
Regulating War: A Taxonomy in Global Administrative Law

Daphné Richemond-Barak*

Abstract

This article examines the intersection between the private security and military industry and the emerging framework of global administrative law ('GAL'). I explore in this article one aspect of this intersection, namely the use of GAL to create a taxonomy of the industry's regulatory schemes. The industry is characterized by a fragmented and decentralized regulatory framework, which has yet to be presented in a complete and orderly fashion. This article fills the gap by applying GAL's methodology to the private security and military industry. Using the industry as a case study in GAL, I identify (1) international formal administration (the United Nations Working Group on Mercenaries); (2) distributed domestic administration (contract and domestic legislation); (3) hybrid modes of administration (multi-stakeholder initiatives); and (4) private modes of administration (industry associations and codes of conduct). By emphasizing – but not limiting itself to – hybrid and private modes of administration, this article describes what is an increasingly complex manifestation of global governance. Its purpose is to highlight GAL's potential in understanding and contending with the growth of the private security and military industry.

1 Introduction

In this article, I consider the regulation of private warfare through the framework of Global Administrative Law (GAL). In particular, I examine how GAL can help us conceptualize the regulation of this complex industry. In recent years, significant efforts have been made to enhance the regulatory framework applicable to private

* Radzyner School of Law, Interdisciplinary Center, Herzliya. This article draws on research conducted as part of my doctoral dissertation at Tel Aviv University, under the supervision of Professor Eyal Benvenisti. Any mistakes are of course mine only. Email: daphne.barak@gmail.com.

security and military companies and their personnel.¹ These efforts have taken place at the international, domestic, industry, and company levels – leading to the emergence of a disorganized and decentralized regulatory framework. Few have sought to understand, analyse, or assess the regulatory framework applicable to the private security and military industry.² This article sets out to do so, drawing on the insights gained from global administrative law.³

GAL's main contribution is to provide both a framework and the analytical tools needed to create a comprehensive and organized taxonomy of existing regulatory mechanisms. Using GAL's methodology and terminology, I identify four modes of administration in the private security and military industry: (1) an international mode of administration (the UN Working Group on Mercenaries⁴); (2) distributed domestic modes of administration (domestic legislation and contracts); (3) hybrid modes of administration (multi-stakeholder initiatives); and (4) private modes of administration (industry associations and internal codes of conduct).

I begin with a brief overview of both the private military industry and the fundamentals of global administrative law (section 2). Drawing on insights gained from GAL, I then offer a taxonomy of the regulatory schemes affecting the private security and military industry (section 3). While this study is not limited to self-regulation alone, I highlight the promise this mode of regulation holds for future governance of the private security and military industry.

2 The Private Military Industry, Global Administrative Law, and their Intersection

Before delving into an analysis of military outsourcing from the perspective of GAL, preliminary remarks about each of these fields are in order.

¹ 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'), adopted on 17 Sept. 2008, 13 *J Conflict Security L* (2008) 451, at 453 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.'

² de Nevers, '(Self) Regulating War?: Voluntary Regulation and the Private Security Industry', 18 *Security Stud* (2009) 479; and Ranganathan, 'Between Complicity and Irrelevance? Industry Associations and the Challenge of Regulating Private Security Contractors', 141 *Georgia J Int'l L* (2010) 303; and Hoppe and Quirico, 'Codes of Conduct for Private Military and Security Companies: The State of Self-regulation in the Industry', in F. Francioni and N. Ronzitti (eds), *War by Contract* (2011), at 362.

³ It should however be noted that the connection between the emerging field of global administrative law and the private military industry has been made in the past – in particular by the Institute for International Law and Justice at New York University, as explained in greater length in sect. 2C below.

⁴ This refers to the United Nations Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination. See <http://www2.ohchr.org/english/issues/mercenaries/index.htm>.

A The Private Military Industry

Soldiering-for-money is not a new phenomenon. The use of mercenaries is recorded in the Bible,⁵ in the writings of Machiavelli,⁶ and in numerous United Nations resolutions condemning their activity in Africa in the 1960s and 1970s.⁷ But in the last two decades, military outsourcing has taken a more sophisticated form – with governments entrusting private business entities with essential security and military functions. Such responsibilities, traditionally within the purview of the state, are now being carried out by contractors with only a small measure of oversight on the part of the state.

Though the trend of outsourcing military functions to private companies began as early as the 1970s, the new breed of actors that emerged in the 1990s as ‘security companies’ has grown exponentially following 11 September 2001 and with the wars in Afghanistan and Iraq. Today, the number of contractors in Iraq and Afghanistan, for example, exceeds the number of enlisted troops.⁸

The largest employers of military contractors have been companies based in the United States and the United Kingdom – such as Blackwater, G4S, Aegis, Erinys, Triple Canopy, and DynCorp.⁹ The US and UK are also the industry’s most important clients. But states are by no means the companies’ sole source of business. Private contractors also work – and increasingly so – for multinational corporations (such as General Electric)¹⁰ and international and non-governmental organizations (such as the UN, the ICRC, and CARE).¹¹

Just as the resort to the private sector has grown in the last two decades, the range of the services offered by the companies has also expanded dramatically.¹² When working on behalf of states, private security and military companies assume substantial roles

⁵ In Judges, it is mentioned that Hebrew leaders in 1250 BC supplemented their armies with men hired for pieces of silver. When the Hebrews fought the Philistines, King Saul also had recourse to mercenaries (Samuel I, 15:52).

⁶ See N. Machiavelli, *The Prince* (1513) 55–56 (1513, 2005 edn).

⁷ See, e.g., GA Res 2395 (XXIII), UN Doc A/2395 (1968); GA Res 3396 (XXX), UN Doc A/3396 (1975) (*Question of Southern Rhodesia*); SC Res 405, UN Doc S/RES/405 (1977) (Benin); and SC Res 507, UN Doc S/RES/507 (1982) (Seychelles).

⁸ See, e.g., *Transforming Wartime Contracting: Controlling Costs, Reducing Risks*, Final Report to Congress, Commission on Wartime Contracting in Iraq and Afghanistan (2011), at 18.

⁹ See Cronin, ‘Rights: Violations Privatized Away’, Inter Press Service News Agency, 10 Feb. 2009 (notes that about 85% of private security firms are based in either Britain or the US).

¹⁰ See, e.g., Fairweather and Tibbetts, ‘British Guard Killed in Iraq Ambush’, *Daily Telegraph*, 24 Mar. 2004.

¹¹ See Bearpark and Schulz, ‘The Future of the Market’, in S. Chesterman and C. Lehnardt (eds), *From Mercenaries to Market* (2002), at 240, 247.

¹² See O’Reilly, ‘“Eye Spy Private High”, Re-Conceptualizing High Policy Theory’, 46 *Brit J Criminology* (2006) 641, at 648 (listing bodyguard services, business intelligence, confidential investigations, corporate advisory and restructuring services, crisis management and response, fraud prevention, kidnap and ransom advice/negotiation services, political and security risk analysis, and the safeguarding of intellectual property and corporate brands).

alongside the military or even in its place.¹³ From guarding government officials in the Persian Gulf to combat training and oil field security in Colombia, it seems that no task is too critical or sensitive for companies to undertake. Indeed, the spectrum of activity performed by private military contractors is as broad as that performed by ordinary soldiers – from cooking, driving, and protecting individuals, locations, and convoys, to training, intelligence gathering, target identification, the operation of complex military systems, and prisoner interrogation.

Private military contractors work very closely with the armed forces they support, playing a growing role in the conduct of military operations. Often they are hired to help the military enhance its own capabilities (as in Iraq,¹⁴ Latin America,¹⁵ and the Balkans¹⁶). Such training may include battlefield planning, military strategy, or running battle simulation centres.¹⁷ Contractors also provide expertise and know-how needed on the modern battlefield – from logistical support (including communications, intelligence, and aerial surveillance) to the maintenance of sophisticated military equipment.¹⁸ One area in which the involvement of private military contractors has been growing is intelligence – raising much criticism.¹⁹ For example, contractors post the names of new terrorist suspects onto immigration and law enforcement watch lists, handle clandestine meetings with CIA sources, conduct clearance and security checks, and track high-value targets in Afghanistan.²⁰ Another highly controversial role entrusted to private military contractors has been the supervision and monitoring of other contractors.²¹

The contractors' closeness with the army and military operations (in terms of background,²² function, and location) means that even seemingly benign tasks may have important implications. This was the difficult lesson learned from the

¹³ See 'Military for Hire', ABC News, 18 Sept. 2007, available at: <http://abcnews.go.com/WN/IraqCoverage/story?id=3619090&page=1>; and Brooks, 'Messiahs or Mercenaries? The Future of International Private Military Services', 7 *International Peacekeeping: Managing Armed Conflict in the 21st Century* (2009) 129, at 129.

¹⁴ See Calbreath, *supra* note 8 (reporting that Vinnell trains 900-troop battalions for the Iraqi army on a \$48 million sole source contract).

¹⁵ See, e.g., 'BP at War', *Economist*, 17 July 1997, available at: www.economist.com/node/151558.

¹⁶ 'Outsourcing War', *BusinessWeek Online*, 15 Sept. 2003, available at: www.businessweek.com/magazine/content/03_37/b3849012.htm.

¹⁷ Schrader, 'U.S. Companies Hired to Train Foreign Armies', *Los Angeles Times*, 14 Apr. 2002, at 4.

¹⁸ *Ibid.*

¹⁹ See, respectively, Chesterman, "'We Can't Spy If We Can't Buy!': The Privatization of Intelligence and the Limits of Outsourcing Inherently Governmental Functions", 19 *EJIL* (2008) 1055; and Fainaru and Klein, 'In Iraq, A Private Realm of Intelligence-Gathering', *Washington Post*, 1 July 2007.

²⁰ 'Ex-CIA Worker Sentenced in Afghan Beating', CBS News, 13 Feb. 2007 available at: www.cbsnews.com/stories/2007/02/13/national/main2471092.shtml?source=RSS&tr=HOME_2471092

²¹ In 2004, Aegis was awarded a \$300 million contract to supervise 50 other private security and military companies operating in Iraq. See *infra* notes 243. See also Singer, 'Nation Builders and Low Bidders in Iraq', *New York Times*, 15 June 2004.

²² See P. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (2003), at 76; and Haynes, 'Private Guards Set for Bigger Role Despite Fury at Blackwater Deaths', *TimesOnline*, 15 Oct. 2007, available at: www.nytimes.com/2004/06/15/opinion/nation-builders-and-low-bidders-in-iraq.html.

abuses committed at the Abu Ghraib prison in Iraq in 2004 by US soldiers and US contractors who had been hired as interrogators and translators.²³ Similar tasks were performed by contractors at the US base at Guantanamo Bay, Cuba.²⁴ The use of contractors to run military checkpoints in Iraq and Israel raises comparable issues.²⁵

When working on behalf of international organizations, private military contractors operate in equally volatile environments – in conflict or post-conflict. Their tasks are not always limited to security and have at times included logistical support in battle zones as well. For example, Pacific A&E provided logistical support to the UN in Sierra Leone, and International Charters Incorporated of Oregon provided assault and transport helicopters to ECOWAS in the Liberian war in the 1990s.²⁶ ArmorGroup (now G4S²⁷) provided support to UN agencies and non-governmental organizations, such as landmine removal in Southern Sudan.²⁸ Perhaps the most poignant testimony to the ever-expanding range of private military company activity is the willingness expressed by certain private military companies to become involved in peacekeeping operations on behalf of the United Nations, NATO, or other regional organizations.²⁹

In the realm of personal protection and guarding, examples of private military contractors' activity abound. Contractors guard high-profile government figures – Paul Bremer, the former head of the Coalition Provisional Authority in Iraq, was guarded by Blackwater – and employees of multinational corporations working in dangerous areas.³⁰

²³ Hersh, 'Torture at Abu Ghraib', *New Yorker*, 10 May 2004.

²⁴ Witte and Merle, 'Contractors Are Cited in Abuses in Guantanamo', *Washington Post*, 4 Jan. 2007.

²⁵ Lagerquist and Steele, 'Group 4 Security Firm Pulls Guards Out of West Bank', *Guardian*, 9 Oct. 2002; Bennett, 'Victims of an Outsourced War', *Time*, 15 Mar. 2007; and Pfeffer, 'Security Guards Shoot Palestinian at West Bank Checkpoint', *Haaretz*, 27 Apr. 2009. See also Ronen, 'Israel: The Use and Regulation of Private Military and Security Companies in Situations of Armed Conflict' (2010) (on file with author); and see Programme on Humanitarian Policy and Conflict Research, 'Private Security Companies in the OPT' (2008), available at: <http://opt.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pageId=1640>.

²⁶ 'Private Military Companies, Response to the Secretary of State for Foreign and Commonwealth Affairs', Ninth Report of UK Foreign Affairs Committee (2002) ('Green Paper'), available at: www.fco.gov.uk/Files/ksfile/mercenaries.O.pdf, at para. 56; Singer, 'Outsourcing The War', *Salon.com*, 16 Apr. 2004, at 3, available at: http://dir.salon.com/news/feature/2004/04/16/outsourcing_war/index.html; Verloy, 'Making a Killing: Private Military Firms Say They are the Future of Humanitarian Intervention in Africa', *New Internationalist* (2004); and Singer, 'Peacekeepers, Inc.', 119 *Policy Rev Online* (2003) 5.

²⁷ See 'G4S Buys Security Firm Rival ArmorGroup for £43m', *TimesOnline*, 21 Mar. 2008, available at: http://business.timesonline.co.uk/tol/business/industry_sectors/support_services/article3593666.ece.

²⁸ See Klinger, 'ArmorGroup Wins \$7 Million Sudan Contract', *The Times*, 14 July 2006.

²⁹ See, generally, Hukill, 'Should Peacekeepers Be Privatized?', 20 *Nat'l J* (2004) 1526; McLaughlin, 'Guns For Hire Thrive in Africa', *Christian Science Monitor*, 15 Mar. 2004; and Verloy, *supra* note 26. For more on private military contractors and peacekeeping operations see Richmond-Barak, 'The New Peacekeepers? Private Military Companies and the Future of Peacekeeping Operations', European Society of International Law Paper Agora Series (2007), available at: www.esil-sedi.eu/fichiers/en/Agora_Richmond_358.pdf; and Lehnardt, 'Peacekeeping', in S. Chesterman and A. Fisher (eds), *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (2009), at 205.

³⁰ See Fairweather and Tibbetts, *supra* note 10 (Olive Group protected employees of General Electric in Iraq).

