CAN SELF-REGULATION WORK? LESSONS FROM THE PRIVATE SECURITY AND MILITARY INDUSTRY

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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 in which an array of self-regulatory schemes has emerged. These regulatory initiatives took shape as states, security companies, and the broader

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public recognized the need to clarify the legal framework applicable to private security and military companies.

Private contractors, once regarded as mercenaries, have over the past two decades played an increasingly central role in support of modern militaries.[1] Reasons for this phenomenon range from budgetary policy to the need for specialized expertise most readily available in the private sector.[2] Given the prominence of private contractors on the modern battlefield, a consensus has formed around the need to establish standards to govern the conduct of this increasingly prominent category of non-state actor.[3] The industry's expanding scope of activity and client base—composed of not only states, but also international organizations, non-governmental organizations, and multinational corporations operating in volatile environments—has made regulation an even stronger priority.[4] In just a few years, working jointly with states and civil society, the private security and military industry[5] has developed a sophisticated self-regulatory framework applicable to its activities.

This framework is characterized by multi-stakeholder initiatives, industry associations, and corporate codes of conduct. In part because of the rapid pace at which these mechanisms developed, legal scholars have yet to assess the normative outcome of emerging self-regulatory frameworks in the realm of war and security. And yet, the stakes are high—particularly given the growing presence of private security and military contractors on and near the battlefield and the increased sensitivity of functions entrusted to them.[6]

With the help of GAL-developed benchmarks, this Article assesses the normative outcome produced by self-regulation in the private security and military industry for the first time. It also offers a blueprint for the institutionalization of compliance in the industry—keeping self-regulation

1. *See generally* Peter W. Singer, Corporate Warriors: The Rise of the Privatized Military Industry (2003).

2. *Id.*

3. *See* Daphné Richemond-Barak, *Regulating War—A Taxonomy in Global Administrative Law*, 22 EURO. J. INT'L L. 1027, 1027–1069 (2011) (discussing the shift in the United Nation's position).

4. *See id.* at 1053.

5. The Swiss Department of Foreign Affairs 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." Switzerland Federal Department of Foreign Affairs, *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict*, INT'L COMM. OF THE RED CROSS 9 (Aug. 2008), *available at* http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0078.File.tmp/Montreux%20Broschuere.pdf [hereinafter *Montreux Document*].

6. *See* MOSHE SCHWARTZ & JOYPRADA SWAIN, CONG. RESEARCH SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND AND ANALYSIS, 6 (2011), *available at* http://www.fas.org/sgp/crs/natsec/R40764.pdf.

as its core. The issue is not, as critics would have it, that the industry *should not* or *cannot* regulate itself. On the contrary, self-regulation presents distinct advantages over formal governance in certain circumstances—particularly in influencing the behavior of non-state actors.

Reflection upon the achievements of the emerging regulatory framework governing war and security also yields important ramifications for other industries. The financial sector, in particular, has been engaged in vibrant debates over whether top-down or bottom-up approaches to regulation produce better results; whether regional regulation by the European Central Bank is preferable to national regulation; and whether self-regulation should be ruled out altogether, given its failure to prevent the global financial crisis.[7] 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.[8] This Article 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.[9] Any critique, to be credible, must acknowledge this progress. That said, skeptics are correct to say that more needs to be done. This Article seeks to identify what "more" means in the context of the regulation of the private military and security industry. 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.

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[10] as well as on the experience of other globally regulated sec-

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7. *See, e.g.*, Alex Cukierman, *Reflections on the Crisis and on its Lessons for Regulatory Reform and for Central Bank Policies*, 7 JOURNAL OF FINANCIAL STABILITY 26, 26 (2011); Eric Helleiner & 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., 2012).

8. *See, e.g.*, Renée de Nevers, *(Self) Regulating War?: Voluntary Regulation and the Private Security Industry*, 18 SECURITY STUD. 479, 516 (2009) ("[a]s it is currently configured, this industry does not lend itself to obligatory self-regulation."); *see also* Caroline Holmqvist, *Private Security Companies, The Case for Regulation*, STOCKHOLM INT'L PEACE RES. INST. Paper 9, 50 (2005)("[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.").

9. *See* Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 61 (2005).

10. *See* PRIVATE SECURITY SERVICE PROVIDER'S ASSOCIATION, INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDER'S ASSOCIATION (2013),

tors. 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.[11]

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 do major industry players perceive such regulation? Has the private security and military industry found the right equilibrium?

This Article thus not only in identifies mechanisms best suited to monitor compliance in the private security and military industry, but also designs optimal methods of regulation in global governance more generally. To the debate over the creation of "hybrid sources of law" by non-state actors,[12] this Article contributes important insights on the feasibility and the benefits of involving certain non-state actors in international law making.

I. The 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).[13] The key achievement of self-regulatory schemes lies in the crystallization of indus-

[hereinafter Articles of Association], *available at* http://www.icoc-psp.org/uploads/ICoC_Articles_of_Association.pdf.

11. 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*, *e.g.*, International Stability Operations Association, *ISOA Code of Conduct*, art. 14.2 (2011) [hereinafter *ISOA Code of Conduct*], *available at* http://www.stability-operations.org/index.php; *see also* Draft Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Service Providers, § IX (F)(2)(b) [hereinafter Draft Charter], *available at* http://www.icoc-psp.org/uploads/Draft_Charter.pdf (companies could reapply for admission two years after losing their membership). Other instruments fail to mention sanctions altogether. *See, e.g.*, Human Rights Counsel Res. 15/25, 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, 15th Sess., July 5 2010, U.N. GAOR, 65th Sess., A/HRC/15/25.

12. *See, e.g.*, 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).

13. National legislation, though present sporadically, does not suffice. For legislation efforts, see *National regulatory framework on PMSCs*, United Nations Human Rights—Office of the High Commissioner for Human Rights, http://www.ohchr.org/en/Issues/Mercenaries/WGMercenaries/Pages/NationalRegulatoryFrameworks.aspx).

try-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.[14]

In the private security and military industry, self-regulation[15] has reached beyond what is traditionally regarded as industry regulation.[16] 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.[17]

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14. It is important to note that this Article does not analyze how market conditions affect self-regulation. Rather, it takes an institutional look at self-regulation: that is, the characteristics of self-regulatory schemes and how self-regulation is carried out.

15. 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 "policy making by non-legislative public and private actors independently from political actors' intervention." Adrienne Héritier & Dirk Lehmkuhl, *Introduction: The Shadow of Hierarchy and New Modes of Governance*, 28 J. PUB. POL'Y 1, 3 (2008); *see also*, Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 J.L. & POL'Y 363, 366 (1997) (defining the difference between self-regulation and government regulation in terms of "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."); Anthony Ogus, *Rethinking Self-Regulation*, 15 OXFORD J.L.STUD. 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.").

16. 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, e.g.*, Anil K. Gupta & Lawrence J. Lad, *Industry Self-Regulation: An Economic, Organizational and Political Analysis*, 8 ACAD. OF MGMT. REV. 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.").

17. 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* Ian Ayres & John Braithwaite, RESPONSIVE REGULATION 102 (OUP, 1992); *see also* Gunningham and Rees, *supra* note 15, at 366; VIRGINIA HAUFLER, A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY 112 (Carnegie Endowment for International Peace ed., 2001). 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

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Examples of private regulation include regulation by industry associations and the adoption of codes of conduct by individual companies.[19] 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;[20] 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;[21] the *International Code of Conduct for Private Security Service Providers* (ICoC) in 2010;[22] and the *Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Providers* (Charter) in 2013.[23]

The multiplication and growing sophistication of self-regulatory schemes in the industry can be attributed in part to sustained criticism of

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contributed to the success of the Montreux Document and the ICoC. *See Minutes of the IcoC Working Group #3 Meeting: June 27, 2011 via Teleconference*, ICoC, http://www.icoc-psp.org/uploads/Minutes_WG_3_June_27.pdf (last visited Nov. 6, 2014) [hereinafter *Minutes of the IcoC Working Group #3 Meeting: June 27, 2011*]. In the future, states could contemplate additional ways to promote co-regulation by, for example, rewarding firms that participate in these schemes. *See* Andrew A. King & Michael J. Lenox, *Industry Self-regulation without Sanctions—The Chemical Industry's Responsible Care Program*, 43 ACAD. MGMT. J. 698 (2008). Creating such incentives would only reinforce the impact of co-regulation in the industry, giving it more bite than self-regulation.

18. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION 35 (1992); *see also* John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. LAW REV. 1466 (1982) (noting, as an example of co-regulation, tripartite processes involving public interest groups).

19. *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.").

20. *Voluntary Principles on Security and Human Rights*, VOLUNTARY PRINCIPLES ON SECURITY & HUM. RTS., http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary_principles_english.pdf (last visited Nov. 6, 2014) [hereinafter *Voluntary Principles*].

21. *See Montreux Document*, *supra* note 5; *see also, e.g.*, Daphné Richemond-Barak, *Regulating War: A Taxonomy in Global Administrative Law*, 22 EUR. J. INT'L L. 1027 (2011) [hereinafter Richemond-Barak].

22. *See International Code of Conduct for Private Security Service Providers*, ICoC (Nov. 9, 2010), http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf [hereinafter *ICoC*].

23. *See id.*

alleged abuses, lack of oversight and accountability, and general public disapproval of outsourcing core military and security functions.[24] In this climate, industry players sought a way to gain legitimacy by showing that they were bound by certain norms of conduct.[25] The absence of a readily applicable regulatory framework made this goal difficult to achieve.[26] Domestic legal systems had long failed to provide a solution: whenever one state regulated the outsourcing of private security and military services, companies would simply choose to operate from another.[27] At least theoretically, formal avenues of international regulation (chiefly via the United Nations) would seem to be best placed to regulate such activity. However, in practice, formal avenues could not keep track with the unprecedented growth of the industry in the last two decades.[28] 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.[29] 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).[30] This was the case, for example, when the Swiss government and the International Committee of the Red Cross joined forces to build the multi-stakeholder initiative that evolved into the so-called Montreux Document.[31] The involvement of other states only increased the impetus for companies to become involved, later joined by NGOs.[32] Together, they wanted to develop international standards for the operation of private security and military companies in complex and highly volatile environments, and improve oversight and accountability of these actors. The initiative gained support in a relatively short time: as of March 2014, fifty states and three international organizations had signed on to the Montreux Document,[33] and over

24. See, European Commission for Democracy through Law (Venice Commission), *Report on Private Military and Security Firms and Erosion of the State Monopoly on the Use of Force*, Adopted by the Venice Commission at its 79th Plenary Session, 29 June 2009, para. 8.

25. *Id.*

26. *Id.*

27. *Id.*

28. 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.

