effect on the behavior of industry players.<sup>79</sup> This cynicism attaches to self-regulation generally, which is perceived as a public relations scheme designed to make the industry "look good" and bring more business.<sup>80</sup> More nuanced assessments acknowledge that certain codes "are remarkably effective in guiding and controlling industry conduct ... and that most others probably fall somewhere in between."<sup>81</sup>

In the context of the private security and military industry, the impact of company codes has evolved over the years. While in the past codes merely set forth standards and best practices, today they increasingly provide for internal (and, in some cases, even external) mechanisms designed to ensure compliance. Companies have also updated or modified their code of conduct

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<sup>77</sup> See *supra* note 72. Please note that although companies sometimes referred to them as codes of ethics, I will use the expression "codes of conduct" – it being understood that I include codes of ethics as well.

<sup>78</sup> Richemond-Barak, *supra* note 15, at 1062.

<sup>79</sup> Gunnigham and Rees, *supra* note 11, at 380.

<sup>80</sup> See Virginia Haufler, A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY 112 (Carnegie Endowment for International Peace, 2001) (wondering whether self-regulation is just "talk" and arguing that it does indeed change behavior, though "evidence is scattered and difficult to analyze systematically.")

<sup>81</sup> *Id.*, at 380 (citing Joseph Rees, HOSTAGES OF EACH OTHER: THE TRANSFORMATION OF NUCLEAR SAFETY SINCE THREE MILE ISLAND (Chicago University Press, 1994)).

to account for developments in the industry – such as the adoption of the ICoC.<sup>82</sup> Most recently, companies have begun outsourcing the task of monitoring compliance with the codes to third parties. Industry leaders like Aegis and DynCorp have entered into a relationship with EthicsPoint to this end.<sup>83</sup>

These changes indicate that (self-)regulation has become a concern for companies in the industry. Companies have adjusted their approach to regulation as their needs, clients, activities – and the regulation itself – have evolved. Like the industry itself, self-regulation in the industry constantly transforms itself, and company codes have played a central role in and as a result of this evolution. Ironically, with time, the success of these codes might bring their demise – as the industry standards that they have helped develop gain broad acceptance.<sup>84</sup>

This seems to be the case with Erinys, a small company founded in 2002 and best known for its involvement in the reconstruction of Iraqi oil infrastructure. Up until the adoption of the ICoC, Erinys had one of the most sophisticated internal sanctioning schemes in the industry.<sup>85</sup> Erinys' code mandated employees to report breaches of the code through the management chain.<sup>86</sup> Non-compliant employees were to be surrendered to appropriate authorities and/or subject to dismissal from the company. The sanction for violating the code, in other words, was not limited to dismissal from the company but also included the involvement of external authorities. This two-level sanctioning mechanism – reminiscent of the Voluntary Principles on Security and Human

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<sup>82</sup> See the discussion of Erinys below. Additional examples of companies that modified their codes of conduct in the wake of the ICoC's adoption include Aegis, Hart Security, DynCorp, Triple Canopy, and Edinburgh International.

<sup>83</sup> See Richemond-Barak, *supra* note 15, at 1066-67. See, respectively, <https://secure.ethicspoint.com/domain/media/en/gui/27925/index.html>; and <https://secure.ethicspoint.com/domain/media/en/gui/27481/index.html>.

<sup>84</sup> Instead of adopting their own internal code of conduct, companies now often refer to the ICoC or the ISOA as the applicable instrument summarizing the standards with which they comply. Examples of such companies include Hart Security, Erinys, Janus Security, or – for the IPOA/ISOA – New Century Corp.

<sup>85</sup> On file with author. The scheme is no longer in force having been replaced by a reference to the ICoC.

<sup>86</sup> *Id.*, Section 3.2.

Rights<sup>87</sup> – constituted one of the better implementations of an internal sanctioning scheme in the private security and military industry. Erinys' reliance on the ICoC (which does not contemplate this two-level sanctioning mechanism and is thus arguably weaker than Erinys' own code in global governance terms) raises at least two questions. The first one, mentioned above, pertains to the future of company codes as industry standards receive broader acceptance. The second question, developed further in Part II, relates to the impact of participation on standard-setting. The case of Erinys suggests that in rare cases where companies set up stringent internal mechanisms, the adoption of broad-based industry regulation may have the unfortunate effect of lowering applicable standards.

Perhaps most importantly, the experience of Erinys demonstrates that companies can take regulation seriously and periodically re-evaluate their approach to regulation. The experience of Triple Canopy, a US company providing security and risk management services to the oil and gas sector, further illustrates how companies have adapted to changing regulatory developments.<sup>88</sup> In the wake of the ICoC's adoption, Triple Canopy undertook a complete revision of its code of conduct.<sup>89</sup> The revised code acknowledges the adoption of the ICoC, and states that "[a]s a signatory to the ICoC, Triple Canopy must follow the ICoC's guidance, and the Company must ensure that it operates in accordance with the standards and principles it contains."<sup>90</sup> Though the

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<sup>87</sup> See *supra* note 14.

<sup>88</sup> Triple Canopy's website, <http://www.triplecanopy.com>. Triple Canopy was created in 2003 and contracted for over \$100 million with the US State Department for the provision of personal and guard services.

<sup>89</sup> See Triple Canopy's Code of Ethics and Business Conduct, available at [http://www.triplecanopy.com/assets/tc-ethics-business-conduct-02212012-WEB\\_new.pdf](http://www.triplecanopy.com/assets/tc-ethics-business-conduct-02212012-WEB_new.pdf). The most recent (and fifth) revision dates from late 2011, following the adoption of the ICoC. It entered into force in February 2012. For a description and analysis of the compliance program, which has not been significantly modified, see Richemond-Barak, *supra* note 15, at 1065-66. It should be noted that Triple Canopy's commitment to law and regulation also finds expression in "an organizational-wide human rights policy", in which the company declares that its business conduct will be guided by the United Nations Universal Declaration of Human Rights, the Chemical Weapons Convention, the Convention against Torture, the Geneva Conventions (including Protocols Additional to the Geneva Conventions), and the Voluntary Principles on Security and Human Rights (see <http://www.triplecanopy.com/philosophy/human-rights/>).

<sup>90</sup> *Id.*, Section 11.8.



company notes that most of the ICoC standards and principles were reflected in the Company's operations even prior to the ICoC's adoption, the company calls on employees to report any actual or suspected violation of the ICoC.<sup>91</sup>

A number of additional features of Triple Canopy's revised code are worth mentioning, as they show the regulatory potential of company codes.<sup>92</sup> First, Triple Canopy's code broadens the scope of self-regulation by applying not only to employees of the company, but also to subcontractors, vendors, and suppliers.<sup>93</sup> In addition, and for the first time in a company code, a chain of accountability is contemplated. The code notes that employees are responsible for their own conduct and that supervisors are responsible and accountable for ensuring that employees comply with the code.<sup>94</sup> Finally, the code breaks new ground in the realm of sanctioning:

"Any reported violation of this Code will be investigated, and every actual violation will constitute a basis for disciplinary action involving the person violating this Code up to and including termination, *and violations may result in civil or criminal action against that person*".<sup>95</sup>

This last sentence is significant. Previously, the code only contemplated disciplinary action and the termination of employment. Today, Triple Canopy considers the possibility of civil or

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<sup>91</sup> *Id.*, Section 7.8.

<sup>92</sup> For a study of the previous version of Triple Canopy's code, see Richemond-Barak, *supra* note 15, at 1065-66.

<sup>93</sup> *Id.*, Introduction and Part 5.

<sup>94</sup> *Id.*, Part 2.0, Section 2.5.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (emphasis added).

<sup>95</sup> *Id.*

criminal action *in addition to* dismissal from the company (though it should be noted that most companies contemplate only disciplinary action in such cases).<sup>96</sup>

There is little doubt that codes of conduct offer a unique window of understanding on how companies view regulation. The importance and scope of company codes have increased – partly out of the realization that enforcement can no longer remain a purely internal matter. Beyond their impact on the companies' *modus operandi*, and much like industry codes, company codes have also been used as a springboard to engage in broader regulatory efforts. Companies have taken a role in promoting self-regulation and ensuring the harmonization of industry standards – not just for their own sake but for the benefit of the industry as a whole.

Triple Canopy, for example, has been actively engaged in multi-stakeholder initiatives. It participated in the drafting of the ICoC, and communicated its code of conduct to the Swiss government as a source document. At the ICoC signing ceremony, Triple Canopy's CEO recognized that companies such as Triple Canopy operate at a higher standard than the industry at-large and that the industry needed a way to ensure that all security companies worldwide were committed to the same principles and held similar ethical and operational standards. Moreover, Triple Canopy committed to ensuring that the ICoC "gains worldwide acceptance and becomes an integral part of how the industry operates and how governments and clients select security providers" and that "transparency, oversight and accountability accompany the Code so that the full extent of its intent is shown."<sup>97</sup> The company's commitment to self-regulation could not have been expressed more clearly.

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<sup>96</sup> See, for example, Akademi at [https://academi.s3.amazonaws.com/uploads/document/document/29/Akademi\\_CodeofConduct\\_03.01.2013.pdf](https://academi.s3.amazonaws.com/uploads/document/document/29/Akademi_CodeofConduct_03.01.2013.pdf), at 10.

<sup>97</sup> See <http://www.triplecanopy.com/philosophy/international-code-of-conduct/>.

Though it is still too early to speak of an industry pattern, such commitments to internalization and harmonization may reveal a change in how companies view regulation. They also illustrate the impact of an inclusive regulatory process on the success and implementation of regulatory initiatives. The benefits of involving all industry players (including non-state actors) in terms of legitimacy and internalization must be acknowledged. One could even venture to say that the private security and military industry provides an example of how the transnational legal process (or something akin to it) may be transposed to non-state actors.<sup>98</sup>

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<sup>98</sup> Harold Koh, *Transnational Legal Process*, 75. Neb. L. Rev. 181 (1996).

## **Part II – Assessing the Normative Outcome Produced by Self-Regulation in the Private Security and Military Industry**

Self-regulation in the private security and military industry is dynamic, innovative, and takes many forms. But does it work? This section examines the normative outcome produced by emerging self-regulatory initiatives based on benchmarks developed by Global Administrative Law. The analysis shows the impact of self-regulation on participation and transparency in the industry – a development rarely acknowledged in the literature. The normative assessment also points to specific weaknesses of emerging self-regulatory schemes including, notably, doubts over the efficacy of sanctions and limitations in terms of individual accountability.

These findings have valuable implications well beyond the private security and military industry.

### **1. Goal-Identification**

Because normative assessments of the emerging self-regulatory framework have not been conducted, a few preliminary questions arise. These questions relate to the very nature of self-regulation and the challenges of measuring the impact of non-traditional modes of governance.

By nature, traditional and non-traditional modes of governance seek to achieve similar goals – namely, influencing their addressee’s behavior. International legal theory measures the role and importance of international law by analyzing its influence on state behavior and decision-making.<sup>99</sup> Questions such as why states obey international law have preoccupied scholars for as long as international law has existed. In particular, scholars have reflected upon the relative weight of international law among other factors influencing state behavior. The effectiveness or

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<sup>99</sup> On the parallel between GAL and general international law at the level of theory, see David Dyzenhaus, *Accountability and the Concept of (Global) Administrative Law*, IILJ Working Paper 2008/7 (Global Administrative Law Series) (2008), at 20. On the role of international law in decision-making processes, see Rosalyn Higgins, *INTERNATIONAL LAW: PROBLEMS & PROCESS* 267 (OUP, 1994).

normative impact of international law, in other words, has been evaluated by measuring its impact on state behavior.<sup>100</sup>

This, too, should guide our assessment of self-regulatory schemes. Because of its non-binding and voluntary nature, self-regulation is often perceived as weak, self-serving, and ineffective.<sup>101</sup>

That it typically only exists as a complement to national or international regulation does not help.

In addition, critics point to the fact that self-regulation leads to opportunistic behavior on the part of companies that, with no fear of sanction, may use the appearance of standards and accountability to disguise poor performances and human rights violations.<sup>102</sup> Nevertheless, as the

experience of the financial, communications, transportation and private military/security sectors (among others) demonstrate, "self-regulation (either alone, or more commonly, in conjunction with other policy instruments) can be a remarkably effective and efficient means of social control."<sup>103</sup> This coercive effect has been recognized even in the absence of formal sanctioning.<sup>104</sup>

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<sup>100</sup> See for example, André Nollkaemper, *On the Effectiveness of International Rules* in *Acta Politica* 49 (1992) (noting that the effectiveness of law indicates the extent to which state behavior conforms to them). It should add that the very meaning of "effectiveness" is unclear – even in the context of governmental regulation (see Gupta and Lad, *supra* note 12, at 419).

