

The Politics of Legal Arrangements: The “Duty of Care,” Justifying, Extending, and Perpetuating the Public-in-the-Private Forms of Protection

Anna Leander

Journal article (Publisher’s version)

Please cite this article as:

Leander, A. (2018). The Politics of Legal Arrangements: The “Duty of Care,” Justifying, Extending, and Perpetuating the Public-in-the-Private Forms of Protection. *Indiana Journal of Global Legal Studies*, 25(1), 265-289. <https://doi.org/10.2979/indjglolegstu.25.1.0265>

DOI: [10.2979/indjglolegstu.25.1.0265](https://doi.org/10.2979/indjglolegstu.25.1.0265)

No part of this document may be reproduced, stored in a retrieval system, transmitted, or distributed in any form, by any means, electronic, mechanical, photographic, or otherwise, without the prior permission of Indiana University Press. For educational reuse, please contact the Copyright Clearance Center <http://www.copyright.com/>. For all other permissions, contact IU Press at <http://iupress.indiana.edu/rights/>.

Uploaded to [CBS Research Portal](#): August 2019

With permission by Indiana University Press



The Politics of Legal Arrangements: The “Duty of Care,” Justifying, Extending, and Perpetuating the Public-in-the-Private Forms of Protection*

ANNA LEANDER**

ABSTRACT

This article explores the place of formal legal arrangements in the politics surrounding the hybrid, enmeshed public-in-the-private forms of authority this special issue focuses on. It does so by analyzing the significance of one specific legal arrangement, the Duty of Care, for the politics surrounding public-in-the-private forms of protection. I show that the Duty of Care does considerable political work. It contributes to decentering, commercializing, and depoliticizing protection. In so doing, the Duty of Care is justifying this specific form of protection, defining and extending its scope, and perpetuating it. The article makes this argument by drawing both on the legal discussion about the Duty of Care and on close observation of its presence in the Security and Counterterrorism Expo trade fair. It concludes that acknowledging the

* Support from the Norwegian Research Council is gratefully acknowledged. Thank you also to the participants in the workshop, *Duty of Care: Protecting Citizens Abroad* (Clingendael June 17–18, 2016), to the editors of this special issue, Stefano Guzzini, and the participants in the doctoral seminar in international relations at the Graduate Institute Geneva for their careful reading and comments on an earlier version of this article. Finally, I wish to acknowledge the editorial team of the *Indiana Journal of Global Legal Studies* for their uncommonly thorough and professional support.

** Anna Leander is a professor (MSO) at the Copenhagen Business School and a professor of International Relations at the Pontifical Catholic University of Rio de Janeiro. She is a research partner at the Centre for the Resolution of International Conflicts and the Nordic Centre of Excellence for Technology and Societal Values (both in Copenhagen). Her research is in International Political Sociology and focuses on practice theory and commercial security with an emphasis on digital, visual, and legal practices and on the ethnographic method. She recently published articles in the *European Journal of Social Theory*, *EPD: Space and Society*, *Leiden Journal of International Law*, *Global Constitutionalism*, and *Review of International Studies*. Recent books include the *Handbook of Private Security Studies* (eds. w. Abrahamsen) and *Commercializing Security in Europe* (ed.). For more see: www.cbs.dk/staff/ale.

Indiana Journal of Global Legal Studies Vol. 25 #1 (Spring 2018)
© Indiana University Maurer School of Law

politics of the Duty of Care requires shifting the focus and divisions currently organizing debates about the regulation of commercial security as well as about managerialism in international law more generally.

INTRODUCTION

On April 19-20, 2016, the Security & Counterterrorism Expo took place in the Olympia Convention Centre in London. According to the advertisement, the Expo is “the security industry’s most topical and operationally critical event” during which “as a registered visitor you will join 9000+ international security professionals to see the future of security.”¹ Interestingly, many of the organizations, exhibitors, visitors, and expert lecturers at the fair were *both public and private*. The public was enmeshed with and intertwined in the private. The public was in the ostensibly private space of the Olympia Security & Counterterrorism Expo (SCTX).² The SCTX was an instantiation of “the public-in-the-private” theme of this special issue. This article focuses on the legal politics that underpin and reinforce the *Public-in-the-private form of Protection* (PPP) on display at the Expo.³ I wish to heed David Kennedy’s advice that we “lay down the burdens of faith and see law’s role in the ubiquitous struggles of global political and economic life and the injustice that results.”⁴ Doing so seems particularly important because it is often (implicitly or explicitly) assumed that soft “governance” is driving and deepening neo-liberalization, whereas hard law promises to contain and control it.⁵ The argument here shows that

1. E-mail from Security & Counter Terror Expo to Anna Leander, Professor of International Relations at the PUC, Rio de Janeiro (Apr. 14, 2016, 09:33 GMT) (on file with author) (Security & Counterterrorism Expo registration confirmation to visitors).