29. *See* discussion at Part I.A, *infra*.

30. *Id.*

31. *Id.*

32. *See The Montreux Document on private military and security companies*, SWITZERLAND FED. DEP'T FOREIGN AFF., http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html.

33. The document was jointly finalized by 17 states (Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom, Ukraine, and the United States of America), and later

700 companies had signed on to the widely accepted industry code known as the ICoC.[34]

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 self-regulation has generated among public and private actors alike[35] are noteworthy.[36] The innovative approach taken by the industry thus deserves more attention than it has received so far from regulatory experts.

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, such as 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. Although curtailment of human dignity, life, and freedom by a profit-making enterprise has in some instances hindered the privatization of prisons such concerns have not hindered security and military outsourcing. Even in countries where the privatization of prisons has been limited, such as Israel, it is unlikely that the rationale for outlawing prisons could be extended to war and security.[37] More generally, 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.

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

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signed on by another 33. *See* http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html.

34. *See Participating States of the Montreux Document*, SWITZERLAND FED. DEP'T FOREIGN AFF., http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html (last modified Feb. 21, 2014); *see also The International Code of Conduct for Private Security Service Providers Signatory Companies*, CODE , http://www.icoc-psp.org/uploads/Signatory_Companies_-_August_2013_-_Composite_List2.pdf (last visited Nov. 6, 2014).

35. *See* Gupta & Lad, *supra* note 16, at 421 (describing the appeal of self-regulation when it offers benefits to the industry as a whole).

36. 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* Gunningham & Rees, *supra* note 15, at 373.

37. *See* HCJ 2605/05 *Academic Center of Law and Business v. Minister of Finance*, [Nov. 19, 2009] (Isr.); and Daphné Richemond-Barak, *Rethinking Private Warfare*, 5 Law and Ethics of Human Rights 159, 171 (2011).

are voluntary; they 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,[38] 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.

A. *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 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),[39] and the recent Charter (2013).

Chronologically, the Voluntary Principles were the first to affect the industry. Initiated by the British Foreign & Commonwealth Office and the U.S. Department of State, today the Voluntary Principles counts thirty-eight participants—including states, companies, and NGOs.[40] Companies in the extractive industry have used the Voluntary Principles to ensure the safety and security of their operations in volatile environments while also respecting human rights and humanitarian law.[41] In particular, the Voluntary Principles set forth a set of standards guiding the conduct of companies and their personnel in the use of private security services. [42] These standards—ranging from the use of force to the vetting and training of contractors—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 to guarantee compliance with the standards.[43] At the company level, the Voluntary Principles encourage investigations into allegations of abusive or unlawful acts, as well as disciplinary measures sufficient to prevent and deter wrongdoing.[44] In addition, the Voluntary Principles call for signatory companies to establish procedures for reporting allegations of wrongdoing to relevant local law enforcement authorities.[45] This two-pronged monitoring mechanism—dis-

38. *See* Richemond-Barak, *supra* note 21.

39. *See ICoC*, *supra* note 22; *see also* Richemond-Barak, *supra note* 21 (further elaborating this mode of governance in the industry).

40. Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org/ (last visited Nov. 6, 2014) (showing that as of March 2014, the Voluntary Principles cover 8 states, 9 NGOs, and 23 companies).

41. *See id.*

42. *See id.*

43. *See id.* ¶ 4.

44. *See id.*

45. *See id.*

ciplinary measures within each company, paired with the potential to resort to public authorities—goes beyond the company itself. However, the Voluntary Principles fall short of establishing a dedicated sanctioning body, relying instead on the companies.

The next and most significant initiative was launched by Switzerland and the International Committee of the Red Cross in 2006. This multi-stakeholder initiative represented the first concrete attempt at clarifying the legal framework applicable to the provision of security and military services. It quickly expanded to include other states, international and non-governmental organizations, and industry leaders. The Swiss initiative consisted of extensive consultations among the various actors, leading to the adoption of the Montreux Document in 2008.[46] Non-binding but far-reaching,[47] the Montreux Document recalls states' existing obligations under humanitarian law and human rights law. It also establishes "good practices" primarily for states but also for companies and their personnel.[48] Like the Voluntary Principles, the Montreux Document recommends the use of contracts to enhance compliance with agreed-upon standards.[49]

Though less ground-breaking in the realm of monitoring than the Voluntary Principles (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 acceptable to all industry players.[50] Perhaps most importantly, the Mon-

46. *See Montreux Document*, *supra* note 5.

47. *See* 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*.")

48. 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 5.

49. *Montreux Document*, *supra* note 5, art. 14.

50. The Montreux Document was received warmly by states, the United Nations, and the industry. In addition to the 17 states that participated in the drafting of the Montreux Document, 29 more states have expressed support to the Montreux Document since its release. *See Participating States of the Montreux Document*, SWITZERLAND FED. DEP'T FOREIGN AFF., http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html (last modified Feb. 21, 2014). The U.N. General Assembly and Security Council endorsed the Montreux Document and circulated it to member states in a joint resolution. *See* U.N. Security Council, Letter Dated 2 October 2008 from the Permanent representative of Switzerland to the United Nations Addressed to the Secretary-General, U.N. Doc. A/63/467-S/2008/636 (October 6, 2008). At the time, the British Association of Private Security Companies noted on its website that it would ensure that the good practices of the Montreux Document are reflected in the future regulations issued by the association. Moreover, the BAPSC (the British Association of Private Security Companies) qualified the adoption of the Montreux Document as "a milestone that clarifies the applicable law and thus contributes to strengthening compliance with [international humanitarian law] and respect for human rights." *See* http://

treux Document served as a platform for the development of other self-regulatory initiatives within the industry.

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*.[51] Adopted by fifty-eight companies at the time of its drafting in 2010, the ICoC now includes over 700 signatory companies.[52] The ICoC is to the private sector what the Montreux Document is to states. Both the Montreux Document and the ICoC were convened by the Swiss government in consultation with a mix of public and private stakeholders – strengthening the continuity and complementarity between the two instruments. In fact, by virtue of their acceptance of the ICoC, companies 'endorse the principles of the Montreux Document' and agree to standards guiding the exercise of their functions.[53]

Like the Montreux Document, the main objective of the ICoC is to set standards. It hopes 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."[54] It succeeds in establishing standards in areas such as recruiting, subcontracting, and the use of force. Unlike the Montreux Document, however, the ICoC goes beyond standard setting, and prepares the stage for the establishment of enforcement mechanisms.[55] 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

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www.bapsc.org.uk/key_documents-swissInitiative.asp. *See also* David Isenberg, *Dogs of War: Bursting the Unaccountability Myth*, UPI (Oct. 10, 2008), http://www.upi.com/Emerging_Threats/2008/10/10/Dogs-of-War-Busting-the-unaccountability-myth/UPI-37961223666832/ (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").

51. *ICoC*, *supra* note 22.

52. *See Participating States of the Montreaux Document*, *supra* note 34.

53. *Id.* ¶ 3.

54. *Id.* ¶ 5.

55. *Id.* pmbl. (7); *see also* pmbl. (8) (noting that the ICoC was conceived as "the first step in a process toward[ ] full compliance" which would include a "governance and oversight mechanism").

> 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.[56]

To fulfill this important goal, the ICoC set up a tripartite Steering Committee and three working groups to work on assessment, reporting, and internal and external oversight; third party complaints; and the independent governance and oversight mechanism.[57] By including industry, civil society, and government representatives, the Steering Committee and its working groups signified an unprecedented cooperation among these disparate groups. Following lengthy deliberations and consultations, the Steering Committee and its working groups delivered the *Draft Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Providers*.[58] 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.[59]

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."[60] Like the Montreux Document and the ICoC, the Charter was elaborated under the auspices of the Swiss government and in cooperation with all three stakeholder groups.

The participatory element permeates the entire Charter, 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.[61] This type of informal horizontal arrangement is a welcome addition to the regulatory framework—which has so far lacked transnational networks and coordination arrangements.[62] The Board of Directors, which is responsible for enforcing the ICoC, also comprises members from all

56. *See id.*

57. *See Concept Paper: Areas Requiring Further Consideration for the ICoC* (2011), *available at* http://www.icoc-psp.org/uploads/TSC_Concept_Paper-final_2011May.pdf.

58. Though I refer to this document as the Draft Charter, it is sometimes referred to as "IGOM." *See* supra note 11 (the document was adopted in 2012 and it has since then been replaced by the Articles of Association. *See* ARTICLES OF ASSOCIATION, *supra* note 10); *see also Explanatory Note on the Draft Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Providers*, ICOC, http://www.icoc-psp.org/uploads/Explanatory_Note.pdf (last visited Nov. 6, 2014) [*hereinafter Explanatory Note*] (indicating that the oversight mechanism was developed over twelve months of work, during which the steering committee held eighteen meetings, and the working groups held twenty-six meetings over the course of the summer 2011).

59. *See* Draft Charter, *supra* note 11.

60. *See id*. art. 2.

61. *See id*. art 6.2.

62. *See* Richemond-Barak, *supra* note 21, at 1040.

stakeholder groups.[63] The ICoC encourages participation of civil society organizations and states in the scheme, alongside companies. Civil society 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."[64] States and intergovernmental organizations may also participate in the scheme if they have expressed support for the Montreux Document and have committed to participate in relevant meetings and events.[65] (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 Part IV elaborates further.)

When joining in, companies do not yet accede to full membership status. Until they are certified—a process designed to assess whether the companies' policies meet the ICoC's principles and confirm that companies monitor compliance with the code properly[66]—companies only enjoy provisional membership. Member companies have ongoing reporting obligations and must thereafter subject themselves to independent auditing and verification of their performance.[67]

Allegations of violations of the ICoC may be submitted by way of "fair and accessible grievance procedures that offer effective remedies."[68] 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.[69] Sanctions taken against non-compliant companies, as deemed necessary by the Board, may include the suspension or the termination of a company's membership.[70] The decision to sanction also involves all three groups of stakeholders: eight Board members must vote in favor of sanctions, including at least two representatives of each stakeholder group (companies, civil society, and governments).[71]

Much has been accomplished in the realm of governance in the industry—from the Voluntary Principles 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

63. *See* Draft Charter *supra* note 11, art. 7.2.

64. *See id*. art. 3.3.3.

65. *See id*. art. 3.3.2.

66. *See id*. art. 11. The certification process has yet to be fully worked out. Once obtained, certification remains valid for three years (Art. 11.3).

67. *See id*. art. 12.

68. *See id*. art. 13.1.

69. *See id*. art. 13.2.1.

70. *See id*. art. 13.2.7. Note that under the Charter, the company was prohibited from reapplying to the Mechanism for two years unless otherwise determined by the Board. *Id.* § IX (F)(2)(b). This provision does not exist in the Articles of Association—which mentions suspension or termination without any further detail.