<sup>101</sup> See Gunnigham and Rees, *supra* note 11, at 370.

<sup>102</sup> Andrew A. King and Michael J. Lenox, *Industry Self-regulation without Sanctions: The Chemical Industry's Responsible Care Program*, 43 *Academy of Management Journal* 698 (2008).

<sup>103</sup> Gunnigham and Rees, *supra* note 11, at 363, 405 (arguing that "[w]e must take seriously the potential for self-regulation in industrial life.") See also Michael S. Barr and Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 *Eur. J. Int'l L.* 15 (2006); Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 *Eur. J. Int'l L.* 47 (2006); Paul DiMaggio and Walter Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organization Fields*, 48 *Am. Sociological Review* 147, 150 (1983) ("Organizations compete not just for resources and customers, but for political power and institutional legitimacy, for social as well as economic fitness").

<sup>104</sup> See, for example, Asif Efrat, *Designing International Agreements: Evidence from the International Regulation of Small Arms*, Paper presented at the annual convention of the International Studies Association, San Diego (April 2012); and Chris Brummer, *Why Soft Law Dominates International Finance – and Not Trade*, 13 *Journal of International Economic Law* 623 (2010). Even looking at international law more generally, sanctions play only a limited role in ensuring state compliance. See, Louis Henkin, *HOW NATIONS BEHAVE* 49 (Columbia University Press, 1979); and Higgins, *supra* note 99, at 16.

Like more formal international legal norms, self-regulation ought to create a structure, a normative order, within which the regulation's addressees act along relatively predictable lines and cooperate with each other. At the most basic level, self-regulation aims to create and give expression to an "industry morality", a set of accepted (even if unwritten or non-binding) standards of behavior to which industry players aspire. As the standards become internalized, self-regulation seeks to enhance predictability, and lessen the potential for illegal or abusive behavior.<sup>105</sup> Eventually, self-regulation also ought to provide a framework through which non-compliant actors may be punished.

Remarkably, self-regulation presents the unique advantage, compared to more traditional modes of governance, of being able to influence both states' and non-states actors' behavior. In this respect, the assessment conducted below offers valuable insight: self-regulation in the private security and military industry has begun to create a framework for inculcating, shaping, monitoring, and eventually enforcing behavioral norms among public and private actors alike.

Whether it governs the conduct of states or non-state actors, self-regulation is expected to achieve these goals faster than more formal regulation, while being more sensitive to market circumstances.<sup>106</sup> But overall, what we expect of self-regulation is not that different from what we expect of traditional and more formal modes of governance.

## **2. Benchmark-Identification**

Though the goals of self-regulation have been clarified, the challenge of determining whether these goals have been obtained remains. Benchmarks are necessary to assess whether existing

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<sup>105</sup> See Gunningham and Rees, *supra* note 11, at 363 ("bring the behavior of industry members within a normative ordering responsive to broader social values."); and De Nevers, *supra* note 13, at 223 (noting that self-regulation aims at changing corporate behavior and assuaging public concerns).

<sup>106</sup> Gunningham and Rees, *supra* note 11, at 366.

self-regulatory schemes governing the outsourcing of security and military services succeed in achieving their basic objective.

Since self-regulation seeks to positively influence its addressee's behavior, an empirical study of violations that occurred *before* the adoption of self-regulatory schemes and those that occurred *after* might seem appropriate. This empirical exercise, however, would only produce a partial picture of how self-regulatory schemes have impacted compliance. Important questions would remain unanswered: Is there indeed a causal relationship between the self-regulatory initiatives and changes in behavior, or is something else at play – shifting public values, "outing" of rogue behavior, a decline in high-risk contracts, or better training? How soon after the adoption of a regulatory scheme does compliance improve, and why? Measuring the occurrence of violations empirically also fails to acknowledge that the issue is not only quantitative (how many violations have occurred) but also, and importantly, qualitative (what type of violations occurred) and how such violations are handled.

Global Administrative Law – the school of thought developed primarily by New York University scholars for analyzing global governance – offers valuable guidance on how to assess the impact of non-traditional regulatory schemes. GAL, as it is commonly known, "begins from the twin ideas that much of global governance can be understood as administration, and that such administration is often organized and shaped by principles of an administrative character."<sup>107</sup> Building on this observation, GAL applies tools developed in domestic administrative law to assess the achievements and failures of global governance. More specifically, GAL analyzes how "administrative law, or mechanisms, rules, and procedures comparable to administrative

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<sup>107</sup> Benedict Kingsbury, Nico Krisch, Richard Stewart and Jonathan Wiener, *Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law*, 68 *Law & Contemp. Probs.* 1, 2 (2005).

law, are used to promote *transparency, participation* and *accountability* in informal, cooperative and hybrid structures and in multi-level systems with shared responsibility in decision-making."<sup>108</sup>

Global Administrative Law thus regards transparency, participation and accountability as the components of a successful global administration scheme. Let us examine whether emerging regulatory frameworks in the private security and military industry meet these GAL-developed standards.<sup>109</sup>

*Transparency.* In less than a decade, transparency in the industry has improved significantly. As late as 2005 almost no information was available on the private security and military industry. Researching contracting firms, contracts, or industry practices posed great challenges. Often, the only available information came from doubtful news sources with suspicious agendas. Today, in contrast, nearly all companies have internet sites providing information about their activities, referencing some of their clients and areas of operation. Though secrecy still prevails at times to protect national security, private security and military companies have generally become more transparent by making their "behavior and motives readily knowable to interested parties".<sup>110</sup> Companies have also become more open about the extent of their commitment to industry regulation. Many of them highlight their membership in industry associations and publicly declare (on websites or in marketing materials) their commitment to industry best practices and

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<sup>108</sup> Kingsbury et al., *supra* note 6, at 61 (emphases added).

<sup>109</sup> These GAL-developed benchmarks enable a systematic and critical analysis of regulatory developments in the industry. I should note that GAL encourages the use of standardized benchmarks in order to enable "cross-fertilization". Only if various global governance schemes are assessed using set criteria can the schemes effectively be compared to one another and can insights be learned for other industries. This paper thus conducts the first GAL-type analysis of the normative outcome produced by emerging self-regulatory schemes in the private security and military industry.

<sup>110</sup> Thomas N. Hale, *Transparency, Accountability, and Global Governance*, 14 *Global Governance* 73, 75 (2008).



self-regulatory schemes.<sup>111</sup> These commitments deserve to be noted notwithstanding the fact that, unfortunately, they do not always translate into better compliance with the law.

Growing awareness of the presence and role of contractors on the battlefield, too, has played a role in enhancing transparency. Since the media attention surrounding the events in Falluja and Abu Ghraib in 2004, the industry has been scrutinized by politicians, government officials, the media and the broader public. Documentaries, most of them critical of the industry, have been produced and widely screened.<sup>112</sup> The press began reporting extensively on the industry, especially on abuses committed by private military contractors in Iraq and Afghanistan. Steve Fainaru of the Washington Post spent an entire year reporting on private military contractors, for example.<sup>113</sup> Individual contractors – and not just the companies that hire them – face increased scrutiny from the firms that employ them, the public, the media, and international actors. As a result, the industry was compelled to make its practices more public and clarify the extent and nature of its role.

At the institutional level, too, a concern for transparency has been shown. For example, the main industry association posted on its website a detailed explanation of the process leading to the revision of its code of conduct.<sup>114</sup> At the multi-stakeholder level, the ICoC Steering Committee published all the minutes of its working groups meetings and called on the wider public to comment on the *Draft Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Service Providers*.<sup>115</sup> The United Nations, through more formal

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<sup>111</sup> See Richemond-Barak, *supra* note 15, at 1062. See also *supra* note 217.

<sup>112</sup> *Iraq for Sale*, directed by Robert Greenwald (Brave New Films, 2006); and *Shadow Company*, directed by Nic Bicanic and Jason Bourque (Purpose Built Film, 2006) are two examples.

<sup>113</sup> Fainaru also published a widely-acclaimed book on the topic (Steve Fainaru, *BIG BOY RULES: AMERICA'S MERCENARIES FIGHTING IN IRAQ* (Da Capo, 2008)).

<sup>114</sup> See <http://www.stability-operations.org/index.php>.

<sup>115</sup> See *infra* note 127.

channels, also places increased emphasis on transparency, openly hiring private security contractors and developing policies to govern their employment.<sup>116</sup> Its Working Group on Mercenaries (the "UN Working Group") has gained and shared greater knowledge of the industry's *modus operandi* by way of country visits, reports, and the establishment of complaint procedures.<sup>117</sup> Even the UN Draft Convention on Private Security and Military Companies declares that it is "aimed at ensuring that States take the necessary measures to promote transparency, responsibility and accountability in their use of PMSCs and their personnel."<sup>118</sup>

Skeptics would argue that this evolution toward transparency has more to do with a quest for legitimacy (i.e. more business opportunities) than with a true concern for transparency. Certainly, the quest for legitimacy has played a role – but it has by no means been the only motivation.<sup>119</sup> A number of factors have contributed to enhanced transparency in the industry:<sup>120</sup> public opinion in the wake of contractor abuses; media attention focused on the growing role of private actors on the battlefield; governmental debate over the efficacy and cost of outsourcing security and military functions to for-profit institutions; the adoption of industry-wide standards and practices by industry associations; and disclosure programs initiated by companies acting in response to the foregoing developments or to the directives of their boards of directors. Peer-pressure did the rest: when a cluster of companies within the industry decided to make their work,

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<sup>116</sup> See Kristen Boon, *New Guidelines for Armed Private Security Companies Doing Business with the UN*, *Opinio Juris* (2012) (available at <http://opiniojuris.org/2013/04/03/new-guidelines-for-armed-private-security-companies-doing-business-with-the-un/>).

<sup>117</sup> See <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/WGMercenariesIndex.aspx>.

<sup>118</sup> See A/HRC/15/25, Annex, *Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council* (Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination) ("UN Draft Convention") (2 July 2010), para. 41. Though the full name of the UN Working Group is *The United Nations Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination* it will be referred herein as "the UN Working Group" or "the UN Working Group on Mercenaries."

<sup>119</sup> Richmond-Barak, *supra* note 23.

<sup>120</sup> The relationship between transparency and accountability in global governance has been examined in Hale, *supra* note 110.

clients, vetting methods, enforcement schemes and contracts public, it created incentives for other companies to do the same.<sup>121</sup> So while the quest for legitimacy did play a role in enhancing transparency in the industry, the changes witnessed cannot be reduced to this factor alone.

The industry's substantial progress in the realm of transparency must be acknowledged for the criticism of it to be credible. Instead of a sweeping criticism of emerging regulatory schemes – which are, without doubt, far from perfect – this article hopes to shift the debate on what can be done to make self-regulation work.

To enhance transparency, the industry must find a way to better publicize instances of violations.<sup>122</sup> At the moment, no public data exists regarding violations by corporations or individual contractors with internal company regulations, industry standards, domestic law or international law (assuming that companies and institutions do keep a record of violations). In addition, companies must provide more information on the role and substance of internal complaint mechanisms. Companies must also encourage employees to use internal complaint mechanisms not only to address employment issues and other administrative matters but to raise instances of violations of industry standards and applicable law. When internal compliance schemes are modified, companies should issue a press release explaining the motivations behind the change in regulatory policy. Too many companies have withdrawn or replaced codes of conduct without any explanation. In some cases the codes are resurrected in revised versions later publicized on companies' websites. In others, they simply disappeared. More work can and must be done to ensure transparency on regulatory matters, but tremendous progress has been made over the past decade, by any measure.

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<sup>121</sup> *Id.*, at 76 (arguing that, as a result of market pressure, internal norms, and discourse between industry players, the information disclosed by companies actually influences other companies' behavior in a positive way.)

<sup>122</sup> I am indebted to Laura Dickinson for this important point.