The same is true when contractors work on behalf of international organizations. The UN and the ICRC increasingly rely on private security to protect staff and facilities in hostile environments.³¹ The UN employed private intelligence firms to assist the UN Transitional Administration in East Timor, and hired Defense Systems Ltd. in the 1980s and 1990s for the UN Mission in the Democratic Republic of the Congo.³² Private contractors have also flown protected UN personnel (as well as food convoys and warehouses) in Congo and Liberia.³³ Contractors are also entrusted with the protection of strategic assets. For example, under a \$7 billion contract, KBR provided solutions in case Saddam Hussein's forces set fire to the country's oil fields at the onset of the Second Gulf War,³⁴ and in Iraq and Latin America, contractors protect major oil installations.³⁵

On the less problematic range of the spectrum, contractors build detention camps³⁶ and military bases,³⁷ provide food and shelter for the army, wash soldiers' laundry, and work in the kitchen.³⁸ These activities constitute an important part of the contractors' activity, but by no means the bulk of it. In other words, when contending with private military contractors, it must be kept in mind that contractors perform a range of activities – some of which are closely related to the conduct of military operations.

To summarize, private security/military companies are engaged in a common range of activities, employing personnel with similar backgrounds, and are exposed to similar risks. It is therefore appropriate to view these actors as constituting a global *industry*. Regulation has been approached, generally speaking, at the industry level – as the companies have organized under the umbrella of industry associations in order to pursue common goals. Similarly, states and international organizations have attempted to contend with the companies as an industry.

³¹ Fennell, 'Private Security Companies: The New Humanitarian Agent', Presentation to the Conference on Interagency Co-ordination in Complex Humanitarian Emergencies, 19 Oct. 1999, at Cranfield University/Royal Military College of Science, Shrivenham, Wilts. See also Green Paper, *supra* note 26, at para. 56; and Singer, 'Should Humanitarians Use Private Military Services?', *Humanitarian Aff Rev* (2004) 14.

³² See F. Schreier and M. Caparini, *Privatizing Security: Law, Practice and Governance of Private Military and Security Companies* (2005), at 32; and O'Brien, 'PMCs, Myths and Mercenaries: The Debate on Private Military Companies', *Royal United Service Institute J* (2000), at 7.

³³ See NPR, 'Private Military Firm Pitches Its Services in Darfur', 26 May 2006, available at: www.npr.org/templates/story/story.php?storyId=5433902.

³⁴ BusinessWeek Online, *supra* note 16.

³⁵ See, respectively, 'The Baghdad Boom', *Economist*, 25 Mar 2004, and *Economist*, *supra* note 15.

³⁶ BusinessWeek Online, *supra* note 16 (also notes that KBR built the Guantanamo Bay detention camp).

³⁷ Mayeda and Blanchfield, 'Military Should Shed More Light on Private Contractors to Afghan Mission', CanWest News Service, 20 Nov. 2007, available at: www.canada.com/story_print.html?id=2c4e93d3-253d-422a-86a8-71e7d04d71&sponsor= (a large Canadian engineering company, SNC-PAE, employed under the Canadian Forces Contractor Augmentation Programme, has built its own military-like base in Kabul).

³⁸ 'Military-Industrial Complexities', *Economist*, 27 Mar. 2003.

B Global Administrative Law

Global administrative law, a framework developed in contemporary times³⁹ primarily by international law scholars at New York University,⁴⁰ seeks to improve our understanding of global governance. It is defined as encompassing

the legal mechanisms, principles, and practices, along with supportive social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make.⁴¹

An essential characteristic of global administrative law is that it does not replace but rather exists alongside more 'formal' types of regulation, such as national legislation or international treaties.⁴² Accordingly, in global administrative law, 'there is no single agent who can decisively resolve the issue for practical purposes'.⁴³ Instead, a wide variety of regulatory and quasi-regulatory actors (and the interaction between these actors) must be considered – a task I undertake in section 3.⁴⁴

GAL's underlying idea is that while global governance operates along the same lines as administration in general,⁴⁵ the meaning of administration is different in the realm of global governance: it is not necessarily exclusively public, it is not exclusively national, and it tends not to be obligatory. This phenomenon, GAL scholars argue, is common to a variety of fields, from forestry⁴⁶ to banking,⁴⁷ environmental law,⁴⁸ accounting,⁴⁹ and labour law.⁵⁰ An essential contribution of global administrative law, therefore, is that

³⁹ For a list of early works in the field of global administrative law see www.iilj.org/gal/bibliography/GALBib-Historical.asp.

⁴⁰ See Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', 68 *L & Contemp Probs* (2005) 15, at 15 (defining the Global Administrative Law Research Project at NYU as 'an effort to systematize studies in diverse national, transnational, and international settings that relate to the administrative law of global governance').

⁴¹ Kingsbury, Krisch, Stewart, and Wiener, 'Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law', 68 *Law & Contemp Probs* (2005) 1, at 5.

⁴² See, e.g., www.css.ba/projects/index.html (the Centre for Security Studies in Sarajevo notes that its code 'is intended for use in addition to national legislation and all firms should also meet the basic conditions imposed by national legislation, complying strictly with both their spirit and the letter') (emphasis added).

⁴³ Kingsbury, 'The Concept of "Law" in Global Administrative Law', 20 *EJIL* (2009) 23, at 26.

⁴⁴ See, generally, Benvenisti, 'The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions', 68 *Law & Contemp Probs* (2005) 319.

⁴⁵ See Kingsbury, *supra* note 41, at 2.

⁴⁶ Meidinger, 'The Administrative Law of Global Private-Public Regulation: The Case of Forestry', 17 *EJIL* (2006) 47.

⁴⁷ Barr and Miller, 'Global Administrative Law: The View from Basel', 17 *EJIL* (2006) 15.

⁴⁸ See, e.g., Clapp, 'The Privatization of Global Environmental Governance: ISO 14000 and the Developing World', 4 *Global Governance* (1998) 295; and Craik, 'Deliberation and Legitimacy in Transnational Environmental Governance', IILJ Working Papers 2006/10 (Global Administrative Law Series) (2006).

⁴⁹ Mattli and Büthe, 'Global Private Governance: Lessons from a National Model of Setting Standards in Accounting', 68 *Law & Contemp Probs* (2005) 229.

⁵⁰ Blackett, 'Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct', 8 *Indiana J Global Legal Stud* (2001) 401.

it ‘examines the practical issues arising in different types of global regulatory institutions and regulatory subject areas that have usually been studied in relative isolation from each other’.⁵¹ While there is no consistency as to how regulation/administration is envisaged in these various fields, global administrative law highlights the commonalities in an effort to encourage dialogue, mutual learning, and harmonization.⁵²

Among these commonalities are the increasing role played by private regulators and public-private bodies, the wide array of informal/transnational institutional arrangements that operate alongside formal/domestic institutions, and the extension of normative sources beyond traditional ones.⁵³ These elements characterize the global administrative space.⁵⁴ First, within the global administrative space, the boundary between public and private has been blurred – with standards being elaborated *by* and *for* private (or semi-private) entities.⁵⁵ Consider, for example, the Forest Stewardship Council, a broad-participation international association the members of which include representatives from environmental and social groups, the timber trade, and the forestry profession as well as corporations and community forestry groups.⁵⁶ Another unique trait of the global administrative space is that it finds itself somewhere between the domestic and the international realms.⁵⁷ Where activities take place on the territory of more than one state or where local laws or enforcement practices tend to be wholly insufficient (such as in the case of child labour in the global clothing industry, in particular from a labour law perspective) – global standards are called for. The use of the word ‘global’ in *global* administrative law reflects this particular aspect of global governance: GAL acknowledges the existence of regulatory or quasi-regulatory schemes that transcend individual states and take into account the variety of players (public/private; domestic/transnational) active in a given field. In the global administrative space, moreover, informal processes play significant roles – alongside formal institutional arrangements. Consider, for example, the horizontal and informal process created by the Basel Committee in the area of bank regulation⁵⁸ or the soft law elaborated to contend with environmental challenges.⁵⁹ Finally, in the global administrative space, where non-binding norms play a significant role, the concept of law and the meaning of compliance are more fluid. Rather uniquely, global administrative law recognizes the corpus of standards and soft norms that – even in the absence of black letter law or enforcement mechanisms – has the potential to enhance participation, accountability, and transparency.

⁵¹ See Kingsbury, *supra* note 41, at 4.

⁵² *Ibid.* See also Krisch and Kingsbury, ‘Global Administrative Law: The Quest for Principles and Values’, 17 *EJIL* (2006) 187.

⁵³ ‘Global Administrative Law – Resources, Concept and Working Definition’, at 2, available at: <http://iilj.org/GAL/GALworkingdefinitionnoteasp>.

⁵⁴ Kingsbury, *supra* note 43, at 25.

⁵⁵ See, e.g., Meidinger, *supra* note 46.

⁵⁶ See www.fsc.org/about-fsc.html.

⁵⁷ Kingsbury, *Emergence*, *supra* note 40, at 25.

⁵⁸ See *infra* note 89.

⁵⁹ Copenhagen Accord, Draft Decision -/CP.15, FCCC/CP/2009/L.7, 18 Dec. 2009.

To summarize, global administrative law provides a framework for the analysis of global governance in a variety of fields, highlighting common patterns and practices among an array of private and public actors. I argue that the private military industry may, too, be analysed through the prism of global administrative law.

C *The Intersection: GAL as a Framework for Understanding Governance in the Private Military Industry*

That GAL might be instructive in studying the industry has been envisaged in the past – most notably in a work by Simon Chesterman and Angelina Fisher which draws ‘on insights from work on privatization, regulation, and accountability in the emerging field of global administrative law’.⁶⁰ Published as part of the Project on Military and Security Companies at New York University,⁶¹ the book builds on the insights gained from global administrative law: it addresses the questions of accountability and transparency and seeks to draw lessons for the private security/military industry from other sectors. While global administrative law certainly constitutes the backdrop to the book, none of its chapters directly applies insights gained from GAL to the industry.⁶²

The direct application of GAL’s methodology to the industry holds much promise.⁶³ First, GAL is helpful in classifying the industry’s complex regulatory schemes. The use of global administrative law enables not only an exhaustive presentation of self-regulatory schemes but also an orderly one. Unlike existing literature in this field,⁶⁴ this article’s declared intention is to paint a complete picture of existing regulation.⁶⁵ In addition, unlike in the studies mentioned above, GAL constitutes this article’s main focus. Most, if not all, of the arguments made herein rest *directly* on GAL. Thus, this article constitutes the first real attempt at using GAL as a tool to analyse and assess the regulation of the private security and military industry. My hope is that, by applying GAL’s theoretical insights to the industry, this article will contribute both to the literature on the industry and to contemporary attempts at shaping and understanding GAL.

⁶⁰ See Chesterman and Fisher, *supra* note 29, at 1.

⁶¹ For more information on the project see www.iilj.org/research/PrivateMilitaryandSecurityCompanies.asp.

⁶² Rebecca DeWinter-Schmitt gets close to doing so when reviewing regulatory schemes within the industry – yet her piece does not refer to global administrative law: see DeWinter-Schmitt, ‘Human Rights and Self-Regulation in the Apparel Industry’, in Chesterman and Fisher, *supra* note 29, at 133.

⁶³ I must point out that, in spite of the distinct advantages of the GAL analysis, the regulation of the private security and military industry may be examined independently of GAL. This is the case, e.g., with the studies conducted by de Nevers, Ranganathan, and Hoppe: see *supra* note 2.

⁶⁴ While very helpful, existing studies chose to cover only certain aspects of self-regulation – and the need to provide a comprehensive taxonomy of self-regulatory schemes existing within the industry therefore remains: see de Nevers and Ranganathan, *supra* note 2, both of whom devote little attention to efforts undertaken at the company level or to multi-stakeholder initiatives.

⁶⁵ It is important to note, however, that within each regulatory mode (i.e., industry associations or contracts) I do not intend to provide an exhaustive survey of all existing regulation. While I do try to be as thorough as possible, the emphasis is on the identification of the various modes of administration rather than on a comprehensive study of each of these modes. For example, when discussing company codes of conduct, I analyse some of these codes, but not all existing codes.

One aspect of war regulation particularly stands out from the analysis below – namely, self-regulation. In the GAL taxonomy I offer here, self-regulation is addressed as part of ‘hybrid’ and ‘private’ modes of administration. A detailed analysis of self-regulation is beyond the scope of this article but the importance and potential of self-regulatory mechanisms are apparent from the study on private security and military companies and must be noted at the outset. Other than limited *ad hoc* analytical and investigatory efforts undertaken by national governments, there is little in the way of legislation governing the industry – and no dedicated enforcement mechanisms. Only the United States⁶⁶ and South Africa⁶⁷ have adopted legislation dealing specifically with the question of modern security and military outsourcing. The limited scope of national legislation dealing specifically with the private military industry is

⁶⁶ See the US Arms Export Control Act of 1968, 22 CFR 120–130 (which, together with the International Transfer of Arms Regulation (ITAR) designed to implement the Act, regulates foreign sales of certain non-US defence articles and services by the US government). For more information see D. Avant, *The Market For Force* (2005), at 147, 149–151. See also the Military Extraterritorial Jurisdiction Act (‘MEJA’) of 2000, Pub. L. 106-523 (106th Congress); 18 USC 3261 (which establishes federal jurisdiction over offences committed outside the US by persons employed by or accompanying the armed forces as well as former members of the US armed forces). For more information see Caparini, ‘Regulating Private Military and Security Companies, The US Approach’, in A. Alexandra, D.-P. Baker, and M. Caparini (eds), *Private Military and Security Companies, Ethics, Policies and Civil-Military Relations* (2008), at 171. MEJA’s extraterritorial jurisdiction allows for the prosecution of contractors employed by the US Department of Defense in US federal courts. In an effort to enhance the accountability of military contractors, MEJA’s jurisdiction was extended to all federal contractors (not just those hired by the Department of Defense) hired by a US department or agency in contingency operations such as Iraq and Afghanistan, provided that their employment ‘relates to supporting the mission of the Department of Defense overseas’. See MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Congress, 1st session, 4 Oct. 2007; US House of Representatives Committee on the Judiciary, Press Release, ‘House Passes Military Contractor Legislation’, 4 Oct. 2007; Press Release, ‘IPOA Formally Endorses H.R. 2740’, 2 Oct. 2007; and Caparini, *supra*, at 171, 180–181. See also the Uniform Code of Military Justice (UCMJ), Pub. L. 109-364 (subjecting civilians supporting the armed forces to prosecution by court-martial). For more information see Mangan, ‘Conflicts of Laws, UCMJ and MEJA Challenge for Legal Supremacy’, 2 *J Int’l Peace Operations* (2007) 23; and Witte, ‘New Law Could Subject Civilians to Military Trials’, *Washington Post*, 15 Jan. 2007, available at: www.washingtonpost.com/wp-dyn/content/article/2007/01/14/AR2007011400906.html. The UCMJ, which had applied only with respect to declared wars, was amended to cover cases of contingency operations. The purpose of the amendment was to include private military contractors working in Afghanistan and Iraq within the scope of the UCMJ. For more information see Singer, ‘The Law Catches Up to Private Militaries, Embeds’, *DefenseTech* (2007), available at: <http://defensetech.org/2007/01/03/the-law-catches-up-to-private-militaries-embeds/>.