2. For a more detailed empirical discussion of public-private enmeshment, see generally Anna Leander, *Understanding US National Intelligence: Analyzing Practices to Capture the Chimera*, in *THE RETURN OF THE PUBLIC IN GLOBAL GOVERNANCE*, 197, 197–221 (Jacqueline Best and Alexandra Gheicu eds., 2014).

3. I refer to PPP throughout the text as a shorthand for commercialized governance of military/security. I do so in reference to the title and common theme of this special issue. However, the invocation of the private and the public is exceedingly problematic. It assumes that they can be separated, which is often not the case, and since it recalls the gamut of connotations related to each of the terms which often do more to harm and hinder analysis than to help it. I have consistently reiterated this point since I first made it in Anna Leander, *Commercial Security Practices*, in *THE ROUTLEDGE HANDBOOK OF NEW SECURITY STUDIES*, 208–16 (J. Peter Burgess ed., Routledge 2010).

4. DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* 254 (2016).

5. Koskenniemi, for example, writes that the problem of managerialism originates in “a political science inspired language of ‘governance,’ ‘regulation’ or ‘legitimacy,’ and of ‘informal regimes.’” See Martti Koskenniemi, *The Politics of International Law – 20 Years*

this assumption is in dire need of revision. We need to become more precise in our understanding of how “legal arrangements”⁶ re-produce neo-liberal, commercial, governance forms. This is particularly true as resorting to hard law is the most common strategy for curbing the expansion of commercial governance forms in military and security matters. If the argument I make is correct, that resort may produce opposite effects from those intended.

The following pages are devoted to showing how and why hard law may drive and deepen the neo-liberalizing of security-military governance—possibly even more effectively than soft law governance. To make this argument, I explore the politics of one specific legal arrangement—namely the Duty of Care (DoC). The DoC is a tort law principle dating back to the eighteenth century.⁷ It addresses the negligence to prevent foreseeable harm. The DoC principle makes it so those providing a service or a good have a “Duty” of “Care” to others. Like general common law principles, the DoC is derived from custom and judicial precedent, rather than statutes, and can therefore be made relevant across a wide range of contexts. One (primarily legal) way of exploring this extension of the DoC to the military/security area would be to clarify usages, interpretations, relations to other regulations, or its potential and limits as a regulatory mechanism. However, in this article, my exploration takes a different (primarily political) form: I investigate the politics of the DoC in the military/security area; I ask how the spread of the DoC to this area refashions the kind of protection provided, to whom, and what possibility for debating and contesting exists. Legal interpretations and court decisions obviously matter for politics.⁸ However, they matter because they become involved in politics that take place largely beyond the legal text, its interpretation, and the courtroom. In this article, I therefore follow a tradition of legal

Later, in THE POLITICS OF INTERNATIONAL LAW 63, 72 (2011). For discussion on the topic, see also THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI (Wouter Werner et al. eds., 2017).

6. I use the term legal arrangements, rather than simply law or regulation, to capture both the formal, positive, *legal* quality as well as the contextual variability generated by differences in how it is inscribed into specific regulatory *arrangements*.

7. For a good historical overview, see Martin Davies, *The End of the Affair: Duty of Care and Liability Insurance*, 9 LEGAL STUD. 67, 69–83 (1989). For books introducing the principle, see ROSEMARY KENNEDY, DUTY OF CARE IN THE HUMAN SERVICES: MISHAPS, MISDEEDS AND THE LAW 104–15 (Eve Merton ed., 2009); see also A.J.E. JAFFEY, DUTY OF CARE 3–4 (1992).

8. I will return to the most significant case to date for the sector in some detail below. See Oslo District Court, Nov. 25, 2015, Case No. 15-032886TVI-OTI R/05 (Nor.) [hereinafter OSD].

anthropology, combining arguments from the legal literature (in my case about the DoC) with fieldwork (my observations at the STCX).⁹

I argue that the DoC works politically in three ways: it *justifies*, *extends*, and *perpetuates* the public-in-the-private Forms of Protection (PPP). It does so because it reproduces and consolidates the interrelated decentering, commercializing, and depoliticizing of protection at the heart of the PPP. I claim neither that the DoC is a representative example of how legal arrangements do politics generally, nor that it is solely responsible for the neo-liberalization of military/security governance. Rather, the argument here is both more modest and more ambitious. It is modest in that it is restricted to the politics of one specific legal arrangement (the DoC), in relation to one issue (military/security protection). Yet, at the same time the article makes the more ambitious and generalizing claim that, on the basis of this situated argument, we can derive general insights about how to conceptualize the politics of legal arrangements. The article indeed points to three specific mechanisms by which the DoC does politics that might have analogies in other contexts (their place in justifying, delimiting, and perpetuating political orders).¹⁰ To make this argument, the article successively introduces the three processes through which I argue the DoC is doing politics: justifying, drawing the boundaries around, and stabilizing the commercialized military/security governance. The conclusion returns to the broader implications of this argument, underlining that it calls for a revision of the normative assumptions underpinning discussions about the regulation of commercial security specifically and of managerialism in international law more generally.