*Participation.* In the realm of participation, similar progress has been made. In the past decade, private military companies have become active participants in formal and informal regulatory initiatives. They attend international conferences promoting regulation, take part in multi-stakeholder initiatives, and engage in dialogue with states on matters of concern. Industry associations participated in the discussions leading up to the adoption of the Montreux Document in 2007 and made submissions to the South African Parliament during the drafting of its legislation on private security and military companies.<sup>123</sup> Membership in industry associations confirms this trend: from only eight members in 2005, the main industry association (the International Stability Operations Association) now counts over fifty members.<sup>124</sup> And, as noted above, over 600 companies have signed on to the ICoC.<sup>125</sup> Companies, civil society organizations and governments participated on an equal footing in the ICoC's steering committee and working groups, and in the yet-to-be-established ICoC organs.<sup>126</sup> This amounts to decisional participation, with all stakeholders having a genuine impact on the decision-making process. The ICoC Charter, for example, was adopted following an extensive consultation among stakeholders and the public at large.<sup>127</sup> And the UN Draft Convention is the product of "a series of consultation with a wide range of stakeholders" – suggesting that even traditional forms of regulation in the industry have become more participatory.<sup>128</sup>

Increased participation of the industry in regulatory initiatives, no matter how welcomed and desirable, should not be used by the industry as a way to lower applicable legal standards and

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<sup>123</sup> See *supra* Part I(2).

<sup>124</sup> My sense is that membership has similarly increased in other associations; but unfortunately data is not publicly available.

<sup>125</sup> See *supra* note 20.

<sup>126</sup> See [http://www.icoc-ppsp.org/ICoC\\_Steering\\_Committee.html](http://www.icoc-ppsp.org/ICoC_Steering_Committee.html), and [http://www.icoc-ppsp.org/ICoC\\_Working\\_Groups.html](http://www.icoc-ppsp.org/ICoC_Working_Groups.html), respectively.

<sup>127</sup> For more information, see <http://www.icoc-ppsp.org/>.

<sup>128</sup> See UN Draft Convention, *supra* note 118, para. 58.

obligations. The value of participation depends on the nature of such participation. Unfortunately, too little is known about the nature of the industry's contribution to instruments like the Montreux Document or the ICoC. Did industry players advocate less stringent standards and procedures? What views do they hold on the sanctioning of non-compliant actors? Ultimately, does their presence around the table strengthen or weaken the regulation-in-making? In addition, more information is needed on the impact of participation. For companies that had set high standards at the outset, participation could potentially mean doing less, not more. Consider, for example, the case of Erinys. Erinys had one of the most comprehensive and sophisticated schemes in the industry. The scheme was taken down and replaced by a reference to the ICoC in the wake of the latter's adoption. Unlike Erinys' original scheme, the ICoC does not contemplate a two-prong monitoring system – raising the question of the impact of participation for companies with stringent internal regulation.<sup>129</sup>

In other words, though participation has increased significantly over the past decade, more data and more research are needed to assess the value and impact of participation in the industry. One way to give participation further meaning would be to treat participation as a precondition to doing business. Governments, the UN and other entities hiring private security companies should work only with companies that are members in good standing of industry associations (such as the US-based ISOA) or self-regulatory schemes (such as the ICoC). For this purpose, hiring entities could rely on the certification scheme developed under the Charter. Though not finalized yet, the scheme will provide a valuable, hopefully public, and up-to-date resource available to those wanting to contract out security or military services.<sup>130</sup> Insisting on mandatory participation in the ICoC and certification under the terms of the Charter could have a significant

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<sup>129</sup> See *supra* p.20.

<sup>130</sup> Charter, *supra* note 7, Article 11.

impact on compliance – even in the absence of bureaucratic oversight or the incorporation of industry standards into domestic laws and enforcement regimes.

*Accountability.* Given the intimate relationship between transparency, participation and accountability, progress made in the first two has led to greater accountability. There is little doubt that the multiplication and sophistication of self-regulatory schemes, combined with public scrutiny and peer pressure, has played a role. Knowing more about the industry has also allowed for better and more targeted oversight. But transparency and participation alone cannot promote accountability.<sup>131</sup> Mechanisms designed to monitor compliance with existing standards and sanction non-compliant actors must be created to enhance accountability.

The challenge begins with the difficulty of delineating the contours of the concept of accountability in the realm of global governance. Can there be accountability and, if so, what form may such accountability take? The industry has developed some level of 'soft' accountability – primarily in the form of market pressure and naming-and-shaming. This type of accountability featured prominently in early drafts of the ICoC Charter, which placed an emphasis on publicizing disciplinary actions.<sup>132</sup> Performance assessments, review processes, and suspension/termination of membership also had to be publicly announced,<sup>133</sup> and the Secretariat was obligated to maintain a public listing of companies, reflecting their membership and certification status.<sup>134</sup> Unfortunately the final version of the Charter eliminated this soft form of

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<sup>131</sup> See Richard Stewart, *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance* (2008), available at <http://iilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf> ("the provision of information is a necessary but not sufficient condition for accountability.")

<sup>132</sup> See *supra* note 44.

<sup>133</sup> Draft Charter Sections C(4), D(4)(c), and F(2).

<sup>134</sup> *Id.*, *supra* note 7, Section C(1)(d).

accountability, though there is hope it may be rectified as the ICoC oversight mechanisms take shape.<sup>135</sup>

Even if this form of peer pressure were eventually restored, more is needed for the industry to properly self-regulate. Accountability implies sanctions. What type of sanctions, if any, can the industry contemplate? Is 'hard' enforcement of the type existing in domestic systems (and to a much lesser degree in international law) at all possible? Lenox and Nash have argued that voluntary self-regulation operating without the threat of sanctions may lead to opportunistic behavior by companies that use this platform merely as a public relations drill.<sup>136</sup> As a result, self-regulation at times "includes a disproportionate number of poor performers, and its members do not improve faster than non-members".<sup>137</sup> They recommend the expulsion of non-compliant members from industry associations – a sanction which I believe would be beneficial but remains insufficient. As GAL scholars have noted, global governance – including self-regulatory frameworks – must build "meaningful and effective mechanisms of accountability to control abuses of power and secure rule-of-law values."<sup>138</sup> Expulsion (let alone suspension) of regulatory schemes do not meet this GAL-developed standard. Accountability mechanisms in the industry must incorporate tougher sanctions like the referral of non-compliant actors to national authorities.<sup>139</sup> I elaborate further on what these mechanisms should look like in Part III.

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<sup>135</sup> The launch conference of the International Code of Conduct Association, which will give shape to the oversight mechanism, will take place on the 19th and 20th of September 2013 in Geneva. See <http://www.icoc-psp.org/>.

<sup>136</sup> Michael J. Lenox and Jennifer Nash, *Industry Self-Regulation and Adverse Selection: A Comparison Across Four Trade Association Programs*, 12 Bus. Strat. Env. 1, 11 (2003).

<sup>137</sup> King and Lenox, *supra* note 102, at 26.

<sup>138</sup> Emergence, *supra* note 108, at 51.

<sup>139</sup> These mechanisms would complement, rather than replace, internal proceedings against noncompliant employees initiated within the company itself and the suspension/expulsion of noncompliant members from industry associations.

An additional threshold issue when contending with the accountability deficit in the private security industry is identifying the "subjects" of self-regulation.<sup>140</sup> Who are private security and military companies accountable to? Does it make a difference if the hiring party is *not* a state? And who are individual contractors accountable to? All existing schemes place an emphasis on corporate accountability. In addition, they take as axiomatic the hiring of private security and military companies *by states*<sup>141</sup> – overlooking the growing practice on the part of inter-governmental organizations and multi-national corporations to turn to outsourcing.<sup>142</sup> These two assumptions need to be reconsidered for the industry to perfect self-regulatory schemes. Individual accountability must exist alongside corporate accountability, and supervisory accountability among the end "clients" of private security firms must be strengthened. Corporate and individual accountability should not serve to evade or somehow excuse state accountability. Further, accountability mechanisms must accommodate the increasingly common hiring of private security and military companies by international organizations, non-governmental organizations, or multi-national corporations. Efforts to regulate individuals and corporations as contracted parties, and states, NGOs and international organizations as employers (with attendant monitoring and enforcement obligations) creates jurisdictional complexities that, taken together, militate in favor of a global, hybrid regulatory scheme as the only workable framework for accountability. Unfortunately, developing frameworks do not address this increasingly common set of circumstances.

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<sup>140</sup> On the constituency question, see Nico Krisch, *The Pluralism of Global Administrative Law*, 17 Eur. J. Int'l L. 247, 249 (2006).

<sup>141</sup> See, for example, UN Draft Convention, *supra* note 118, Article 7.

<sup>142</sup> See, for example, Åse Gilje Østensen, *UN Use of Private Military and Security Companies: Practices and Policies*, Geneva Center for the Democratic Control of Armed Forces (2011), available at <http://www.dcaf.ch/Publications/UN-Use-of-Private-Military-and-Security-Companies-Practices-and-Policies>.



Within the institution itself, attributing levels of responsibility to various officials might also create difficulties. In fact, many industries are engaged in a vibrant debate over whether top-down or bottom-up approaches to regulation are best. Should the factory director of a company in China be responsible for environmental pollution? What about the directors of a company – should they be criminal responsible for actions of their employees? The question, in other words, lies in how far down along the hierarchical ladder regulators should go when devising regulatory schemes. In the context of the private security and military industry, self-regulatory schemes must go down the hierarchical ladder all the way from the hiring entity, state or otherwise, down to the individual.

To summarize, the private security and military industry has undergone a transformation of its image, practices, and governance over the past decade. It has gained its legitimacy primarily as a result of working closely with other relevant stakeholders towards the establishment of a regulatory framework. The most tangible product of this public/private cooperation is the set of standards developed, promoted and internalized by private security and military companies themselves. While critics have deplored the very fact of the industry's efforts at self-regulating, I believe that self-regulation *can* work. For it to work, the industry needs to publicize its standards and practices, as well as instances of violations and how they are dealt with – both internally and in cooperation with law enforcement bodies. In addition, participatory schemes must be systematically strengthened by clients (governments, NGOs, international organizations) insisting on membership in industry associations and adherence to hybrid self-regulatory schemes. Information must be gathered about the nature of the industry's contribution to the shaping of the regulation. Finally, the progress made in standard-setting should translate into efficient

monitoring and sanctioning mechanisms to ensure accountability. Only then will self-regulation fully achieve the desired normative outcome.

## **Part III – Proposing a New Regulatory Model for the Private Security and Military**

### **Industry**

Critics of the industry's self-regulatory frameworks have missed the point. The weakness of the emerging regulatory framework governing war and security rests neither in its soft nor in its voluntary nature. On the contrary, in my view both of these characteristics hold distinct advantages if properly conceptualized. The widespread and voluntary endorsement of the International Code of Conduct – the standard-setting document which over 600 companies have signed since its adoption in 2010 – suggests that soft law may have distinct appeal for a much-maligned industry. Similarly, the organic development of corporate and industry codes of conduct under the auspices of the US-based ISOA and the UK-based BAPSC, may reflect the advantages of voluntary initiatives over rigid regulation. So far, industry associations and the companies themselves have played a leading role, alongside NGOs and interested governments, in helping define the contours of a new regulatory regime. These stakeholders (and this author) have no illusions about the limitations of the current regulatory framework. But it would be wrong to ignore or minimize as 'window-dressing' the progress we have witnessed; and any attempt to introduce a greater degree of 'hard' standards and sanctions must acknowledge and build on this progress.

In this section I propose a model for global governance of the private security and military industry, taking into account its unique characteristics, transnational nature, industry self-regulatory initiatives, and the emerging consensus around applicable standards. The model contemplates the creation of a network of regional monitoring bodies supervised by an international sanctioning body. Such a structure could address the main weaknesses of the existing self-regulatory schemes: first, the absence of real sanctions against non-compliant

behavior by industry participants and, second, the failure to establish a framework capable of monitoring corporations *as well as* individuals.

As a starting point, it is important and encouraging to note that the present "proto-regime" bears some resemblance to other hybrid regulatory initiatives which began as voluntary undertakings and multi-lateral initiatives, won widespread endorsement, and later succeeded in impacting compliance. The financial services sector provides several examples of self-regulatory mechanisms overseen or influenced by international standard-setting bodies, with regional monitoring bodies that include government bureaucracies.