71. *See id*. art. 7.6.

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 groundbreaking attempt at institutionalizing compliance with agreed-upon standards.

B. *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 significance, as industry associations are best placed to establish baseline standards, educate, provide commonality of norms, and create peer pressure—contributing 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 a given association to subscribe to a code of conduct.[72] Though industry codes are generally not enforceable, they contain moral standards used to guide the corporate behavior of the member companies.[73]

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, the International Stability Operations Association (ISOA)[74] boasts forty-six members, including industry leaders DynCorp International and Olive Group.[75] The association has assisted the elaboration of industry standards since its creation in 2001, including in the development and drafting of the ICoC.[76] The ISOA also works to promote and

72. *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).

73. *See generally* Jürgen Friedrich, *Codes of Conduct* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (OUP, 2008); *see also* Mark Schwartz, *The Nature of the Relationship between Corporate Codes of Ethics and Behavior*, 32 J. BUS. ETHICS 247 (2001)(explaining that codes developed by industry associations usually go beyond, but do not substitute themselves for, existing legislation). *See, e.g.*, 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).

74. *International Stability Operations Association: IPOA's New Name*, PR NEWSWIRE (Oct. 25, 2010), http://www.prnewswire.com/news-releases/international-stability-operations-association-ipoas-new-name-105686208.html.

75. *See* INTERNATIONAL STABILITY OPERATIONS ASSOCIATION, http://www.stability-operations.org/index.php (presenting a list of ISOA members).

76. *See Code of Conduct for Private Security Companies,* INTERNATIONAL STABILITY OPERATIONS ASSOCIATIONS, http://www.stability-operations.org/?International_COC.

improve existing regulatory instruments applicable to the industry. It prides itself on being "absolutely committed to raising the bar for professionalism, standards and ethics across the private sector . . . and actively participat[ing] in activities such as the development of the International Code of Conduct for Private Security Companies."[77]

A major contribution of the ISOA to industry regulation has been its code of conduct, which members of the association must abide by.[78] The code elaborates standards applicable to ISOA members operating in conflict and post-conflict environments, regardless of location.[79] 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).[80]

The association's code of conduct calls on its members to report serious infractions to relevant authorities[81] and to cooperate with official investigations.[82] Individuals and organizations may lodge complaints against an ISOA member for violations of the ISOA code of conduct.[83] Regrettably, the sanction for non-compliance remains limited to dismissal from the association.[84] 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*."[85] This provision echoes the trend toward the adoption of indi-

77. *See Advocacy Initiatives*, INTERNATIONAL STABILITY OPERATIONS ASSOCIATION, http://www.stability-operations.org/?page=advocacy.

78. For the thirteenth version of the Code of Conduct, see *ISOA Code of Conduct*, *supra* note 11 (The original version of the Code was adopted in 2001 and the most recent version of the Code was adopted in 2011.); *see also* Richemond-Barak, *supra* note 21 (providing more information on the Code).

79. *See ISOA Code of Conduct*, *supra* note 11, pmbl.

80. *See id.*

81. *See ISOA Code of Conduct*, *supra* note 11, § 3.3.

82. *Id.* § 3.2.

83. 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. *See Standards Complaint Form Submission*, INTERNATIONAL STABILITY OPERATIONS ASSOCIATION, http://www.stability-operations.org/?page=complaint_Form&hh SearchTerms=%22complaint%22; *see also How to Submit a Standard Complaint*, INTERNATIONAL STABILITY OPERATIONS ASSOCIATION, http://www.stability-operations.org/?page=standards_Complaint.

84. *See ISOA Code of Conduct*, *supra* note 11, § 14.2.

85. *See id.* § 14.1(emphasis added).

vidual 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, the ISOA's experience suggests that industry associations could play a role in regulating self-regulation in the industry.[86]

In parallel to the Washington-based ISOA, its UK equivalent BAPSC (the British Association of Private Security Companies) played an important role.[87] Like the ISOA, its impact on self-regulation was twofold: first, by way of its code of conduct,[88] and, second, due to its involvement in regulatory initiatives such as the Montreux process.[89]

C. *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.[90] These codes generally incorporate the principles expounded by the multi-stakeholder initiatives and echo the views of industry associations. Through its 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.[91]

The broader context of global governance has seen mixed reactions to codes of conduct. Critics argue that these codes of conduct amount to no more than window dressing: "self-serving industry rhetoric" with no real effect on the behavior of industry players.[92] 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.[93] More nuanced assessments acknowledge that certain codes "are remarkably ef-

86. *See* Gupta & Lad, *supra* note 16, at 416.

87. *See* Andrew Bearpark & Sabrina Schulz, *The Future of the Market*, *in* FROM MERCENARIES TO MARKET 240, 247 (Simon Chesterman & Chia Lehnardt, eds., 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 [U.S.] [f]orces, and the direct oversight of PSCs by the Government of Iraq, the need for the PSCAI has withered." *See* PRIVATE SECURITY COMPANY ASSOCIATION OF IRAQ, http://www.pscai.org/ (last visited Nov. 6, 2014).

88. *See id.*

89. *See The British Association of Private Security Companies*, BAPSC, http://www.bapsc.org.uk/?keydocuments=Swiss-initiative.

90. 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.

91. *See* Richemond-Barak, *supra* note 21, at 1062.

92. Gunningham & Rees, *supra* note 15, at 380.

93. HAUFLER, *supra* note 17 (debating whether self-regulation is just "talk" and ultimately arguing that it is not because self-regulation does indeed change behavior, though "evidence is scattered and difficult to analyze systematically.").

fective in guiding and controlling industry conduct . . . and that most others probably fall somewhere in between."[94]

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 to account for developments in the industry—such as the adoption of the ICoC.[95] Most recently, companies have begun outsourcing the task of monitoring compliance with the codes to third parties. Industry leaders such as Aegis and DynCorp, for example, have entered into relationships with EthicsPoint to this end.[96]

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.[97]

This seems to be the case with Erinys, a small security contractor founded in 2002 and best known for its involvement in the reconstruction of Iraqi oil infrastructure. Until the adoption of the ICoC, Erinys had one of the most sophisticated internal sanctioning schemes in the industry.[98] Erinys' code mandated employees to report breaches of the code through the management chain.[99] Non-compliant employees were to be surrendered to appropriate authorities and were 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

94. Gunningham & Rees, *supra* note 15, at 380 (citing JOSEPH REES, HOSTAGES OF EACH OTHER: THE TRANSFORMATION OF NUCLEAR SAFETY SINCE THREE MILE ISLAND (Chicago University Press, 1994)).

95. *See infra* Part II.B.2 (discussion of Erinys). 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.

96. Richemond-Barak, *supra* note 21, at 1066–67; *see, e.g.*, EthicsPoint—Aegis Defense, AEGIS, https://secure.ethicspoint.com/domain/media/en/gui/27925/index.html (last visited Nov. 6, 2014); *see also, e.g.*, EthicsPoint—DynCorp International, DYNCORP INTERNATIONAL, https://secure.ethicspoint.com/domain/media/en/gui/27481/index.html (last visited Nov. 6, 2014).

97. 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.

98. ERINYS INTERNATIONAL, ERINYS CODE (2008). The scheme is no longer in force having been replaced by a reference to the ICoC.

99. *Id.* § 3.2.

of the Voluntary Principles on Security and Human Rights[100]—constituted one of the better implementations of an internal sanctioning scheme in the private security and military industry. Erinys' subsequent 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 regulations 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 reevaluate their approach to regulation. The experience of Triple Canopy, a U.S. company providing security and risk management services to the oil and gas sector, further illustrates how companies have adapted to changing regulatory developments.[101] In the wake of the ICoC's adoption, Triple Canopy undertook a complete revision of its code of conduct.[102] 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."[103] Though the 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.[104]

A number of additional features of Triple Canopy's revised code are worth mentioning, as they show the regulatory potential of company

100. *See Voluntary Principles*, supra note 20.

101. *See* Triple Canopy, http://www.triplecanopy.com (last visited Nov. 6, 2014). Triple Canopy was created in 2003 and contracted for over $100 million with the U.S. State Department for the provision of personal and guard services.

102. *See* Triple Canopy, *Code of Ethics and Business Conduct* (5th rev. 2012), http://www.triplecanopy.com/assets/tc-ethics-business-conduct-02212012-WEB_new.pdf [hereinafter *Triple Canopy Code*]. The fifth and most recent revision dates to late 2011, following the adoption of the ICoC. The revised Code entered into force in February 2012. *See* Richemond-Barak, *supra* note 21, at 1065-66, for a description and analysis of the compliance program, which has not been significantly modified. 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 U.N. 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. *Human Rights—Respecting the Communities We Serve*, TRIPLE CANOPY, http://www.triplecanopy.com/philosophy/human-rights/ (last visited Nov. 6, 2014).

103. *Triple Canopy Code*, *supra* note 102, § 7.8.

104. *Id.*

codes.[105] 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.[106] 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.[107] 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*."[108] 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 criminal action *in addition to* dismissal from the company (though it should be noted that most companies contemplate only disciplinary action in such cases).[109]

There is little doubt that company 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 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. The company actively participated in the drafting of the ICoC, including by communicating its own code of conduct to the Swiss government as a source document. At the ICoC signing ceremony, Triple Canopy's CEO stressed the importance of subjecting all security companies worldwide to high ethical and operational standards. Triple Canopy not only endorsed the ICoC but also committed to ensuring that it "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."[110] The company's commitment

105. *See* Richemond-Barak, *supra* note 21, at 1065–66, for a study of the previous version of Triple Canopy's Code.

106. *Id.* Intro., § 5.1.

107. *Id.* Pt. 2.0, § 2.5. *Id.* Pt. 2.0, § 2.5. (emphasis added).

108. *See id.*

109. *See, e.g.*, ACADEMI, CODE OF BUSINESS ETHICS AND CONDUCT 10 (rev. 2013), *available at* https://academi.s3.amazonaws.com/uploads/document/document/29/Academi_CodeofConduct_03.01.2013.pdf.

110. Triple Canopy, *Triple Canopy Signs International Code of Conduct for Private Security Service Providers*, (Nov. 9, 2010) http://www.triplecanopy.com/news/press/triple-canopy-signs-international-code-of-conduct-for-private-security-serv/.

to industry self-regulation expressed in the course of the ICoC's adoption and in its wake deserves to be noted.