9. For further discussions and examples of the rationale for this kind of work see, for example, Anne Orford, *In Praise of Description*, 25 LEIDEN J. INT'L L. 609, 609–11 (2012). The contributions are also helpful in Michael Freeman & David Napier, *Introduction*, in 12 LAW AND ANTHROPOLOGY 1 (Michael Freeman & David Napier eds., 2009); Annelise Riles, *Cultural Conflicts*, in 12 LAW AND ANTHROPOLOGY 89 (Michael Freeman & David Napier eds., 2009); and Fleur Johns, *Global Governance Through the Pairing of List and Algorithm*, 34 ENV'T & PLAN. D 126, 130 (2016).

10. In so doing it contributes to a growing literature on the performativity of legal arrangements and the related artifacts. See, e.g., DOCUMENTS: ARTIFACTS OF MODERN KNOWLEDGE 1–5 (Annelise Riles ed., 2006); Seyla Benhabib, *Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty*, 103 AM. POL. SCI. REV. 691, 694 (2009); Michel Callon, *Economic Markets and the Rise of Interactive Agencements: From Prosthetic Agencies to Habilitated Agencies*, in LIVING IN A MATERIAL WORLD: ECONOMIC SOCIOLOGY MEETS SCIENCE AND TECHNOLOGY STUDIES 29, 29–32 (Trevor Pinch & Richard Swedberg eds., 2008); Anna Leander, *The Politics of Whitelisting: Regulatory Work and Topologies in Commercial Security*, 34 ENV'T & PLAN. D 48, 48–50 (2016); Anna Leander, *What Do Codes of Conduct Do? Hybrid Constitutionalization and Militarization in Military Markets*, 1 GLOBAL CONSTITUTIONALISM 91, 91–92 (2012).

I. DoC DECENTERING RESPONSIBILITY FOR PROTECTION: JUSTIFYING THE PPP

The Olympia Expo demonstrates the extent to which the provision of protection now will involve markets and companies. This is a relatively novel development. As late as 2007, the rapid move from mercenaries to markets puzzled observers.¹¹ At the SCTX, this puzzlement was ostensibly gone.¹² “Security and anti-terrorism” is a commercial activity for the public and the private alike. This transition from mercenaries to markets has been anything but straightforward. It has required overcoming or circumventing a deeply rooted reluctance toward protection for profit.¹³ Moreover, the transition is only partially and unequally complete.¹⁴ The reluctance toward commercial military/security activities keeps threatening to intrude. It is as haunting to commercial security as Derrida’s Marxian Ghost is to the social sciences.¹⁵ Even in the SCTX, the insistent references to public police and armed forces, to loyalty toward the state, and to legality signal the need to respond to the ostensibly absent but omnipresent reluctance toward for-profit protection. The first way regulatory arrangements generally, and the DoC specifically, do politics is by justifying the PPP and hence keeping the reluctance in check. It legitimizes and legalizes the decentering of responsibility for protection of which the PPP is an expression.

11. See generally, FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES (Simon Chesterman & Chia Lehnardt eds., 2007) (providing a panorama of positions on private military companies (PMCs)).

12. During the fair, I came across a group of young peace researchers and a dozen critical scholars and journalists who might still be puzzled.

13. Among many, see Sarah Percy, *Morality and Regulation*, in FROM MERCENARIES TO MARKETS: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 11, 14–22 (Simon Chesterman & Chia Lehnardt eds., 2007); see also Michael J. Sandel, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS 87, 93–139 (2012); JAMES PATTISON, THE MORALITY OF PRIVATE WAR: THE CHALLENGE OF PRIVATE MILITARY AND SECURITY COMPANIES 2–5 (2014); Anna Leander, *Mercados transgresores de seguridad: una mercancía en disputa y sus prácticas de mercado* [*Transgressive Security Markets: A Contested Commodity and Its Market Practices*], 30 RELACIONES INTERNACIONALES [RI] 117 (2015).

14. A core difference between the U.S. and the U.K. and the rest of the world is that elsewhere the reluctance toward protection for profit remains strong even when and if protection has been thoroughly commercialized. See, e.g., Anna Leander & Christopher Spearin, *Conclusion*, in COMMERCIALISING SECURITY IN EUROPE: POLITICAL CONSEQUENCES FOR EUROPEAN PEACE OPERATIONS 202, 206–09 (Anna Leander ed., 2013).