The experience of the International Accounting Standards Board (IASB), which develops standards for corporate accounting and financial reporting, is instructive. Funded by contributions from major accounting firms, private financial institutions and industrial companies, central and development banks, national funding regimes, and other international and professional organizations throughout the world, the IASB publishes International Financial Accounting Standards that have created a common language for financial accounting and reporting. What began as an initiative aimed at harmonizing EU accounting practices developed over three decades to become the authoritative reference point for accountants internationally – so authoritative, in fact, that national regulators have generally adopted the standards wholesale. The IASB's meetings are held in public and webcast, and new standards are adopted following the publication of consultative documents on which interested parties may comment. As of today, approximately 120 nations and reporting jurisdictions permit or require the use of the standards and 90 countries are in full compliance with the standards. Viewed from the perspective of Global Administrative Law, the accounting industry presents a model of success: a multi-

stakeholder self-regulatory scheme that operates with transparency, the broadest of participation, and accountability enforced by domestic law enforcement bodies.<sup>143</sup>

The Basel Committee on Banking Supervision, too, has succeeded in harmonizing banking supervision and operating standards. Today it is the primary global standard-setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters.<sup>144</sup> Monitoring takes place through peer review of participating states' compliance with the standards developed by the committee and the Capital Monitoring Group that shares national experiences in monitoring capital requirements.<sup>145</sup> The informal and horizontal nature of the process has contributed to the relative success of the Basel Committee by providing states with an opportunity to exchange experiences and harmonize industry standards – far from the perceived threat of international regulation.

The Organization for Economic Cooperation and Development ("OECD") represents a more 'formal' global governance scheme that has encouraged, and in many cases overseen, the promotion of internationally accepted standards of conduct. The organization's official status as an inter-governmental organization, and the mechanisms through which it addresses regulatory directives to national governments and industry, holds potential for the private security and military industry. After consideration of an array of global governance schemes,<sup>146</sup> I believe the

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<sup>143</sup> See [http://www.ifrs.com/ifrs\\_faqs.html](http://www.ifrs.com/ifrs_faqs.html).

<sup>144</sup> See <http://www.bis.org/bcbs/about.htm>.

<sup>145</sup> See <http://www.bis.org/bcbs/about.htm>.

<sup>146</sup> Such as, for example, the US-Cambodia Bilateral Textile Trade Agreement (in which the International Labor Organization was given a role in monitoring compliance with the agreement) (available at [http://photos.state.gov/libraries/cambodia/231771/PDFs/uskh\\_textile.pdf](http://photos.state.gov/libraries/cambodia/231771/PDFs/uskh_textile.pdf)); the Kimberley Process (which includes a certification scheme, see [www.kimberleyprocess.com](http://www.kimberleyprocess.com)); the Agreement on Trade-Related Aspects of Intellectual Property Rights (compliance with the latter is monitored – though not sanctioned – by the SIRS Council, which comprises all WTO members and is responsible for conducting peer-reviews of members' compliance with their obligations under the TRIPS agreement; see [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)); the International Labor Organization (which allows its members to file complaints with the International Labor Office alleging violations on the part of other members of the organization; see

OECD offers some of the best guidance for a hybrid, multi-level regulatory structure for the private security and military industry: one which combines monitoring at the local (national) level with supervision and sanctioning at the international (inter-governmental) level. Alongside these monitoring/supervisory/standard-setting functions, I propose the introduction of a sanction and enforcement mechanism that builds on the strength of local law enforcement, but vests primary sanctioning authority at the international level. While I do not advocate the establishment of a regulatory regime for private military companies within the framework of the OECD or its organs, the organization's structure has much informed the model I propose below.

Initially established by Western leaders in the wake of World War II to encourage reconstruction, economic development and cooperation in Europe, today the OECD is a global intergovernmental organization comprising 34 member states including the United States and Canada, alongside advanced emerging markets such as Turkey, Chile, Israel and Korea. The OECD also maintains official and consultative relations with international organizations (for example, the International Labor Organization, the International Monetary Fund, the World Bank), civil society groups (NGOs, think tanks, academia), and significant non-member states (Brazil, China, Russia and others). It provides a forum in which these countries and stakeholders can agree on common standards and coordinate policies in areas such as agriculture, competition,

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<http://www.ilo.org/ilolex/english/constq.htm>, Articles 26-29); the Compliance Advisor Ombudsman (a mechanism set up by the International Finance Corporation that hears complaints from project-affected communities about the social and environmental impacts of projects supported by the International Finance Corporation and the Multilateral Investment Guarantee Agency – the private sector lending arms of the World Bank Group – but does not have competence neither to impose solutions nor to inflict sanctions; see <http://www.cao-ombudsman.org/howwework/ombudsman/index.html>); the World Bank Inspection Panel (a body with the authority to determine if any of the World Bank's operational policies or procedures has been violated by the International Bank for Reconstruction and Development or the International Development Association; see <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64132057~pagePK:64130364~piPK:64132056~theSitePK:380794,00.html>); and the Commission on Environmental Cooperation (an intergovernmental organization created by the environmental side agreement to the NAFTA, which is authorized to review complaints submitted by any resident of North America regarding NAFTA parties' compliance with domestic environmental laws; see <http://www.cec.org/Page.asp?PageID=751&SiteNodeID=250>).

governance, anti-bribery, education, environmental, finance, health, industry, tax and other matters. As the premier inter-governmental organization of its kind, and a long-established forum for coordinating global policy initiatives, its record of fostering cooperation among industry and government deserves close examination.<sup>147</sup>

For our purposes, I would like to focus on one specific OECD initiative – the elaboration of the Guidelines for Multinational Enterprises (the "Guidelines").<sup>148</sup> The Guidelines consist of a detailed set of principles and standards of conduct, adopted by OECD member states, that are applicable to multinational enterprises operating in, and from, OECD countries.<sup>149</sup> Addressed by governments to the private sector, the Guidelines are non-binding and compliance takes place on a voluntary basis, though the countries adhering to the Guidelines make a binding commitment to implement them domestically. In fact, the Guidelines represent the first and perhaps most comprehensive multilateral code of responsible business conduct that governments have committed to promoting.<sup>150</sup> They cover areas as broad as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.<sup>151</sup>

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<sup>147</sup> The Organization for European Economic Cooperation (OEEC), predecessor to the OECD, was originally established in 1948 to administer the Marshall Plan. The organization later reorganized and updated its mission, and was re-launched as the OECD in 1961 with membership open to non-European states. See <http://www.oecd.org/about/history/>; <http://www.oecd.org/about/>.

<sup>148</sup> Available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>. This is the fifth time the Guidelines are amended; they were amended in 1979, 1984, 1991 and 2011.

<sup>149</sup> *OECD Guidelines for Multinational Enterprises* (2011 Edition), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

<sup>150</sup> By way of comparison, the Guidelines were first adopted in 1976 – and the UN Global Compact, which seeks to align the practices of corporate and public actors in areas of human rights, labor, environment and corruption, only came about in 2000 (for more details, see [www.unglobalcompact.org](http://www.unglobalcompact.org)).

<sup>151</sup> OECD Guidelines, *supra* note 149, Foreword; para.1; Part I.

In order to monitor respect of the Guidelines, the OECD employs a multi-level cooperation and a decentralized soft mediation-based implementation mechanism.<sup>152</sup> It includes a dual-level of control – first, at the domestic level with non-judicial monitoring bodies called National Contact Points (or NCPs) located in each individual member state; and, second, at the international level with a supervisory body (the OECD Investment Committee).

A National Contact Point consists of "a government office responsible for encouraging observance of [the Guidelines] in a national context and for ensuring that the Guidelines are well known and understood by the national business community and by other interested parties."<sup>153</sup> Its role is to promote respect for the Guidelines, deal with inquiries, and assist in solving problems arising out of the Guidelines' implementation. All OECD members must establish a NCP on their territories – but they have flexibility in terms of organization.<sup>154</sup> As monitoring bodies, National Contact Points also serve as the initial stage of consideration for issues and conflicts arising under the Guidelines.<sup>155</sup> Complaints may be submitted to an NCP by any person or organization, and the NCP may help resolve the dispute by offering good services or consulting with third parties. At the end of the process, the NCP may issuing a public statement or report describing the issues raised, whether an agreement has been reached and why.<sup>156</sup> As

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<sup>152</sup> Gefion Schuler, *Effective Governance through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises*, 9 German L. J. 1753, 1755 (2008).

<sup>153</sup> *National Contact Points for the OECD Guidelines for Multinational Enterprises, Frequently Asked Questions*, available at [http://www.oecd.org/document/3/0,3343,en\\_2649\\_34889\\_1933116\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/3/0,3343,en_2649_34889_1933116_1_1_1_1,00.html).

<sup>154</sup> Guidelines, *supra* note 149, Procedural Guidance, Section A. In Germany, the Ministry of Economics and Technology serves as the National Contact Point. In Canada and Japan, this role is played by divisions of the countries' respective foreign ministries. In Denmark, Finland and Ireland, ministries of employment serve as National Contact Points. For these and other examples, see <http://www.oecd.org/dataoecd/17/44/1900962.pdf>.

<sup>155</sup> James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 Law and Contemporary Problems 189, 213 (2005).

<sup>156</sup> Guidelines, *supra* note 149, Procedural Guidance, Section A(C).



such, NCPS play a role both as a forum for discussion and as a light mechanism for dispute settlement.<sup>157</sup>

At the international level, the OECD Investment Committee fulfills a coordination, facilitation and soft-supervisory function. But it exercises only limited oversight: it has no power to overrule a decision made at the local NCP level, nor can it act as a judicial or quasi-judicial body, or reach conclusions on the conduct of individual enterprises.<sup>158</sup> Instead, it must consult with the relevant NCPs before making recommendations to improve the functioning of NCPs and the effective implementation of the Guidelines.<sup>159</sup> The non-binding character of its recommendations,<sup>160</sup> and the impossibility to issue determinations to the effect that the Guidelines have been violated, constitute serious limitations in the realm of sanctioning.<sup>161</sup> Though important, the role of the international body is limited in comparison to the role of the local NCPs.<sup>162</sup>

## **1. A model for effective, multi-level regulation of the private security and military industry**

Over the past decade, the private security and military industry – working together with civil society organizations and governments – has introduced a strong measure of self- and hybrid-governance into an area that was once plagued by legal uncertainty and a virtual vacuum of

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<sup>157</sup> See Guidelines, *supra* note 149, *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, para. 9.

<sup>158</sup> See Guidelines, *supra* note 149, *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, para. 44.

<sup>159</sup> *Id.*; and Procedural Guidance, Section II (C). See also Rianne Mahon and Stephen Mc Bride, *Standardizing and Disseminating Knowledge: The Role of the OECD in Global Governance*, 1 *European Political Science Review* 83, 90 (2009) ("The OECD's main contribution to transnational governance may, however, be its 'meditative' function.")

<sup>160</sup> Salzman, *supra* note 155, at 213-14.

<sup>161</sup> Jernej Letnar Cernic, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, 3 *Hanse Law Review* 71, 94 (2008).

<sup>162</sup> See Schuler, *supra* note 152, at 1765 and 1777 (noting that the shift to a decentralized system was made as part of the 2000 revision of the Guidelines).

transparency and participation.<sup>163</sup> It has done so by dramatically elevating the role of multi-stakeholder initiatives designed to set standards of good conduct: the widely-subscribed ICoC serves as the best current example of what has been accomplished.

The next step in the evolution of regulation of the industry, however, is to introduce systematic monitoring and sanctions – 'hard' accountability as discussed in Part II of this paper. This can be accomplished while preserving key elements of the present proto-governance scheme. But it will require the introduction of more formal processes and authorities, much as the OECD provides a formal governance structure (albeit weak) to support self-regulation and national law-making in select areas of economic activity. The UN Working Group on Mercenaries, possibly reconstituted under a new title (referring expressly to private military contractors), would be a natural candidate to oversee the establishment of the new regulatory regime, though other possible supervisory bodies are noted below.

The model I propose here builds on the success of governments, non-governmental organizations and contracting firms themselves in establishing and legitimizing baseline behavioral norms and codes of conduct, which culminated in the recent Charter of the Oversight Mechanism.<sup>164</sup> It is informed by the experience of other self-regulatory initiatives, such as the IASB-developed standards, which began as an effort to harmonize regulation, but with time became the de facto 'language' of the financial industry. And it borrows from the OECD's Guidelines which, while weak on enforcement, is still one of the only examples of a multilateral code of business conduct that contemplates multi-level monitoring and has been committed to by a large number of state signatories.

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<sup>163</sup> See *supra* Part II(2).