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 that an inclusive regulatory process can have on the success and implementation of regulatory initiatives, even in the sacrosanct realm of war and security. Involving all security industry players had a tangible impact in terms of legitimacy and internalization—so much so that the industry could provide an example of how the transnational legal process (or something akin to it) may be transposed to non-state actors. But before we can apply regulatory lessons to actors in other industries, we must first assess the normative outcome of self-regulation in the private security and military industry.[111]

II. Assessing the Normative Outcome of Self-Regulation in the Industry

Self-regulation in the private security and military industry is dynamic and innovative, and it 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 positive 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 significant implications well beyond the private security and military industry.

A. *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 addressees' behavior. International legal theory measures the role and importance of international law by analyzing its influence on state behavior and decision making.[112] In particular, scholars have sought to assess the relative weight of international law among other factors influencing state behavior. As schol-

111. *See generally* Harold Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181, 181 (1996) (defining transnational legal process).

112. *See* David Dyzenhaus, *Accountability and the Concept of (Global) Administrative Law* 20 (Global Administrative Law Series, Working Paper No. 2008/7) (describing the parallel between GAL and general international law at the level of theory); *see also* Rosalyn Higgins, International Law: Problems & Process 267 (1994)(describing the role of international law in decision-making processes).

ars measure the effectiveness of international law by its impact on state behavior,[113] so too shall we measure the effectiveness of self-regulatory schemes based on their impact on their addressees' behavior.

Because of its non-binding and voluntary nature, self-regulation is often perceived as weak, self-serving, and ineffective.[114] 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 performance and human rights violations.[115]

Nevertheless, as the experience of the financial, communications, transportation, and private military and 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."[116] The impact of self-regulation has been recognized even in the absence of formal sanctioning.[117]

Like more formal international legal norms, self-regulation seeks to create a structure, or normative order, within which regulations' addressees cooperate with each other and act along relatively predictable lines. 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 standards become internalized, self-regulation seeks to enhance predictability and lessen the potential for illegal or abusive behavior.[118] Eventually, self-reg-

113. *See, e.g.*, 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 it). It should add that the very meaning of "effectiveness" is unclear even in the context of governmental regulation. *See* Gupta & Lad, *supra* note 16, at 419.

114. *See* Gunningham & Rees, *supra* note 15, at 370.

115. Andrew A. King & Michael J. Lenox, *Industry Self-regulation without Sanctions: The Chemical Industry's Responsible Care Program*, 43 ACAD. MAGMT. J. 698 (2008).

116. Gunningham & Rees, *supra* note 15, at 363, 405 (arguing that "[w]e must take seriously the potential for self-regulation in industrial life."); *see also* Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15 (2006); Paul DiMaggio & Walter Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organization Fields*, 48 AM. SOCIOLOGICAL REV. 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"); Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT'L L. 47 (2006).

117. *See, e.g.*, Asif Efrat, *Designing International Agreements: Evidence from the International Regulation of Small Arms*, Paper Presented at the Annual Convention of the International Studies Association (April 2012); *see also* Chris Brummer, *Why Soft Law Dominates International Finance—and Not Trade*, 13 J. INT'L ECON. L. 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); *see also* Higgins, *supra* note 112, at 16.

118. Gunningham & Rees, *supra* note 15, at 363 ("bring the behavior of industry members within a normative ordering responsive to broader social values."); *see* De Nevers, *supra*

ulation 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-state actors' behavior. The assessment conducted below shows how self-regulation in the private security and military industry helped 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.[119] But overall, what we expect of self-regulation is not that different from what we expect of traditional and more formal modes of governance.

B. *Benchmark Identification*

Though the goals of self-regulation have been clarified, the challenge remains of determining whether these goals have been achieved. Benchmarks are necessary to assess whether existing self-regulatory schemes governing the outsourcing of security and military services succeed in achieving their basic objectives.

Because self-regulation seeks to positively influence its addressees' behavior, it might seem appropriate to conduct an empirical study of violations that occurred both before and after the adoption of self-regulatory schemes. This empirical exercise, however, would only produce a partial picture of how self-regulatory schemes have affected 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 types of violations have occurred and how such violations have been handled.

Global administrative law (GAL)—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."[120] Building on this observa-

note 19, at 223 (noting that self-regulation aims at changing corporate behavior and assuaging public concerns).

119. Gunningham & Rees, *supra* note 15, at 366.

120. Benedict Kingsbury, Nico Krisch, Richard Stewart and Jonathan Wiener, *Foreword: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, 68 L. & CONTEMP. PROBS. 1, 2 (2005).

tion, 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 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."[121]

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.[122]

1. 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. Today, in contrast, nearly all companies have Internet sites providing information about their activities, making reference to some of their clients and areas of operation.[123] 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."[124] 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 self-regulatory schemes.[125] These commitments deserve to be noted notwithstanding the fact that they may not always translate into better compliance with the law.

Growing public awareness of the presence and role of contractors on the battlefield, too, has played a role in enhancing transparency. In the

121. Kingsbury et al., *supra* note 9, at 61 (emphasis added).

122. 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 Article thus conducts the first GAL-type analysis of the normative outcome produced by emerging self-regulatory schemes in the private security and military industry.

123. *See, e.g.*, http://www.hartinternational.com/; http://www.g4s.com/en/.

124. Thomas N. Hale, *Transparency, Accountability, and Global Governance*, 14 GLOBAL GOVERNANCE 73, 75 (2008).

125. *See* Richemond-Barak, *supra* note 21, at 1062; *see also* Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. J. INT'L L. 387, 425 (2000).

wake of the events in Falluja and Abu Ghraib in 2004,[126] the industry received much attention from the media, government officials, and the public at large. Documentaries, most of them critical of the industry, were produced and widely screened.[127] 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.[128] 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.

Transparency concerns show at the institutional level, as well. 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.[129] At the multi-stakeholder level, the ICoC Steering Committee published all 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*.[130] The United Nations, through more formal channels, also places increased emphasis on transparency, openly hiring private security contractors and developing policies to govern their employment.[131] Its Working Group on Mercenaries (the "U.N. Working Group") has gained and shared greater knowledge of the industry's modus operandi by way of reports, country visits, and establishment of complaint procedures.[132] Even the U.N. Draft Convention on Private Security and Military Companies declares that it is "aimed at ensuring that States take the necessary measures to promote

126. See Jeffrey Gettleman, *Enraged Mod in Falluja Kills 4 American Contractors*, N.Y. TIMES (31 March 2004); and Seymour Hersh, *Torture at Abu Ghraib*, THE NEW YORKER (10 May 2004).

127. IRAQ FOR SALE (Brave New Films 2006) (directed by Robert Greenwald), and SHADOW COMPANY (Purpose Built Film, 2006) (directed by Nic Bicanic and Jason Bourque) are two examples.

128. Fainaru also published a widely acclaimed book on the topic. *See* Steve Fainaru, BIG BOY RULES: AMERICA'S MERCENARIES FIGHTING IN IRAQ (Da Capo, 2008)).

129. *See ISOA Code of Conduct, supra* note 11.

130. *See* Richard Stewart, *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance* 33 (2008), *available at* http://iilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf ("[T]he provision of information is a necessary but not sufficient condition for accountability.").

131. *See* Kristen Boon, *New Guidelines for Armed Private Security Companies Doing Business with the U.N.*, OPINIO JURIS (2012).

132. *See Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, U.N. OFF. OF THE HIGH COMMISSIONER OF HUM. RTS. (Mar. 20, 2014), http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/WGMercenariesIndex.aspx.

transparency, responsibility, and accountability in their use of PMSCs and their personnel."[133]

Skeptics would argue that this evolution toward transparency has more to do with a quest for legitimacy (that is, greater business opportunity) 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.[134] A number of factors have contributed to enhanced transparency in the industry:[135] public opinion in the wake of contractor abuses; media attention to the growing role of private actors on the battlefield; governmental debate on the efficacy and cost of outsourcing security and military functions to for-profit institutions; 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.[136] Peer pressure did the rest: when a cluster of companies within the industry decided to make their work, clients, vetting methods, enforcement schemes, and contracts public, it created incentives for other companies to do the same.[137] 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.

Any criticism, to be credible, must acknowledge the industry's substantial progress in the realm of transparency. Instead of a sweeping criticism of emerging regulatory schemes—which are, without doubt, far from perfect—this Article suggests to focus on what can be done to make self-regulation work.

The industry must find a way to better publicize instances of violations as a first and indispensable step toward greater transparency.[138] At the moment, no public data exists regarding violations by corporations or individual contractors of 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

133. *See* U.N. Human Rights Council, *Rep. 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*, Annex, ¶ 41, U.N. Doc. A/HRC/15/25 (July 2, 2010) (by Jose Luis Gomez del Prado) [hereinafter "U.N. Draft Convention"] (the Annex contains the Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council).

134. *See* Richemond-Barak, *supra* note 21.

135. The relationship between transparency and accountability in global governance has been examined in Hale, *supra* note 124.

136. *See supra* note 96; *supra* Part I.B; Sam Black & Anjali Kamat, *After 12 Years of War, Labor Abuses Rampant on U.S. Bases in Afghanistan*, Al Jazeera (March 7, 2014), http://america.aljazeera.com/articles/2014/3/7/after-12-years-ofwarlaborabusesrampantonus basesinafghanistan.html. *See generally* U.S. Gov't Accountability Office, www.gao.gov (last visited Nov. 6, 2014).

137. *See Hale*, *supra* note 124, 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).

138. I am indebted to Professor Laura Dickinson for this important point.

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 also to raise instances of violations of industry standards and applicable law. When companies modify internal compliance schemes, they should issue press releases explaining the motivations behind such changes. Too many companies have withdrawn or replaced codes of conduct without explanation. In some cases the codes are resurrected in revised versions that are later publicized on companies' websites.[139] In others, they simply disappear. More work can and must be done to ensure transparency on regulatory matters, but significant progress has been made over the past decade, by any measure.

2. Participation

Similar progress has been made in the realm of participation. Within 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.[140] Membership in industry associations confirms this trend: from only eight members in 2005, the main industry association (the International Stability Operations Association) now has more than forty members.[141] And, as noted above, more than 700 companies have signed on to the ICoC.[142] Companies, civil society organizations, and governments participated on equal footing in the ICoC's steering committee and working groups, and in the yet-to-be-established ICoC organs.[143] 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.[144] And the U.N. 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.[145]

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139. *See* Richemond-Barak, *supra* note 21, at 1065–66.

140. *See supra* Part I.B.

141. My sense is that membership has similarly increased in other associations, but unfortunately data is not publicly available.

142. *See* ICoC, *ICoC Signatory Companies,* http://www.icoc-psp.org/ICoCSignatoryCompanies.html (last visited Nov. 6, 2014).

