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From National and International Frustrations to Transnational Triumph? Hybrid Transnational Private Regulatory Regimes in the Industry of Private Military and Security Companies and Their Effectiveness in Ensuring Compliance with Human Rights

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From National and International Frustrations to Transnational Triumph? Hybrid Transnational Private Regulatory Regimes in the Industry of Private Military and Security Companies and Their Effectiveness in Ensuring Compliance with Human Rights

*Evgeni Moyakine**

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ABSTRACT

With the boom of the industry of private military and security service provision after the end of the Cold War and the emergence of various transnational private regulatory initiatives, many questions have been posed with regard to the application of international law to these entities and the usefulness of transnational private regulation in ensuring their compliance with human rights. As there is no established tradition of this type of regulation in the given sector, it might be instructive to analyze the effectiveness of two main multi-stakeholder regimes: the Voluntary Principles on Security and Human Rights and the International Code of

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Conduct for Private Security Service Providers. While the Voluntary Principles provide guidance for extractive companies as clients of private military and security contractors, the International Code of Conduct is specifically aimed at regulating the conduct of these contractors regarding their human rights performance and respect of international humanitarian law. In order to make informed conclusions regarding the effectiveness of both regimes, the examination is based on the insights into such dimensions as legitimacy, enforcement and quality. By evaluating the architecture, functioning and major successes and failures of both regulatory frameworks and analyzing four above-mentioned elements, this article investigates how important the initiatives are for tackling the main issues of the industry associated with the commission of human rights abuses by their representatives.

[I]n the absence of a strong public law answer to the challenges posed by transnational activities to regulation, transnational private regulation offers a tool that should not simply be dismissed as ineffective and therefore inadequate.

—Nicola Jägers¹

I. INTRODUCTION

For more than two decades, a trend towards privatization of military affairs and security has been a global phenomenon involving the increasingly extensive use of private military and security companies (hereinafter: PMSCs) by a wide spectrum of clients ranging from States to international organizations, NGOs, and corporations.² When information about human rights abuses committed at the Abu Ghraib detention facility in Iraq was released in 2004, it came to the fore that some employees of PMSCs hired by the U.S. government were implicated in these violations.³ The reached settlement in the case only indicates that actual perpetrators implicated in the commission of most serious crimes often escape any responsibility.⁴ Therefore, there is a definite need to regulate the industry of private military and security service provision on both national and international levels. A possible Convention on Private Military and Security Companies is being drafted by the United Nations Working Group on the Use of Mercenaries.⁵

1. Nicola Jägers, *Regulating the Private Security Industry: Connecting the Public and the Private Through Transnational Private Regulation*, 6 HUM. RTS. & INT'L LEGAL DISCOURSE 56, 91 (2012).

2. *Id.* at 59.

3. Brent Kendall, *Contractor's Torture Settlement a Milestone*, WALL ST. J. (Jan. 9, 2013), <http://www.wsj.com/articles/SB10001424127887324442304578232070457319286>.

4. *See id.*

5. *National Regulatory Frameworks on PMSCs*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalRegulatoryFrameworks.aspx> (last visited

Among other States, some forms of domestic regulation of the industry are to be traced in the national laws of the United States, the United Kingdom, and South Africa, but the question of their effectiveness remains open.⁶ Against this backdrop, it is argued that the third type of regulatory mechanisms in form of transnational private regulation can be seen as a significant tool in the regulatory toolbox that is capable of regulating PMSCs and ensuring their compliance with human rights standards.⁷

The current contribution builds upon the results of the case study of the Center for Transboundary Legal Development (hereinafter: CTLD) of Tilburg University carried out within the framework of the collaborative research project on transnational private regulatory regimes (hereinafter: TPRERs) funded by the Hague Institute for the Internationalisation of Law (hereinafter: HiiL).⁸ It seeks to critically analyze two main hybrid regimes established in the field—the Voluntary Principles on Security and Human Rights (hereinafter: VPs) and the International Code of Conduct for Private Security Service Providers (hereinafter: ICoC)—from the point of view of their effectiveness.⁹ The examination is based on three particular dimensions—legitimacy, enforcement, and quality—that are crucial for the effectiveness of TPRERs.¹⁰ Due to the lack of information, specific nature of the sectors, and constant development of the concerned initiatives, it is impossible to make credible conclusions regarding the element of effectiveness, which is influenced by three above-mentioned dimensions and will be assessed in rather general terms. Firstly, this article describes two hybrid regimes and provides necessary background information on their functioning and governance structures.¹¹ Secondly, the article examines the three elements of legitimacy, quality, and enforcement in order to evaluate the fourth main dimension of effectiveness.¹² Finally, the article makes a number of conclusions regarding the VPs and the ICoC, the degree of their effectiveness and its possible enhancement.¹³

Mar. 7, 2015) (listing national legislation of some States focusing on PMSCs that the Working Group has surveyed).

6. *Id.*

7. CENTER FOR TRANSBOUNDARY LEGAL DEVELOPMENT (CTLD), CASE STUDY FOR THE HAGUE INSTITUTE FOR THE INTERNATIONALISATION OF LAW: TRANSNATIONAL PRIVATE REGULATION, PRIVATE SECURITY COMPANIES AND HUMAN RIGHTS: PROMISE OF EFFECTIVENESS? 39 (2012) [hereinafter CTLD].