<sup>164</sup> See *supra* note 7.

The proposed model breaks from other initiatives in several meaningful ways, however. First and foremost, and as noted above, the proposed model contemplates the imposition of sanctions beyond the mere exclusion or suspension of non-compliant actors. Existing self-regulatory schemes in the private security and military industry contemplate dismissal as the main, if not only, sanction for non-compliance, leaving a true accountability deficit.<sup>165</sup> The threat of suspension/exclusion from an industry association – even if it means a company cannot bid on contracts, as some have proposed – is an insufficient sanction where significant wrongdoing has taken place.

Second, the model provides for a double-layer of accountability. Current practices and proposals are exclusively limited to corporate accountability, which is insufficient to ensure respect for industry standards.<sup>166</sup> *Individual* accountability is needed to provide incentives for the employees of private security companies to conform to the applicable standards. By contemplating the imposition of sanctions against companies and contractors alike, the proposed model significantly broadens the reach (and thus the potential) of self-regulation in the industry.<sup>167</sup>

Third, the proposed model mandates transparency and participation, by requiring all private security and military companies with international activities to 'join' the regulatory scheme via the relevant local jurisdiction and insisting on their good standing as a precondition to contracting their services.

Finally, the model envisages the roles of monitoring and sanctioning independently of each other.

This point may seem obvious – but the tendency has been to refer to monitoring and sanctioning

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<sup>165</sup> See *supra* note 8.

<sup>166</sup> See, for example, Voluntary Principles, *supra* note 14; and Charter, *supra* note 7.

<sup>167</sup> I should add, with a note of caution, that the sidelining of the state at the regulatory level should be carefully weighed to ensure that state accountability is not being sidelined by the growing accountability of private actors.

under the general heading "enforcement mechanisms", with the unfortunate consequence that sanctioning is often overlooked.<sup>168</sup> Monitoring and sanctioning need not necessarily be performed by separate bodies – but they are conceptually distinct and require different capabilities. Consider, for example, the monitoring functions currently performed by industry associations. Industry associations are well-placed to monitor their members given their intimate understanding of the industry, close contacts with contracting firms, and sensitivity to contractor behavior that might attract adverse public attention. But they are ill-equipped to sanction private security and military companies – let alone to address criminal abuses committed by individual contractors. In contrast, government organs and judicial authorities are certainly the correct address for sanctioning, but are not the best fit for basic monitoring of individual companies. The proposed model splits monitoring from sanctioning and adopts a two-level mechanism of the type existing in the OECD's Guidelines: it combines the use of domestic, non-governmental mechanisms at the monitoring stage with the use of both domestic and international bodies at the sanctioning phase.

## **2. Monitoring in the proposed model**

Building on the experience of the OECD, direct monitoring of the industry would be carried out by locally-established monitoring offices or "LMOs" – bodies created specifically for this purpose, either in individual states or at the regional level. Though local governmental offices serve as National Contact Points (NCPs) in the OECD framework,<sup>169</sup> in the case of the security sector LMOs would be independent from national governments. As the government is generally a major client of private security and military companies, this will help mitigate potential

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<sup>168</sup> The Voluntary Principles embody a rare example of a scheme contemplating both monitoring and sanctioning (at the company level and at the governmental level, following referral to appropriate authorities).

<sup>169</sup> See *supra* note 154.

conflicts of interest.<sup>170</sup> LMOs would, however, be governed by boards with industry, governmental, and non-governmental representation. An obvious candidate for a US or North American LMO, for example, would be a new, independent executive body overseen by a board with representatives from the US Department of State, the US Department of Defense, the ISOA, the ICRC and leading think tanks. Alternatively, it could be a strengthened and restructured ISOA.

LMOs would have broad monitoring responsibility for internationally-active private security and military companies registered or operating within their jurisdiction. The scope of the monitoring function could borrow from an earlier draft of the ICoC Charter, which contemplated the ongoing and independent monitoring of companies' activities (though it did not specify who might act as a monitor),<sup>171</sup> as well as targeted performance reviews when a serious violation occurred or was likely to occur.<sup>172</sup> Taking the monitoring function further than the Charter contemplated, the LMO under the proposed model would also undertake to verify that companies implement their own codes of conduct and those of industry associations in which they are members; 'certify' that companies meet basic compliance standards as a pre-requisite to bidding on government contracts; mandate participation in industry associations or activity-specific training requirements;<sup>173</sup> establish effective complaint procedures for victims of wrongdoing or their advocates; ensure that hotlines and whistle-blower protections are in place; and maintain a

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<sup>170</sup> I disagree with the possibility once raised in the UK of having a public monitoring body (see Foreign and Commonwealth Office, *Private Military and Security Companies (PMSCs): Summary of Public Consultation Working Group*, April 2010, available at <http://www.fco.gov.uk/resources/en/pdf/about-us/our-publications/pmsc-working-group-summary-060410>, noting that "only a Government body would be truly independent, provide legitimacy and encourage wide membership.")

<sup>171</sup> IGOM, *supra* note 44.

<sup>172</sup> *Id.*, Section IX (D).

<sup>173</sup> The Virginia Department of Criminal Justice Services, for example, has established a regulatory regime applicable to private security services providers in the State of Virginia, including detailed registration, training and licensing provisions. See <http://www.dcjs.virginia.gov/pss/howto/registrations/armedSecurityOfficer.cfm>.

blacklist of offenders (corporate and individual). To promote the objective of participation, all contracting firms eligible to apply for international security assignments would need to be in good standing with their local LMO. To promote transparency, compliance information on specific companies and the industry would be included in reports published by LMOs. Companies, too (especially those of large scale), might be required to formally file compliance reports, much as financial institutions and private investment funds are required to file periodic reports on their activity.<sup>174</sup>

A core function of the LMOs would be to review and investigate complaints against contracting firms and, importantly, *individuals* as well. Complaint mechanisms are an increasingly common feature of global governance schemes,<sup>175</sup> but they were introduced only recently in the private security and military industry. Several years ago, for example, the UN Working Group on Mercenaries developed a procedure allowing for the submission of complaints "by a State, State organ, intergovernmental and non-governmental organization (NGO), or the individuals concerned, their families or their representatives, or any other relevant source."<sup>176</sup> As part of this process, the UN Working Group makes recommendations to companies, governments, the party that lodged the complaint and, eventually, to the Human Rights Council.<sup>177</sup> These parties in turn must inform the UN Working Group of any follow-up action taken based on its recommendations.<sup>178</sup> The Charter<sup>179</sup> and the UN Draft Convention<sup>180</sup> contemplate similar

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<sup>174</sup> See, for example, Form ADV filed by investment advisors to register with the SEC and state securities authorities, at <http://www.sec.gov/answers/formadv.htm>.

<sup>175</sup> For this reason, efforts should be made to streamline the process under the proposed model and avoid creating overlap with other national, regional or international arrangements.

<sup>176</sup> See Working Group Methods of Work, available at <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/MethodsWork.aspx>, para. 17.

<sup>177</sup> *Id.* paras. 20 and 21.

<sup>178</sup> *Id.* para. 22.

<sup>179</sup> Charter, *supra* note 7, Article 13.

<sup>180</sup> Draft Convention, *supra* note 118, Article 34.

arrangements. Setting aside the soft complaint reporting mechanisms already in place at industry associations – it is clear that in the future a robust complaint procedure will need to be established under LMO auspices, one which will complement its monitoring, certification and verification responsibilities.<sup>181</sup>

The two-tiered structure I propose contemplates the referral of complaints and findings of non-compliance to an international body, which would further investigate (if necessary) and ultimately sanction abuses itself or refer to local or international law enforcement for further treatment, in the manner detailed below. In the case of significant abuses, however, the referral hierarchy would be two pronged: LMOs would have a responsibility to report criminal wrongdoing to local law enforcement bodies as well.

Finally, in the spirit of the OECD's Guidelines, and as suggested in the Charter, domestic monitoring offices would also serve as a forum for discussion between companies, industry associations, non-governmental organizations, and government organs with a relevant interest in security contracting, as well as a mechanism for dispute settlement.<sup>182</sup>

### **3. Sanctioning in the proposed model**

By strengthening existing elements of soft accountability and introducing limited elements of hard accountability, the monitoring and sanctioning model presented here enhances the self-regulatory regime represented by the Montreux Process and the ICoC. While the proposed model clearly foresees a much-expanded role for the LMOs above and beyond that which is performed

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<sup>181</sup> Like under the Charter of the ICoC, the right to file complaints with LMOs should be granted to any party that has suffered a wrong as a result of a violation. It should not, however, be extended to "any other source" as contemplated under the UN Working Group mechanism – at the risk of diluting the mechanism with unjustified or politicized complaints.

<sup>182</sup> Charter, *supra* note 7, Article 13.2.5.

by industry groups today,<sup>183</sup> the competence of LMOs would remain primarily in the realm of soft accountability – namely, making public announcements, publishing findings, performing special reviews and certifying compliance with best practices or codes of conduct.<sup>184</sup> Cases deserving of sanction would be referred by the LMOs to the international supervisory body which could issue sanctions in its own right or involve domestic (or international) law enforcement bodies as appropriate.<sup>185</sup> Examples of behavior warranting sanction by the supervisory body would include substandard compliance practices, a track-record of wrongdoing short of criminal activity, failure to remediate low standards of conduct, or unethical practices. Such behavior might be punished by expulsion or suspension from industry groups or a prohibition on further contracting until improvements are shown. More severe cases, including criminal wrongdoing, would be referred directly to law enforcement authorities. Importantly, sanctioning would extend beyond private security and military companies to individual contractors as well.

By entrusting the international supervisory body with near-exclusive competence to impose hard sanctions, the model seeks to maximize oversight, clearly delineate responsibilities, enable the top-down harmonization and internalization of standards across participating states, and ensure an appropriate level of independence from governments.<sup>186</sup> Like the IASB or the OECD's Investment Committee, *but with teeth and official status*, the international supervisory body

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<sup>183</sup> In contrast with the OECD framework which has become more decentralized over the years and has shifted influence from its international supervisory body to the local monitoring bodies, the proposed model maintains centralization at the international level.

<sup>184</sup> See IGOM, *supra note* 44, Section D(4) ("If a Specific Compliance Review is commenced, the Mechanism *may* publicly identify the Member Company that is subject to the review" (emphasis added)). The outcome of special reviews should also be publicly announced by LMOs.

<sup>185</sup> Of course, the LMOs would be able and obliged to report clear criminal behavior or widespread abuses to domestic law enforcement authorities as well.

<sup>186</sup> The proposed model also gives greater competence to local monitoring offices to determine whether a violation of industry-wide standards or company procedures has taken place – a determination which should ideally come in the form of a straightforward and public decision. Sanctions (other than a potential referral to local law enforcement authorities) would be imposed at the international level, not at the local level.



would have a policy making, consultative and coordination mandate alongside its sanctioning and referral authority.

Which body is best suited to fulfill this important role? A natural choice would be for the UN Working Group to serve as the international monitoring, oversight and sanctioning body of the industry.<sup>187</sup> Part and parcel of the United Nations, the UN Working Group has exclusive competence within the UN system to deal with matters related to the private security and military industry. Though for many years the UN Working Group demonstrated a poor understanding of security outsourcing – its very name, the UN Working Group on Mercenaries, reveals its shortcomings – it has since shown innovation and an appreciation for the unique status of private security and military companies (which, as I have noted, do not fall within the definition of mercenaries).<sup>188</sup> The UN Working Group's current complaint mechanism, which can be triggered by filing in a questionnaire available on its website, demonstrates an appreciation for the centrality of complaint procedures to the enforcement of industry standards.<sup>189</sup> A vastly enhanced complaint mechanism, together with well-defined supervisory and policy-making functions, would allow the UN Working Group to develop into the contemplated international supervisory body, atop a hierarchy that builds on the monitoring, investigatory and referral work of LMOs.<sup>190</sup>

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<sup>187</sup> While making this suggestion, I would like to call for caution. Only very recently did the Working Group relent to the idea that mercenaries and private military contractors are to be treated differently at law. Until such time, the Working Group advocated a ban of private military contractors, using the framework outlawing mercenaries. (I analyze the evolution of the UN position on this subject at length in Richemond-Barak, *supra* note 15). I would therefore recommend to wait and see how the Working Group handles its new "communications" system, and how it interacts with the industry in this context. At the moment, based on conversations with UN officials, this mechanism has seldom been used and data on its use is presently unavailable.