143. *See* ICoC, *ICoC Temporary Steering Committee*, http://www.icoc-psp.org/ICoC_Steering_Committee.html (last visited Nov. 6, 2014); *see also*ICoC, *ICoC Working Groups*, http://www.icoc-psp.org/ICoC_Working_Groups.html (last visited Nov. 6, 2014).

144. *See* ICoC, http://www.icoc-psp.org (last visited Nov. 6, 2014).

145. *See* U.N. Draft Convention, *supra* note 133, ¶ 58.

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 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 did they hold on the sanctioning of non-compliant actors? Ultimately, did their presence at the table strengthen or weaken the regulatory outcome? 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. In the wake of the ICoC's adoption, Erinys dismantled the scheme and replaced it with a reference to the ICoC. Unlike Erinys' original scheme, the ICoC does not contemplate a two-pronged monitoring system—raising the question of the impact of participation for companies with stringent internal regulation.[146]

In other words, though participation has increased significantly over the past decade, more data is 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 United Nations, and other entities hiring private security companies should work only with companies that are members in good standing of industry associations (such as the United States 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.[147] Insisting on mandatory participation in the ICoC and certification under the terms of the Charter could have a significant impact on compliance—even in the absence of bureaucratic oversight or the incorporation of industry standards into domestic laws and enforcement regimes.

3. Accountability

Given the intimate relationships among 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, have played a role. Knowing more about the industry has also allowed for better and more targeted oversight. But transparency and

146. *See supra* p.20.

147. *See* Draft Charter, *supra* note 11, art. 11.

participation alone cannot promote accountability.[148] Mechanisms designed to monitor compliance with existing standards and to sanction noncompliant 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.[149] Performance assessments, review processes, and suspension or termination of membership also had to be publicly announced,[150] and the Secretariat was obligated to maintain a public listing of companies, reflecting their membership and certification status.[151] Unfortunately the Articles of Association eliminated this soft form of accountability, though hope remains that it may be rectified as ICoC oversight mechanisms take shape.

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 advocate the use of sanctions, specifically the expulsion of non-compliant members from industry associations—a sanction which I believe remains insufficient.[152] As GAL scholars have noted, global governance must build "meaningful and effective mechanisms of accountability to control abuses of power and secure rule-of-law values."[153] 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.[154] I elaborate further on what these mechanisms should look like in Part III.

An additional difficulty lies in identifying the subjects of self-regulation.[155]All existing schemes place an emphasis on corporate accountabil-

148. *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 ("[T]he provision of information is a necessary but not sufficient condition for accountability.").

149. *See* Draft Charter, *supra* note 11.

150. *See id*., §§ C(4), D(4)(c), F(2).

151. *See id.* § C(1)(d).

152. Michael J. Lenox and Jennifer Nash, Industry Self-Regulation and Adverse Selection: A Comparison Across Four Trade Association Programs, 12 Bus. Strat. Env. 1, 5 (2003).

153. *See* Kingsbury et al., *supra* note 9, at 51.

154. These mechanisms would complement, rather than replace, internal proceedings against noncompliant employees initiated within the company itself and the suspension or expulsion of noncompliant members from industry associations.

155. *See* Nico Krisch*, The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247, 249 (2006) (discussing the constituency question).

ity. As I explain further in Part III, this approach is too restrictive. Self-regulatory schemes must reach corporations as well as individual contractors. In addition, the focus on corporate and individual accountability when shaping self-regulatory schemes should not serve to evade or somehow excuse state accountability.

Emerging industry schemes also take as axiomatic the hiring of private security and military companies *by states*[156]—overlooking the growing practice on the part of intergovernmental organizations and multi-national corporations to turn to outsourcing.[157] Accountability mechanisms must accommodate the increasingly common hiring of private security and military companies by international organizations, non-governmental organizations, or multi-national corporations. These situations create 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.

Finally, emerging regulatory schemes must attribute levels of responsibility to the various industry players involved. 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 criminally responsible for actions of their employees? How far down along the hierarchical ladder should regulators go when devising regulatory schemes? As I explain below, policies should provide adequate incentives for all relevant actors to abide by agreed-upon standards. While an industry worker in Bangladesh should not share responsibility for the violation of fire safety procedures, an individual contractor deployed in Afghanistan should be held responsible for intentionally killing civilians. In the context of the private security and military industry, in other words, incentives must be created for company personnel to comply with applicable regulation. The model proposed in Part IV goes down the hierarchical ladder all the way from the hiring entity, state or otherwise, to the corporation and the individual in the hope of creating better incentives for all actors involved.

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156. *See, e.g.*, U.N. Draft Convention, *supra* note 133, art. 7.

157. *See, e.g.*, Åse Gilje Østensen, *U.N. Use of Private Military and Security Companies: Practices and Policies*, GENEVA CTR. FOR THE DEMOCRATIC CONTROL OF ARMED FORCES (2011), http://www.dcaf.ch/Publications/UN-Use-of-Private-Military-and-Security-Companies-Practices-and-Policies. *See U.N. Dep't of Safety & Sec.,* Guidelines on the Use of Armed Security Services from Private Security Companies (Nov. 8, 2012), http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesOnUseOfArmedSecurity Services.pdf; Christopher Spearin, *Humanitarian Non-Governmental Organizations and International Private Companies*, DCAF (2006); *ICRC Guard Killed in Mogadishu Shooting Accident*, HIIRAAN ONLINE (Dec. 13, 2008), http://www.hiiraan.com/news4/2008/Dec/8957/icrc_guard_killed_in_mogadishu_shooting_incident.aspx; *see also* Anne-Marie Buzatu & Benjamin S. Buckland, *Private Military & Security Companies: Future Challenges in Security Governance*, DCAF (2010).

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 toward the establishment of a regulatory framework. The most tangible product of this public and 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, governments, NGOs, international organizations should insist on clients' membership in industry associations and adherence to hybrid self-regulatory schemes. More research should be conducted on the industry's contribution to the development, nature, and scope of industry standards. 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.

III. Proposing a New Regulatory Model for the 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 700 companies have signed since its adoption in 2010—suggests that soft law may have distinct appeal for industry players. Similarly, the organic development of corporate and industry codes of conduct under the auspices of the U.S.-based ISOA and the U.K.-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 actors, and, second, the need to extend accountability to 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 multilateral initiatives.

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 the International Financial Reporting Standards (IFRS).[158] What began as an initiative aimed at harmonizing European Union (E.U.) accounting practices developed over three decades to become the authoritative reference point for accountants internationally—so authoritative, in fact, that E.U.-listed companies have been required to prepare their financial statements following these standards since 2005.[159] 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. Approximately 120 nations and reporting jurisdictions permit or require the use of the standards and ninety countries are in full compliance with the standards. Viewed from the perspective of global governance, 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.[160]

Though its contribution is more debated, the Basel Committee on Banking Supervision, too, has led to the harmonization of 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.[161] The informal and horizontal nature of the process—monitoring takes place through peer review[162]—has provided states with an opportunity to exchange experiences and har-

158. See IFRS, International Financial Reporting Standards, http//www.ifrs.com/ifrs_faqs.html#q2 (last visited Nov. 6, 2014).

159. Regulation (EC) No. 1606/2002, of the European Parliament and of the Council of 19 July 2002 on the Application of International Accounting Standards.

160. *See* IFRS, *International Financial Reporting Standards* FAQs, AICPA IFRS RESOURCES (2014), http://www.ifrs.com/ifrs_faqs.html (last visited Nov. 6, 2014).

161. *See Bank for International Settlements, About Basel Committee*, BANK FOR INT'L SETTLEMENTS, http://www.bis.org/bcbs/about.htm (last updated Jun. 10, 2013).

162. *See About Basel Committee*, BANK FOR INTERNATIONAL SETTLEMENTS, http://www.bis.org/bcbs/about.htm (last updated Jun. 10, 2013).

monize industry standards far from the perceived threat of international regulation. [163]

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.[164] The organization's structure, and the mechanisms through which it addresses regulatory directives to national governments and industry, hold potential for the private security and military industry.[165] After consideration of an array of global governance schemes, [166] I believe the 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 or national level with supervision and sanctioning at the international or intergovernmental level. Alongside these monitoring, supervisory, or standard-setting functions, I propose the introduction of a sanctioning 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

163. *See* Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 5 (2006).

164. *See* About the OECD, http://www.oecd.org/about/ (last visited Nov. 6, 2014).

165. *See id.*

166. *See, e.g.*, Agreement Relating to Trade in Cotton, Wool, Man-made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products Between the Government of the United States of America and the Royal Government of Cambodia, U.S.-Cambodia, Jan. 20, 1999, *available at* http://cambodia.usembassy.gov/uploads/images/M9rzdrzMKGi6Ajf0SIuJRA/uskh_texttile.pdf (giving the International Labor Organization a role in monitoring compliance with the agreement); International Labour Organization [ILO], *ILO Constitution*, Art. 26–29 (1919) http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO. (allowing its members to file complaints with the International Labor Office alleging violations on the part of other members of the organization); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (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); KIMBERLEY PROCESS, http://www.kimberleyprocess.com/ (last visited Nov. 6, 2014) (containing a certification scheme as well as a mechanism hearing complaints from project-affected communities but does not have competence to impose solutions or to inflict sanctions (*How We Work: Ombudsman*, OFFICE OF THE COMPLIANCE ADVISOR / OMBUDSMAN, http://www.cao-ombudsman.org/howwework/ombudsman/index.html (last visited Nov. 6, 2014); *About Us*, THE WORLD BANK INSPECTION PANEL, http://ewebapps.worldbank.org/apps/ip/Pages/AboutUS.aspx (last visited Nov. 6, 2014) (operating as 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); *and see* the Commission on Environmental Cooperation http://www.cec.org/Page.asp?PageID=751&SiteNodeID=250 (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).

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, the OECD today comprises thirty-four member states.[167] These states include 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, governance, anti-bribery, education, environmental, finance, health, industry, tax, and other matters. As the premier intergovernmental organization of its kind— and a long-established forum for coordinating global policy initiatives—the OECD's record of fostering cooperation among industry and government deserves close examination. [168]

For our purposes, I would like to focus on one specific OECD initiative: the elaboration of the Guidelines for Multinational Enterprises (the "Guidelines").[169] 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.[170] Addressed by governments to the private sector, the Guidelines are non-binding. Compliance takes place on a voluntary basis, though the countries adhering to the Guidelines make a binding commitment to implement them domestically. [171] In fact, the Guidelines represent the first and perhaps most comprehensive multilateral code of responsible business conduct that governments have committed to promoting.[172] They cover areas as broad as employment and industrial relations, human rights, environ-

167. *See* History of the OECD, http://www.oecd.org/about/history/ (last visited Nov. 6, 2014).

168. *Id*. 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.