8. *Id.*; Details on the case study and broader research project *see also Transnational Private Regulation: Constitutional Foundations and Governance Design*, HiiL, <http://www.hiil.org/privateregulation> (last visited Mar. 7, 2015).

9. CTLD, *supra* note 7, at 11-14, 27.

10. *See id.* at 8-9 (explaining the theoretical framework of the HiiL research project).

11. *See id.*

12. *Id.* at 11-13, 20.

13. *Id.* at 15.

II. REGIMES UNDER CONSIDERATION

A. Hybrid Regimes

There are a number of TPRERs aimed at regulating the conduct of PMSCs and their employees.¹⁴ In addition to trade associations, such as the International Stability Operations Association (hereinafter: ISOA) and the British Association of Private Security Companies (hereinafter: BAPSC) established on the soil of the United States and the United Kingdom, there are hybrid regimes also involving a variety of stakeholders other than PMSCs.¹⁵ In contrast to the trade associations safeguarding interests of their members and promoting some general standards, the hybrid schemes serve as an arrangement for regulating the industry and participating in a constructive dialogue on the incorporation of international humanitarian law and human rights norms and principles into specific commitments for companies.¹⁶ These TPRERs arguably constitute a promising regulatory instrument in terms of their effectiveness and are elaborated upon below.¹⁷

B. The Voluntary Principles on Security and Human Rights

As the oldest initiative tackling human rights concerns arising from the field of security, the VPs were convened and directed by the U.S. and U.K. governments in 2000 in order to deal with human rights issues associated with the extraction industry.¹⁸ The VPs only indirectly address PMSCs and specifically focus on the corporate clients of PMSCs from this sector.¹⁹ Its membership consists of representatives of three particular pillars: the government pillar, the NGO pillar, and the corporate pillar respectively including nine States, 10 NGOs, and 25 companies.²⁰ The governance structures of the regime are comprised of four bodies.²¹ The Plenary is the main decision-making body of the initiative

14. *Id.* at 102.

15. CTLD, *supra* note 7, at 50-51.

16. *Id.* at 59.

17. *Id.* at 81; *see also infra* Part III.

18. *What are the Voluntary Principles*, VOLUNTARY PRINCIPLES ON SECURITY + HUMAN RIGHTS, <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/> (last visited Mar. 7, 2015); *The Initiative of the Voluntary Principles on Security and Human Rights: Governance Rules*, § I, (Mar. 29, 2012), http://www.voluntaryprinciples.org/wp-content/uploads/2014/06/VPs_Governance_Rules_-_as_posted_June_2014.pdf [hereinafter VPs].

19. *See generally* VPs, *supra* note 18.

20. *The Voluntary Principles on Security and Human Rights Fact Sheet*, VOLUNTARY PRINCIPLES ON SECURITY + HUMAN RIGHTS, http://www.voluntaryprinciples.org/wp-content/uploads/2015/01/VPs_-_Fact_Sheet_-_January_2015.pdf (last visited Mar. 7, 2015) [hereinafter Fact Sheet].

21. VPs, *supra* note 18, at SEC. III ¶ 1(a).

consisting of all participants.²² The Steering Committee forms the main executive body composed of participating entities from all three pillars.²³ The Secretariat is the administrative body of the VPs²⁴ and its tasks are currently exercised by Foley Hoag's Corporate Social Responsibility practice.²⁵ The Voluntary Principles Association is an entity addressing a variety of financial and administrative needs of the initiative.²⁶ The VPs provide guidelines for risk assessment and relations of corporations with public and private security forces.²⁷ All participants need to meet a number of criteria including the requirements of publicly promoting the VPs, proactively implementing or assisting in the implementation of the VPs, and at least annually communicating publicly on the efforts to implement or assist in the implementation of the VPs.²⁸ In general, the VPs is the first major hybrid regime indirectly focusing on the industry of PMSCs and is often perceived as a blueprint for other initiatives emerging in the field.

C. *The International Code of Conduct for Private Security Service Providers*

The ICoC is a recently developed multi-stakeholder process engaging three types of stakeholders: States, NGOs, and PMSCs.²⁹ The Code itself is signed by companies while others are in a position to issue a political statement of support. While in November 2010 only 58 PMSCs signed the Code at the Signatory Ceremony in Geneva, currently there are 708 firms participating in the initiative.³⁰ The Code has been established as a result of the negotiations of Switzerland, the United Kingdom, and the United States with a broad range of PMSCs, international organizations, and NGOs, such as Human Rights First and Geneva Centre for the Democratic Control of Armed Forces.³¹ According to a state official³², as it has been emphasized at the Signatory Ceremony, one of the major challenges was to bring stakeholders together and achieve a sufficiently

22. *Id.* at SEC. III ¶ 2(a).

23. *Id.* at SEC. III ¶ 2(b).

24. *Id.*

25. Foley Hoag LLP, *CSR Practice Selected as Secretariat for Voluntary Principles on Security and Human Rights* (Jun. 19, 2014), <http://www.foleyhoag.com/news-and-events/news/2010/september/csr-practice-selected-as-secretariat-for-voluntary-principles-on-security-and-human-rights>.

26. VPs, *supra* note 18, at SEC. III ¶ 2(d).

27. *Id.*

28. *Participation Criteria*, VOLUNTARY PRINCIPLES ON SECURITY + HUMAN RIGHTS, http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/VPs_Participation_Criteria_Final_-_127000_v1_FHE-DC.pdf (last visited Mar. 7, 2015) [hereinafter *Participation Criteria*].

29. INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY PROVIDERS, <http://www.icoc-psp.org> (last visited Jan. 23, 2015).

30. *Id.*

31. *Id.*

32. Anne-Marie Buzatu, Project Coordinator of the Geneva Centre for the Democratic Control of Armed Forces, at the Signatory Ceremony of the Int'l Code of Conduct for Private Sec. Service Providers held in Geneva (Nov. 9, 2010).

high level of mutual trust. Within the initiative, the multi-stakeholder Steering Committee of 6 to 9 members is functioning as a temporary board and is responsible for developing the Independent Governance and Oversight Mechanism (hereinafter: IGOM).³³ Taking the bodies of international humanitarian and human rights law as a starting point, the regime seeks to establish standards and principles for the industry of private security service providers.³⁴ The corporations undertake a number of commitments relating to the operation in accordance with the Code, applicable law, regulations and corporate standards of business conduct, and commit to function, in a manner recognizing and supporting the rule of law, respecting human rights standards, and protecting the interests of their clientele.³⁵ In addition, companies are required to take steps for establishing and maintaining effective internal governance frameworks and make available necessary means for addressing possible violations of national law, international law, or the Code.³⁶ Finally, PMSCs need to cooperate with national and international authorities in investigations of violations of international humanitarian law, human rights, or international and national criminal law.³⁷

III. DIMENSIONS OF THE ANALYSIS

A. *Legitimacy*

In the case study, the aspect of legitimacy has been defined as the acceptance that an organization has a right to govern by those it aims to govern and those on whose behalf it intends to govern.³⁸ It is generally accepted that the TPRERs created in this field lack both the coercive capacity and automatic legitimacy of State regulation.³⁹ Nevertheless, the objectives of the regimes aimed at ensuring respect of companies for human rights and the law of armed conflict serve as an indication of a certain degree of legitimacy. Inclusiveness, procedural transparency, and the regulators' accountability form the main tools to examine the aspect of legitimacy.⁴⁰

33. International Code of Conduct for Private Security Service Providers at 6 ¶ 11-12 (Nov. 9, 2010), http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf [hereinafter ICoC].

34. *Id.* at 3 ¶ 5.

35. *Id.*

36. *Id.* at 4 ¶ 7-8.

37. *Id.* at 7 ¶ 21-22.

38. Hague Institute for the Internationalisation of Law (HiiL), *The Added Value of Private Regulation in an Internationalized World? Towards a Model of the Legitimacy, Effectiveness, Enforcement and Quality of Private Regulation*, at 9, www.hiil.org [hereinafter HiiL].

39. Colin Scott, *Regulating in Global Regimes*, HANDBOOK ON THE POLITICS OF REGULATION 563, 564-565 (David Levi-Faur ed., 2011).

40. HiiL, *supra* note 38, at 9.

Inclusiveness entails the participation of the regulated entities—PMSCs and their clients—and beneficiaries—persons and entities affected by the conduct of PMSCs and their representatives (NGOs)—in the decision-making process.⁴¹ According to a state representative, although the VPs are generally well-known for the active participation of various stakeholders,⁴² the degree of inclusion is low. Only major corporations from North America and Western Europe became part of the initiative and there is still insufficient extent of participation of States and NGOs.⁴³ There is strict admissibility and participation criteria for joining the VPs.⁴⁴ In contrast, the processes within the ICoC framework reflect the high level of inclusiveness due to the involvement of not only PMSCs, but also States and NGOs in the standard-setting and enforcement mechanisms.⁴⁵ The large number of PMSCs that signed up to the Code indicates a fairly low threshold of becoming a signatory company, but the geographical spread of participating corporations is rather limited.⁴⁶ Most of them are from the United States and the United Kingdom, especially those that are most actively involved in the functioning of the regime.⁴⁷

The following components of legitimacy are procedural transparency and accountability. Confidentiality and secrecy surrounding the operations of PMSCs is a general feature of the industry of PMSCs and the significance of more transparency and accountability is often accentuated.⁴⁸ While the VPs' regime suffers from the lack of transparency and trust among different stakeholders,⁴⁹ the transparency of the ICoC is sufficiently ensured and participants seek to achieve trust and understanding. Due to the effects PMSCs' conduct and regulators within the TPRERs can have on third parties, a pertinent need for accountability mechanisms arise.⁵⁰ The element of accountability of the regulators is strongly connected to the availability of control and oversight instruments that are accepted by the regulated and by the third parties influenced by the PMSCs' activities.⁵¹ The internal accountability mechanisms directed at those regulated concern the possibility of withdrawal and voting procedures within the VPs and

41. *Id.* at 12.

42. The author and his colleagues personally interviewed a State representative on September 21, 2011.

43. VPs, *supra* note 18, at SEC. III ¶ 1; Fact Sheet, *supra* note 20.

44. Participation Criteria, *supra* note 28.

45. See Fact Sheet ICoC, Processes so Far, (Jun. 19, 2014), http://www.icoc-psp.org/uploads/Fact_Sheet_ICoC_November_2011.pdf.

46. Participation Criteria, *supra* note 28.

47. *Id.*; see also INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY PROVIDERS, *supra* note 29.

48. Kevin A. O'Brien, *What Should and What Should not Be Regulated?*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES, 29, 31 (Simon Chesterman & Chia Lehndt eds., 2007).