15. JACQUES DERRIDA, LES SPECTRES DE MARX: L’ÉTAT DE LA DETTE, LE TRAVAIL DU DEUIL ET LA NOUVELLE INTERNATIONALE (1993).

A. Legitimizing the Public-in-the-Private Forms of Protection

The decentering of responsibility for protection only makes sense in the broader context of the shifting organization of the state that is the focus of this special issue. In terms of providing protection, this reorganization is motivated by a wish to improve services, including cultivating and managing potential.¹⁶ As Sevenhuijsen suggests in her discussion about the care provided through social policy:

We can probably consider the government as *régisseur* of the “caring about” process, that of a collective attentiveness that ensures that no loopholes exist in care. Instead of doing everything itself, the government develops itself in a number of respects as an *initiator of new combinations of the public and private*, as is currently happening.¹⁷

Justifying this transformation of the public to a *régisseur* of potential and initiator of new combinations of public and private is complicated, particularly in relation to military/security matters. It evokes the prospect that, in the end, no one will take responsibility for providing care and protection or for the mistakes and mishaps associated with it. An important part of the politics surrounding the shifting provision of protection therefore revolves around whether or not the assurances offered are strong enough to ensure that the decentering of responsibility for care/protection will not amount to a generalized irresponsibility.¹⁸

Regulatory arrangements, such as the DoC, have an important place in providing precisely this kind of assurance. They cast the recourse to the PPP as responsible, reflected, and grounded in a reasoned acceptance (at least in the context in which the regulatory arrangement was developed) rather than as a mere response to practical, budgetary, or political necessities imposed from the top down. By framing the PPP,

16. See generally NIELS ÅKERSTRØM ANDERSEN & JUSTINE GRØNBÆK PORS, PUBLIC MANAGEMENT IN TRANSITION: THE ORCHESTRATION OF POTENTIALITY (2016) (exploring what problems cause new management concepts to be developed).

17. Selma Sevenhuijsen, *The Place of Care: The Relevance of the Feminist Ethic of Care for Social Policy*, 4 FEMINIST THEORY 179, 193 (2003) (emphasis in original).

18. In some cases, the DoC may reinforce generalized irresponsibility. For example, an Australian court “identified the principle of ‘inconsistent duties’ to make their judgement, that when various duties contradict, no duty is owed.” Philip Keightley & Anthony Barker, *Duty of Care Versus Least Restrictive Care. The High Court Weighs in*, 23 AUSTRALASIAN PSYCHIATRY 445, 446 (2015).

the regulatory arrangements in this way endow them with a form of procedural legitimacy.¹⁹ In the context of the PPP, they do so in at least three ways. First, regulatory arrangements provide overarching principles for interpreting existing obligations and rights in the context of the PPP, as does for example, the Montreux Document interpreting the Geneva Conventions, or the US Military Extraterritorial Jurisdiction Act placing US military contractors on missions abroad under US law.²⁰ Second, regulatory arrangements formulate new standards or norms for some specific aspect of the activities related to the PPP that exist only because the PPP exists. For example, the International Code of Conduct for Private Security Service Providers is for security contractors generally, *The Defense Industry Initiative on Business Ethics and Conduct* is concerned primarily with the contracting process, or the *Best Management Practices for Protection against Somali Based Piracy* deals predominantly with security in the Gulf of Aden.²¹ And, third, they regulate the responsibility of the PPP itself to ensure a certain quality and level of protection. The DoC regulates in this way, by specifying when and under what conditions care (as protection) must be provided to whom and by whom. Together these three forms underscore that there are rules governing the decentering of protection and that these rules have an anchoring in collective political processes. The DoC has a particularly central role in

19. Responsible, reflected, and reasoned acceptance are hallmarks of procedural legitimacy. See RICHARD E. FLATHMAN, *Legitimacy*, in 1 A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 678, 682 (Robert E. Goodin et al. eds., 2d ed. 2007). See generally Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379 (1999) (disputing certain explanations about the lack of centralized power in international relations). Legitimacy might also have other sources including religious and/or charismatic. Minow has argued that these also are significant for the development of PPP. See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003) (discussing what happens to the scope and content of public values when public commitments proceed through private agents).

20. See *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*, INT'L COMM. OF THE RED CROSS (Aug. 2009), https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf; see also James Cockayne, *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 13 J. CONFLICT & SEC. L. 401 (2008). For the UMEJA, see K. Elizabeth Waits, *Avoiding the "Legal Bermuda Triangle": The Military Extraterritorial Jurisdiction Act's Unprecedented Expansion of U.S. Criminal Jurisdiction Over Foreign Nationals*, 23 ARIZ. J. INT'L & COMP. L. 493 (2006).

21. These documents are available online. For discussions, see, for example, Rebecca DeWinter-Schmitt, *Transnational Business Governance Through Standards and Codes of Conduct*, in ROUTLEDGE HANDBOOK OF PRIVATE SECURITY STUDIES (Rita Abrahamson & Anna Leander eds., 2016); Stig Jarle Hansen, *The Evolution of Best Management Practices in the Civil Maritime Sector*, 35 STUD. CONFLICT & TERRORISM 562 (2012).

this because it addresses the fundamental question of responsibility for the level and quality of the protection provided.