169. *See* Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises*, (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf [hereinafter *2011 OECD Guidelines*] (showing the fifth time the Guidelines are amended. The previous amendments took place in 1979, 1984, 1991 and 2011).

170. *See id.* at 3.

171. *See id.* at 13.

172. The Guidelines were first adopted in 1976. By way of comparison, the U.N. 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. *See* Overview of the U.N. Global Compact, http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Nov. 6, 2014).

ment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.[173]

In order to monitor compliance with the Guidelines, the OECD relies on multi-level cooperation and employs a decentralized, soft, mediation-based implementation mechanism.[174] It includes dual levels of control: first, at the domestic level with non-judicial monitoring bodies called National Contact Points (NCPs) located in each individual member state; and, second, at the international level with a supervisory body (the OECD Investment Committee).

An NCP 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."[175] 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.[176] As monitoring bodies, NCPs also serve as the initial stage of consideration for issues and conflicts arising under the Guidelines.[177] Any person or organization may submit a complaint to an NCP, and the NCP may help resolve the dispute by offering services or consulting with third parties. At the end of the process, the NCP may make a public statement or report describing the issues raised, as well as whether an agreement has been reached, and why.[178] As such, NCPs play a role both as a forum for discussion and as a light mechanism for dispute settlement.[179]

At the international level, the OECD Investment Committee fulfills coordination, facilitation, and soft-supervisory functions. 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

173. *See 2011 OECD Guidelines*, *supra* note 169, Foreword, ¶ 1, Pt. I.

174. *See* Gefion Schuler, *Effective Governance through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises*, 9 GERMAN L.J. 1753, 1755 (2008).

175. Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises*: *Frequently Asked Questions, Guidelines for Multinational Enterprises*, *available at* http://www.oecd.org/fr/daf/inv/mne/theoecdguidelinesformultinationalenterprisesfrequentlyaskedquestions.htm. *See also* Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises*, *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf [hereinafter *Guidelines*].

176. *See id.* at 7; *see also.*, http://www.oecd.org/daf/inv/mne/NCPContactDetails.pdf pdf (explaining in Germany, the Ministry of Economics and Technology serves as the National Contact Point. In Canada and Japan, divisions of the countries' respective foreign ministries act as the National Contact Point. In Denmark, Finland and Ireland, ministries of employment serve as National Contact Points).

177. *See* James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 L. & CONTEMP. PROBS. 189, 213 (2005) [hereinafter Salzman].

178. *See id*. at 71–74.

179. *See id*. at 79.

conclusions on the conduct of individual enterprises.[180] Instead, it must consult with the relevant NCPs before making recommendations to improve the functioning of NCPs and the effective implementation of the Guidelines.[181] The non-binding character of its recommendations,[182] and the impossibility to issue determinations to the effect that the Guidelines have been violated, constitute serious limitations in the realm of sanctioning.[183] Though important, the role of the international body is limited in comparison to the role of the local NCPs.[184]

A. *A Model for Effective, Multi-Level Regulation of the 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-governance and hybrid governance into an area that was once plagued by legal uncertainty and a virtual vacuum of transparency and participation.[185] 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 logical next step in the evolution of regulation of the industry, however, is to introduce systematic monitoring and sanctions. 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 (albeit weak) governance structure to support self-regulation and national law making in select areas of economic activity. The U.N. 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.[186] It is informed by the experience of other self-regulatory initiatives, such as

180. *See id*. at 88.

181. *See id. at 73*; *see also* Procedural Guidance, *supra* note 176, § II (C); *see also* Rianne Mahon & Stephen Mc Bride, *Standardizing and Disseminating Knowledge: The Role of the OECD in Global Governance*, 1 EUR. POL. SCI. REV. 83, 90 (2009) ("The OECD's main contribution to transnational governance may, however, be its 'meditative' function.").

182. *See* Salzman, *supra* note 177, at 213–14.

183. *See* Jernej Letnar Cernic, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, 4 HANSE L. REV. 71, 94–96 (2008).

184. *See* Schuler, *supra* note 174, at 1765, 1777 (noting that the shift to a decentralized system was made as part of the 2000 revision of the Guidelines).

185. *See supra* Part II.B.

186. *See supra* note 11.

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 that, 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 subscribed to by a large number of statess.

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.[187] The threat of suspension or 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 two layers of accountability. Current practices and proposals address only corporate accountability, which is insufficient to ensure respect for industry standards.[188] *Only individual* accountability can 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 would significantly broaden the reach (and thus the potential) of self-regulation in the industry.[189]

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 relevant local jurisdictions and by insisting on their good standing as a precondition to contracting their services.

Finally, the model envisages the roles of monitoring and sanctioning as independent of each other. This point may seem obvious—but the tendency has been to refer to monitoring and sanctioning under the general heading "enforcement mechanisms," with the unfortunate consequence that sanctioning is often overlooked.[190] 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,

187. *See supra* note 11.

188. *See generally*, *Voluntary Principles*, *supra* note 20; Draft Charter, *supra* note 11.

189. 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.

190. *See Voluntary Principles*, *supra* note 20 (embodying 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).

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 best equipped to address sanctioning, but are not necessarily capable of monitoring individual companies. The proposed model addresses this concern by splitting monitoring from sanctioning. It advocates in favor of a two-level mechanism combining the use of domestic, non-governmental mechanisms at the monitoring stage with the use of both domestic and international bodies at the sanctioning phase.

B. *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 (LMOs)—bodies created specifically for this purpose, either in individual states or at the regional level. Though local governmental offices often serve as NCPs in the OECD framework,[191] 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 would help mitigate potential conflicts of interest. I disagree with the possibility once raised in the UK of having a public monitoring body.[192] LMOs would, however, be governed by boards with industry, governmental, and non-governmental representation. An obvious candidate for a U.S. or North American LMO, for example, would be a new, independent executive body overseen by a board with representatives from the U.S. Department of State, the U.S. Department of Defense, the ISOA, the ICRC, and leading think tanks and NGOs. A strengthened and restructured ISOA could also work.

LMOs would have broad monitoring responsibility for internationally active private security and military companies registered or operating within their jurisdictions. The scope of this monitoring function could borrow from the Charter, which contemplates the ongoing and independent monitoring of companies' activities (though it did not specify who might act as a monitor),[193] as well as targeted performance reviews when a serious violation occurred or was likely to occur.[194] Taking the monitoring function further than the Charter contemplated, the LMO under the proposed model would also 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 prerequisite

191. *See* Salzman, *supra* note 177, at 213–215. *See also supra* note 176.

192. *See* FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY AND SECURITY COMPANIES (PMSCS): SUMMARY OF PUBLIC CONSULTATION WORKING GROUP, 2010 (U.K.), *available at* http://www.fco.gov.uk/resources/en/pdf/about-us/our-publications/pmsc-working-group-summary-060410 ("Only a Government body would be truly independent, provide legitimacy and encourage wide membership.").

193. *See* Draft Charter, *supra* note 11.

194. *See id.* § IX (D. 1-2).

to bidding on government contracts; mandate participation in industry associations or activity-specific training requirements;[195] establish effective complaint procedures for victims of wrongdoing or their advocates; ensure that hotlines and whistle-blower protections are in place; and maintain a 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.[196]

A core function of the LMOs would be to review and investigate complaints against contracting firms and, importantly, *individuals* as well. Though complaint mechanisms are an increasingly common feature of global governance schemes,[197] they were introduced only recently in the private security and military industry. Several years ago, for example, the U.N. Working Group on Mercenaries developed a procedure allowing for the submission of complaints "by a State, State organ, inter-governmental and non-governmental organization (NGO), or the individuals concerned, their families or their representatives, or any other relevant source."[198] As part of this process, the U.N. Working Group makes recommendations to companies, governments, the party that lodged the complaint and, eventually, to the Human Rights Council.[199] These parties in turn must inform the U.N. Working Group of any follow-up action taken based on its recommendations.[200] The Charter[201] and the U.N. Draft Convention[202] contemplate similar 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

195. *See, e.g.*, *Armed Security Officer*, VIRGINIA DEP'T OF CRIMINAL JUSTICE SERV., http://www.dcjs.virginia.gov/pss/howto/registrations/armedSecurityOfficer.cfm (last visited Nov. 6, 2014) (describing that the Virginia Department of Criminal Justice Services has established a regulatory regime applicable to private security services providers in the State of Virginia, including detailed registration, training and licensing provisions).

196. *See, e.g.*, Investment Advisers Act, 15 U.S.C. §§ 80b-1–80b-21, 203–204 (1940); *Form ADV*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/formadv.htm (last visited Nov. 6, 2014) (presenting the form investment advisors use to register with the SEC and state securities authorities).

197. 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.

198. Office of the High Comm'r for Human Rights, *Methods of Work*, U.N. HUM. RTS. ¶ 17, http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/MethodsWork.aspx (last visited Nov. 6, 2014).

199. *See id.* ¶¶ 20-21.

200. *See id.* ¶ 22.

201. *See* Draft Charter, *supra* note 11, art. 13.

202. U.N. Draft Convention, *supra* note 133, art. 34.

LMO auspices: one that will complement its monitoring, certification, and verification responsibilities.[203]

The two-tiered structure I propose contemplates the referral of complaints and findings of non-compliance to an international body authorized to investigate, sanction, or refer the situation to local or international authorities. 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.[204]

C. *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 foresees a much-expanded role for the LMOs above and beyond that which is performed by industry groups today,[205] 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.[206] Cases deserving of sanction would be referred by the LMOs to the international supervisory body that could issue sanctions in its own right or involve domestic (or international) law enforcement bodies as appropriate.[207] 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

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203. Like under the Charter of the ICoC, the right to file complaints with LMOs should be granted to any party that has been wronged due to a violation. The right should not, however, extend to "any other source" as contemplated under the U.N. Working Group mechanism since doing so risks diluting the mechanism with unjustified or politicized complaints. *See* Office of the High Comm'r for Human Rights, *supra* note 198)

204. *See* Draft Charter, *supra* note 11, art. 13.2.5.

205. In contrast with the OECD framework that 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.

206. Draft Charter, supra note 11, § 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)). LMOs should also publicly announce the outcome of special reviews.

207. Of course, the LMOs also have the capabilities and obligation to report clear criminal behavior or widespread abuses to domestic law enforcement authorities.