49. JAMES COCKAYNE ET AL., BEYOND MARKET FORCES: REGULATING THE GLOBAL SECURITY INDUSTRY 156-157 (2009).

50. Deirdre Curtin & Linda Senden, *Public Accountability of Transnational Private Regulation: Chimera or Reality?*, 38 J.L. & SOC'Y 183 (2011).

51. See *id.* at 169-70, 181-86.

the ICoC.⁵² The external accountability toward the third parties can find expression in a certain degree of accountability towards NGOs and other stakeholders engaged in both processes.⁵³

In sum, it appears that the dimension of legitimacy is not well-articulated in the VPs and needs further enhancement, while the ICoC seems to be an overall more legitimate process.⁵⁴

B. Quality

This dimension is concerned with the quality of regulatory norms and is dependent upon three particular factors.⁵⁵ In the first place, precision, accessibility, and practicability of the standards determine the aspect of quality.⁵⁶ The VPs aimed at guiding the conduct of corporations and establishing a dialogue between stakeholders has a rather general nature and contain broad provisions, such as the following: “companies recognize a commitment . . . to be mindful of the highest applicable international standards.”⁵⁷ As expectations are directed at companies, this approach arguably facilitates more flexibility of the process focused on a variety of corporations operating in different contexts and meets the need of adjusting to societal changes.⁵⁸ The ICoC distinguishes itself from the VPs by its specific provisions relating to the conduct of PMSCs including rules on the use of force, prohibition of torture, and other matters.⁵⁹

The following set of factors influencing the aspect of quality is comprised by complementarity and consistency entailing the degree to which TPRERs complement existing public legal frameworks and other TPRERs and are consistent with them. While the VPs contain references to the vague notions of human rights and international humanitarian law, the document also specifically mentions the Universal Declaration of Human Rights,⁶⁰ the UN Code of Conduct for Law Enforcement Officials, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,⁶¹ and ILO Declaration on Fundamental

52. CTLD, *supra* note 7, at 12.

53. *Id.* at 66.

54. *Id.* at 63-64, 78.

55. *Id.* at 12.

56. *Id.*

57. VPs, *supra* note 18, at Appendix 1, A-1.

58. TINEKE E. LAMBOOIJ, CORPORATE SOCIAL RESPONSIBILITY: LEGAL AND SEMI-LEGAL FRAMEWORKS SUPPORTING CSR: DEVELOPMENTS 2000-2010 AND CASE STUDIES 252 (2010).

59. Compare ICoC, *supra* note 33, at 8-11 ¶ 28-43 (listing specific principles regarding the conduct of personnel, including rules for general conduct, rules for the use of force, rules for detention, rules for apprehending persons, and prohibitions of torture or other cruel inhuman or degrading treatment or punishment) with Foley Hoag LLP, *supra* note 25.

60. *Introduction and Interactions Between Companies and Private Security*, VOLUNTARY PRINCIPLES ON SECURITY + HUMAN RIGHTS, <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles> (last visited Mar. 7, 2015).

61. *Id.* at 4-5.

Principles and Rights at Work.⁶² The ICoC also refers not only to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,⁶³ but also the Montreux Document and the UN “Protect, Respect, and Remedy” framework.⁶⁴ Both codes of conduct, however, do not include references to other TPRERs established in this particular field or other sectors.⁶⁵

With regard to the dimension of quality, it can be observed that on the one hand the ICoC is to be perceived as initiative making a relatively strong claim of being a high quality TPRER, certainly considering precision and accessibility of its provisions, and complementarity and consistency with international norms and standards. On the other hand, the quality of the VPs lags behind.

C. Enforcement

It is obvious that the guidelines laid down in the codes of conduct need to be enforced in order to have effect on those regulated by the TPRERs. Some go as far as to assert that effective regulation must be in place in order for the TPRERs to even be perceived as a form of regulation.⁶⁶ Enforcement comprises all possible activities aimed at ensuring compliance of regulated entities with regulatory norms.⁶⁷ It implies not only ex post enforcement mechanisms, such as remedies and sanctions, but also ex ante instruments in form of monitoring and supervision.⁶⁸ TPRERs established in the field of private security service provision are largely at the stage of standard setting and implementation and lack effective enforcement instruments, which is a feature common to many TPRERs.⁶⁹

The VPs have ex ante enforcement instruments in form of an obligation to publicly report on the implementation steps taken by the participants.⁷⁰ Failure to comply with this obligation can render the participants’ status inactive.⁷¹ In addition, in cooperation with States, the member companies are encouraged to participate in in-country processes in order to integrate the VPs into the local

62. *Id.*

63. ICoC, *supra* note 33, at arts. 32, 59(c).

64. *Id.* at Preamble, arts. 2-3.

65. *See id.*; Foley Hoag LLP, *supra* note 25.

66. Colin Scott, *Non-judicial Enforcement of Transnational Private Regulation*, ENFORCEMENT OF TRANSNATIONAL REGULATION: ENSURING COMPLIANCE IN A GLOBAL WORLD 147, 151 (Fabrizio Cafaggi ed., 2012).

67. *Id.*

68. *Id.*

69. *See* Fabrizio Cafaggi, *Introduction: The Transformation of Transnational Private Regulation: Enforcement Gaps and Governance Design*, in ENFORCEMENT OF TRANSNATIONAL REGULATION: ENSURING COMPLIANCE IN A GLOBAL WORLD 1, 6147, 147-150, (Fabrizio Cafaggi ed. 2012).