⁶⁷ See Regulation of Foreign Military Assistance Act of 1998 (South Africa), which *prohibits* the recruitment, use, training, and financing of mercenaries and *regulates* the provision of military and military-related services by South African citizens and foreigners found within South African territory. The Act (Arts 3–5) establishes an authorization process through which an individual or a company may be accredited to render foreign military assistance. Under the Act, such authorization is not transferable, in order to avoid some of the problems arising out of subcontracting and companies’ re-birth (Art. 5(4)). The Act’s extraterritorial scope of application, in particular, shows South Africa’s determination to bring an end to mercenary activity and regulate private military contractors, not only when such activity takes place on its own territory, but also when its citizens are hired abroad.

certainly a factor that has led companies to generate their own regulation.⁶⁸ Through this growing body of self-regulation, industry-wide standards have been elaborated and internal mechanisms designed to encourage compliance have been established. The GAL analysis sheds light on the contribution of self-regulation to the regulatory environment applicable to private military companies and their personnel. Determining the precise extent of their contribution is one of GAL's central objectives – as stressed by Benedict Kingsbury:

The term GAL is applied to shared sets of norms and norm-guided practices that are in some cases regarded as obligatory, and in many cases are given some weight, even where they are not obviously part of national (state) law or standard inter-state law.⁶⁹

While this article cannot examine the precise role of these 'shared sets of norms and norm-guided practices', it identifies them as encompassing both hybrid and private modes of administration, and highlights some of the idiosyncrasies of these modes of governance.

3 A Taxonomy of Regulatory Schemes within the Private Military Industry

A significant advantage of applying GAL's insights to the private military industry is that it provides the tools needed to classify the industry's regulatory schemes into clear and systematic categories. I have explained the need for such a classification from an academic viewpoint, noting the tendency of existing studies to focus on one or a few mechanisms, while leaving out important others.⁷⁰ This tendency can be attributed to the disorderly nature of this regulation (particularly self-regulation), which makes it difficult to track.

There is also a didactic need for this classification. Within each mode of administration, patterns and commonalities can be identified. For instance, within distributed domestic modes of administration, contracts and domestic legislation share an important feature – their extra-territorial reach. By highlighting this common feature among seemingly distinct modes of administration, we might think of common or joint strategies to improve their respective efficiency. In addition, the classification enables us to identify specific and important features of the industry. For example, we observe the absence of administration by transnational networks and coordination arrangements within the private security and military industry⁷¹ – which suggests that informal mechanisms enabling governments to discuss and consult with each other on these matters may be lacking. It would be interesting to know whether transnational networks of cooperation are commonly used in other industries, and whether

⁶⁸ Although it remains limited, the importance of domestic legislation dealing specifically with modern forms of military outsourcing should not be undermined: it demonstrates that states treat private military contractors and mercenaries as distinct legal entities.

⁶⁹ Kingsbury, *supra* note 43, at 26.

⁷⁰ See *infra* sect. 2C.

⁷¹ See *supra* sect. 3A2.

creating such mechanisms would be beneficial to the private security industry. Finally, the elaboration of a field-specific taxonomy makes cross-fertilization much easier. The use of standardized categories enables us to draw comparisons among various industries and find ways to improve regulation in a given sector – also an essential objective of GAL.

A GAL and the Taxonomy of Regulatory Schemes

GAL has identified tools designed to facilitate field-specific inquiries in the realm of global governance, helping to classify regulatory systems existing in the private security and military industry. This section reviews these tools and highlights their usefulness when contending with the industry.

In their seminal piece, *The Emergence of Global Administrative Law*, Benedict Kingsbury, Nico Krisch, and Richard Stewart explain that the global administrative space consists, broadly speaking, of five types of international or transnational administrative body:⁷² formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public–private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance.⁷³ This categorization of the institutional make-up of the global administrative space is not meant to constrain field-specific studies such as the one undertaken in this article. Rather, its purpose is to map out the options that must be considered for the sake of completeness:

In practice, many of these layers overlap or combine, but we propose this array of ideal types to facilitate further inquiry.⁷⁴

By using this list as a roadmap, we ensure a complete and exhaustive review of the multi-faceted regulatory mechanisms applicable to the private military industry. The following taxonomy highlights those categories that are most relevant to the industry, making certain adjustments to best account for its specific features.

1 Administration by Formal International Organizations

Formal international organizations are defined as ‘inter-governmental organizations established by treaty or executive agreement’.⁷⁵ Examples of such modes of administration include the United Nations Security Council, the United Nations High Commissioner for Refugees, the World Health Organization, and the International Labour Association.⁷⁶

In the realm of modern security and military outsourcing, the United Nations Working Group on Mercenaries (‘UN Working Group’) constitutes an important type

⁷² Kingsbury, *supra* note 40, at 26.

⁷³ *Ibid.*, at 17.

⁷⁴ *Ibid.*, at 20.

⁷⁵ *Ibid.*, at 21.

⁷⁶ *Ibid.*

of 'formal' administration. Established in 2005 pursuant to a resolution of the Commission on Human Rights,⁷⁷ it succeeded the Special Rapporteur on the use of mercenaries, which had been in existence since 1987.⁷⁸ In March 2008, the Human Rights Council extended the mandate of the UN Working Group for a period of three years.⁷⁹ The UN Working Group's responsibilities include, *inter alia*, studying the effects on the enjoyment of human rights of new trends and manifestations of mercenary or mercenary-related activities (in particular 'the activities of private companies offering military assistance, consultancy and security services on the international market'), monitoring such activities 'in all their forms and manifestations in different parts of the world', and preparing a draft of international basic principles that encourage respect for human rights by those companies.⁸⁰ Both the text of the resolution establishing the UN Working Group and the UN Working Group's practice in recent years indicate that the regulation of the private security and military industry falls within the UN Working Group's mandate.

The activity of the UN Working Group consists of holding sessions twice to three times a year,⁸¹ periodically issuing reports,⁸² conducting country visits,⁸³ commenting on industry developments,⁸⁴ and – most recently – leading the adoption of instruments dealing with new forms of security and military outsourcing.⁸⁵ These activities involve, from time to time, decision-making on the part of the UN Working Group. While the decisions are not formally binding, they carry much weight and legitimacy within the UN and among industry players as decisions emanating from the UN body exclusively devoted to this issue.

Because it was not established by treaty⁸⁶ and its decisions are not formally binding on states, it could be argued that the UN Working Group does not qualify as a formal mode of administration, defined by GAL as an 'inter-governmental organization established by treaty or executive agreement'. Part of the uncertainty stems from the somewhat ambivalent position taken by GAL scholars with respect to formal modes of administration. While they note, with respect to the Security Council

⁷⁷ HRC Res 2005/2, UN Doc E/CN.4/Res 2005/2 (7 Apr. 2005).

⁷⁸ Mr. Enrique Bernales Ballesteros (Peru) served as Special Rapporteur from 1987 to 2004 and Ms. Shaista Shameem (Fiji) from 2004 to 2005.

⁷⁹ HRC Res 7/21, UN Doc A/HRC/RES/7/21 (28 Mar. 2008).

⁸⁰ UN Doc A/HRC/RES/7/21, Mandate 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 (28 Mar 2008).

⁸¹ See www2.ohchr.org/english/issues/mercenaries/wgissues.htm.

⁸² See www2.ohchr.org/english/issues/mercenaries/annual_reports.htm.

⁸³ See www2.ohchr.org/english/issues/mercenaries/wgvisits.htm.

⁸⁴ See Oral Statement by Mr. Alexander Ivanovich Nikitin, President of the Working Group on the use of mercenaries as a means of violating human rights and impeding the right of peoples to self-determination, Human Rights Council, 10th Session, 6 Mar. 2009 (commenting on the adoption of the Montreux Document).

⁸⁵ 'Mercenaries: UN expert panel pushes for stronger regulation of private military and security companies', 23 July 2010, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10227&LangID=E.

⁸⁶ See *supra* note 77.

and its committees, that they ‘adopt subsidiary legislation’ and ‘take binding decisions’, they also characterize as such bodies that do *not* issue binding decisions – for example, the United Nations High Commissioner for Refugees (which has ‘assumed numerous regulatory functions and other administrative tasks’), the World Health Organization (‘assessing policies . . . and sanctioning violations’), and the World Bank (‘setting standards’).⁸⁷ This suggests that issuing binding decisions is not, in and of itself, a defining feature of formal international administration. Similarly, the categorization of the UN High Commissioner for Refugees (established pursuant to a decision of the UN General Assembly in 1950) as a formal means of administration suggests that the requirement of being established by treaty, too, may be interpreted loosely. This, together with the fact that the UN Working Group forms an integral part of the UN institutional structure and contributes actively to shaping administrative-type standards applicable in the industry, suggests that the UN Working Group can appropriately be classified as a mode of ‘administration by formal international organization’.

2 *Administration by Transnational Networks and Coordination Arrangements*

Taking place outside the framework of a treaty, administration by transnational networks is characterized by ‘the absence of a binding formal decision-making structure and the dominance of informal cooperation among state regulators’.⁸⁸ This type of horizontal arrangement among states typically produces effective, albeit non-binding, outcomes. As noted above, examples of informal arrangements of this sort include the Basel Committee in the area of banking regulation⁸⁹ and the Organization for Economic Cooperation and Development – most of whose decisions are not binding on state members.⁹⁰

Strictly speaking, no transnational network or coordination arrangement exists within the private security and military industry. States have yet to establish an informal forum through which they can discuss and cooperate on military outsourcing. That said, definitional caveats mentioned above (not established by treaty; not issuing binding decisions) suggest that the UN Working Group could be characterized as a horizontal coordination arrangement. One of its essential attributes is indeed to provide states with opportunities to debate industry-related issues. In other words, as predicted by GAL scholars, we observe a certain overlap between ‘formal’ and ‘informal’ modes of administration – which, in this industry, is well embodied by the UN Working Group.

3 *Distributed Domestic Administration*

Distributed domestic administration highlights the role of domestic regulatory agencies within the global administrative space. In particular, it includes states’ attempt at regu-

⁸⁷ See Kingsbury, *supra* note 40, at 21.

⁸⁸ *Ibid.*

⁸⁹ See www.bis.org/bcbs/index.htm.

⁹⁰ See www.oecd.org.

lating activities taking place outside their territory.⁹¹ One such example is the extension of United States jurisdiction over the extraterritorial detention of suspected terrorists in Guantanamo Bay, Cuba.⁹²

In the field under review in this article, the domestic regulation of global activities would include legislation adopted by South Africa to regulate the provision of security and military services by its nationals both within and outside South Africa.⁹³ It might also cover the use of contracts to regulate private security and military activities – particularly when such regulation is mandated by domestic legislation.⁹⁴

4 Administration by Hybrid Intergovernmental–Private Arrangements

An essential objective of global administrative law has been to uncover the growing role played by hybrid bodies (i.e., '[b]odies that combine private and governmental actors'⁹⁵) in global governance. GAL has shown how, across fields, standards are adopted by these bodies, and, at times, even enforced. GAL scholars give the following examples of hybrid intergovernmental–private arrangements: the Codex Alimentarius Commission (in the area of food safety) and the Internet Corporations for Assigned Names and Numbers (ICANN) (an internet regulatory body).⁹⁶ The UN Global Compact⁹⁷ would also be a relevant example (in the area of corporate social responsibility), as well as the Forest Stewardship Council (promoting the responsible management of forests worldwide).⁹⁸

In the realm of security and military outsourcing, administration by public–private bodies has proved particularly promising in recent years – with multi-stakeholders' initiatives achieving unprecedented successes in standard-setting. Examples of such successes, which I analyse in depth below, include the *Voluntary Principles on Security and Human Rights* ('Voluntary Principles'), 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'), and the *International Code of Conduct for Private Security Service Providers* ('ICoC').⁹⁹

5 Administration by Private Institutions with Regulatory Functions

This last category refers to exclusively private bodies which assume global regulatory functions – such as the International Standardization Organization (ISO), the

⁹¹ *Ibid.*, at 21–22.

⁹² See, generally, *Rasul v. Bush*, 124 S Ct 2686 (2004); and *Boumediene v. Bush*, 128 S Ct 2229 (2008).

⁹³ See Regulation of Foreign Military Assistance Act of 1998 (South Africa), *supra* note 67.

⁹⁴ See, e.g., Dickinson, 'Contract as a Tool for Regulating PMCs', in Chesterman and Lehnart (eds), *supra* note 11, at 217.

⁹⁵ Kingsbury, *supra* note 40, at 22.

⁹⁶ *Ibid.*, at 22.

⁹⁷ See www.unglobalcompact.org.

⁹⁸ See www.fsc.org.

⁹⁹ International Code of Conduct for Private Security Service Providers, available at: www.icoc-psp.org/uploads/Signatory_Companies_-_June_2011_-_Composite_List_-_SHORT_VERSION.pdf. ('ICoC').

Fair Labour Association in the clothing industry, or the International Accounting Standards Board (a group of experts whose role it is to set and harmonize accounting standards).

In the private security and military industry, this category raises questions of legitimacy and authority. Industry associations qualify as private bodies established to develop industry-wide standards of behaviour. Issues arise, however, with the requirement to perform regulatory functions. While industry associations often assume *de facto* regulatory functions, they are not necessarily created as regulators by their founders nor regarded as such by their members. Rather, industry associations are generally conceived as clubs bringing together various industry players (often competitors) in an effort to enhance cooperation and legitimacy. Mere admission to these industry associations provides members with a stamp of approval likely to have a positive impact on their business.

Can industry associations in the realm of private security and military outsourcing appropriately be regarded as exercising regulatory functions? As noted by Surabhi Ranganathan, this has not been the prevailing view.¹⁰⁰ She argues that industry associations do in fact fulfil regulatory functions – though informal, imperfect, and not exploited to their full potential – and suggests that more attention be paid to the associations' potential as regulatory bodies. While the industry associations certainly could come to assume this role and contribute to regulatory efforts, I believe it is too early to classify industry associations as private bodies *with* regulatory functions. I write this mindful that, given the fast-changing nature of the industry, matters may very well evolve in this direction in the near future.

Other regulatory mechanisms that fail to meet the 'regulatory functions' requirement are the codes of business conduct/ethics adopted by individual companies in an effort to disseminate information and improve compliance. Like industry associations, these instruments do not neatly fit within any of the five categories identified by GAL scholars. I therefore suggest amending the model GAL taxonomy to account for this specific aspect of the private security and military industry.

B. The Proposed Taxonomy of the Private Security and Military Industry

The proposed taxonomy, which incorporates the insights gained from GAL while taking into account the unique features of the industry under review, is as follows:

- (1) the UN Working Group – as a formal mode of administration;
- (2) extraterritorial legislation¹⁰¹ and contract – as distributed domestic administration;
- (3) multi-stakeholder initiatives – as hybrid modes of administration; and

¹⁰⁰ See *supra* note 2.