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.[208] Like the IASB or the OECD's Investment Committee—but endowed with greater sanctioning power—the international supervisory body 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 U.N. Working Group to serve as the international monitoring, oversight, and sanctioning body of the industry.[209] Part and parcel of the United Nations, the U.N. Working Group has exclusive competence within the U.N. system to deal with matters related to the private security and military industry. Though for many years the U.N. Working Group demonstrated a poor understanding of security outsourcing—its very name, the U.N. 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, are no longer regarded as falling within the definition of "mercenaries").[210] The U.N. Working Group's current complaint mechanism, which can be triggered by filling in a questionnaire available on its website, demonstrates an appreciation for the centrality of complaint procedures to the enforcement of industry standards.[211] A vastly enhanced complaint mechanism, together with well-defined supervisory and policy-making functions, would allow the U.N. Working Group to develop into the contemplated international supervisory body, atop a hierarchy that builds on the monitoring, investigatory, and referral work of LMOs.[212]

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208. 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 that should ideally come in the form of a straightforward and public decision. Except for a potential referral to local law enforcement authorities, sanctions would be imposed at the international level, not at the local level.

209. While making this suggestion, I would like to call for caution. Only very recently did the Working Group concede to the idea that the law should treat mercenaries and private military contractors differently. Previously, the Working Group advocated a ban of private military contractors (I analyzed the evolution of the U.N. position on this subject at length in Richemond-Barak, *supra* note 21). 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 U.N. officials, this mechanism has seldom been used and data on its use is presently unavailable.

210. *See* Richemond-Barak, *supra* note 21, at 1043–46.

211. *See* Office of the High Comm'r for Human Rights, *supra* note 198, (C)(1), ¶ 16.

212. 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 international secretariat competent to hear com-

Another potential candidate to act as the industry's international supervisory body, though less compelling than the U.N. Working Group, is the Committee on the Regulation, Oversight, and Monitoring of Private Military Companies (the Committee) contemplated in the United Nations' draft international treaty governing the private security and military industry (Draft Convention).[213] 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.[214] The Draft Convention also fails to indicate what type of sanctions, if any, the Committee would be able to impose at the outcome of the various review procedures contemplated.[215] Finally and more generally, the state-centric approach[216] adopted by the U.N. Draft Convention sits uneasily with the participatory nature of emerging regulatory schemes.[217]

Returning to the nature of sanctions in the proposed model, and as noted above, most emerging regulatory schemes in the international security industry do not contemplate sanctions. [218] When they do, sanctions are

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plaints 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 192, at 10–11.

213. *See* U.N. Draft Convention, *supra* note 133. 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 measures which they have adopted and which give effect to the provisions of this Convention." (Art. 31) 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." (Article 32) More problematic (and seemingly redundant with the role of the U.N. Working Group) is the competence of the Committee to hear interstate complaints. (Article 34) This mechanism, which exists under most human rights treaties but has not proved particularly helpful, would be activated only between two state parties that 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 interstate complaint process.

214. *See id.*, art. 37.

215. 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." See Draft Convention, *supra* note 133, Article 1(1)(e).

216. This is true even though the Convention applies to states and intergovernmental organizations on an equal footing (Art. 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 (Art. 42); *see also* U.N. Draft Convention, *supra* note 133, ¶ 44.

217. The approach of the U.N. Draft Convention stands in stark contrast with the approach taken by the U.N. 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.

218. *See supra* note 11.

either too lenient or directed exclusively at corporations.[219] 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, imposition of fines,[220] and 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).[221] Here again, the U.N. Working Group could provide the robust institutional backdrop needed to implement an efficient referral system.

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 would 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 toward effective governance. 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: industry associations, complaint mechanisms; and
- At the regional level, by Local Monitoring Offices (LMOs): monitoring and reporting on industry trends, certification of companies,

219. *See supra* Draft Charter, *supra* note 11, § IX (F)(2)(b); *see also* ISOA Code of Conduct, *supra* note 11, § 14.2.

220. *See Minutes of the ICoC Working Group #3 Meeting: June 27, 2011*, *supra* note 17 (providing more details on the suggestion).

221. As noted above, such a referral is actually contemplated under the Voluntary Principles—an initiative supported by the leading buyers of private military services, including the United States and the U.K. *See supra* note 20. Referral by the contracting state to investigative authorities is also contemplated in the Montreux Document. *Montreux Document*, *supra* note 5, art. 20.

verification of compliance, investigations, naming and shaming, referrals to the international supervisory body, forums for discussion and policy making among stakeholders, light mechanisms for dispute settlement,[222] referral to law enforcement of criminal activity.

(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, or international authorities;
   - Contractors: removal of benefits, termination of employment, prohibition to work in the industry, referral to national, regional, or international authorities; and
   - State or other hiring entity: investigation and referral for prosecution of representatives or officials.

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)?[223]

Other industries have recognized the potential of self-regulation—take the IASB or the Basel Committee in the financial sector. Though questions remain, particularly after the global financial crisis, the banking industry insists that regulation will not work unless it is involved in its making. The perfect balance between public and private authority may not have been found but the regulatory shift is irreversible.

The experience of the private security and military industry confirms that law making can no longer be envisaged as an exclusively public activity—not even in the realm of international humanitarian law, which has traditionally been off limits 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 would this expanded conception of law making mean for the role of the state as sole law maker? More broadly, what would it mean 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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222. 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 determine whether a violation has occurred—and, most importantly, should keep a tedious and public record of these violations.

223. *See* Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 Harvard Int'l L.J. 327 (2006).

A. *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 foreign to the theory of sources in international law. Though it challenges the marginal role played by non-state actors in international law and international law making, the experience of the private security and military industry shows that non-state participation in law making does hold certain benefits. Acknowledging that non-state actors play a growing role in international law making, particularly in the controversial area of humanitarian law, does not necessarily deny any role to the state. As scholars have noted, a measure of state involvement may enhance the impact of self-regulatory schemes.[224] The difficulty lies in achieving the optimal balance between public and private authority, and the experience of the private security and military industry provides a pertinent example of how this balance may be achieved.

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 developed the concept of "enforced self-regulation,"[225] where states become involved mainly at the monitoring and enforcing stages. Enforced self-regulation is appealing because it "combines the versatility and flexibility of voluntary self-regulation, but avoids many of the inherent weaknesses of voluntarism."[226] In this type of regulatory regime, companies write rules in consultation with, or under general guidelines established by, the government. Independent compliance groups established within the companies then conduct enforcement. [227] The role of the government is to control the independence of this internal compliance mechanism and to ensure that violations of rules are punishable by law.[228]

The proposed model borrows from enforced regulation by entrusting a level of enforcement and sanctioning authority to private bodies. This feature exists in banking regulation: for example, U.S. Federal law granted the Financial Industry Regulatory Authority (FINRA) the power to discipline firms and individuals in the securities industry who violate FINRA

224. *See* Gunningham & Rees *supra* note 15, at 396 (discussing the need to "complement self-regulation with some form of government and third-party involvement").

225. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION 35 (1992); *see also* John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466 (1982).

226. *See* AYRES & BRAITHWAITE, *supra* note 225, at 106; Braithwaite, *supra* note 225, at 1470.

227. *See supra* note 190, at 10–11.

228. *See* Braithwaite, *supra* note 225, at 1470–71.

rules.[229] In the accounting industry, the wholesale adoption of IFRS into law by certain states (notably E.U. countries) provides a similar, though structurally different, example. [230]

The proposed model also borrows from "orchestrated regulation," a type of scheme characterized by governments' promoting, encouraging, and backing up emerging self-regulatory schemes:

> "Orchestration includes a wide range of directive and facilitative measures designed to convene, empower, support, and steer public and private actors engaged in regulatory activities."[231]

According to its promoters, orchestration can "enhance the impact, legitimacy, and public interest orientation" of self-regulatory frameworks by promoting and encouraging them.[232] Some government oversight contributes not only to greater legitimacy but also to greater transparency, participation, and accountability—themes that echo the analysis in Part II.[233] 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.

Industry schemes should incorporate more of these features. Just as states played a role in initiating self-regulation, they should become involved at the sanctioning stage. There is little doubt that the involvement of public actors (primarily Switzerland) [234] in initiating self-regulation in the private security and military industry endowed the Montreux Document and the ICoC with the legitimacy they needed to flourish. A similar infusion of public authority could and should also take place at the sanctioning stage—that is, when a local LMO or the international supervisory body determines that a referral to national, regional, or international authorities is warranted. The proposed model places an emphasis on this novel and important aspect.

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229. *See generally* IFRS, *Jurisdiction Profiles*, FINANCIAL INDUSTRY REGULATORY AUTHORITY, http://www.finra.org (last visited Nov. 6, 2014).

230. *See* http://www.ifrs.org/Use-around-the-world/Pages/Jurisdiction-profiles.aspx.

231. *See* Kenneth Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VANDERBILT J. INT'L L. 501, 532 (2009). See also Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 Minn. L. Rev. 262, 265 (2004).

232. *See id.* at 510.

233. *See 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.").

234. *See supra* note 33.

Notwithstanding their role in initiating, supporting, and promoting regulation, however, it is important to concede that states have lost their status as the *sole* lawmakers and enforcers in the areas of war and security—as in so many other areas of international law.[235] Increasingly deprived of their sacrosanct monopoly on the *use* of force, states have also lost much of their monopoly over the *regulation* of force.[236] 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 matters of war and security.[237] 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.[238] Just as a broader array of protagonists wages war, a broader array of actors participates in the process of regulating war.[239] 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 governing private war and security represents 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 virtual monopoly over international law making.[240] 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 companies.[241] As a whole, the role of states in the Montreux scheme remains limited: like civil society organizations, states are eligible for membership if they so request and provided they meet a number of conditions.[242] Their affiliation, in

235. *See*, *e.g.*, INFORMAL INTERNATIONAL LAW-MAKING (Joost Pauwelyn, Ramses A Wessel, & Jan Wouters, eds., 2012).

236. *See* THOMSON JANICE, MERCENARIES, PIRATES & SOVEREIGNS (1994) (discussing the evolution of state control over violence).

237. For example, the Independent International Fact-Finding Mission on the Conflict in Georgia established by the Council of Europe and the Bahrain Independent Commission of Inquiry established by Hamad bin Isa Al Khalifa, the King of Bahrain, to investigate the incidents that occurred during the period of unrest in Bahrain in early 2011 and the consequences of these events. *See, e.g.*, *The Report of the Bahrain Independent Commission of Inquiry*, BAHRAIN INDEPENDENT COMMISSION OF INQUIRY (Nov. 23, 2011), http://www.bici.org.bh.

238. *See* Janice, *supra* note 236.

239. *See* Rianne Mahon & Stephen Mc Bride, *Standardizing and Disseminating Knowledge: The Role of the OECD in Global Governance*, 1 EUR. POL. SCI. REV. 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.").

240. International humanitarian law is still defined as consisting of treaties and customary law—that is, state-made law. See, *e.g.*, MARCO SASSOLI, ANTOINE A. BOUVIER & ANNE QUINTIN, HOW DOES LAW PROTECT IN WAR, Ch. 4 (ICRC 2011).