70. Participation Criteria, *supra* note 28, at 1-2.

71. *Id.* at 2.

practices of host countries and promote a dialogue among different stakeholders.⁷² Participants also have a possibility to file complaints with the dispute resolution mechanism regarding the non-compliance of each other with the duty to implement the VPs.⁷³ As a result, non-complying participants can be expelled from the initiative with the unanimous decision.⁷⁴

As to the ICoC, at the drafting conference that took place in Montreux on February 19-22, 2013 PMSCs, national governments and civil society organizations reached an agreement on the final text of the charter of the IGOM, the so-called Articles of Association.⁷⁵ According to a state representative, on September 19-20, 2013, the initiative launched in Geneva the International Code of Conduct Association (hereinafter: ICoCA) that could potentially form an effective governance and oversight mechanism without which the Code itself would be a dry and meaningless document.⁷⁶ In addition to national courts and public forums of civil society organizations, the IGOM offers the third platform for holding private military and security corporations accountable.⁷⁷ The non-profit Association is created as a multi-stakeholder initiative and constitutes an independent legal entity with legal capacity under Swiss law.⁷⁸ It is aimed at not only promoting, governing, and overseeing implementation of the ICoC, but also promoting “the responsible provision of security services and respect for human rights and national and international law in accordance with the Code.”⁷⁹ The Association is responsible for monitoring, reporting and assessing the participants’ performance⁸⁰ and maintaining a third party complaints process.⁸¹ The members of the Association are divided into three stakeholder pillars: private security companies and private security service providers; governments, and civil society organizations.⁸² As of June 2014, 162 private corporations have joined the ICoCA.⁸³ In addition, six States, including Australia, Norway, Sweden,

72. *See id.* at 1, 3.

73. VPs, *supra* note 18, at 31-32.

74. Participation Criteria, *supra* note 28, at 3.

75. *See Eidgenössisches Department Für auswärtige Angelegenheiten*, SWISS CONFEDERATION (Jun. 19, 2014), <http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=47889>.

76. The author and his colleagues personally interviewed a State representative. This information was obtained from that interview. As stressed by Andrew Clapham in the panel discussion that took place at the Signatory Ceremony of the ICoC held in Geneva on Nov. 9, 2010.

77. The author and his colleagues personally interviewed a State representative. This information was obtained from that interview.

78. ICoC, *Articles of Association*, art. 1.1, http://www.icoc-psp.org/uploads/ICoC_Articles_of_Association.pdf [hereinafter ICoC Articles].

79. ICoC Articles, art. 2.2.

80. *Id.* at art. 12.

81. *Id.* at art. 13.

82. *Id.* at art. 3.1.

83. International Code of Conduct Association, Members of the ICoC Association: Private Security Service Providers (Jun. 19, 2014), http://psm.du.edu/media/documents/international_regulation/global_standards_codes_of_conduct/icoca-member-companies_june-2014.pdf [hereinafter ICoCA].

Switzerland, the United Kingdom, and the United States, belong to the members of the Association.⁸⁴ Among the participants, one can also find 13 civil society organizations, such as the Human Rights Watch and One Earth Future.⁸⁵ The main bodies of the ICoCA are the General Assembly, the Board of Directors, and the Secretariat.⁸⁶ The General Assembly is the governing body of the Association comprising all participants that provides a venue for voting on different matters and engaging in a multi-stakeholder dialogue and discussion.⁸⁷ The Board of Directors functions as the executive decision-making organ composed of twelve Directors with four seats for every pillar.⁸⁸ At the moment, the Board is in the process of developing procedures for company certification and monitoring and for the complaints mechanism.⁸⁹ The Secretariat supervised by an Executive Director has as its core task the execution of the decisions of the Board and maintaining records required for the governance of the Association.⁹⁰ In addition, there is also an Advisory Forum of Montreux Document Participants serving as a resource for the Board of Directors and giving advice to the ICoCA concerning national and international policy and regulatory matters.⁹¹

Next to the use of *ex ante* and *ex post* enforcement mechanisms, an alternative means of enforcement should be distinguished in which the clientele of PMSCs can play a crucial role.⁹² As observed by Doug Brooks, the founder of ISOA and now President Emeritus of this association, “standards never change unless the client pays attention to the standards.”⁹³ Therefore, of particular importance is the concept of the so-called redeployment purporting that initially voluntary guidelines, such as those included in codes of conduct, acquire a certain degree of legal bindingness when they are incorporated into the contracts concluded between PMSCs and their clients or are used as benchmarks.⁹⁴ In this regard, voluntary commitments function as legal norms when several gatekeepers contracting PMSCs require companies to comply with a code of conduct. Over time, such instruments of private regulation obtain a compulsory status and can

84. ICoCA, *Members of the ICoC Association: States* (Jun. 19, 2014), http://www.icoca.ch/assets/icoca-member-states_january-20142.pdf.

85. *Id.*

86. ICoC Articles, *supra* note 78, at art. 5.1.

87. *Id.* at art. 6.

88. *Id.* at arts. 7.1-7.2.

89. Minutes from the ICoC Steering Committee Meeting in London (Sep. 26-28, 2011) at 2.

90. ICoC Articles, *supra* note 78, at art. 9.1, 9.3.

91. *Id.* at art. 10.1.

92. WORLD BANK GROUP MANAGEMENT RESPONSE, STRIKING A BETTER BALANCE – THE WORLD BANK GROUP AND EXTRACTIVE INDUSTRIES: THE FINAL REPORT OF THE EXTRACTIVE INDUSTRIES REVIEW §3.20, 3.21 (2004) [hereinafter WORLD BANK GROUP MANAGEMENT RESPONSE].