The place of the DoC in legitimizing the PPP is particularly strong because, unlike the Code of Conduct or the Defence Industry Initiative, the DoC is not merely a (soft) standard but a (hard) legal instrument that can be used in courts. The legal debates around the DoC constantly recall this.²² They gesture toward an authoritative, formal law tradition that can be referenced to settle disputes about responsibility in complex and hybrid public-private settings. In addition, the spread of the DoC to a range of areas, where it has been used precisely to ensure that innovative, neoliberal forms of management are subjected to some form of accountability, further reinforces its capacity to provide assurance and legitimacy for PPP. If the DoC has migrated and been mobilized to locate responsibility for care in areas as diverse as prison healthcare,²³ company responsibility for employees abroad,²⁴ or biodiversity,²⁵ it is reasonable to expect that it could also be drawn upon to regulate the PPP. This reassuring and legitimizing quality of the DoC is well captured in Arbour's suggestion that the DoC may solve the difficulties of attributing the "Responsibility to Protect" internationally, as it could delineate when there is an "obligation to act."²⁶ Arbour's faith in the capacity of the DoC to solve the complex disputes surrounding responsibility to protect underscores the legitimacy of the principle and the possibility of bringing it into novel contexts. Her reference to the obligation of acting points straight to the assurance the DoC offers, not

22. The core question in these debates of what "tests" are required for proving that harm was foreseeable, conduct negligent, and a duty owed by the provider of the goods/service to the recipient feeds into this authority. For introductions to these longstanding debates and disagreements around how to structure the tests see, for example, David Howarth, *Many Duties of Care-Or A Duty of Care? Notes from the Underground*, 26 OXFORD J. LEGAL STUD. 449 (2006); W. L. Morison, *A Re-Examination of the Duty of Care*, 11 MOD. L. REV. 9 (1948); Christian Witting, *Duty of Care: An Analytical Approach*, 25 OXFORD J. OF LEGAL STUD. 33 (2005).

23. See, e.g., Alfred C. Aman, *An Administrative Law Perspective on Government Social Service Contracts: Outsourcing Prison Health Care in New York City*, 14 IND. J. GLOBAL LEGAL STUD. 301 (2007).

24. See, e.g., Andrew Sanger, *Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of Its Subsidiary*, 71 CAMBRIDGE L.J. 478 (2012).

25. See, e.g., G. Earl et al., *Towards a Duty of Care for Biodiversity*, 45 ENV'T MGMT. 682 (2010).

26. She writes that "lawyers, though, might be more confident that such an approach [based on the DoC] is actually a workable proposition well known to the common law in the area of torts, with its analysis of a duty of care between the parties based on proximity, justice and reasonableness carrying with it an obligation to act reasonably on the basis of real or imputed knowledge." Louise Arbour, *The Responsibility to Protect as a Duty of Care in International Law and Practice*, 34 REV. INT'L STUD. 445, 452 (2008).

only by legitimizing the decentering of responsibility but also by legalizing it.

B. Legalizing the Public-in-the-Private Forms of Protection

The DoC can do more than legitimize the decentering of protection. It can provide a legal foundation, reassuring those concerned that decentered protection may amount to no protection at all.²⁷ The DoC formulates a legal duty to act, as Arbour underscores, and furthermore, a duty to act in a qualitatively satisfactory manner.²⁸ In the process, it constitutes legal responsibility where conventional “public” responsibility is no longer, or only partially, pertinent. This responsibility can be and has been argued in firm terms, hence reinforcing the assuring effects of legalizing responsibility. As Mullan insists, the DoC can be framed as a:

“nondelegable duty” [which] captures the idea that where the legislature has entrusted someone with a power to do something, and that person delegates the performance of the work to a third party, the person legislatively entrusted with the power remains legally responsible for discharging the duty of care. . . .²⁹

The DoC is sometimes thought to induce providers to improve their protection by making them think proactively and adjust their activities so as to integrate broader social, political, and ethical considerations. For example, in the context of gambling: “The spectre of legal liability may put new pressure on providers (and on governments as legitimators of gambling products). It may compel more coercive player-protection interventions, as gaming is bracketed with other social harms such as tobacco”³⁰ The DoC, in other words (potentially at least), constitutes the PPP as responsible for rendering this responsibility

27. For the argument that outsourcing is mainly motivated by a wish to circumvent accountability, see, for example, John D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U.L.Q. 1003 (2004); Dave Whyte, *The Crimes of Neo-Liberal Rule in Occupied Iraq*, 47 BRITISH J. CRIMINOLOGY 177 (2007).

28. See Arbour, *supra* note 26.

29. David Mullan & Antonella Ceddia, *The Impact on Public Law of Privatization, Deregulation, Outsourcing, and Downsizing: A Canadian Perspective*, 10 IND. J. GLOBAL LEGAL STUD. 199, 224 (2003).

30. Linda Hancock et al., *Gambling and Corporate Social Responsibility (CSR): Re-Defining Industry and State Roles on Duty of Care, Host Responsibility and Risk Management*, 27 POL'Y & SOC'Y 55, 67 (2008).