241. *See Montreux Document*, *supra* note 5, Preface.

242. *See* Draft Charter, *supra* note 11, art. 3.3.2.

other words, is neither automatic nor indispensable to the proper functioning of the self-regulatory scheme.

B. *Compliance and Normativity in Global Governance*

These developments 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 many 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 affected 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 frameworks applicable to their activities—broad adherence to the ICoC Code is the clearest evidence of this.[243] 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), 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.[244] 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.[245] 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.[246]

243. *See supra* note 34.

244. *See* HAUFLER, *supra* note 17, at 8 (demonstrating that is consistent with the nature of self-regulation, which is to beyond the law).

245. *See supra* note 25.

246. *See* Gunningham & Rees, *supra* note 15, at 379.

Self-regulation has indeed established a strong "claim to obedience" in international security contracting.[247] The elaboration of industry standards as part of an inclusive regulatory process bringing together all major industry players has triggered a tangible pull toward internalization and compliance.[248] Although this pull toward compliance cannot be fully quantified, it manifests itself in how the industry approaches regulation, expresses support for emerging regulatory schemes, and participates in regulatory initiatives.[249]

Companies signal their support for self-regulation on their websites and in claims of fidelity to industry best practices (over 700 are ICoC signatories).[250] They have also revised their codes of conduct to align them with the ICoC.[251] 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.[252] Enhancing compliance is the central objective of the Swiss multi-stakeholder initiative.[253] In fact, following the Montreux Document's endorsement by the United Nations and industry associations,[254] the hope was expressed that the Montreux Document would be incorporated in companies' codes

247. Skeptics would remark that signing on to the ICoC by no means implies greater compliance, which 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 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* "Introduction" of this Article). 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.

248. *Id.*

249. *Id.*

250. *See, e.g.*, OLIVEGROUP, http://www.olivegroup.com/ (last visited Nov. 6, 2014); HART SECURITY, http://www.hartsecurity.com/ (last visited Nov. 6, 2014); NEPTUNE MARITIME SECURITY, http://www.neptunemaritimesecurity.com/ (last visited Nov. 6, 2014).

251. *See supra* note 95.

252. *ISOA Code of Conduct*, supra *note 11, pmbl.*

253. *Minutes of the IcoC Working Group #3 Meeting: June 27, 2011*, *supra* note 15 (noting that "participation ultimately leads to better practice."). On the advantages of multi-stakeholder arrangements on compliance, *see* Abbott & Snidal, *supra* note 231, 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).

254. Cockayne, *supra* note 47, 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.").

of conduct and perhaps even, one day, in an international convention.[255] 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.[256]

Interestingly, the non-binding nature of emerging regulatory schemes does not appear to have hindered the path to internalization. On the contrary, the industry's experience arguably provides a casebook example of circumstances where non-binding agreements have achieved more than have binding ones. 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."[257]

The experience of the international private security and military industry provides a vivid example that "hard" law is only one way of enhancing compliance.[258] With each publicized industry abuse, from Abu Ghraib to numerous other incidents implicating contractors, [259] 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.[260] Though imperfect, the normative regime that emerged in the past

255. In the wake of the Montreux Document's adoption, the United Nations began to draft a treaty regulating private war and security. *See* U.N. Draft Convention, *supra* note 133.

256. *See* Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004).

257. *See* Raustiala, *supra* note 125 (*Compliance. . .)* at 423–24, 426; *see also*, Charles Lipson, *Why are International Agreements Informal?*, 45 INT'L ORG. 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).

258. *See, e.g.*, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton, ed. 2000); *see also* Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 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."); *see also* Raustiala, *supra* note 125, 426.

259. *See supra* Part III.B.3. See, for example, *Security Firm Cleared by US Army*, BBC News (June 14, 2006) (the UK faced outrage after the 2005 circulation of a "trophy video" on the Internet showing Aegis employees randomly shooting at civilians from the back of their vehicle on the road to Baghdad airport but the contractors were found by the US Army's Criminal Investigation Division not to have not overstepped the company's guidelines on the use of force); and *G4S 'Warned' Over Killer Security Guard Danny Fitzsimons*, BBC (Oct.1, 2012) (security contractor killed two in 2009 shooting in Baghad).

260. Raustiala, *supra* note 125, at 439 ("[L]ooking beyond compliance to the evaluation of effectiveness, particularly in the context of international law, yields many benefits. Legal

decade has clarified the legal and moral environment within which private security companies operate.

This will not be the first time that "less is more" in the realm of normativity.[261] I have argued elsewhere that normative ambiguity may, at times, produce satisfactory outcomes.[262] 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.[263] 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 idea quite well. They point to the intrinsic value of self-regulation—beyond its ability to become hard law.[264] They demonstrate that a non-binding and voluntary regime is not necessarily weak or inefficient.[265] While the effectiveness of informal means of cooperation *among states* has been acknowledged,[266] 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 with this particular issue for over a decade.[267] Informal,

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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.").

261. *See* Prosper Weil, *Towards Relative Normativity in International Law?* 77 AM. J.INT'L L. 413, 413 (1983) (arguing against a hierarchy of normativity); *see also* Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 319 (2006).

262. *See* Daphné Richemond, *Normativity in International Law: The Case for Unilateral Humanitarian Intervention*, 6 YALE HUM. RTS. & DEV'T L.J. 45, 45 (2003) (addressing the question of whether there should be norms to govern unilateral humanitarian intervention).

263. 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.

264. *See* Gupta & Lad, *supra* note 16, at 416–17 (presenting a similar view and 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 & MICHAEL TREBILCOCK, HARD CHOICES, SOFT LAW: VOLUNTARY 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 231, at 531 (elaborating Kirton & Trebilcock's view).

265. During the elaboration of the U.N. 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* U.N. Draft Convention, *supra* note 133, ¶ 73.

266. *See* Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 190 (1991).

267. For an overview of the challenges, see Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors,* 98 J. Crim. L. & Criminology 711 (2008); and Marco Sassòli, *Taking Armed Groups Seriously: Ways to Im-*

voluntary and non-binding tools offer interesting avenues for the regulation of non-state actors—including, but not only, in the conduct of war. [268]

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.[269] Salzman has characterized such "law" as "actions which operate below the radar screen of what we normally consider to be 'lawmaking' activities but may significantly influence agency activities." [270] This new "law" is measured by "*the weight to be given to a norm or decision.*"[271]

The question inevitably arises whether multi-stakeholder initiatives such as the Montreux Document or the ICoC might ever be characterized as law. In the context of global governance, the answer is probably 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."[272] Though global governance produces non-binding and non-coercive regulation, it does fulfill a regulatory function akin to law.[273] 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 transnational problem-solving and the harmonization of national law."[274] As in other contexts, global, voluntary, and hybrid regulatory schemes have contributed to solving the legal uncertainties that permeated the private security and military industry only a few years back. But the use of these schemes raises many questions of international legal theory.

Scholars have discussed the implications and precise nature of a growing body of informal international regulation in a variety of contexts,

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prove their Compliance with International Humanitarian Law, 1 J. INT'L HUMAN. LEGAL STUD. 5 (2010), *available at* http://www.cdp-hrc.uottawa.ca/uploads/TakingArmedGroups Seriously.pdf.

268. *See* Steven Ratner, *Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War*, 22 EUR. J. INT'L L. 487, 499 (2011) (arguing that "as international practice expands the universe of legal duty-holders, current approaches to compliance need to broader 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*."); *see also* Benjamin Perrin, *Promoting Compliance of Private Security and Military Companies with International Humanitarian Law*, 88 INT'L REV. RED CROSS 613, 634 (2006).

269. James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 L. & CONTEMP. PROBS. 189, 218 (2005).

270. *Id.*

271. *See* Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR.J.INT'L L. 23, 27 (2009) (emphasis added).

272. *See* Kingsbury et al., *supra* note 9, at 17.

273. *See* Slaughter, *supra* note 266, at 192.

274. *See id.* at 196.

though rarely in the context of humanitarian law.[275] A notable exception, 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 Roberts and Sivakumaran as law "concluded between subjects with recognized lawmaking capacities" and "ones without."[276] 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 crystallize into customary international law.[277]

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 innovative analysis of the emergence of "quasi-custom,"[278] will trigger a genuine discussion of the role played 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 humanitarian law making. The involvement of intergovernmental 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 humanitarian 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-

275. *See generally* Paul Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573 (2011) (discussing the increasing role played by private actors in international lawmaking); *see also* INFORMAL INTERNATIONAL LAW-MAKING, *supra* note 235.

276. *See* Roberts & Sivakumaran, *supra* note 12, at 144.

277. Kingsbury et al., *supra* note 9, 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"). For a discussion of whether customary international law may reflect the practice of actors other than states, *see id.* at 149–51 (developing the notion of "quasi-custom").

278. *See* Roberts & Sivakumaran, *supra* note 12, at 149–51.

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 affected the moral and legal environment in which the industry operates.[279] Measuring this impact is as difficult as it is important.[280] Because compliance levels cannot be measured empirically at this stage, the Article uses benchmarks developed by global governance scholars to assess the normative outcome of the emerging regulatory framework.

With the help of these benchmarks, this Article provides a more accurate and precise picture of the normative outcomes 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 it is 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 affect the behavior of non-state actors.

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 directed at individual contractors must take shape. Such a strategy would create positive and direct incentives by making 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.[281]

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279. *See generally* Cockayne, *supra* note 47; *see also* Interview with Peter Singer, Director of the Brookings Institute (Mar. 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).

280. *See* HAUFLER *supra* note 17, at 118 (discussing the various ways of measuring the success of self-regulation).

281. Certain schemes contemplate the reentry of excluded members after time has passed; others do not contemplate sanctions at all. *See supra* note 11.

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 entrusted with 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 (limited sanctions and a focus on corporate accountability), 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, particularly in the realm of war and security. 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 can create broad buy-in and much-needed incentives for these actors to comply. As more non-state actors play an active role on the international scene in general, and on the modern battlefield in particular, and as the challenge of regulating their behavior grows more acute, this study offers valuable insight on how it can be accomplished. Beyond the participatory element, the Article also introduces the idea of "soft law" in an area previously regulated by states and through "hard law." Though both participation and "soft law" have been analyzed in great depth in other contexts, this Article brings to light their contribution to the regulation of war and security.

Finally, the experience of the private security and military industry 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,[282] international regulation can take time to shape up, and regional regulation may not suit all relevant players.[283] 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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282. 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.

283. 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, e.g.*, Thomas Landan, *Worried Banks Resist Fiscal Union*, N. Y. TIMES (June 17, 2012), *available at* http://www.nytimes.com/2012/06/18/business/global/worried-banks-pose-threat-to-push-for-financial-union.html?_r=0.