<sup>188</sup> See Richemond-Barak, *supra* note 15, at 1043-46.

<sup>189</sup> United Nations Working Group on Mercenaries Methods of Work, <http://www2.ohchr.org/english/issues/mercenaries/work.htm>, at (C) (1), para. 16.

<sup>190</sup> This suggestion is consistent with the suggestion made during the UK's *Consultation on Promoting High Standards of Conduct by Private Military and Security Companies (PMSCs) Internationally*) to establish an

Another potential candidate to act as the industry's international supervisory body, though less compelling than the UN Working Group, is the Committee on the Regulation, Oversight and Monitoring of Private Military Companies (the "Committee") contemplated in the UN's draft international treaty governing the private security and military industry ("Draft Convention").<sup>191</sup> Unfortunately, at this stage the Committee's regulatory potential appears rather limited. The submission of individual and group petitions to the Committee is subject to the special consent of states.<sup>192</sup> In addition, the Draft Convention does not indicate what type of sanctions, if any, the Committee would be able to impose at the outcome of the various review procedures contemplated.<sup>193</sup> Importantly the state-centered approach<sup>194</sup> adopted by the UN Draft Convention

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international secretariat competent to hear complaints and impose sanctions (such as placing additional conditions on the company's contract, issuing official warnings on a public website, obligating the company to pay a fine, or suspending or removing the company from the entire initiative). See *supra* note 170, at 10-11. Though the option of entrusting this function to the local industry association, the BAPSC, has also been discussed seriously as part of the UK consultation process, I do not believe that a local industry association would have the capability to exercise supervisory functions on such a global scale.

<sup>191</sup> UN Draft Convention, *supra* note 118. Composed of experts of high moral standing, its main role would consist in reviewing periodical reports submitted by state parties on "the legislative, judicial, administrative or other measure which they have adopted and which give effect to the provisions of this Convention." Following its consideration of states' reports, the Committee would then be able to make suggestions and general recommendations and request further information. Importantly, these reports would be made available to all state parties, and states "shall make their reports widely available to the public in their own countries". More problematic (and seemingly redundant with the role of the UN Working Group) is the competence of the Committee to hear inter-state complaints. This mechanism, which exists under most human rights treaties but has not proved particularly helpful, would be activated only between two state parties which have both consented to it by making a declaration to that effect. The Draft Convention does not elaborate on the type of decision the Committee can make as part of the inter-state complaint process.

<sup>192</sup> *Id.*, Article 37.

<sup>193</sup> This is surprising given that the Draft Convention's declared objective is to "establish and implement mechanisms to monitor the activities of PMSCs and violations of international human rights and humanitarian law, in particular any illegal or arbitrary use of force committed by PMSCs, to prosecute the perpetrators and to provide effective remedies for the victims."

<sup>194</sup> This is true even though the Convention applies to states and intergovernmental organizations on an equal footing (Article 3 provides that "State Parties" includes both), and under Article 41 companies, industry associations, and other non-state actors may "communicate their support" to the Draft Convention by writing to the Secretary-General of the United Nations, and intergovernmental organizations have a right to vote in the meetings of the state parties (Article 42). See also, A/HRC/15/25, *supra* note 118, para. 44.

sits uneasily with the participatory trend that has come to characterize the industry's regulatory schemes.<sup>195</sup>

Returning to nature of sanctions in the proposed model, and as noted above, most emerging regulatory schemes in the international security industry do not contemplate sanctions. When they do, sanctions are either too lenient or directed exclusively at corporations.<sup>196</sup> Under the new model, the international body's sanctioning arsenal would extend to the imposition of remedial measures (to be monitored by the local LMO); expulsion from industry associations; prohibition from participation in tenders for a period of time; the imposition of fines;<sup>197</sup> and the payment of damages to victims. Companies could also be required, depending on the circumstances, to issue a private or public apology. When an individual contractor would be found to have violated internal or international regulations, he could be stripped of benefits, fired, or banned from working in the industry. But these sanctions, while important, do not suffice. Legal action by judicial authorities constitutes a more effective sanction (and deterrent). Under the proposed model, the competence to refer cases to appropriate national, regional or international courts and tribunals would be granted to the international supervisory body (alongside LMOs in very serious cases).<sup>198</sup> Here again, the UN Working Group could provide the robust institutional backdrop needed to implement an efficient referral system.

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<sup>195</sup> When states raised this concern as part of the drafting process, the UN Working Group responded that "the key responsibility should lie with the States parties to the convention and the intergovernmental organizations that would adhere to the instrument." The approach of the UN Draft Convention also stands in stark contrast with the approach taken by the UN Working Group – whose complaint procedure is opened to states, state organs, intergovernmental and non-governmental organizations, individuals, and "any other relevant source" – and with the multi-stakeholder approach of the Montreux process.

<sup>196</sup> See, respectively, *supra* note 56, Section IX (F)(2)(b); and *supra* note 70, Section 14.2.

<sup>197</sup> For this suggestion, see Minutes of the ICoC #3 Meeting, June 27, 2011, available at [http://www.icoc-ppsp.org/uploads/Minutes\\_WG\\_3\\_June\\_27.pdf](http://www.icoc-ppsp.org/uploads/Minutes_WG_3_June_27.pdf).

<sup>198</sup> As noted above, such a referral is actually contemplated under the Voluntary Principles (see *supra* note 14) – an initiative supported by the leading buyers of private military services, including the United States and the UK.

Overall, the two-tiered proposed model would significantly broaden the arsenal of sanctions – both soft and hard – against non-compliant actors. These sanctions, as I have repeatedly emphasized, must be contemplated at all levels of the contractual chain. Though the threat of more serious sanctions may raise some objections, perhaps the impetus created in recent years around self-regulatory schemes will succeed in fostering approval for a mechanism with more teeth. Even if it does not, just broadening the range of soft sanctions would carry significant weight in helping the industry complete its path towards effective governance.<sup>199</sup>

To summarize, the main features of the proposed regulatory model, which incorporates the existing self-regulatory mechanism already in place, can be outlined as follows:

(1) *Monitoring:*

- At the company level - codes of conduct, disciplinary measures, hotlines, complaint mechanisms, referral to law enforcement of criminal activity
- At the industry level - codes of industry associations, complaint mechanisms
- At the regional level by Local Monitoring Offices (LMOs) - monitoring and reporting on industry trends, certification of companies, verification of compliance, investigations, naming-and-shaming, referrals to the international supervisory body, forum for discussion and policy-making among stakeholders, mediation/ soft dispute settlement,<sup>200</sup> referral to law enforcement of criminal activity

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Referral by the contracting state to investigative authorities is also contemplated in the Montreux Document, *supra* note 2, Article 20.

<sup>200</sup> I would recommend that mediation processes should be non-binding and not include the imposition of ‘hard’ sanctions. This should be left to the international supervisory body. However, mediators could be competent to

(2) *Sanctioning* at the international level by a body supervising the work of LMOs and capable of imposing sanctions against:

- Companies - fines, reparations, suspension or expulsion from industry associations and industry schemes, public or private apology, referral to national, regional, and/or international authorities
- Contractors - removal of benefits, termination of employment, prohibition to work in the industry, referral to national, regional, and/or international authorities
- State or other hiring entity - investigation and/or referral for prosecution of representatives or officials.

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determine whether a violation has occurred – and, most importantly, should keep a tedious and public record of these violations.

## Part IV – Implications for Global Governance

Beyond the insights it offers on self-regulation in the private security and military industry, this Article sheds light on some of the newest trends in global governance. In an area of the law traditionally shaped *by* and addressed *to* states, non-state actors have joined states to create regulation that applies to both. The cooperation is novel, and its outcome raises a broad array of questions. Has the private security and military industry discovered a "new way of law" (to paraphrase Slaughter and Burke-White)<sup>201</sup>? Could this recipe be applicable to other industries – say, for example, the financial or environmental sectors? To be sure, the IASB, Basel Committee and other hybrid self-regulatory schemes are indicative of the potential of self-regulation in the financial sector. In the wake of the global financial crisis, however, self-regulation has fallen out of fashion, particularly in banking. At the same time, the industry claims that regulation will not work unless it, too, is involved in its making. The experience of the private security and military industry suggests that law-making does not necessarily have to be envisaged as an exclusively public activity – not even in the realm of international law, which has traditionally been "closed" to private actors. It also demonstrates that, in certain circumstances, conceiving of law as a public/private partnership may have distinct advantages, particularly in enhancing compliance. But what does this mean for the role of the state as (the sole) law-maker? Or, more broadly, for the theory of sources as traditionally understood in international law? In this section, I address some of the broader implications of the industry's experience for global governance.

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<sup>201</sup> Anne-Marie Slaughter and William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 *Harvard Int'l L. J.* 327 (2006).

## 1. The role of the state

Law-making traditionally constitutes the prerogative of the state. Law-making may take place at the domestic level, through the legislative or executive branch, or at the international level by way of the state's ratification of treaties. The state, and only the state, may participate in the latter. In contrast, self-regulation involves a sharing of public authority with private actors, a notion which is rather foreign to the theory of sources in international law, which envisions very limited status for non-state actors (and virtually none in the area of law-making). As we have seen, the participation of industry in law-making can have certain benefits – particularly in areas, like international security contracting, where responsibility for enforcement is distributed across jurisdictions and there is no clear and unquestioned sanctioning authority. On the other hand, as scholars have noted, a measure of state involvement enhances the impact of self-regulatory schemes.<sup>202</sup> The difficulty lies in achieving the optimal balance between public and private authority, and the experience of the private security and military industry strikes a strong chord in this regard.<sup>203</sup>

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<sup>202</sup> See Gunnigham and Rees, *supra* note 11, at 396 (on the need to "complement self-regulation with some form of government and third-party involvement").

<sup>203</sup> I should note that the term "self-regulation" – which has become the term of reference to describe the emerging regulatory framework in the industry – fails to capture these subtleties. Self-regulation in the industry finds itself somewhere between enforced self-regulation and voluntary self-regulation (in which the government plays no role at all) on the regulatory spectrum. On this spectrum, "co-regulation" best accounts for the interesting mix of public and private authority that has come to characterize the industry's emerging regulatory frameworks. Neither exclusively public nor exclusively private, co-regulation broadly refers to "self-regulation with some oversight and/or ratification by government." (See Ayres and Braithwaite, *infra* note 204, at 102. See also, Gunnigham and Rees, *supra* note 11, at 366; and Haufler, *supra* note 80, at 12). Ayres and Braithwaite give the example of tripartite processes involving public interest groups as an example of co-regulation. In the private security and military industry, it is the indirect but tangible involvement of states in convening, promoting and overseeing self-regulation *in cooperation* with the private security and military industry that brings the regulatory framework closer to co-regulation. This specific element – whose importance has been acknowledged by participants in the scheme – has significantly contributed to the success of the Montreux Document and the ICoC (See Minutes of the ICoC #3 Meeting, June 27, 2011, *supra* note 197). In the future, states could contemplate additional ways to promote co-regulation by, for example, rewarding firms that participate in these schemes (Lenox and Nash, *supra* note 136, at 12). Creating such incentives would only reinforce the impact of co-regulation in the industry, giving it more bite than self-regulation.

Experts in regulation have envisaged numerous ways in which the exercise of public authority may be combined or reconciled with self-regulation – some of which have inspired the proposed model. Ian Ayres and John Braithwaite have developed the concept of "enforced self-regulation",<sup>204</sup> where states become involved mainly at the monitoring and enforcing stages. The appeal of enforced self-regulation lies in that it "combines the versatility and flexibility of voluntary self-regulation, but avoids many of the inherent weaknesses of voluntarism."<sup>205</sup> In this type of regulatory regime, rules are written by companies in consultation with or under general guidelines established by the government. These privately written rules are thus publicly ratified. Enforcement is then conducted by independent compliance groups established within the companies. The role of the government is to control the independence of this internal compliance function and to ensure that violations of rules are punishable by law.<sup>206</sup> This is the case with much of banking regulation. For example, the Financial Industry Regulatory Authority (FINRA) has been granted authority by U.S. Federal law to discipline firms and individuals in the (financial) securities industry who violate FINRA rules.<sup>207</sup> The wholesale adoption of IFRS into law by certain states (notably EU countries) provides a similar, though structurally different, example.