93. Whitney Grespin, *An Act of Faith: Building the International Code of Conduct for Private Security Providers*, THE DIPLOMATIC COURIER, Jul. 19, 2012, available at <http://www.diplomaticcourier.com/news/topics/security/1233-an-act-of-faith-building-the-international-code-of-conduct-for-private-security-providers> (last accessed Mar. 8, 2015).

94. Curtin & Senden, *supra* note 50, at 168.

be regarded as being legally binding to a greater extent than international conventions having their own limitations.⁹⁵ In this process, States appear to play the crucial role by including the guidelines of codes of conduct in the public procurement policies and taking an active stance in the establishment and development of TPRERs.⁹⁶ The VPs—often criticized for the lack of active State support⁹⁷—experienced a surge in development after the involvement of the U.S. government.⁹⁸ Some investors also already take the VPs as a benchmark while financing certain projects: the World Bank requires, for instance, the extractive projects under its support to be compatible with the Code.⁹⁹ The VPs specifically provide that, where it is appropriate, companies should include the outlined standards in the contractual agreements with private security providers.¹⁰⁰ The ICoC also contains a requirement for signatory companies to make compliance with the Code an integral part of contracts with subcontractors, personnel and other parties performing security services under these contractual agreements.¹⁰¹ While the results of the empirical study indicate that various companies participating in the ICoC comply with it, there are corporations lacking any knowledge or understanding of this redeployment provision.¹⁰² In addition to the references to the VPs and the ICoC in contracts and their use as benchmarks, the adherence of PMSCs to the TPRERs can be made compulsory by clients or insurers.¹⁰³ For example, PMSCs willing to be hired by the US in Afghanistan were required to become members of the ISOA in order to win a contract.¹⁰⁴

The current state of affairs makes clear that the aspect of enforcement is rather under-developed in both regimes. The ICoCA, however, constitutes a potentially strong enforcement mechanism capable of ensuring compliance of PMSCs with the standards of the code. In this regard, the main clients of these corporations and other possible gatekeepers need to be actively involved in the functioning of the instrument and redeployment of the standards in question.¹⁰⁵

95. Jägers, *supra* at note 1, at 85.

96. *Id.* at 86-87.

97. Bennett Freeman, To What Extent Can Voluntarism Provide Answers?, Remarks at Wilton Park Conference on Business and Human Rights: Advancing the Agenda (Oct. 11, 2005).

98. Interview with State representative (Sep. 21, 2011).

99. WORLD BANK GROUP MANAGEMENT RESPONSE, *supra* note 92.

100. VPs, *supra* note 18, at 28.

101. ICoC, *supra* note 33, at ¶ 18.

102. Interview with stakeholder (Jun. 20, 2011); Interview with stakeholder (Jul. 22, 2011); Interview with stakeholder (Sep. 8, 2011).

103. CTLD, *supra* note 7, at 111.

104. *Id.*

105. See *supra* Part C.

D. Effectiveness

The element of effectiveness has been identified as the extent to which TPRERs under analysis meet their own objectives.¹⁰⁶ It is influenced by not only legitimacy and quality of the regulatory processes, but also enforcement instruments established by the given regimes.¹⁰⁷ A distinction is made between two particular dimensions of effectiveness: formal and substantive.¹⁰⁸ Formal effectiveness is concerned with the process of measuring compliance with the rules of TPRERs.¹⁰⁹ Substantive effectiveness is measured against the achievement of regulatory objectives of the initiatives.¹¹⁰ It implies that regulatory objectives and regulatory instruments to achieve them are clear and well-defined.¹¹¹

From the perspective of regulatory relationships, the concept of effectiveness is not only capable of measuring compliance of regulated parties with the norms of a regime, but is also concerned with the effects of the regulatory process on the beneficiaries of the regulation.¹¹² Examined from the angle of institutional complementarity, effectiveness of transnational private regulation appears to depend on the credibility and legitimacy of public institutions, such as the judicial bodies on the national and international levels.¹¹³ When hybrid regimes emerge that include both public and private actors, it increases effectiveness due to the fact that various stakeholders participate in the process of rule-making.¹¹⁴ Effectiveness of such initiatives must be assessed in terms of possibilities to ensure that private law-making achieves its promised goals and the question what principles must be used to implement consistency between means and ends.¹¹⁵ The degree of effectiveness, just as legitimacy, depends on different relationships of recognition that TPRERs enter into with their surroundings: for instance, interaction with and connection to other normative orders, such as state legal systems and other TPRERs.¹¹⁶ It is, however, also true that in practice there might be a difference between the effectiveness as perceived by the members of a

106. CTLD, *supra* note 7, at 14.

107. *Id.*

108. Fabrizio Cafaggi, *Clarifying the Definitions*, Internal Guidance Document, HiiL Research Project, 3-4.

109. *Id.*

110. *Id.*

111. *See id.*

112. Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. & Soc'y 1, 24 (2011).

113. *Id.* at 33-34.

114. Fabrizio Cafaggi, *Private Regulation in European Private Law* 11-15 (Robert Schuman Centre for Advanced Studies, Working Paper No. 31, 2009).

115. Fabrizio Cafaggi, *Private Law-making and European Integration: Where Do They Meet, When Do They Conflict?*, THE REGULATORY STATE: CONSTITUTIONAL IMPLICATIONS, 201, 227 (Dawn Oliver et al. eds., 2010).