¹⁰¹ As noted above, I will not consider national legislation, although it is important to note that its extraterritorial effect is indeed relevant to GAL.

- (4) industry associations and companies' codes of conduct – as private modes of administration exercising *de facto* regulatory functions (each of these will be examined separately for the sake of clarity).

1 *The United Nations Working Group on Mercenaries*

The UN Working Group has significantly contributed to the regulation of the private security and military industry. As already mentioned, legal issues relating to the industry fall within the mandate of the UN Working Group *on the use of mercenaries*. This seemingly technical observation reflects the approach of the UN as a whole: traditionally, the UN has treated the private security and military industry as a form of mercenary activity.¹⁰² Only recently has the UN begun to treat the two separately (although issues arising out of the private security and military industry continue to be dealt with under the auspices of the UN Working Group). This change was the culmination of a long process during which the UN expressed much uncertainty as to how private military contractors should be dealt with, and eventually dropped its one-size-fits-all approach and took measure of the differences between mercenaries and private military contractors.

Beginning in 2004, the UN began to pay 'particular attention to the impact of the activities of private companies offering military assistance, consultancy and security services on the international market on the right of peoples to self-determination'.¹⁰³ The realization that mercenary is not synonymous with private security/military contractor began to take hold.¹⁰⁴ A number of country visits, interviews, and communications with member states enabled the UN to gain a better understanding of the private military industry – in particular the fact that, unlike mercenaries, not all private military contractors are of a nationality distinct from that of the belligerents.¹⁰⁵ This challenged the very foundation upon which anti-mercenary norms developed, i.e., that mercenary activity is a form of illegal intervention in another

¹⁰² ECOSOC, 53rd session, UN Doc E/CN.4/1997/24 (20 Feb. 1997), at paras 69, 78. There is little support for the traditional UN approach which treats private military contractors as mercenaries. For two examples of what has become the minority view, see A.-F. Musah and K. Fayemi (eds), *Mercenaries: An African Security Dilemma* (2000); and Leander, 'Global Ungovernance: Mercenaries, States and the Control Over Violence', Copenhagen Peace Research Institute, Working Paper (2002). At the time the UN used to hold that view, it provoked much criticism including by the UK, which characterized the UN's position as 'an extreme point of view' (see Green Paper, *supra* note 26, at para. 37). Also criticizing what was once the UN position see S. Percy, *Mercenaries: The History of a Norm in International Relations* (2007), at 222.

¹⁰³ ECOSOC 2005/14, Report of Shaista Shameem, Special Rapporteur on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination, UN Doc E/CN.4/2005/14 (8 Dec. 2004), at para. 7.

¹⁰⁴ *Ibid.*, at para. 60.

¹⁰⁵ Consider, e.g., the thousands of Iraqi and American military contractors working in Iraq.

state's affairs.¹⁰⁶ Since many private military contractors are nationals of one of the parties to the conflict, the justification for the prohibition of private military contractors as a form of mercenary activity had to be re-examined.

Because international legislation dealing with mercenary activities 'failed adequately to prohibit and criminalize traditional and new forms of mercenarism',¹⁰⁷ the UN proposed amending international definitions of mercenary to include private military and security companies. Although the UN continued to regard modern forms of military outsourcing with much scepticism, it acknowledged that the definitions needed revision in order to reflect the new reality.¹⁰⁸ In 2005, the UN proposed adopting a definition of 'mercenary company' which would require (1) the existence of a contract of service, with the element of compensation (material gain) being a key factor; (2) the knowledge and intention to participate in armed conflict; (3) usually but not always, the mercenary being engaged in armed conflict in a country/countries of which he himself is not a national or where the company is not registered; and (4) a mercenary (person) or mercenary company (legal personality) being engaged in armed conflict for its own sake and/or to topple the constitutional order of a state.¹⁰⁹ This 'new' definition still held on to problematic constructs such as material gain and the nationality requirement. In fact, I would argue that the reason the UN objected for decades to the use of mercenaries (and, later, to private military contractors) was that they violated principles fundamental to the UN's worldview (non-interference, state sovereignty, and territorial integrity) that could not be compromised under any circumstances.

In 2007, the UN Working Group recognized that 'the definition as it currently stands is no longer satisfactory' and that an amendment of the UN Convention or the elaboration of an additional protocol complementing the UN Convention had become

¹⁰⁶ UN GA and SC Resolutions in the late 1970s and early to late 1980s condemned mercenary activity as an illegitimate form of external interference in another state's affairs: see, e.g., GA Res 2625 (XXV), UN Doc A/2625 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations) (24 Oct. 1970); GA Res 41/102, Use of mercenaries as a means to violate human rights and to impede the exercise of the rights of peoples to self-determination, UN Doc A/RES/41/102 (4 Dec. 1986); GA Res 42/96, UN Doc A/RES/42/96 (1987); SC Res 405, UN Doc S/RES/405 (1977); and SC Res 507, UN Doc S/RES/507 (1982). Treaty law governing mercenaries confirms the importance of the non-interference rationale in the prohibition of mercenary activity. The requirement that a mercenary be of a nationality distinct from that of the belligerents appears in all international and regional instruments dealing with mercenaries. See Luanda Convention, reprinted in Mourning, 'Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries', 22 *Va J Int'l L* (1981–1982) 589, 615 (Art. 1); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Art. 47); Convention of the OAU for the Elimination of Mercenarism in Africa, 3 July 1977, OAU Doc CM/433/Rev. L. Annex 1 (1972) Art. 1; and International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, UN Doc A/Res/44/34, 4 Dec. 1989 (Art. 1).

¹⁰⁷ UN Doc E/CN.4/2005/23, The right of peoples to self-determination and its application to peoples under colonial or alien domination or foreign occupation – Note by the United Nations High Commissioner for Human Rights (18 Jan. 2005), at para. 7.

¹⁰⁸ ECOSOC 2005/14, *supra* note 103, para. 46.

¹⁰⁹ UN Doc E/CN.4/2005/23, *supra* note 107, at para. 65.

necessary.¹¹⁰ But it still regarded the activities of private military companies as carried out ‘without legitimacy’ – and recommended a ban on companies ‘intervening in internal and international armed conflicts or actions aiming at destabilizing constitutional regimes’.¹¹¹ Again, the emphasis on non-intervention was apparent.

In a remarkable shift towards the recognition of private military contractors as distinct legal entities, the UN Working Group elaborated for the first time in 2008 a definition of ‘private military and security companies’ as including

companies which perform all types of security assistance, training, provision and consulting services, i.e. ranging from unarmed logistical support, armed security guards, and those involved in defensive or offensive military and/or security-related activities, particularly in armed conflict areas and/or post-conflict situations.¹¹²

Shortly thereafter, the UN Working Group acknowledged that private military contractors may, in certain circumstances, fulfil important and valuable purposes,¹¹³ and the main UN bodies welcomed the adoption of the Montreux Document focusing ‘on aspects of self-regulation by the industry’.¹¹⁴ The UN Working Group stated that, for its part, it intends to concentrate ‘on inter-state legally-binding instruments on which States, not companies, are to agree’.¹¹⁵ The UN – confirming that it has begun looking at the issue in a new light – is now elaborating a new international convention dealing with private military and security companies as such:¹¹⁶

Whilst the Working Group believes that the International Convention against the Recruitment, Use, Financing and Training of Mercenaries remains an important international legal instrument for the prevention of the use of mercenaries as a means of violating human rights and the rights of peoples to self-determination, it is of the opinion that the activities of private military and security companies cannot be regulated on the basis of this existing convention. Rather, the Working Group considers that a new international legal instrument in the format of a new international convention on private military and security companies should be elaborated.¹¹⁷

¹¹⁰ GA Res 4/42, Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled ‘Human Rights Council’, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN Doc A/HRC/4/42 (7 Feb. 2007), at 14.

¹¹¹ *Ibid.*

¹¹² UN Doc A/HRC/RES/7/7, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development, 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 people to self-determination (9 Jan. 2008), at para. 3 (emphasis added). Other suggestions included the adoption of an international ‘code of conduct’ for the industry (UN Doc E/CN/Sub.2/2003/12/Rev.2 (26 Aug. 2003)) and the application of the Norms on the Responsibilities of Transnational Corporations and other business enterprises with regard to human rights to companies operating and providing military and security services in more than one country (ECOSOC 2006/11, The Right of Peoples to Self-Determination and Its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation, UN Doc E/CN.4/2006/11/Add.1 (3 Mar. 2006)).

¹¹³ Press Conference by Amada Benavides and Alexander Nikitin of the UN Working Group on the use of mercenaries, and Dan McNorton, UNAMA Public Information Officer, 9 Apr. 2009.

¹¹⁴ Oral Statement by Mr. Alexander Ivanovich Nikitin, *supra* note 84, at 4.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* at 3 (emphasis in original).

A 'Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council' ('Draft Convention') was made public in July 2010.¹¹⁸ This Draft Convention is the product of a long process involving public and private actors under the auspices of the UN Working Group. Its declared purposes are, *inter alia*, to 'reaffirm and strengthen State responsibility for the use of force and reiterate the importance of its monopoly of the legitimate use of force', 'identify those functions which are inherently State functions and which cannot be outsourced under any circumstances', and 'regulate the activities of [private security and military companies] and sub-contractors'.¹¹⁹ While an analysis of the Draft Convention is beyond the scope of this article, it is important to emphasize that it not only constitutes a major step forward in the global regulation of the industry, but may also embody a formal mode of regulation in and of itself.

The elaboration of the Draft Convention by the UN Working Group highlights this body's potential as a regulator. And yet, the Draft Convention contemplates the creation of a separate body to fulfill such role, composed of experts elected for four years by states parties to the convention (the Committee on Regulation, Oversight and Monitoring, hereinafter the 'Committee').¹²⁰ Each state would have to decide whether it wished to confer competence to the Committee to hear inter-state complaints and/or individual complaints.¹²¹ Were states to submit to its competence, the Committee could therefore become a significant mode of administration.¹²²

To summarize, the UN Working Group has recently come to realize its potential – something which was not possible for many years, as the Working Group refused to treat private security and military contractors as legally distinct from mercenaries. If it ceases to view itself as the guardian of state control over violence and non-intervention, the UN Working Group's role in the regulation of the industry could grow further.¹²³ This could happen either as envisaged in the Draft Convention, through the creation of a Committee on Regulation, Oversight, and Monitoring or, I would argue, by turning the UN Working Group itself into the main global monitoring and sanctioning body of the industry.

¹¹⁸ A/HRC/15/25, Annex, Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council (Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination) ('Draft Convention') (2 July 2010).

¹¹⁹ *Ibid.*, Art. 1.

¹²⁰ *Ibid.*, Art. 29.

¹²¹ *Ibid.*, Arts 34 and 37.

¹²² I find it unlikely that states would submit, under Art. 34, to interstate complaints. This mechanism, which exists in many human rights committees (the Human Rights Committee, the Committee on the Elimination of All Forms of Racial Discrimination, the Committee on Migrant Workers, the Committee against Torture, and the Committee on Enforced Disappearances) has never been used by states. See M. Shaw, *International Law* (2008), at 335; and www2.ohchr.org/english/bodies/petitions/index.htm#interstate.

¹²³ This might take some time given the affirmation of the state's monopoly over the use of force and the non-intervention rationale in the Draft Convention, *supra* note 118.

2 Contracts

Classified in this study as distributed domestic administration, contracts fit particularly well within the global administrative law framework. While contractual standards are elaborated locally by domestic legislation or by a company itself,¹²⁴ their reach goes beyond the boundary of any given state: they apply wherever employees deploy as part of their duties. Their domestic origin, contrasted with their extraterritorial reach, illustrates the private/public convergence at the heart of GAL.

Contracts have been recognized as a useful regulatory tool of the private military and security industry in light of their ability to promote public values and international norms, as well as their versatility in accommodating the needs of a variety of hiring entities (states, international organizations, corporations, etc.).

With respect to contracts' ability to promote public values, Laura Dickinson has shown how contracts, which are private instruments, can be used to promote public values in the absence of effective regulation.¹²⁵ Once incorporated into contracts, standards of behaviour can be implemented using ordinary domestic enforcement mechanisms.¹²⁶

The case of prison management provides an interesting example of how this can be done.¹²⁷ Contracts have been used as the primary tool for outsourcing prisons to the private sector.¹²⁸ For example, provisions have been incorporated to limit the term of the privatization contract: in Arkansas, contracts with private prisons may be entered into for a period of up to 20 years,¹²⁹ and in Ohio, contracts 'shall be for an initial term of not more than two years, with an option to renew for additional periods of two years'.¹³⁰ Contracts have also been used to provide the government with the

¹²⁴ It may be required by legislation to be adopted by the state – but not necessarily (see Dickinson, *supra* note 94). Contractual provisions may also be freely inserted by hiring parties (government or other) in contracts with companies (and of course by companies in contracts with personnel, but that is an entirely different issue).

¹²⁵ See, generally, Dickinson, 'Public Law Values in a Privatized World', 31 *Yale J Int'l L* (2006) 383.

¹²⁶ See, e.g., Vinnell's Statement of Work, 9 June 2003, available at: <http://projects.publicintegrity.org/docs/wow/Vinnell.pdf> (a contract to train the New Iraqi Army provided that Vinnell's invoices for the first six months could not exceed a certain sum).

¹²⁷ The privatization of prisons and the privatization of military services raise similar questions of scope (how much to outsource) and oversight (how to monitor the performance of private actors entrusted with governmental functions). In fact, states have dealt with both types of privatizations in similar ways. The UK, e.g., published a Green Paper envisaging the privatization of prisons in 1998 (UK Home Office, 'Prisons Probation: Joining Forces to Protect the Public' (1998), available at: www.nationalarchives.gov.uk/ERORRecords/HO/421/2/cpd/cpu/pcon1.htm) and, in 2002, another Green Paper addressing the privatization of military functions (see *supra* note 26). In both reports, the outsourcing option was taken seriously, without paying lip service to preconceived ideas or stigmas against privatization. Both Green Papers presented areas in which the involvement of private parties could be beneficial, while highlighting areas worthy of improvement, and are widely regarded as points of reference for policy-makers and scholars in those fields.

¹²⁸ See Aman, 'Private Prisons and the Democratic Deficit', in Chesterman and Fisher, *supra* note 29, at 86, 88.

¹²⁹ *Ibid.*, at 95, quoting Ark. Code. Ann., § 12-55-106(d) (Michie 2002).