The proposed model borrows from enforced self-regulation by entrusting a level of enforcement and sanctioning authority to public bodies.<sup>208</sup>

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<sup>204</sup> See Ian Ayres and John Braithwaite, *RESPONSIVE REGULATION* 35 (OUP, 1992); and John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 Michigan Law Review 1466 (1982).

<sup>205</sup> See Ayres and Braithwaite, *supra* note 204, at 106; and John Braithwaite, *Enforced Regulation*, *supra* note 204, at 1497.

<sup>206</sup> See John Braithwaite, *Enforced Regulation*, *supra* note 204, at 1470-71.

<sup>207</sup> See [www.finra.org](http://www.finra.org).

<sup>208</sup> As a whole, enforced self-regulation would not be a good regulatory choice for the private security and military industry (only larger firms would be able to afford their own independent internal compliance group, making the model too costly for a large section of the industry).



It also borrows from "orchestrated regulation", a type of scheme characterized by the government promoting, encouraging, and backing up emerging self-regulatory schemes:

"Although the state plays more subtle roles in New Governance, its ability to catalyze, orchestrate, and set parameters for decentralized regulatory actions – and its readiness to step in with mandatory action where softer methods fail – are essential to effective, legitimate regulation."<sup>209</sup>

According to its promoters, orchestration can "enhance the impact, legitimacy, and public interest orientation" of self-regulatory frameworks by promoting and encouraging them.<sup>210</sup> Some oversight on the part of the government contributes not only to greater legitimacy but also to greater transparency, participation and accountability – themes which echo the Global Administrative Law analysis and objectives detailed in Part II.<sup>211</sup> Under this type of scheme, states convene private actors to take part in multi-stakeholder schemes, disseminate information on high-quality initiatives, and promote industry standards by adhering to them in their own operations. In this sense, self-regulation in the global private security and military industry also builds on the strengths of orchestrated regulation.

The involvement of public actors in initiating self-regulation in the private security and military industry has endowed the new initiatives with the legitimacy they needed to flourish (both the Montreux Document and the ICoC were initiated, *inter alia*, by Switzerland, and then embraced by other states). A similar infusion of public authority could and should also take place at the

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<sup>209</sup> See Kenneth Abbott and Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 *Vanderbilt J. of Int'l Law* 501, 532 (2009).

<sup>210</sup> *Id.*, at 511.

<sup>211</sup> *Id.*, at 558 (noting that orchestration "could prescribe substantive principles and procedures derived from public law to reinforce transparency and accountability, enhancing the legitimacy of private schemes... Orchestration could modulate the composition, structure, and procedures of private schemes to maximize their participatory and deliberative character and public interest orientation. It could empower weaker and more diffuse groups in internal decision-making, assist them in participating, and act on their behalf when necessary.")

sanctioning stage – i.e., when a local LMO or the international supervisory body determines that a referral to national, regional and/or international authorities is warranted. This is an important feature of the proposed model.

Notwithstanding their role in initiating, supporting and promoting regulation, however, it is important to concede that states have lost their status as the *sole* law-makers and enforcers in the areas of war and security – as in so many other areas of international law. Increasingly deprived of their sacrosanct monopoly on the *use* of force, states have also lost much of their monopoly over the *regulation* of force. Non-state actors ranging from international organizations and courts to non-governmental organizations, industry and civil society increasingly see themselves – and are seen by states – as having the legitimacy to adjudicate, influence or weigh in on the legality of the use of force. With the involvement of civil society and the private sector in the regulation of security and military outsourcing, we witness the emergence of more "hybrid" sources of law – a term appropriately coined by Anthea Roberts and Sandy Sivakumaran. Just as a broader array of protagonists wage war, a broader array of actors participates in the process of regulating war.<sup>212</sup> And we should not be surprised when novel non-state and hybrid initiatives, such as self-regulatory schemes, gain traction.

The role of the state in contemporary regulatory processes dealing with private war and security is a marked departure from the reality of only a few decades ago, when states were the sole participants in the international system and had a monopoly over international law-making. The Montreux process illustrates this quite well. Though initiated and elaborated by states and non-state actors working together on an equal footing, the framework itself applies primarily to

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<sup>212</sup> See Rianne Mahon and Stephen Mc Bride, *Standardizing and Disseminating Knowledge: The Role of the OECD in Global Governance*, 1 *European Political Science Review* 83, 87 (2009) ("This does not mean that nation states have disappeared. They remain as key decision points, though they make policy in a context increasingly shaped by multiple and overlapping transnational networks.")

companies. The role of states in the Montreux scheme is limited as well: states, like civil society organizations, are eligible for membership if they so request and provided they meet a number of conditions.<sup>213</sup> Their affiliation, in other words, is neither automatic nor indispensable to the proper functioning of the self-regulatory scheme.

## **2. Compliance and normativity in global governance**

These important changes challenge not only the role of the state as law-maker, but also our understanding of compliance as it pertains to non-state actors under international law. Measuring the impact of emerging self-regulatory schemes on compliance using empirical tools is virtually impossible for numerous reasons: causality is simply too diffuse; quantifying the number of violations relative to the number of contractors deployed at any given time would require knowledge of contractor numbers (which vary over time) and contractor abuses (which tend to be unreported by victims and companies); the media, public awareness and other external factors have impacted contractor behavior and self-perception (and corporate reporting on bad behavior); and self-regulatory schemes have simply been around for too little time in the industry.

But the impact of self-regulation can be measured in other, palpable ways. Since becoming involved in regulatory processes, private security and military companies have shown more deference to the legal framework applicable to their activities – the ubiquity of adherence to the ICoC Code is the clearest evidence of this. As we have seen, corporate involvement in the regulatory process has affected the security industry’s perception of the law. From being an “addressee” of the law (and only tangentially, as international law is aimed primarily at states),

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<sup>213</sup> Charter, *supra* note 7, Article 3.3.2.

the private security sector has gained the ability to influence the content of the law. Viewing this favorably, the industry has become more willing to cooperate with states.

Perhaps surprisingly, the industry's participation in self-regulatory initiatives law has not been coupled with any perceptible challenge to the applicable standards. In fact, the standards and best practices developed jointly by the public and the private sector often go further than the law itself.<sup>214</sup> The Montreux Document, for example, sets forth "best practices" guiding the conduct of states and other actors, not "minimal requirements", and the private sector has welcomed these developments. Participation, in other words, has endowed joint regulatory efforts with greater legitimacy and has become self-reinforcing:

"[T]he complex process of interaction by which norms are created, interpreted, and elaborated enhances their legitimacy and strengthens their claim to obedience. The basic reason is simple; it becomes harder for a member company to reject a norm after treating it seriously and at length in industry deliberations."<sup>215</sup>

Self-regulation has indeed established a strong "claim to obedience" in international security contracting. The elaboration of industry standards as part of an inclusive regulatory process including all major industry players has triggered a tangible pull towards internalization and compliance. Although this pull towards compliance cannot be fully quantified, it manifests itself in how the industry approaches regulation, broad support for the various initiatives, and a willingness to actively participate in regulatory initiatives.<sup>216</sup>

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<sup>214</sup> That is consistent with the nature of self-regulation, which is to beyond the law. See Haufler, *supra* note 80, at 8.

<sup>215</sup> Gunnigham and Rees, *supra* note 11, at 379.

<sup>216</sup> Skeptics would remark that signing on to the ICoC by no means implies greater compliance, that companies sign on to avoid peer pressure and reap the benefits of joining in, and that the entire scheme is no more than mere window-dressing. Most importantly, they would argue that it is impossible to verify whether "signing on" actually enhances compliance. As I have explained earlier, even if it were feasible (it cannot be excluded that data might

Internalization has come in a variety of forms. Companies signal their support for self-regulation on their websites and in claims of fidelity to industry best practices (over 600 are ICoC signatories).<sup>217</sup> They have also revised their codes of conduct to align them with the ICoC.<sup>218</sup> The main industry association has itself amended its code of conduct to include the ICoC in the list of "rules of international humanitarian law and human rights law" members must honor.<sup>219</sup> Enhancing compliance is the central objective of the Swiss multi-stakeholder initiative,<sup>220</sup> and following the Montreux Document's endorsement by the United Nations and industry associations,<sup>221</sup> the hope was expressed that the Montreux Document would be incorporated in companies' codes of conduct and perhaps even, one day, in an international convention.<sup>222</sup> The progress in compliance and "claims to obedience" (to quote Gunnigham and Reese) over the past several years has doubtless gone beyond that which was imagined possible at the time of the Montreux Document's adoption.

Interestingly, the non-binding character of the industry's main regulatory instruments has not hindered the process leading from participation to internalization. On the contrary, the industry's

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become available in the future on the impact of self-regulation on internal investigations and/or on non-compliance reporting to industry associations) measuring the normative outcome of self-regulation empirically would not necessarily provide an accurate account of compliance. (See *supra* Introduction). Empirical studies cannot fully account for the complexity of normative effectiveness or compliance, and performance indicators are difficult to establish. In the oil and gas industry, in matters not exclusively related to security, Key Performance Indicators are presently being developed based on the Voluntary Principles, the Montreux Document, and the ICoC.

<sup>217</sup> See, for example, OliveGroup (<http://www.olivegroup.com/>); Hart Security (<http://www.hartsecurity.com/>); and Neptune Maritime Security (<http://www.neptunemaritimesecurity.com/>).

<sup>218</sup> See *supra* note 82.

<sup>219</sup> ISOA Code of Conduct, *supra* note 65, Preamble.

<sup>220</sup> Minutes of the ICoC #3 Meeting, June 27, 2011, *supra* note 197 (noting that "participation ultimately leads to better practice.") On the advantages of multi-stakeholder arrangements on compliance, see Abbott and Snidal, *supra* note 209, at 526 (arguing, *inter alia*, that multi-stakeholder arrangements allow actors to reach more balanced standards that are more easily implemented, promote participation, and empower social actors).

<sup>221</sup> Cockayne, *supra* note 34, at 402, 427 (noting that the Montreux Document "has the potential to provide the basis for other forms of more enforceable regulation, such as contract, national law or regional law or broader instruments and implementation arrangements" and "seems poised, therefore, to provide a set of generally respected standards on which other regulatory initiatives might be built.")

<sup>222</sup> In the wake of the Montreux Document's adoption, the United Nations began to draft a treaty regulating private war and security See UN Draft Convention, *supra* note 118.

experience arguably provides a case book example of circumstances where non-binding agreements have achieved more than have binding ones. The debate over 'soft' and 'hard' law has hardly been settled.<sup>223</sup> Conventional wisdom holds that the most effective international commitments are 'hard', legally binding.<sup>224</sup> And yet, non-binding instruments are generally more palatable to states, quicker to elaborate, less costly politically and financially, and most useful "when states are unsure about what they can feasibly implement."<sup>225</sup>

The experience of the international private security and military industry provides a vivid example that 'hard' law is only one way of enhancing compliance. With each publicized industry abuse, from Abu Ghraib to numerous other incidents implicating contractors,<sup>226</sup> calls for stronger regulation grew. But the complexity of the industry, its global and changing nature, and the wide variety of private, governmental and international actors involved, made the prospect of 'hard' law uncertain. Non-binding self-regulation and multi-stakeholder initiatives are the only law-making processes that effectively gained ground – casting doubt on the very necessity of 'hard' law and advocating for a broader view of compliance.<sup>227</sup> Though imperfect, the normative regime that emerged in the past decade has certainly clarified the legal and moral environment within which private security companies operate.

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<sup>223</sup> See, for example, (Dinah Shelton, ed.) *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* (OUP, 2000); and Kal Raustiala, *Form and Substance in International Agreements*, 99 *AJIL* 581, 586-7, 590 (2005) (arguing that "[t]here is no such thing as 'soft-law'" because "state practice is inconsistent with the continuous or spectrum view of legality in agreements" and because the fact that "many non-binding commitments ultimately influence state behavior illustrates the complexity of world politics, not the legal character of those commitments.")

<sup>224</sup> Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 *Case W. J. Int'l L.* 387, 426 (2000).

<sup>225</sup> *Id.*, at 423-4, 426. See also, Charles Lipson, *Why Are Some International Agreements Informal?*, 45 *Int'l Organization* 495, 501 (1991) (noting that the reasons for choosing informal agreements include the desire to avoid formal and visible pledges, the desire to avoid ratification, the ability to renegotiate or modify as circumstances change, or the need to reach agreements quickly).

<sup>226</sup> See *supra* Chapter 2(b)(iii).