“non-delegable.” It is not surprising that the DoC has become an important reference point for those seeking to defend and justify the decentering of protection but who need to locate legal responsibility for it somewhere, usually with someone else.³¹

The case, *Stephen Patrick Dennis v. Norwegian Refugee Council*, illustrates that the DoC can be mobilized to perform the legal work of locating responsibility for protection.³² On November 25, 2015, a District Court in Oslo ruled that the Norwegian Refugee Council (NRC) pay 4.4 million NOK to its former employee Steven Patrick Dennis for the damages suffered as a consequence of NRC’s failure to live up to its DoC.³³ A Somali militia had held Steven Patrick Dennis hostage for four days after kidnapping him as he drove in a convoy through a Dadaab refugee camp in Northern Kenya in June 2012. The security firm hired by the NRC had advised against the trip and was not there to ensure the convoy’s security. A pro-Kenyan government Somali militia eventually liberated the group.³⁴

The court left the responsibility of the public (Norwegian, Kenyan, and Somali state and armed forces) entirely out of the discussion. It was the failure of the NRC to live up to its DoC that justified the judgment. The court rested its argument on the NRC’s failure to follow the private security company’s advice, which argued against the trip. The NRC had the duty to provide the care and the authority to define what sufficiently good care amounted to with a private company. It also argued that Steven Patrick Dennis’s right to be protected stemmed from his reasonable expectation as an employee to be protected in accordance with the NRC’s internal policy guidelines on security. It referred neither to his status as a citizen with the right to claim protection, nor to the obligations of a state to provide protection. In *Dennis v. NRC*, the DoC is mobilized to legalize and enforce a decentering of responsibility for protection that is entirely displaced from states: rights, obligations, and authority to adjudicate quality are located with employees, NGOs, and companies.³⁵ This is reassuring for the PPP. It demonstrates that the decentering of protection can be accompanied by legal accountability. This matters not only for individuals such as Steven Patrick Dennis but

31. Companies and governments alike try to place responsibility elsewhere: “European governments hold to the mantra that worker safety is the reserve solely of the company,” where of course the companies hold to the opposite mantra of worker safety being the reserve of governments. Maaïke Okano-Heijmans & Matthew Caesar-Gordon, *Protecting the Worker-Citizen Abroad: Duty of Care Beyond the State?*, 2 GLOBAL AFF. 431, 439 (2016).

32. See OSD, *supra* note 8.

33. *Id.*

34. *Id.*

35. See *id.*

also for state actors such as the Norwegian government who are reluctant to embrace a decentering of protection without an assurance that accountability can be enforced.

Dennis v. NRC was discussed as a “landmark case,” “precedent-setting,” a “game-changer,” and a “wake-up call” for the aid industry.³⁶ For the purpose of the argument in this article, the case may well be all of these things. However, its significance in this context is that it illustrates the role of the DoC in justifying the decentering of protection and hence the emergence of the PPP exposed in the SCTX. The case epitomizes the justificatory work the DoC does, as it legalizes responsibilities for protection in formulating them as Duties of Care. Moreover, the DoC contributes to the broader processes of legitimizing this decentering. The DoC is doing important political work in justifying the PPP by legitimizing and legalizing it.

II. THE DOC COMMERCIALIZING PROTECTION: EXTENDING THE SCOPE OF THE PPP

The Duty of Care also does politics in a second way. It contributes to delimiting the scope of the public-in-the-private forms of Protection, or more precisely, to extending its scope. The DoC has a central role in the commercial market processes. It encourages constant innovation in the military/security sector by giving it a legal foundation, and it is mobilized in the relentless marketing of an ever-expanding range of military/security services. Drawing on examples from the SCTX, I show this dual expansionary logic at work, insisting successively on the place of the DoC in the expanding range of goods and services of the PPP and on its role in marketing.

A. Generating Products and Services for the Public-in-the-Private Forms of Protection

The products and services on display at the SCTX, coupled with the lectures and events that take place on the side, as well as the research projects and publications promoted at the Expo, are there because they

36. Holly Young, *Steve Dennis and the Court Case That Sent Waves Through the Aid Industry*, GUARDIAN (Dec. 5, 2015), <https://www.theguardian.com/global-development-professionals-network/2015/dec/05/steve-dennis-court-case-waves-aid-industry>; Imogen Wall, *NRC Kidnap Ruling Is 'Wake-Up' Call for Aid Industry*, ALL AFRICA (Nov. 26, 2015), <http://allafrica.com/stories/201511261154.html>; Kelsey Hoppe & Chrstine Williamson, *Dennis vs Norwegian Refugee Council: Implications for Duty of Care*, HUMANITARIAN PRACTICE NETWORK (Apr. 18, 2016), <http://odihpn.org/blog/dennis-vs-norwegian-refugee-council-implications-for-duty-of-care/>.

may be potentially important to those who have a duty to provide care in “Security and Counterterrorism.” The range of products, services, research, and publications that ostensibly fall into this category is not only wide; it seems to be elastic and expanding. The DoC contributes to this expansionary development both because it is folded into already established SCTX goods and services, and because it is driving the inclusion of the development of novel goods and services in the SCTX area.