¹³⁰ *Ibid.*, quoting Ohio Rev Code Ann 9.06(A)(1) (West 2002).

right to put an end to the contract in the case of under-performance on the part of the contractor. This is the case in Tennessee, where the state can cancel the contract with a penalty as long as it gives notice to the private operator within 90 days.¹³¹ In an effort further to enhance the regulatory framework applicable to private prisons in the US, statutes have made the insertion of even more specific clauses mandatory in these contracts.¹³²

It has been suggested that a similar approach be adopted in the context of the privatization of security and military services. Contracts between states and private security and military companies can incorporate provisions requiring employees to respect basic human rights standards and obey norms of international humanitarian law.¹³³ Contracts can also obligate the company to train employees, impose performance benchmarks, or obtain certain accreditations.¹³⁴ For example, contracts between the US Department of Defense and security/military companies accompanying US armed forces overseas must include a number of provisions regarding the use of force or the treatment of contractors as civilians unless they take a direct part in hostilities.¹³⁵ Unfortunately, as is well documented by Dickinson, few contracts actually include the mandatory provisions.¹³⁶ For this reason, Dickinson has advocated contractual reform, emphasizing that it would require very little effort.¹³⁷

In addition to facilitating enforcement, contracts are also a particularly versatile tool: contracts govern relationships between private military companies and states, international organizations, and multi-national corporations. As such, they can be used to effect compliance with international norms. Contracts may also enhance the oversight over subcontractors – a common feature of the industry – by providing for standards of conduct for sub-contractors engaged by the prime contractors. Moreover,

¹³¹ See Pozen, 'Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom', 19 *JL & Pol* (2003) 253, at 279; and Aman, *supra* note 128, at 95–96.

¹³² See Tenn. Code Ann. ¶ 41-24-104(a)(4) (2003) (the statute requires private prison contractors to provide an adequate insurance plan that provides that the sovereign immunity of the state shall not apply to the contractor, and prevents the private contractor from calculating inmate release/parole eligibility, changing the level of custody, or taking disciplinary actions against prisoners); and McAfee, 'Tennessee's Private Prison Act of 1986: An Historical Perspective With Special Attention To California's Experience', 40 *Vanderbilt L Rev* (1987) 851, at 861.

¹³³ Dickinson, *supra* note 94, at 222 (noting that under the model contract for prison management drafted by the Oklahoma Department of Corrections, contractors must meet delineated standards for security, meals and education). Also advocating the use of contracts are the Voluntary Principles on Security and Human Rights (adopted in Dec. 2000, available at: www.voluntaryprinciples.org/files/voluntary_principles.pdf) ('Voluntary Principles') and the Montreux Document, *supra* note 1, both of which are discussed in sect. 4 below.

¹³⁴ Dickinson, *supra* note 94, at 218, 222.

¹³⁵ 48 CFR 252.225-7040 (b)(3)(ii) and (iii). It is worth noting that these provisions must also be incorporated in potential subcontracts (48 CFR 252.225-7040 (q)).

¹³⁶ See Dickinson, *supra* note 94, at 221 (noting that of the 60 publicly available Iraq contracts, 'none contains specific provisions requiring contractors to obey human rights, anti-corruption, or transparency norms').

¹³⁷ *Ibid.*, at 221.

contracts can easily be tailored, on a case-by-case basis, to suit the specific needs of the hiring entity (state or otherwise) and the company.¹³⁸

To summarize, the promise of regulation through contract is far-reaching: contracts allow for the enforcement of basic norms of international law through the domestic system and are adaptable to a variety of situations. These positive features have been recognized within the industry, and multi-stakeholder initiatives have emphasized the advantages of the contractual approach – especially, as noted in the Montreux Document, when used in tandem with other means of regulation such as domestic legislation and international instruments.¹³⁹

3 Multi-Stakeholder Initiatives

I now turn to the third category of administration highlighted by GAL – namely hybrid modes of administration, which are primarily characterized by the joint involvement of public and private actors. In the case of the private military industry, multi-stakeholder initiatives are usually undertaken jointly by governments, private military companies, industry experts, and/or non-governmental organizations. Their aim is to complement, but not provide a substitute for, national legislation.¹⁴⁰ This is a distinctive feature of self-regulation – of which we will also see other manifestations below, in the form of codes of conduct and industry associations. These multi-stakeholder initiatives, as an example of self-regulation, demonstrate the industry’s willingness and ability to enhance the regulatory framework within which it operates.

With this in mind, I address five of these initiatives in turn – the Voluntary Principles, the Code of Conduct and Ethics for the Private Security Sector adopted by the European Confederation of Security Services, the Sarajevo Code of Conduct for Private Security Companies, the Montreux Document, and the ICoC.¹⁴¹ I have selected these initiatives because, taken together, they provide what I believe is an accurate

¹³⁸ Dickinson, *supra* note 94, at 231.

¹³⁹ This point is noted in the Montreux Document, *supra* note 1. See also Voluntary Principles, *supra* note 133.

¹⁴⁰ See, e.g., *ibid.* (‘[a]lthough governments have the primary role of maintaining law and order, security and respect for human rights, Companies have an interest in ensuring that actions taken by governments, particularly the actions of public security providers, are consistent with the protection and promotion of human rights’); Sarajevo Code, *infra* note 156, at (iv) and (v) (the aim of which is ‘to support the development and enforcement of formal regulation by engaging all relevant actors in a drive towards improved standards’); IPOA’s Code of Conduct *infra* note 201 s. 9.1 (providing that ‘signatories shall go beyond the minimum legal requirements and support additional ethical imperatives that are essential for effective peace and stability operations’); and N. Rosemann, *Code of Conduct: Tool for Self-Regulation of Private Military and Security Companies* (2008), at 5.

¹⁴¹ This list is non-exhaustive. Another notable initiative is the one undertaken by the Institute for International Law and Justice as NYU School of Law. The Institute, supported by the Carnegie Corporation of New York, organizes conferences, publishes books, and brings together stakeholders in the private military industry in the aim of developing a normative framework applicable to private military companies’ operations. For more information about this project, see www.iilj.org/research/PrivateMilitaryandSecurityCompanies.asp.

picture of hybrid-type efforts undertaken by and with the industry. They also highlight the weaknesses and potential of this mode of administration.

Chronologically, the Voluntary Principles were the first hybrid initiative undertaken. They were adopted in 2000 to 'guide companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms'.¹⁴² Participants include governments, non-governmental organizations, as well as over a dozen companies, most of them in the oil and gas industry.¹⁴³

The main achievement of the Voluntary Principles is in *standard-setting*. The Voluntary Principles create minimum safeguards and standards that are difficult to sidestep morally once a party has 'signed on'. These principles and standards must be observed by companies, whether hired by corporations, states, or non-governmental organizations. Among such standards, the Voluntary Principles refer to emerging best practices developed by industry, civil society, and governments, as well as international humanitarian law, including international guidelines regarding the use of force.¹⁴⁴ The standards also cover the vetting and training of contractors: the Voluntary Principles warn against the hiring of individuals implicated in human rights abuses and emphasize the importance of teaching contractors how to keep the use of force minimal and proportional to the threat.

The Voluntary Principles recommend the incorporation of these guidelines in contracts with private military companies. They also suggest that contractual provisions enable the contracting party (whether a state or a corporation) to terminate its relationship with private military companies where there is credible evidence of unlawful or abusive behaviour by private military contractors. This particular recommendation is reminiscent of the steps undertaken to regulate the conduct of private prison operators, which I discussed earlier.

Monitoring is contemplated both at the company level and by a separate monitoring body. The Voluntary Principles note, for example, that policies on the use of force must be 'capable of being monitored' by the companies or 'where appropriate, by independent third parties'.¹⁴⁵ The Voluntary Principles specify that, at the company level:

Such monitoring should encompass detailed investigations into allegations of abusive or unlawful acts; the availability of disciplinary measures sufficient to prevent and deter; and procedures for reporting allegations to relevant local law enforcement authorities when appropriate.¹⁴⁶

¹⁴² Voluntary Principles, *supra* note 133, Introduction.

¹⁴³ For the list of participants see www.voluntaryprinciples.org/participants/.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, sect 4.

¹⁴⁶ *Ibid.*

As for allegations of human rights abuses, they should be recorded and credible allegations properly investigated.¹⁴⁷ When physical force is used, the matter should be referred to authorities and/or disciplinary action should be taken.¹⁴⁸

The Voluntary Principles' two-pronged monitoring mechanism – i.e., disciplinary offences within the company and/or resort to the authorities – is significant as it goes beyond the company itself and contemplates the involvement of national authorities. A similar two-pronged monitoring mechanism was adopted by the main industry association (the International Peace Operations Association, IPOA), whose code of conduct provides that '[f]or serious infractions, such as grave breaches of international humanitarian and human rights laws, Signatories should report such offences to the relevant authorities'.¹⁴⁹ This demonstrates the Voluntary Principles' resonance within the industry – which is echoed in similar regional initiatives that shortly followed the Voluntary Principles' adoption.

Consider for instance the adoption in 2003 of the Code of Conduct and Ethics for the Private Security Sector by the Confederation of European Security Services and Uni-Europa (a European trade union federation).¹⁵⁰ This code was born of the belief 'that there should be a more harmonized regulatory framework at the European level for the private security sector'.¹⁵¹ It sets out a number of standards, promotes openness and transparency, encourages the selection and recruitment of staff along objective criteria, and emphasizes the importance of properly training personnel.¹⁵² With respect to enforcement, the Code notes that its two sponsors:

Undertake, on a regular basis, to monitor and evaluate the implementation of this code within their social dialogue. To this end, it is critical that monitoring and preliminary evaluations take place both at company level and at national level.¹⁵³

The language is very soft, and it is unclear how the two sponsors are to play the monitoring role entrusted to them.

A similar code, albeit much more elaborate, was drafted in 2006 as part of the so-called Sarajevo Process – a joint initiative of the Centre for Security Studies (a Bosnian think-tank) and Saferworld (a UK non-governmental organization) undertaken with the financial and technical support of the South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (mandated by the UN to support efforts to control and reduce the use of small arms in South Eastern Europe).¹⁵⁴ The idea of the Sarajevo Process was to bring to-

¹⁴⁷ *Ibid.*, sect 5.

¹⁴⁸ *Ibid.*

¹⁴⁹ IPOA's code of conduct, *supra* note 201, sect 3.3. An important difference between Erinys and IPOA, however, is that IPOA does not turn non-compliant employees over to the authorities – the companies are merely encouraged to report violations to such authorities.

¹⁵⁰ Code of Conduct and Ethics for the Private Security Sector, available at: www.coess.org/documents/code_of_conduct.pdf.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*, sects 1–5.

¹⁵³ *Ibid.* sect 15.

¹⁵⁴ Sarajevo Code of Conduct for Private Security Companies, available at: www.saferworld.org.uk/images/pubdocs/Code%2520of%2520conduct.pdf

gether stakeholders from the Bosnian government, client groups, and international organizations.¹⁵⁵

The Sarajevo Code of Conduct for Private Security Companies ('Sarajevo Code') sets out 'a set of basic standards of professionalism and service delivery', the aim of which is 'to support the development and enforcement of formal regulation by engaging all relevant actors in a drive towards improved standards'.¹⁵⁶ It recommends that background checks be conducted

prior to licenses being awarded to ensure that personnel: (1) have no criminal record; (2) have no past responsibility for human rights violations or violations of humanitarian law; and (3) have not been dishonourably discharged from the police or armed forces.¹⁵⁷

The emphasis on recruitment and training resembles the approach taken by the Code of Conduct and Ethics for the Private Security Sector analysed above. The main difference between the Sarajevo Code and the Code of Conduct and Ethics for the Private Security Sector lies in the provisions dealing with the enforcement of the code. Section 2.21 of the Sarajevo Code provides that complaints of inappropriate or illegal behaviour will be investigated promptly and thoroughly within companies *and* that the police will be informed. In addition, this process 'will be monitored and reviewed on an ongoing basis. Where a trade association or other industry body exists, members will cooperate to allow *additional oversight* at this level.'¹⁵⁸ This provision contemplates monitoring at the company level, by governmental authorities, and by a trade or industry association – although the precise contours of each mechanism remain unclear.

The most important multi-stakeholder initiative in the industry was that which led to the adoption of the Montreux Document in 2008.¹⁵⁹ Undertaken jointly by Switzerland and the ICRC, the initiative included extensive consultation with industry and civil society actors, through five intergovernmental meetings and four experts' meetings.¹⁶⁰ Although not a legally binding instrument,¹⁶¹ the Montreux Document embodies the achievement of (private) regulation through a successful interplay between public and private actors.

The approach of the Montreux Document is unique in that it seeks to recall the existing obligations of, and establish 'good practices' for, all actors involved: states contracting with private military and security companies; territorial states (i.e., states

¹⁵⁵ *Ibid.*, at (iv).

¹⁵⁶ *Ibid.*, at (iv) and (v).

¹⁵⁷ *Ibid.*, sect 2.3 (Selection and Recruitment).

¹⁵⁸ *Ibid.*, sect 2.21 (Oversight) (emphasis added).

¹⁵⁹ Montreux Document, *supra* note 1.

¹⁶⁰ Cockayne, 'Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document', 13 *J Conflict Security L* (2008) 401, at 402.

¹⁶¹ With respect to the Montreux Document's normative value, James Cockayne, who participated in its drafting process, noted that the document's good practices are best understood as 'a non-exhaustive compendium of illustrative good practice for states discharging their existing obligations': *ibid.*, at 405 This is in contrast with the first part of the Montreux Document, Cockayne adds, which 'provides a conservative statement of *lex lata*': *ibid.*, at 404.

on the territory of which private military companies operate); home states (i.e., the state of incorporation of the company); all other states; and the companies and their personnel. The premise on which it is based is that international humanitarian law does apply to these actors such that there is no legal vacuum. While other actors are taken into account, the emphasis is certainly on states – the main objective being to assist states in ensuring respect for applicable international norms in their relationship with private military and security companies.

An important difference between the Montreux Document and other initiatives lies in the broad support it has received from states,¹⁶² from the United Nations,¹⁶³ and from the industry.¹⁶⁴ Again, this is all the more significant in that the document not only reiterates existing law, but also seeks to provide a platform for its development.¹⁶⁵

With respect to monitoring and enforcement, and in a way consistent with its primary objective, the Montreux Document puts the onus mostly on state authorities.¹⁶⁶ Territorial states (i.e., states on the territory of which private military companies operate) are encouraged to ‘establish or designate an adequately resourced monitoring authority’.¹⁶⁷ But the Montreux Document does not specify how such monitoring authority should be established or what types of measures territorial states would be competent to take. In terms of sanctioning, both territorial states and home states (i.e., states where the companies are incorporated) are encouraged to impose sanctions on companies when such companies operate without adequate authorizations.¹⁶⁸ Such sanctions would include the revocation of the company’s licence to operate, the termination of employment contracts, the imposition of financial penalties, and the payment of reparations to those harmed as a result of misconduct by the company or by one of its employees.¹⁶⁹

In practice, the responsibility of monitoring and enforcing the Montreux Document’s standards shifts onto contracting states – i.e., states actually under contract with the private military companies. Contracting states are encouraged to take monitoring into

¹⁶² In addition to the 17 states which participated in the drafting of the Montreux Document, 19 more states have expressed support for the Montreux Document since its release. See www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html.