116. Jacco Bomhoff & Anne Meuwese, *The Meta-regulation of Transnational Private Regulation*, 38 J.L. & Soc'y 138, 162 (2011).

TPRER and the ability of a regime to meet its own regulatory objectives.¹¹⁷ In the final analysis, the effectiveness of private rule-making necessarily entails the question “to what extent the rules as drafted and implemented have been able to achieve the expected and declared regulatory objectives.”¹¹⁸

Before going into the substance of the analysis of effectiveness of the VPs and the ICoC, the specific nature of this particular industry and the environment of the operation of its representatives need to be stressed. The industry of PMSCs is familiar with many rogue corporations that appear, disappear and reappear again under a different name in a different location when governments seek to regulate their activities or human rights are violated and the companies’ image sustains damage.¹¹⁹ Such was the situation in South Africa after the adoption of the South African Foreign and Military Assistance Act in 1998 banning all mercenary activity.¹²⁰ When the act was passed, many private security firms decided to reconstitute themselves, relocate to other States or enter the illegal market beyond the influence of government.¹²¹ Similar practices within the industry characterized by a high level of secrecy undoubtedly have a negative impact on the legitimacy of the industry and undermine effective attempts to regulate the compliance of its representatives with human rights.¹²² In addition, PMSCs are often to be found in conflict areas with the absence of the rule of law, which makes the effective implementation of TPRERs nearly impossible.¹²³

A number of evaluation points should be taken into account in the assessment of effectiveness: industry commitment and capacity, private interests as a driving force behind establishing TPRERs, government pressure and oversight, availability of credible sanctioning policies and means to render this type of regulation effective, such as design indicators and impact indicators.¹²⁴ In the HiiL case study, design indicators were seen as means and mechanisms making regulation effective, while impact indicators were understood as the perception of effectiveness by regulated parties and third parties, since it was

117. Fabrizio Cafaggi & Andrea Renda, (1) *Effectiveness of Private Regulation*, HiiL TRANSNATIONAL PRIVATE REGULATION POLICY BRIEF SERIES 3 (2011), available at <http://privateregulation.eu/wp-content/uploads/2011/11/Policy-brief-Effectiveness.pdf>.

118. *Id.*

119. Eugenio Cusumano, *Policy Prospects for Regulating Private Military and Security Companies*, in WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN LAW, AND PRIVATE CONTRACTORS 11, 27 (Francesco Francioni & Natalino Ronzitti eds., 2011).

120. *Id.* at 28.

121. *Id.*; DEBORAH D. AVANT, THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY, 162-163 (2005); Sarah Percy, *Regulating the Private Security Industry*, 46 ADELPHI PAPERS NO. 384, at 25, 31 (2006); Juan C. Zarate, *The Emergence of a New Dog of War: Private International Security Companies*, *International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75, 157 (1998).

122. Cusumano, *supra* note 119, at 13.

123. *Id.*

124. *Id.* at 19-26.

deemed not possible to measure the actual impact of the TPRERs within the scope of the research.¹²⁵

The initiative of the VPs seeking to regulate the conduct of extractive companies and indirectly influencing PMSCs has experienced little commitment from the industry towards the achievement of the regime's objectives.¹²⁶ According to an NGO representative, merely a small number of corporations have become part of the initiative and comply with the Code as long as there is an added value of doing so.¹²⁷ The companies are largely driven by the main desire to improve the overall image of the industry and individual companies and secure contract possibilities.¹²⁸ These reputational concerns and commercial considerations appear to be in line with the core aim of the VPs to ensure protection of human rights of the local population in the areas where companies operate.¹²⁹ As a primary matter of concern, a general lack of governmental pressure was indicated in the qualitative empirical research.¹³⁰ Enforcement and oversight instruments are considered rather weak and underdeveloped.¹³¹ Sanctioning policies available to the process are also ineffective and are based on the possibility of expelling a participant or declaring its status inactive.¹³² Design indicators of the VPs are constituted in the first instance by the set of performance indicators for member companies developed by the participating NGO International Alert.¹³³ In addition, there is a reporting requirement, according to which every participant has to report to the Plenary regarding its efforts to implement the VPs.¹³⁴ According to a State representative, in general, stakeholders and third parties do not perceive the VPs to constitute an effective process and often criticize it for lacking teeth and being ineffective.¹³⁵ Due to the low levels of legitimacy, quality and enforcement, the effectiveness of the VPs remains very limited.

Currently, the ICoC initiative is making significant steps towards the regulation of the PMSCs' industry: the ICoCA has recently been launched and it

125. CTLD, *supra* note 7, at 72.

126. Interview with NGO representative (Jan. 7, 2010).

127. Interview with NGO representative (Jan. 7, 2010).

128. International Alert, *Voluntary Principles on Security and Human Rights: Performance Indicators*, 1 (2008), available at <http://www.international-alert.org/resources/publications/voluntary-principles-security-and-human-rights-performance-indicators>.

129. *Frequently Asked Questions from Governments*, VOLUNTARY PRINCIPLES ON SECURITY + HUMAN RIGHTS, http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/VPS_FAQs_by_Governments.pdf (last visited Mar. 8, 2015).

130. Interview with State representative.

131. *See* *Frequently Asked Questions from Governments*, *supra* note 129, at 2.

132. *See id.* at 4.