The DoC is folded into the provision of goods in a manner that encourages innovation and diversification of conventional military/security goods and services, as two examples from the SCTX illustrate. First, logistics providers, including those offering “physical security,” have a longstanding, uncontroversial presence in commercial protection.³⁷ As a result, a considerable number of companies constructing barriers, walls, or gates exhibit at the SCTX. They are rapidly extending the range of their activity to include work done with data safety.³⁸ Indeed, much of their activity is geared precisely to this area. A sales manager for a company building walls explained to me that 80% of the sales went to the construction of walls around servers of public administrations, hospitals, universities, and companies. It is “their duty to protect all that data they collect. We help them do that responsibly We construct walls around the clouds.”³⁹ Secondly, and along similar lines, risk analysts, who are equally uncontroversial and longstanding figures of the commercial military/security market, are shifting into new areas and toward new clients. For example, tracking (both the devices and the programs for managing them) has come to occupy an increasingly central role for many risk analysts. Tracking provides real time information about exactly where a “client” is located, and it can also be used to provide information about the situation he or she is in. The promoter of one company offering various risk related services explained in a lecture that he thought it was everyone’s “duty to work with available tracking technologies.”⁴⁰ He went on to explain and exemplify how tracking made protection services “vastly more effective,” and also made it essential for the work of others involved in

37. DEBORAH COWEN, *THE DEADLY LIFE OF LOGISTICS: MAPPING THE VIOLENCE OF GLOBAL TRADE* (2014); CHRISTOPHER KINSEY, *PRIVATE CONTRACTORS AND THE RECONSTRUCTION OF IRAQ: TRANSFORMING MILITARY LOGISTICS* (2009).

38. Indeed, there is generally much emphasis on “integrated” security, which is security covering all different sides of security management.

39. Personal Fieldwork Notes of the Security and Counter Terrorism Expo SCTX (Olympia London, Apr. 19-20, 2016) (on file with author) [hereinafter SCTX].

40. *Id.*

protection during a crisis (including public agencies).⁴¹ “It was our duty to share the information we had and eventually this had resulted in ‘a deal with the local police.’”⁴² The DoC is part and parcel of generating innovation and expansion in the conventional, well-established, traditional, commercial military/security sector.

The SCTX is also rich in examples of how the DoC encourages the invention of new commercial military/security related services. Moreover, these expansions are explained in the DoC language. A first case in point is the creation of training and certification services. As the manager of a training program explained, “It is your duty as a hotel manager to have people who know what to do if something goes wrong.”⁴³ Similarly, the certification schemes that provide pointers and evaluations to help clients distinguish among military/security providers (including those offering education⁴⁴) on the basis of their quality are marketed in a DoC language. “The clients have a duty to buy competent services Considering that we have certifications such as the PCI [Professional Certified Investigator⁴⁵] there is no excuse for not doing so,” as the representative of a company specialized in investigations told me. A second case in point is the emergence of military/security coordination services. Indeed, with the fragmentation and increasing complexity of PPP, a whole new family of services has emerged that aims at coordinating the many military/security services and products that any one company has to rely on.⁴⁶ As the advertising of the companies offering these services conveys, the CCTV data, the security around the building, the biometric data, the staff codes/cards that grant access, the security inside the building, and the actual guarding practices all have to be coordinated (and much more might be added depending on the context). The sales manager of a company proposing this kind of service explained that he considered it “the duty

41. *Id.*

42. *Id.*

43. *Id.*

44. Companies offering education for everything from drone pilots to dog trainers insist on the certification their training has, and that participants can therefore invoke to support the value of their degree.

45. This is an ASIS Board Certification in Investigations. For more information, see ASIS INT'L, <https://www.asisonline.org/Certification/Pages/default.aspx> (last visited Oct. 5, 2017).

46. A sales-manager of a company providing coordination services explained that the company offered three models of coordination: (1) to coordinate and ensure the compatibility of the services a client already relies on, (2) to reconfigure these services so that they are provided by “privileged partners” which makes it easier to guarantee smooth coordination or to entirely (3) take over the security function and in effect replace the in-house “central security officer.” See SCTX, *supra* note 39.

of any responsible security officer” to make the parts of a security strategy work together.⁴⁷

The goods and services exposed at the SCTX integrate the Duty of Care, and the DoC contributes to the steady expansion of their range. The DoC is so pervasive that it has also come to justify the presence of goods and services with only strenuous links to the SCTX area. A travel agent, for example, explained his presence at the expo to me by underlining that a “responsible approach to travelling in high-risk areas requires someone specialized and experienced like us.”⁴⁸ The language and logic of the DoC are clearly folded into the products and services of the SCTX in ways driving innovation and expansion. It is contributing to the extended scope of commercialized protection that is of the PPP.