¹⁶³ The UN GA and SC endorsed the Montreux Document and circulated it to member states in a joint resolution. See UN Doc A/63/467 – S/2008/636 (6 Oct 2008).

¹⁶⁴ The British Association of Private Security Companies notes on its website that it will ensure that the good practices of the Montreux Document are reflected in the future regulations issued by the association, and qualifies the adoption of the Montreux Document as ‘a milestone that clarifies the applicable law and thus contributes to strengthening compliance with IHL and respect for human rights’: see www.bapsc.org.uk/key_documents-swissInitiative.asp.

¹⁶⁵ 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 entitled ‘Good Practices Relating to Private Security and Military Companies’.

¹⁶⁶ This is consistent with the nature of the Montreux Document, which identifies good practices *for states* – as its name indicates (‘On Pertinent International Legal Obligations and Good Practices *for States* related to Operations of Private Military and Security Companies during Armed Conflict’) (emphasis added).

¹⁶⁷ Montreux Document, *supra* note 1, at para. 46.

¹⁶⁸ *Ibid.*, at paras 25–42.

¹⁶⁹ *Ibid.*, at para. 46.

consideration early in the process by ensuring that the hired company has adopted internal regulations with respect to international humanitarian law and human rights law (such as policies regarding the use of force and firearms) and investigation and disciplinary arrangements in case of allegations of wrongdoing by the company's personnel.¹⁷⁰ The contracting state may also require information as to the company's past conduct, its financial and economic capacity, the possession of the required registration, licences, or authorizations, personnel and property records, or the welfare of personnel.¹⁷¹ Contracting states also ought to take measures later on in the process, i.e., once violations have been committed, by imposing administrative, disciplinary, or judicial sanctions.¹⁷²

The Montreux Document clearly views the contractual relationship between the contracting state and the company as offering significant monitoring potential. It recommends the insertion, by way of contract, of 'performance requirements that ensure respect for relevant national law, international humanitarian law and human rights law' by the private military company.¹⁷³ Contracts should also be used, the Montreux Document notes, to impose standards regarding the selection of subcontractors and to establish the liability of the company for the conduct of such subcontractors.¹⁷⁴ In order to enhance control over private military companies, the Montreux Document considers granting contracting states the right to terminate the contract if and when a company fails to comply with contractual provisions¹⁷⁵ – a suggestion inherited from the Voluntary Principles on Security and Human Rights. In fact, both the Voluntary Principles and the Montreux Document (on a broader scale) combine a hybrid and a contractual approach – the latter designed to give more 'teeth' to the standards and mechanisms elaborated.

Notwithstanding the Montreux Document's numerous achievements in advancing regulation within the industry, a closer examination reveals that its monitoring provisions are less advanced than those of the Voluntary Principles. As I explained above, the Voluntary Principles contemplate a two-pronged mechanism, which combines disciplinary offences within the company with resort to the authorities in cases of non-compliance. In contrast, the Montreux Document's approach is exclusively contractual and company-based. The latter approach, by nature limited, does not envisage sanctioning, other than (as noted above) the revocation of the company's licence to operate, the termination of employment contracts, the imposition of financial penalties, or the payment of reparations to those harmed as a result of misconduct by the company or by one of its employees.¹⁷⁶ Moreover, it is unclear which body would have the authority to enforce such sanctions.

¹⁷⁰ *Ibid.*, at para. 12.

¹⁷¹ *Ibid.*, at paras 6–10.

¹⁷² *Ibid.*, at para. 3.

¹⁷³ *Ibid.*, at paras 14–18.

¹⁷⁴ *Ibid.*, at para. 15.

¹⁷⁵ *Ibid.*, at para. 14.

¹⁷⁶ *Ibid.*, at para. 46.

The broad acceptance of the Montreux Document, together with its weaknesses, illustrates the nature of hybrid modes of governance within the industry. On one hand, gathering important and varied industry players to agree on industry-wide standards represents, in and of itself, an undeniable achievement. That these standards go beyond minimum legal requirements, too, is significant. On the other hand, few mechanisms have been put in place through the Montreux Agreement to guarantee compliance with the agreed-upon standards.

The recent International Code of Conduct for Private Security Service Providers embodies a similar trend. Having sprung from the Montreux Document, the ICoC is to the private sector what the Montreux Document is to states. Adopted in November 2010 and initially endorsed by 58 companies, the ICoC now counts 166 signatory companies.¹⁷⁷ By virtue of their acceptance of the ICoC, these companies 'endorse the principles of the Montreux Document'¹⁷⁸ and agree to standards guiding the exercise of their functions. The specific purpose of the ICoC is 'to set forth a commonly-agreed set of principles for [Private Security Providers] and to establish a foundation to translate those principles into related standards as well as governance and oversight mechanisms'.¹⁷⁹

The International Code of Conduct for Private Security Service Providers succeeds in establishing standards in areas such as recruiting, subcontracting, and the resort to force. However, it has yet to carry out its promise to create 'better governance, compliance and accountability' and establish 'external independent mechanisms for effective governance and oversight'.¹⁸⁰ These goals, while laudable, translate into too few commitments on the part of companies in the code itself. Reporting and investigating are insufficient to achieve self-regulation. Similarly, disciplinary action 'which could include termination of employment' falls short of true sanctioning of non-compliant employees.¹⁸¹

Much like that of its predecessor, the Montreux Document, the ICoC's main achievement rests in elaborating industry-wide standards acceptable to all interest groups. Emphasizing the importance of this broad appeal, the ICoC establishes a tripartite steering committee composed of representatives of the industry, civil society, and governments.¹⁸² That is perhaps the most distinctive feature of this true 'multi-stakeholder' initiative. To ensure that the ICoC does not remain a mere declaration of good intentions, the tripartite steering committee's working groups meet on a regular basis on topics such as oversight, third party complaints, and governance.¹⁸³ Minutes of their meetings are posted online – in an apparent effort to make their activity as transparent as possible.¹⁸⁴

¹⁷⁷ *Ibid.* As of Aug 2011.

¹⁷⁸ *Ibid.*, at para. 3.

¹⁷⁹ *Ibid.*, at para. 5.

¹⁸⁰ *Ibid.*, at para. 7(b).

¹⁸¹ *Ibid.*, at para. 67(f).

¹⁸² *Ibid.*, at para. 11. See also www.icoc-psp.org/ICoC_Steering_Committee.html.

¹⁸³ See Concept Paper: Areas Requiring Further Consideration for the ICoC (2011), available at: www.icoc-psp.org/uploads/TSC_Concept_Paper-final_2011May.pdf.

¹⁸⁴ See www.icoc-psp.org/ICoC_Working_Groups.html.

Whether the ICoC will succeed in creating enforceable self-regulatory standards for the industry remains uncertain. The tension between the achievements and weaknesses of instruments such as the Montreux Document and the ICoC – a tension characteristic of self-regulation generally – has been a cause of scepticism.¹⁸⁵ Yet, hybrid modes of governance have been at the forefront of the efforts to regulate the industry. They certainly have gone further than any domestic or international initiative. At the moment, I would argue that multi-stakeholder initiatives of this kind offer highly promising avenues in enhancing the regulation of the industry – in particular in terms of participation, transparency, and harmonization.

4 Industry Associations

Using GAL's taxonomy, I have identified two modes of private administration within the private military industry. The first one, industry associations, is addressed in this section; the second one, codes of conduct, is addressed in the following section.

Industry associations consist of private bodies that regroup private security and military companies under the same roof.¹⁸⁶ Through the associations, competing companies discuss issues of common interest and engage in collective efforts – with the common aim of enhancing transparency and accountability in the industry, upon a backdrop of public scrutiny and well-documented abuses. The hope is also to forestall governmental intervention and the imposition of costly or constraining regulation, while ensuring that new contracts continue to flow. In other words, the role of industry associations is both to regulate the industry and seek 'better contract opportunities for their members'.¹⁸⁷

Industry associations help the industry present a united front when dealing with regulatory issues at the domestic level (the adoption of legislation by states) or the international level (the adoption of standards by the international community). For example, IPOA and the British Association of Private Security Companies (BAPSC) both took part in the discussions leading to the adoption of the Montreux Document in 2007.¹⁸⁸ In the UK, the BAPSC has welcomed and is likely to participate in the consultation process undertaken by the UK government on the question of private

¹⁸⁵ See, generally, de Nevers and Hoppe and Quirico, *supra* note 2.

¹⁸⁶ See Ranganathan, *supra* note 2, at 329–330 (noting that there was 'no involvement of government bodies in their set-up and they do not number government representatives among their staff' nor 'is there any government involvement in their functioning' with respect to IPOA and BAPSC but expressing a more nuanced opinion regarding PASC). My view is that the role of PASC as the liaison/point of contact between the Iraqi Ministry of Interior and the companies does not take away from its private nature. In fact, Ranganathan herself eventually decides to treat PASC as a private body, in the same way as IPOA and BAPSC).

¹⁸⁷ *Ibid.*, at 375.

¹⁸⁸ See Workshop of Governmental Experts and Industry Representatives on Private Military/Security Companies, 16–17 Jan 2006, Zurich, Switzerland. Summary of the Chair, 1 Sept. 2006, available at: www.eda.admin.ch/psc.

security and military companies.¹⁸⁹ And industry associations made submissions to the South African Parliament during the drafting of its legislation on private security and military companies.¹⁹⁰ Cynics would contend that industry associations constitute a public relations stunt aimed at preventing the adoption of onerous national or transnational regulation. But in practice, industry-led initiatives have borne meaningful results, as I further discuss below.

Motivations aside, industry associations have taken significant steps to advance self-regulation.¹⁹¹ Although the associations do not possess *de lege* regulatory authority, their influence on the industry's regulatory environment has been significant,¹⁹² in particular due to the adoption of codes of conduct to which their members must subscribe. In the context of an industry association, a code of conduct is a written document, not necessarily legally enforceable, which contains moral standards used to guide the corporate behaviour of the association's members.¹⁹³ As a matter of definition, and as noted above with respect to self-regulation generally, codes of conduct usually go beyond, but do not substitute themselves for, existing legislation.¹⁹⁴

In the context of GAL, the industry associations provide an excellent example not only of regulation at the hands of private bodies, but also of the disappearing boundary between the domestic and the international realms. Indeed, while two out of three main associations are country-based, their reach is global – with the standards applying wherever the contractors operate.¹⁹⁵

The most important industry association, the US-based IPOA, was founded in 2000.¹⁹⁶ It seeks to promote ethical standards of companies active in the industry; to engage in a constructive dialogue with policy-makers about the growing and positive contribution of these firms to the enhancement of international peace, development, and human security; and to inform the concerned public about the activities and role of the industry.¹⁹⁷ Membership has so far been granted to 57 members including such firms as DynCorp International and MPRI.¹⁹⁸

¹⁸⁹ See 'The British Association of Private Security Companies Response to the Foreign & Commonwealth Office's Announcement on the Public Consultation Regarding Promoting High Standards of Conduct by Private Military and Security Companies (PMSCs) Internationally', 24 Apr. 2009, available at: www.bapsc.org.uk/downloads/BAPSC%20%27SR%27%20Statement.pdf.

¹⁹⁰ See Ranganathan, *supra* note 2, at n. 100.

¹⁹¹ Brooks, *supra* note 13, at 130.

¹⁹² This influence, often overlooked, has been described at length by Ranganathan, whose article constitutes an excellent complement to this section. See *supra* note 2.

¹⁹³ See, generally, Friedrich, 'Codes of Conduct' in *Max Planck Encyclopedia of Public International Law* (2008); and Schwartz, 'The Nature of the Relationship between Corporate Codes of Ethics and Behavior', 32 *J Bus Ethics* (2001) 247.

¹⁹⁴ See *supra* note 140.

¹⁹⁵ See, e.g., the BAPSC's charter, available at www.bapsc.org.uk/key_documents-charter.asp (which regulates the 'activities of UK-based firms and companies that provide armed security services in countries outside the UK').

¹⁹⁶ Although still referred to as IPOA, the association has been renamed 'The Association of the Stability Operations Industry'.

¹⁹⁷ The IPOA's website is at: www.ipoaonline.org.

¹⁹⁸ For a list of IPOA members see <http://ipoaworld.org/eng/ipoamembers.html>.

Adept at both self-regulation and public relations, the IPOA has developed a Code of Conduct, now in its twelfth version.¹⁹⁹ The code elaborates standards applicable to IPOA members operating in conflict and post-conflict environments regardless of where that may be.²⁰⁰ Although 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).²⁰¹

The emphasis on human rights and humanitarian law permeates the entire code.²⁰² The code encourages IPOA members to ‘take firm and definitive action if their personnel engages in unlawful activities’, contemplating that grave breaches of humanitarian law be reported to ‘the relevant authorities’.²⁰³ In addition, the code stresses the importance of properly informing, training, and vetting personnel.²⁰⁴ Finally, the code calls on companies to elaborate rules of engagement ahead of deployment and ensure that these rules comply with international humanitarian and human rights law.²⁰⁵

In terms of enforcement, the IPOA’s Code of Conduct provides that members ‘shall take firm and definitive action if their personnel engage in unlawful activities’.²⁰⁶ To that end, the IPOA calls on its members to set up internal mechanisms for personnel to report suspected breaches of international humanitarian and human rights laws and violations of other applicable laws or the IPOA Code of Conduct.²⁰⁷ It also encourages the companies to report violations of international humanitarian and human rights law committed by their personnel to the relevant authorities.²⁰⁸ Most remarkably, the IPOA’s Code of Conduct establishes its own enforcement mechanism, which allows individuals and organizations to lodge a complaint with IPOA’s Chief Liaison Officer of the Standards Committee.²⁰⁹ I should note that I am not aware of this mechanism ever having been used.

Through the IPOA’s complaint mechanism, companies as well as individuals may submit complaints to the association for alleged violations of the IPOA’s self-imposed

¹⁹⁹ IPOA Code of Conduct, available at: <http://ipoaworld.org/eng/codeofconduct/87-codecodeofconductv12enghtml.html> (the original version of the code was adopted in 2001 and the most recent one in 2009).

²⁰⁰ *Ibid.*, Preamble.

²⁰¹ *Ibid.*

²⁰² *Ibid.*, sects 1.1 (Human Rights), 3.2 and 3.3 (Accountability), 9.2.2 (Rules for the Use of Force), and 11.4 (Application and Enforcement).

²⁰³ *Ibid.*, sect. 3.3.

²⁰⁴ *Ibid.*, sect. 6.

²⁰⁵ *Ibid.*, sect. 9.2.

²⁰⁶ *Ibid.*, sect. 3.3.

²⁰⁷ *Ibid.*, sect. 11.4.

²⁰⁸ *Ibid.*, sect. 3.3.