<sup>227</sup> Raustiala, *supra* note 224, at 439 ("looking beyond compliance to the evaluation of effectiveness, particularly in the context of international law, yields many benefits. Legal scholarship's prevailing focus on compliance obscures these benefits. Only by understanding the limits of compliance, and how compliance and effectiveness interact, can we move toward both richer, deeper analysis and more productive, effective international law.")

This will not be the first time that "less is more" in the realm of normativity.<sup>228</sup> I have argued elsewhere that normative ambiguity may, at times, produce satisfactory outcomes.<sup>229</sup> In an analysis of norms governing unilateral humanitarian intervention, I showed why the codification of a norm dealing with unilateral humanitarian intervention may be less desirable, from a normative standpoint, than the ambiguous normative status quo.<sup>230</sup> Just as an ambiguous legal regime may at times offer advantages over a strictly delineated one, informal means of regulation may at times offer advantages over more formal ones.

The regulatory schemes in question illustrate this quite well. They point to the intrinsic potential of self-regulation – beyond its ability to become hard law.<sup>231</sup> They demonstrate that a non-binding and voluntary regime should not necessarily be characterized as weak or inefficient.<sup>232</sup>

While the effectiveness of informal means of cooperation *among states* has been acknowledged,<sup>233</sup> their potential seems even more apparent when non-states are involved.

Normalizing the behavior of non-state actors can be challenging. The laws of war have struggled

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<sup>228</sup> See Prosper Weil, *Towards Relative Normativity in International Law?* 77 AJIL 413 (1983); and Dinah Shelton, *Normative Hierarchy in International Law*, 100 AJIL 291 (2006).

<sup>229</sup> See Daphné Richemond, *Normativity in International Law: The Case for Unilateral Humanitarian Intervention*, 6 Yale Human Rights and Dev't L. J. 45, 48 (2003) (addressing the question of whether there should be norms to govern unilateral humanitarian intervention.)

<sup>230</sup> I define unilateral humanitarian intervention as "a military intervention undertaken by a state (or a group of states) outside the umbrella of the United Nations in order to secure human rights in another country." *Id.* at 47.

<sup>231</sup> For a similar view, see Gupta and Lad, *supra* note 12, at 416 and 417 (noting that self-regulation and stakeholder participation may produce similar or better results than direct regulation by the government "either alone or in conjunction with direct regulation by the government" and that, as such, self-regulation may "supplement or complement" governmental regulation). For the opposite view, see John Kirton and Michael Trebilcock (*Introduction: Hard Choices and Soft Law in Sustainable Global Governance* in HARD CHOICES, SOFT LAW: STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE 12 (2004) (noting that much of the value of soft law mechanisms is that they may lead to eventual hard law commitments that can be effectively enforced). On this point, see also Abbott and Snidal, *supra* note 209, at 531.

<sup>232</sup> During the elaboration of the UN Draft Convention on Private Military and Security Companies, certain states reportedly "raised the opinion that the treaty may not be the most effective way of improving oversight and accountability for the industry". See UN Draft Convention, *supra* note 118, para. 73.

<sup>233</sup> Anne-Marie Slaughter, *The Real New World Order*, 76 Foreign Affairs 183, 190 (1991).

with this particular issue for over a decade. Informal, voluntary and non-binding tools offer interesting avenues for the regulation of non-state actors – including, but not only, in the conduct of war.<sup>234</sup>

Normatively, the by-product of this evolution is a different type of law altogether: produced by less formal mechanisms, not the result of the exercise of public authority, written by non-state actors, and not legally binding – characterized by Salzman as "actions which operate below the radar screen of what we normally consider to be 'lawmaking' activities but may significantly influence agency activities."<sup>235</sup> This new "law" is measured by "*the weight to be given to a norm or decision.*"<sup>236</sup>

The question inevitably arises of whether the Montreux Document or the ICoC can be characterized as law. In the context of global governance, the answer probably is yes. Global administrative law conceives of rule-making at the global level "not in the form of treaties negotiated by states, but of standards and rules of general applicability adopted by subsidiary bodies."<sup>237</sup> Though producing non-binding and non-coercive regulation, global governance does fulfill a regulatory function akin to law.<sup>238</sup> As a result, "[t]he next generation of international institutions is also likely to look more like the Basle Committee, or, more formally, the Organization of Economic Cooperation and Development, dedicated to providing a forum for

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<sup>234</sup> See Steven Ratner, *Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War*, 22 Eur. J. Int'l L. 459, 485-87, 499 (2011) (arguing that "as international practice expands the universe of legal duty-holders, current approaches to compliance need to broaden their ambit to consider how and why these actors comply" and that "achieving *compliance with the law* does not necessitate a conversation *laden with law*." (emphases in original). See also Benjamin Perrin, *Promoting Compliance of Private Security and Military Companies with International Humanitarian Law*, 88 Int'l R. Red. Cross 613, 634 (2006).

<sup>235</sup> James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 Law and Contemporary Problems 189, 218 (2005).

<sup>236</sup> Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EJIL 23, 27 (2009).

<sup>237</sup> Emergence, *supra* note 108, at 17.

<sup>238</sup> Slaughter, *supra* note 233, at 192.



transnational problem-solving and the harmonization of national law."<sup>239</sup> As in other contexts, global, voluntary and hybrid regulatory schemes have greatly contributed to solving the legal uncertainties that permeated the private security and military industry only a few years back. But the void filled by global governance raises many questions of international legal theory, which the experience of the private security and military industry further brings to light.

The implications and precise nature of a growing body of informal international regulation have been discussed in a variety of contexts.<sup>240</sup> In the realm of the laws of war specifically, Roberts and Sivakumaran have highlighted the role played by armed groups in shaping international humanitarian law – and the implications these developments have on international law's theory of sources. Law-making in the private security and military industry provides another example of the emergence of "hybrid sources of law", defined by the Roberts and Sivakumaran as law "concluded between subjects with recognized lawmaking capacities" and "ones without".<sup>241</sup> Moreover, the question arises as to whether "hybrid" industry standards and practices embodied in instruments like the Montreux Document and the ICoC – and like those drawn up by armed groups – could one day constitute customary international law.<sup>242</sup>

The question of whether a new theory of sources is necessary to account for these changes is beyond the scope of this article. But I do hope that its insights, particularly when analyzed in conjunction with Roberts and Sivakumaran's, will trigger a genuine discussion of the role played

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<sup>239</sup> *Id.*, at 196.

<sup>240</sup> On the increasing role played by private actors in international lawmaking, see Paul Stephan, *Privatizing International Law*, 97 *Virginia Law Review* 1573 (2011). See also *INFORMAL INTERNATIONAL LAW-MAKING* (Joost Pauwelyn, Ramses A Wessel, and Jan Wouters, eds.) (OUP, 2012).

<sup>241</sup> See Roberts and Sivakumaran, *supra* note 9, at 144.

<sup>242</sup> For a discussion of whether customary international law may reflect the practice of actors other than states, see Roberts and Sivakumaran, *supra* note 9, at 149-51 (developing the notion of "quasi-custom"); and *Emergence*, *supra* note 108, at 29 (expressing the view that "[c]ustomary international law is still generally understood as being formed primarily by state action, and thus for the time being does not fully incorporate the relevant practice of non-state actors, such as global administrative bodies.")

by non-state actors in international (humanitarian) law-making. Like the phenomenon identified by Roberts and Sivakumaran, the emergence of self-regulatory frameworks in the private security and military industry provides an example of the involvement of non-state actors in law-making. The involvement of inter-governmental organizations, NGOs and corporations in regulatory processes is arguably less controversial than that of armed groups. And in the case of the private security and military industry, as noted above, the state does maintain a level of involvement in the process. In spite of these differences, the two phenomena both raise the question of whether the "hybrid" and non-binding instruments produced qualify as "norms" under international law and of the normative nature of the fragmented, disorderly and decentralized outcome produced. Non-state-made-law affects the substance of international law in tangible and irreversible ways. It is time for international scholars to take full measure of the involvement of non-state actors in international law-making and address the important theoretical questions and policy dilemmas it raises.

Let me be clear: involving non-state actors in law-making may not always be desirable or possible. This should be determined on a case-by-case basis, depending on the type of non-state actor and the area of law considered. But what the private security and military industry illustrates is that *at least in some circumstances*, participation in international law-making holds promise for legitimacy, compliance, and the harmonization and internalization of standards.

## Conclusion

The past decade has seen the emergence of a broad array of self-regulatory schemes applicable to the private security and military industry. The experience of the industry shows how a disorderly, multi-layered, non-binding, voluntary, and decentralized framework developed by a variety of public and private actors, has impacted the moral and legal environment in which the industry operates.<sup>243</sup> Measuring this impact is as difficult as it is important.<sup>244</sup> Since compliance levels cannot be measured empirically at this stage, the Article used benchmarks developed by global governance scholars to assess the normative outcome of the emerging regulatory framework.

With the help of these benchmarks, the Article provides a more accurate and precise picture of the normative outcome produced by self-regulation than any assessment conducted so far. Instead of an all-too-common sweeping criticism against self-regulation, it offers a blueprint for the institutionalization of compliance in the industry – keeping self-regulation as its core. The issue is not, as critics would have it, that the industry *should not* or *cannot* regulate itself. Rather the opposite: there is nothing inherently wrong with self-regulation, and it can be more effective than formal governance in certain circumstances, particularly if the objective is to impact behavior.

The weakness of the emerging self-regulatory framework rests in two principal areas. First, the emerging framework is, for the most part, limited to corporate accountability. In order to truly ensure compliance with industry standards, a bottom-up strategy targeted at individual

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<sup>243</sup> See Cockayne, *supra* note 34. See also Interview with Peter Singer of the Brookings Institute, March 28, 2006 (on file with author) (saying that growing awareness of the activities of private military contractors has had an impact on companies which are more careful today than in the 1990s, for example in how they recruit).

<sup>244</sup> See Haufler, *supra* note 80, at 118 (on the various ways of measuring the success of self-regulation).

contractors must take shape. Such a strategy would balance an understanding of conditions in the field with an appreciation of the need to make individuals personally accountable for bad behavior. The industry is well-positioned to lead such an initiative, but much will depend on the applicable sanctioning regime. The second weakness of the emerging self-regulatory framework is that none of the existing schemes contemplate the imposition of sanctions beyond the mere exclusion or suspension of non-compliant actors.<sup>245</sup>

Building on the *Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Providers* and the OECD framework, the proposed model establishes a dual level of control: at the local level through LMOs which will be primarily focused on monitoring, and at the international level through an international sanctioning body primarily focused on sanctioning. The proposed model would thus address the two main substantive weaknesses of the emerging self-regulatory framework, while at the same time providing structure and formality to what has hitherto been a piecemeal process of regulatory development.

In addition to providing practical and timely suggestions for improving regulation in the industry, the present study highlighted the feasibility and promise of engaging certain types of non-state actors in law-making. The experience of the private security and military industry shows that an inclusive regulatory process translates into greater transparency and internationalization – the ingredients needed to enhance compliance.

Clearly, not all non-state actors can or should be engaged in law-making. But in certain circumstances, as we have seen, the involvement of non-state actors in law-making can create broad buy-in and much-needed incentives for these actors to comply. As more non-state actors

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<sup>245</sup> Certain schemes contemplate the re-entry of excluded members after time has passed; others do not contemplate sanctions at all. See *supra* note 8.

play an active role on the international scene, and the challenge of regulating their behavior grows more acute, this study offers valuable insight on how it can be accomplished.

Lastly, the experience of the private security and military industry also contributes to the ongoing debate over optimal modes of regulation. National regulation is often perceived as ill-equipped to account for the complexity of the market,<sup>246</sup> international regulation can take time to shape up, and regional regulation may not suit all relevant players.<sup>247</sup> In the private security and military industry, much creativity has been shown. Though not perfect, the model it offers can help other industries assess the benefits of self-regulation, work out the desired extent of governmental involvement, and define the reach of accountability schemes.

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<sup>246</sup> This was the prevailing sentiment in the wake of the collapse of the Fortis bank. The Belgium government could not be saved by the Belgium government unless the bank agreed to limit its activities to Belgium proper.

<sup>247</sup> The regulation of the financial sector has been entrusted to the European Central Bank – a model closer to formal regulation, which initially caused anxiety within the banking sector. See, for example, Landan Thomas Jr., New York Times, *Worried Banks Resist Fiscal Union* (June 17, 2012).