133. International Alert, *supra* note 128, at 3.

134. VPs, *supra* note 18, at SEC. VIII, ¶ 1.

135. Interview with State representative (Feb. 1, 2010); Interview with State representative (Nov. 2, 2011); Interview with State representative (Nov. 10, 2011); Interview with Company representative (Feb. 2, 2010).

might be too early to speak of the effectiveness of the regime as a whole.¹³⁶ A number of general observations, however, are in order. It is obvious that there is a fairly high degree of industry commitment and support of States and trade organizations for the ICoC.¹³⁷ As the main reason for the PMSCs to become signatory parties to the regime reputational concerns and more competitiveness on the market have frequently been articulated, and it perfectly aligns with the aims of the initiative.¹³⁸ Upon its establishment, the Association aims at ensuring monitoring, reporting and assessment of the participants' performance and operating a third party complaints process.¹³⁹ In sum, the ICoC potentially holds the strongest promise for effectiveness due to its level of legitimacy, quality of the norms and standards and, most importantly, its elaborate governance and oversight mechanism substantially improving the dimension of enforcement.¹⁴⁰

IV. CONCLUSION

Two hybrid rights-based transnational private regulatory frameworks directly or indirectly focusing on PMSCs constitute a reaction to numerous corporate human rights violations that should not be underestimated.¹⁴¹ These regimes remain, without doubt, voluntary initiatives in which firms can participate or abstain from any involvement, but voluntary in a strict legal sense they acquire a degree of binding authority from not only the social and economic points of view¹⁴², but also from the legal perspective in case of re-deployment.

Considering the effectiveness of the VPs and the ICoC, it follows that the absence of effective oversight and enforcement mechanisms ensuring implementation of the codes and respect of the standards by the participants severely diminishes the capacity of the TPRERs to achieve their objectives.¹⁴³ It is evident that the lack of credible and effective enforcement mechanisms

136. Press Release, *ICoCA Launch Marks Significant Step to Improve Private Security Contractor Oversight*, HUMAN RIGHTS FIRST (Sep. 18, 2013), <http://www.humanrightsfirst.org/press-release/icoca-launch-marks-significant-step-improve-private-security-contractor-oversight>; Deborah Avant, *Pragmatism and Effective Fragmented Governance: Comparing Trajectories in Small Arms and Military and Security Services*, 3 Oñati Socio-Legal Series 741, 758 (2013), available at <http://opo.iisj.net/index.php/osls/article/viewFile/230/272>.

137. Avant, *supra* note 136, at 758.

138. Interview with Company representative (Aug. 25, 2011); Interview with Company representative (Jul. 7, 2011); Interview with Company representative (Jul. 22, 2011).

139. See Avant, *supra* note 136, at 744.

140. Human Rights First, *supra* note 136.

141. See *supra* Parts II-III.

142. Cafaggi, *supra* note 69, at 4-5.

143. NIGEL D. WHITE, REGULATORY INITIATIVES AT THE INTERNATIONAL LEVEL, MULTILEVEL REGULATION OF MILITARY AND SECURITY CONTRACTORS: THE INTERPLAY BETWEEN INTERNATIONAL, EUROPEAN AND DOMESTIC NORMS 11, 16 (Christine Bakker & Mirko Sossai eds., 2012).

common to transnational private regulation in general makes them ineffective.¹⁴⁴ In this regard, the ICoC will potentially serve as an example of the initiative capable of establishing and maintaining an effective enforcement process and be significantly more effective than its predecessors. In the same vein, the ICoC as a self-regulatory framework involving PMSCs that undertake to participate in the process and comply with the standards concerned has the advantage of directly addressing these business entities and surpassing limitations and weaknesses of international law.¹⁴⁵ It is also clear that effectiveness of both the VPs and the ICoC is to a great degree dependent upon the active participation and support of States and other stakeholders, such as clients, insurance companies and NGOs playing a central role of gatekeepers.¹⁴⁶ It might be apparent, however, that to engage more stakeholders and encourage them to function as such, a higher level of transparency of the processes is necessary.

Currently, there is a long way to go for the ICoC and especially the VPs to become more effective. Obviously, the industry of PMSCs with its peculiarities and challenges can hardly be regulated by the TPRERs alone: what is needed is a balanced exercise¹⁴⁷ of creating a smart mix of measures of international, national and transnational character.¹⁴⁸ Only this method of using a variety of regulatory instruments will prove to be undeniably effective in achieving the ultimate goal of ensuring compliance of PMSCs with human rights.

144. See Kenneth W. Abbot & Duncan Snidal, *The Governance Triangle*, in THE POLITICS OF GLOBAL REGULATION 44, 46 (Walter Mattli & Ngaire Woods eds., 2009); Fabrizio Cafaggi, *A Comparative Analysis of Transnational Private Regulation; Legitimacy, Quality, Effectiveness and Enforcement* (Jun. 2014), available at http://www.eesc.europa.eu/resources/dovs/a-comparative-analysis-of-transnational-private-regulation-fcafaggi_12062014.pdf.

145. White, *supra* note 143, at 16.

146. See *supra* Part III.

147. Curtin & Senden, *supra* note 50, at 188.

148. Willem van Genugten, Nicola Jägers & Evgeni Moyakine, *Private Military and Security Companies, Transnational Private Regulation and Public International Law: From the Public to the Private and Back Again?*, in HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS (Jernej Letnar čerňak & Tara Van Ho eds., 2015); Jägers, *supra* note 1, at 90.

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