²⁰⁹ For more information on IPOA’s Enforcement Mechanism see www.ipoaworld.org/eng/submitcomplaint.html.

standards.²¹⁰ Such complaints may remain anonymous if appropriately specified. The written complaint, as noted above, is directed to the Chief Liaison Officer of the Standards Committee, 'who is an employee of IPOA and is not affiliated with any company'.²¹¹ Of course, the IPOA may not consider complaints against companies that are not members of the association highlighting a structural weakness of such self-regulatory regimes.²¹² When responding to a complaint, the IPOA Standards Committee follows a Standards Compliance and Oversight Procedure.²¹³ This provides that the monitoring/sanctioning will take place in four steps: (1) an administrative panel will look at the complaint and decide whether it is worthy of review; (2) a review panel will hear the complaint and determine whether a violation of IPOA's code of conduct has occurred; (3) a compliance panel will suggest and impose remedies and monitor the compliance of the company subject to the complaint; and (4) a disciplinary panel will provide a final ruling on expulsion. As 'IPOA is not a law enforcement or judicial organization', it 'will not attempt to prove the guilt or innocence of a member company in a criminal or civil legal case'.²¹⁴

Although a unique three-level enforcement mechanism is contemplated, the only sanction envisaged by IPOA is the expulsion of a member from the association. Expulsion alone sidesteps true accountability, even if it may have significant reputational and financial implications. While the model of industry-led accountability is attractive at the procedural level – it avoids the need for new monitoring/enforcement mechanisms – it fails on the substantive level. A more effective model would provide for a referral by the IPOA's *Compliance Panel* to relevant authorities whenever a violation of the code has been found by such panel to have occurred. The expulsion of non-compliant members remains too limited a sanction.²¹⁵

A more local association, the BAPSC (British Association of Private Security Companies), created in 2006, represents companies that are based in the UK and provide armed security services overseas.²¹⁶ The association was founded by Andrew Bearpark, formerly a director of operations for the Coalition Provisional Authority in Iraq and involved in reconstruction efforts in Kosovo as part of the UN Mission in Kosovo. A staunch advocate of self-regulation,²¹⁷ the BAPSC's purpose is 'to promote, enhance and regulate the interests and activities of UK-based firms and companies that provide armed security services in countries outside the UK and to represent the

²¹⁰ The IPOA's complaint mechanism is available at: <http://ipoaworld.org/eng/submitcomplaint.html>.

²¹¹ *Ibid.* (emphasis in original).

²¹² *Ibid.*

²¹³ The IPOA's Standard Compliance and Oversight Procedure is available at: <http://ipoaworld.org/eng/compliancev02eng.html>.

²¹⁴ *Ibid.*, Preamble. See also *ibid.*, sect. 1.7.

²¹⁵ On the weakness of the IPOA's scheme see also Hoppe and Quirico, *supra* note 2.

²¹⁶ Bearpark and Schulz, *supra* note 11, at 247.

²¹⁷ BAPSC's charter, *supra* note 197 ('[t]he Association believes that it is only through effective self-regulation that the Members will enhance their position and be able to achieve differentiation from non Members in the same industry sector'); and Bearpark and Schulz, *supra* note 11.

interests and activities of Members in matters of proposed or actual legislation'.²¹⁸ By being admitted as members and signing the BAPSC Charter, companies commit themselves to standards of transparency, integrity, and accountability.²¹⁹ The association's Charter sets out a commitment to 'follow all rules of international, humanitarian and human rights law that are applicable as well as all relevant international protocols and conventions and further agree to subscribe to and abide by the ethical codes of practice of the Association'.²²⁰ The Charter focuses on its members' obligations when using force (which may be used only defensively), training (which must be adequate to the assignment and in accordance with the law), and the rights of the companies' personnel to 'protective equipment, adequate weapons and ammunition, medical support and insurance'.²²¹

Importantly, the BAPSC sees itself as a player in both public and private regulatory initiatives, emphasizing the importance of engaging with the UK government and relevant international organizations.²²² As noted above, the BAPSC participated in the Swiss initiative leading up to the adoption of the Montreux Document – and details of such participation are proudly displayed on the association's website.²²³ In particular, the association notes that its involvement since the initiative's inception in 2006 has contributed 'to a better understanding of the industry amongst the participating governments and ensured that an industry perspective be reflected in the final version of the Montreux document'.²²⁴ With respect to the Montreux Document itself, the BAPSC welcomed 'the enhanced clarity it brings to the legal situation of its members during their operations in areas of armed conflict' and looks forward to providing 'further input and support' in follow-ups to the process.²²⁵ This role is clearly conceived as an essential part of the association's mission. However – and this is significant – the Charter says nothing of sanctions to be adopted against non-compliant members.

A third industry association is the Private Security Company Association of Iraq (PSCAI) – a more discreet, less vocal, association 'committed to furthering professionalism, transparency and accountability within the private security industry operating in Iraq'.²²⁶ The PSCAI offers its member a forum to discuss issues of mutual interest, a medium to work with the Iraqi Government, access to data, networking opportunities, and visibility.²²⁷ Its members include the companies with the most

²¹⁸ *Ibid.* (the Charter defines 'armed services' as 'as any service provided by a Member of the Association that involves the recruitment, training, equipping, co-ordination, or employment, directly or indirectly of persons who bear lethal arms').

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ See www.bapsc.org.uk/key_documents-swissInitiative.asp.

²²⁴ *Ibid.*

²²⁵ See www.bapsc.org.uk/key_documents-swissInitiative.asp.

²²⁶ See the PSCAI website, available at : www.pscai.org.

²²⁷ *Ibid.*

lucrative Iraq contracts – such as Aegis, Erinys, and Triple Canopy. Generally speaking, much less information is available about the PSCAI than about the IPOA or the BASPC. The PSCAI does not have a code of conduct or a charter – at least not a public one.²²⁸ But with respect to membership, the admission process is much more rigorous than in other industry associations and is subject to third party approval. Such process consists in the preparation and submission of a large amount of documentation, verification by the Iraqi Ministry of the Interior, and, finally, the granting of the licence to the company.²²⁹ The PSCAI plays an important role in helping companies to go through this process, in particular by acting as a liaison between the applicants and the Iraqi Ministry of the Interior. This role illustrates the positioning of the association mostly as a local actor: unlike those of IPOA and the BAPSC, the PSCAI's activities are geared toward the local market and the companies operating within that market.

To summarize, industry associations play a growing role in enhancing the regulatory environment applicable to the activities of private security and military companies. So far largely underestimated, the regulatory potential of industry associations and their role as private administrators should be acknowledged and better exploited.

5 Codes of Conduct

In addition to their adherence to the codes established by industry associations of which they are members, a number of private military companies have adopted their own internal codes of conduct/ethics.²³⁰ As I explain below, codes adopted by companies borrow much from codes adopted by industry associations – probably in an effort to reinforce such codes and achieve some consistency within the industry. Importantly, both types of regulation may be classified as private modes of administration under GAL. In addition, codes of conduct adopted at the company level share basic characteristics with those adopted by industry associations – not legally enforceable, containing moral and legal standards, going beyond what is required by law, extraterritorial in their reach, and traditionally rather weak on enforcement.

In spite of their resemblance to industry codes, I analyse the companies' codes of conduct separately. The reason is twofold. First, these codes demonstrate the companies' *voluntary* commitment to regulation. Both the number of companies that have taken such a step and the extent of their commitment have grown in recent years. Secondly, while most codes of conduct still lack any enforcement scheme, companies have taken various measures designed to give effect to their codes of conduct. The attempt at giving more 'teeth' to self-regulation – a feature virtually absent within industry associations²³¹ – also justifies the separate treatment of these codes of conduct.

²²⁸ See Ranganathan, *supra* note 2, at 314.

²²⁹ See www.psc.ai.org/Docs/PSC_Registration_Process_2006.pdf.

²³⁰ For the sake of clarity, I will refer to these codes as codes of conduct, it being understood that this includes codes of ethics as well.

²³¹ See, e.g., the IPOA's Standards Compliance and Oversight Procedure, *supra* note 215, sect. 1.9 (expulsion of the company from the industry association is typically the only sanction contemplated, even though members of the association are encouraged to report violations directly to relevant authorities).

While these reasons call for a separate and in-depth treatment of these codes, the literature devotes little attention to this aspect of the industry's self-regulation.²³² I try to correct this imbalance in the present section not only by describing and analysing these codes, but also by emphasizing their importance in the overall efforts undertaken by the industry to self-regulate.

Efforts undertaken at the company level clearly appear from a quick survey of the leading private security and military companies. Out of the leading companies (all members of at least one industry association), approximately 9 per cent have adopted their own code of conduct and made it public. Other companies – approximately another 2 per cent – have adopted such a code but have chosen *not* to make it public. Finally, if we factor in companies which have made some other type of public commitment to legal standards, i.e., an additional 12 per cent,²³³ we observe that nearly 25 per cent of the leading private security and military companies have made some type of public commitment to international law and industry regulation. This figure demonstrates the positioning of the companies as agents of private regulation.

Five companies have taken particularly innovative steps with respect to regulation: ArmorGroup (it was the first company to adopt a public policy with respect to regulation); Aegis (its commitment was only recently made public); and Triple Canopy and DynCorp (because of the internal enforcement mechanisms they have set up in tandem with the adoption of their codes of conduct). From the perspective of Global Administrative Law, I believe that these companies constitute interesting case studies of private modes of administration without express regulatory authority.

ArmorGroup, a global leader in protective security, security training, risk management, and consultancy, bought by G4S in 2008,²³⁴ was among the first private military companies to commit to basic norms of international law. With over 9,000 personnel operating in 38 countries at the height of the war in Iraq, *ArmorGroup*'s worldwide presence and global client-base²³⁵ turned the company into a mega corporation.²³⁶ The company's strong position only made its decision to publish, in 2004, a paper entitled 'Regulation – An *ArmorGroup* Perspective', more significant.²³⁷

²³² One exception is Hoppe and Quirico, *supra* note 2.

²³³ I should note that, in this figure, I include companies that have posted on their websites detailed information (i.e., more than just a logo) regarding their membership of industry association(s). The reason is that I wanted to account for those companies which have taken the extra step to make a public and visible commitment to the provisions included in the industry associations' codes of conduct.

²³⁴ See *supra* note 27.

²³⁵ The company's clients included a number of UK governmental agencies, the US Department of Defense, the Japanese Ministry of Development and Reconstruction, the Swiss, Swedish and Canadian governments, and the European Commission. *ArmorGroup* also worked extensively for large corporations. See www.Bloomberg.com, 'ArmorGroup Nears \$380 Million Mine Clearance Order', 14 Apr. 2005, available at: www.bloomberg.com/apps/news?pid=newsarchive&sid=ajT63FtnGdTO; and Fisk and Carell, 'Occupiers Spend Millions on Private Army of Security Men', *The Independent*, 28 Mar. 2004.

²³⁶ See Fainaru and Tate, 'Outsourcing a War', *Washington Post*, 24 June 2007 (*ArmorGroup*'s Iraq Operations Manager said of the firm 'it's a monster').

²³⁷ 'Regulation – An *ArmorGroup* Perspective' (2004), previously available at: www.armorgroup.com/mediacentre/publications/?year=2004, now on file with author, at 4.

Discussing regulatory options for the private military industry, this policy paper constituted one of the first attempts of the industry at *voluntarily* enhancing the regulatory framework. Directed at companies based in the UK, ArmorGroup's policy paper advocates 'greater transparency and understanding' through 'better regulation' of the industry.

In its effort to encourage legislation applicable to UK-based companies, ArmorGroup advocates concrete steps. Genuinely convinced of its ability to affect the regulatory framework, the company recommends the extension of the Private Security Industry Act of 2002 to private security companies 'registered and based in the UK, but which operate outside the United Kingdom, in respect of all pertinent activity that they undertake *within* the United Kingdom'.²³⁸ The company suggests that regulation should require companies to submit information about their activities on a regular basis, adopt an ethics policy 'confirming compliance with international laws on human rights' and a code of conduct 'for employees operating outside the United Kingdom to include rules of engagement if weapons are to be carried', and register with applicable government departments and agencies.²³⁹ This, ArmorGroup notes, will enhance transparency within the industry.

Why did ArmorGroup take such a ground-breaking step? There is no doubt that the company's call for more legitimacy and more regulation was driven by the growing awareness of the costs of being associated with mercenaries:

Although [private security and military contractors] may be armed they have nothing in common with Private Military Companies or Mercenaries who engage in, or support, offensive combat operations that may seize ground and try to change the prevailing balance of power in a foreign country.²⁴⁰

The company's call for a better image and more recognition, which the rest of the industry later joined, necessarily came with a strong desire to distance itself from mercenaries. In this respect, as well as from the standpoint of self-regulation, ArmorGroup's bold move marked a turning point for the industry – as the experience of other companies, such as Aegis, illustrates.

Aegis, a British company made famous by its award in 2004 of a \$300 million contract by the US Government,²⁴¹ was entrusted with the task of protecting the staff members of the US Army Corps of Engineers and the Project and Contracting Office throughout Iraq²⁴² and overseeing the work of 50 other companies working in Iraq, coordinating their reconstruction work, gathering security intelligence for their

²³⁸ *Ibid.*, at 4 (emphasis in original).

²³⁹ *Ibid.*, at 5–6.

²⁴⁰ *Ibid.*, at 1.

²⁴¹ Under the contract, Aegis was to receive \$92 million in the base year, \$97 million in the first option year, and \$103 in the second and final option year (see Office of the Special Inspector General for Iraq Reconstruction, Audit Report, 'Compliance with Contract No. W911S0-04-C-0003 Awarded to Aegis Defence Services Limited', Report 05-005, 20 Apr. 2005, at 1).

²⁴² See *ibid.*, at 6; and Minow, 'Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy', 46 *BC L Rev* (2005) 989, at 1010.

workers, and warning contractors of potentially dangerous areas and missions.²⁴³ A founding member of the British Association of Private Security Companies, Aegis developed, together with the BAPSC's other members, the association's code of conduct. Internally, Aegis adopted its own ethical codes – which have once again become available on the company's website.²⁴⁴ Aegis has developed both a 'Code of Conduct' and a 'Code of Business Conduct'.²⁴⁵ It is not immediately clear why the company has not combined the two codes into one. For our purposes, the Code of Conduct is more relevant, as it provides the overarching framework, with an emphasis on regulation and international law, and I therefore focus on this code.

Aegis' Code of Conduct is naturally aimed at the company and its activities, yet it also contains elements directed at the industry as a whole. The company declares that 'it is essential that legitimate [private security companies] work within the framework of National (host country) and International Law and set themselves their own high standard of ethics, conduct and procedures', and appears as an active supporter of industry regulation.²⁴⁶ Not only in the code itself²⁴⁷ but also on its website, Aegis refers to security sector reforms, welcomes the adoption of the Montreux Document, and publicizes its participation in a number of multi-stakeholders initiatives.

Another focus of the code is international law, which Aegis repeatedly declares itself bound to.²⁴⁸ This commitment translates into engaging only in 'legitimate work which adheres to the principles of International Law, including International Humanitarian Law and Human Rights Law',²⁴⁹ and in training its personnel in these laws.²⁵⁰ Aegis commits to monitoring compliance with the code by investigating reports of incidents²⁵¹ and establishing disciplinary procedures 'to deal with any deviation from the standards laid down'.²⁵² Aegis also notes the role of the BAPSC in the 'integration and promulgation' of the code.²⁵³

Aegis's code is one of the most detailed and regulation-oriented codes in the industry. The company has clearly invested much time and effort in its elaboration, while in parallel promoting industry regulation.²⁵⁴ But while the code remains emblematic of a public commitment to law and regulation made by a private security

²⁴³ 'Aegis Links Help Reinforce Security', *The Times*, 25 Nov. 2005.

²⁴⁴ Aegis' Code of Conduct, June 2010, and Aegis' Code of Business Conduct, July 2010, available at: www.aegisworld.com/index.php/codeofconduct (the code had been taken off the website, probably while undergoing some revisions. The code is on file with the author).

²⁴⁵ The company's Code of Business Conduct contains specific standards in the area of negotiating, bidding, receiving gifts and gratuities, and harassment. See Aegis' Code of Business Conduct, *supra* note 246, at paras 3.4, 2.3, and 8.3.

²⁴⁶ Aegis' Code of Conduct, *supra* note 246, at para. 2.

²⁴⁷ *Ibid.*, at paras 5, 10, 14, 47, and 48.

²⁴⁸ *Ibid.*, at para. 12.

²⁴⁹ *Ibid.*, at para. 7. See also *ibid.*, at para. 9.

²⁵⁰ *Ibid.*, at paras 18, 22.

²⁵¹ *Ibid.*, at para. 13.

²⁵² *Ibid.*, at para. 21. See also *ibid.*, at paras 13, 19, and 32.

²⁵³ *Ibid.*, at para. 5.

²⁵⁴ See, e.g., Aegis' Code of Business Conduct, *supra* note 250, at 4.

and military company, it unfortunately does not designate any effective enforcement mechanisms to ensure compliance.²⁵⁵

This is a weakness common to company codes: even companies that have tried to set up enforcement mechanisms have struggled to overcome the enforcement issues inherent in this type of regulation. Companies like Triple Canopy and DynCorp, for example, have in recent years set up enforcement mechanisms in order to give more teeth to their codes of conduct. Their experience illustrates the emergence of new regulatory trends within the industry and highlights the companies' constantly and rapidly evolving approach to regulation, monitoring, and sanctioning.

Triple Canopy, a US company which specializes in providing security and risk management services to the oil and gas sector,²⁵⁶ particularly in Iraq,²⁵⁷ expresses its commitment to law and regulation repeatedly on its website. First, Triple Canopy declares that its business conduct must be guided by the United Nations Universal Declaration of Human Rights and other applicable human rights documents and principles.²⁵⁸ These include the Chemical Weapons Convention, the Convention Against Torture, the Geneva Conventions (including the Additional Protocols), and the Voluntary Principles on Security and Human Rights.²⁵⁹

In addition, the company has posted the ICoC on its website – in effect replacing an elaborate compliance programme which had entered into force only a few months before the adoption of the ICoC. Triple Canopy's compliance programme consisted of a Code of Ethics and Business Conduct and detailed enforcement mechanisms designed to ensure its respect. These mechanisms included an 'Ethics Hotline', available round the clock, designed to enable employees, consultants, and agents to raise questions or report possible misconduct. Information could also be submitted electronically through the 'Ethics Reporting Form'²⁶⁰ or directly to the Ethics Officer (the Senior Vice President of Human Resources who reports directly to the company's CEO).²⁶¹ The Ethics Hotline, together with reviewing and investigating mechanisms within the company, ensured that the company's various ethical and legal commitments were complied with. In the event of a violation employees were 'subject to disciplinary action up to and including termination of employment'.²⁶² But Triple Canopy did not consider the possibility of turning the non-compliant employee over to the appropriate authorities in addition to dismissing him from the company.

²⁵⁵ E.g., it is unfortunate that the company's 'ethics hotline' only takes messages and does not provide a real forum for concerned personnel. See Aegis' Code of Business Conduct, *supra* note 250, at para. 12.

²⁵⁶ Triple Canopy's website is at: www.triplecanopy.com. Triple Canopy was created in 2003 and contracted for over \$100 million with the US State Department for the provision of personal and guard services.

²⁵⁷ See also Berger, 'The Other Army', *New York Times Magazine*, 14 Aug. 2005.

²⁵⁸ Triple Canopy's 'Commitment to Human Rights', available at: www.triplecanopy.com/philosophy/human-rights/.

²⁵⁹ Voluntary Principles, *supra* note 133.

²⁶⁰ *Ibid.*, sect. 2.2.

²⁶¹ *Ibid.*, sect. 2.4 (emphases omitted).

²⁶² *Ibid.*, sect. 2.5.

Though it was replaced by the ICoC, Triple Canopy's scheme continues to be relevant for at least two reasons. First, it illustrates the efforts made by companies to provide 'teeth' to internal and industry standards. In addition, Triple Canopy's experience highlights the weaknesses inherent in voluntary schemes: when enforcement remains an internal matter, a company may not be able to 'punish' non-compliant contractors other than by firing them. Unless it is accompanied by a referral to governmental authorities, that sanction, as I have noted above, is insufficient: would the contractor be able to work for another company after being discharged? Under a scheme like Triple Canopy's, would he escape altogether any type of judicial proceedings? While Triple Canopy's scheme was ground-breaking in its comprehensiveness, it too failed to answer these important questions.

The case of DynCorp offers some additional insight into how the companies' perception of their regulatory function has evolved in recent years. DynCorp works primarily for the US Department of State in high-risk environments, and specializes in training, management, and security. DynCorp has a Code of Ethics and Business Conduct which emphasizes the need to comply 'with all applicable laws, regulations, and best practices' – a statement which highlights the importance of industry standards alongside black-letter laws.²⁶³ Also on its website DynCorp includes a link for those who wish '[t]o learn more about how to report a possible violation of the Standards of Business Conduct, laws, regulations, or other company policies'.²⁶⁴ This link is to the 'DI Hotline' a website customized for DynCorp, but operated by a company called EthicsPoint.²⁶⁵ Through this site, employees may confidentially report violations of the code. The website notes that EthicsPoint will 'review every submission received, investigate all complaints, and, where appropriate, implement corrective action'. Once a report has been submitted, follow-up is possible with the help of report number and a password.

Partnering with EthicsPoint enables a company to operate a confidential, independent, hassle-free, organized, and cost-efficient structure for the treatment of instances of non-compliance. Other companies in the industry, such as EOD Technology and MPRI (acquired by L-3 in 2000), have also 'outsourced' the enforcement of laws, regulatory standards, and codes of conduct.²⁶⁶ These recent developments suggest that compliance has become a central concern of the companies in this sector. By turning to EthicsPoint, private security and military companies save themselves the complexity of setting up imperfect and complex internal mechanisms of the type established by Triple Canopy prior to the adoption of the ICoC – and ensure that efficient reporting and investigating mechanisms are in place.

More importantly, the adoption of the ICoC and the growing use of services provided by EthicsPoint indicate a change in how the companies view their regulatory role. The

²⁶³ DynCorp's Code of Ethics and Business Conduct, available at: www.dyn-intl.com/media/1474/code_of_ethics_and_business_conduct.pdf.

²⁶⁴ See www.dyn-intl.com/code-of-ethics.aspx.

²⁶⁵ DI Hotline, available at: <https://secure.ethicspoint.com/domain/media/en/gui/27481/index.html>.

²⁶⁶ See www.eodt.com/AboutUs/Ethics/and <https://secure.ethicspoint.com/domain/media/en/gui/17948/index.html>.

latter certainly includes standard-setting – namely, participation in multi-stakeholder initiatives, membership of an industry association, and the adoption of company codes of conduct. This role, however, seems less and less likely to include monitoring of the codes and industry standards, as such monitoring is increasingly turned over to separate entities. The outsourcing of this function by no means implies that monitoring is perceived as unimportant. On the contrary, by turning over reporting, monitoring, and investigating powers to EthicsPoint, companies convey the message that codes of conduct are no longer mere declarations of good intentions.

But many questions remain with respect to the sanctioning of violations. Once EthicsPoint has determined that a violation has occurred, does it turn over the ‘case’ to the company? Who of EthicsPoint or the company decides what the sanctions may be? Although, as noted above, EthicsPoint notes that it does ‘implement corrective action’ in cases of violations, no information on sanctioning is available on EthicsPoint’s website (or on the companies’ websites). Finally, I would assume that EthicsPoint takes into account instruments such as the Montreux Document and the ICoc in determining whether a violation has occurred – but the website does not confirm that this is the case.

6 Assessment

Together, standard-setting, monitoring, and sanctioning constitute the three steps that characterize an effective self-regulatory scheme: at the standard-setting stage, industry players agree to certain basic rules of behaviour.²⁶⁷ A monitoring stage usually follows in which efforts are undertaken to oversee respect for such rules, such as periodic review of participants’ behaviour. The self-regulatory regime is then completed by the development of sanctioning measures designed to punish non-compliant actors.²⁶⁸

Private modes of regulation have certainly come a long way since ArmorGroup issued its groundbreaking policy paper in 2004.²⁶⁹ The scope of self-regulation generally – understood as encompassing hybrid and private modes of administration – has reached far beyond what was ever anticipated. More and more companies have expressed a public commitment to international law and industry regulation. In some

²⁶⁷ See Kingsbury, *supra* note 43, at 36–37; and Abbott and Snidal, ‘Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit’, 42 *Vanderbilt J Trans’l L* (2009) 501, at 507.

²⁶⁸ See, for an example in the sporting goods industry, van Tulder and Kolk, ‘Multinationality and Corporate Ethics: Codes of Conduct in the Sporting Goods Industry’, 32 *J Int’l Bus Studies* (2001) 267, at 271, 274; Raustiala, ‘Compliance and Effectiveness in International Regulatory Cooperation’, 32 *Case Western J Int’l L* (2000) 387, at 425, citing K. Raustiala and D. Victor, *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998); Bernauer and Moser, ‘Reducing Pollution of the River Rhine: The Influence of International Cooperation’, 5 *J Env’t & Dev* (1996) 389; and Brown Weiss, ‘Understanding Compliance with International Environmental Agreements: The Baker’s Dozen Myths’, 32 *U Mich L Rev* (1999) 1555.

²⁶⁹ See *supra* note 239.

cases, this commitment to standards of behaviour is accompanied by the establishment of monitoring mechanisms at the company or industry level.

Accordingly, I would argue that the private security and military industry currently finds itself in an imperfect, albeit advanced, state of global administration. There is little doubt that the private military industry has succeeded in elaborating standards that can be applied industry-wide, and has made progress in developing monitoring mechanisms capable of enforcing these standards. It has done so through a variety of measures, both public and private, which have given shape to a set of rules designed to make up for the lack of efficient international regulation.

But beyond these notable achievements in standard-setting and monitoring, as we have seen self-regulation is not devoid of weaknesses. In addition to being disorderly and thus difficult to track, self-regulation often lacks the teeth necessary to attain its full potential. What is lacking, in other words, is the sanctioning mechanisms needed to ensure compliance with the standards elaborated voluntarily by and within the industry.

Under the vast majority of voluntary regulatory schemes, non-compliant contractors face only the termination of their employment contracts. Non-compliant companies may, theoretically, face expulsion from important industry associations; but such instances have not been documented. Only in rare cases does self-regulation contemplate any type of real and effective sanction, let alone the involvement of police or other law-enforcement authorities. Even when such involvement is contemplated, such as in the Voluntary Principles and IPOA's Code of Conduct, its modalities are unclear. The modalities may vary from one company to another but the objective – to enhance accountability in the industry – is common to all initiatives undertaken.

For self-regulation to be effective, the industry must therefore focus on developing tools and powers required to sanction non-compliant players. While this will not be easy, the private military industry has demonstrated its ability to adapt quickly to protect and promote its interests. The substantial changes that swept through the industry in the first decade of the 21st century, in particular with respect to standard-setting, are telling in this regard and give reason for hope that the industry will succeed in perfecting monitoring and developing efficient sanctioning mechanisms.

4 Conclusion

This article has examined the intersection between the private security and military industry and global administrative law. Much can be learned from this exercise – for global governance, for the private security and military industry, and for GAL itself. The aim of this article has been to highlight GAL's contribution to the study of the industry, while focusing on how GAL's insights enable the elaboration of a complete, orderly, and systematic taxonomy of the industry's regulatory schemes.

While the use of GAL to study and analyse the industry is not indispensable, it offers definite advantages. First, reference to model-type categories of administration identified under GAL ensures that no mode of administration is overlooked. For example,

the GAL taxonomy highlights the potential of the UN Working Group as a regulator of the industry. Secondly, the use of GAL draws our attention to aspects of the industry's regulation that might not have been observed otherwise. For instance, we observe the absence of transnational, informal, networks of administration within the industry – a horizontal mode of governance which typically produces effective, albeit non-binding, instruments. Further work could be conducted to determine how useful this mode has proved in other sectors and what the advantages might be of creating such mechanisms in the industry. Thirdly, the GAL taxonomy highlights similarities among seemingly different modes of administration. Consider, for example, contracts and domestic legislation, both classified as distributed domestic modes of administration. The categorization of two seemingly distinct regulatory mechanisms under the unique umbrella of 'domestic modes of administration' makes it possible to shape common strategies to enhance these mechanisms' efficiency. Finally, the rationalization of the industry's regulatory schemes under GAL facilitates comparisons with numerous manifestations of global governance previously analysed by GAL.

The proposed taxonomy, which incorporates the insights gained from GAL while taking into account the unique features of the industry, identifies four main modes of administration: formal modes of administration (exemplified by the United Nations Working Group on mercenaries); distributed domestic modes of administration (regulation through contract and extraterritorial domestic legislation); hybrid modes of administration (multi-stakeholder initiatives such as the Montreux Document); and private modes of administration (industry associations and companies' codes of conduct).

Immediately apparent from this taxonomy is the prevalence of self-regulation within the industry, namely in the form of hybrid and private modes of administration. GAL highlights the importance of such modes, while drawing distinctions among them. Although beyond the scope of this article, GAL also provides guidance on *how* to assess the normative outcome produced by self-regulation – an important topic that warrants examination in its own right. For now, suffice it to say that the potential and weaknesses of self-regulation suggest that the industry – which has gone a long way in standard-setting and, to some extent, monitoring – must now focus on establishing mechanisms capable of sanctioning non-compliance with the standards elaborated voluntarily by and within the industry.

GAL provides an innovative perspective on the development and incorporation of legal and behavioural norms – and I am hopeful that this article will provide a platform for future studies of the intersection of GAL and the private security and military industry.