B. Marketing Public-in-the-Private Forms of Protection

The place of the DoC in expanding the space for commercial military/security is even more visible in the marketing and promotion of the constantly swelling range of products and services at the SCTX. Here, the DoC is explicitly and frequently referenced. It provides a legal backing for the argument that the products and services should be bought. If the products or services are necessary to fill the DoC, not buying them may lead to lost court cases and compensation payments. Sales managers and advertising material mention the DoC and legal consultancies offer courses about it, but perhaps the best way of capturing its centrality in marketing is to look at the collective focus on the DoC of the sector as a whole. At the SCTX, conferences around the DoC were advertised.⁴⁹ Editors of specialized magazines and online information services exhibiting at the fair emphasized the salience of the DoC for the sector. The editor of one established magazine explained that, while her review “had not done a special issue on the Duty of Care,” she was sure that “every other issue” would have an article relating to it. “It is an important topic for our community,” she

47. *Id.*

48. *Id.*

49. See, for example, the legal consultancy offered by ACAS (Advisory, Conciliation and Arbitration Service): *Defining an Employer’s Duty of Care*, ADVISORY, CONCILIATION & ARBITRATION SERV., <http://www.acas.org.uk/index.aspx?articleid=3751> (last visited Jan. 29, 2018). See also the 2013 and 2016 commercially-sponsored, London-located conferences on the topic: *Duty of Care Conference: Protecting Workers Overseas*, INT’L NGO SAFETY & SECURITY ASS’N, <http://ingossa.org/events/duty-of-care-conference-protecting-workers-overseas> (last visited Jan. 29, 2018); *Duty of Care: Protecting Workers Overseas*, QUAYNOTE COMM., <http://www.quaynote.com/conference/duty-of-care-protecting-workers-overseas/> (last visited Jan. 29, 2018).

insisted.⁵⁰ At the “less commercial and more educational[.]” that is more seminar focused ASIS trade fair, there were no less than four presentations (out of a total twenty-five) focused on the DoC specifically.⁵¹

Folding the DoC into marketing makes particularly good sense because of the elusiveness surrounding exactly what is required to live up to the DoC—which of the many competing products and services displayed at the SCTX does the security provider have to rely on to be responsible in a legally satisfactory fashion? There is surprisingly little guidance to answer this basic question. Competing certifications provide contradictory and uncertain indications. Similarly, there is little hard data on which an argument could be based. Considering that we are generally awash with rankings and evaluations, their virtual absence in relation to the SCTX, and the paucity of independent assessments generally, is striking.⁵² The legal practice surrounding the DoC does not provide much indication either. It is impossible to determine exactly to whom a DoC is due. The procedure of defining lists has an “antique quality” in the sense that “to build negligence law by examining the ‘duty’ attached to every job and social role is a hopeless task in an age of rapid social change and any attempt to do so for modern society would

50. SCTX, *supra* note 39.

51. 15TH EUROPEAN SECURITY CONFERENCE EXHIBITION PROGRAM, ASIS INT’L (London, Apr. 6-8, 2016). The ASIS is a professional association originally based in the United States but that now has chapters across the world. It offers certifications in the industry. The acronym originally stood for “American Society of Industrial Security”; this is no longer spelled out as the association considers itself global. The description of the fair was made by an SCTX organizer. SCTX, *supra* note 39.

52. As a large study of counterterrorism programs formulates it: there is a “proliferation of counter-terrorism programs and policies as well as massive increases in expenditures toward combating terrorism. Yet, we know almost nothing about the effectiveness of any of these programs or continue to use programs that we know are ineffective or harmful.” Cynthia Lum, et al., *Is Counter-Terrorism Policy Evidence-Based? What Works, What Harms, and What is Unknown*, 20 PSICOTHEMA 35, 41 (2008). The evaluation of nominally private initiatives and policies is even more scarce and when it exists (as for example in the context of evaluating the consequences of public outsourcing which the US is one of few governments to even try to do, sic) there is a long standing tradition for applying measures that are biased to showing positive results for the commercial initiatives. Ann R. Markusen, *The Case Against Privatizing National Security*, 16 GOVERNANCE 471 (2003); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-551T, CONTINUED ACTIONS NEEDED BY DOD TO IMPROVE AND INSTITUTIONALIZE CONTRACTOR SUPPORT IN CONTINGENCY OPERATIONS (2010); *Learning From Iraq: A Final Report from the Special Inspector General for Iraq Reconstruction: Hearing Before the Subcomm. on the Middle East and North Africa of the H. Comm. on Foreign Affairs*, 113th Cong. 9–18 (2013) (Statement of the Honorable Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction).

collapse under its own weight.”⁵³ But also in the more generic sense that lists combine and relate the heterogeneous as Jorge Luis Borges’ lists show. Lists open up for expansion in the direction of ever new clients, and they may be useful for marketing of course.⁵⁴ Nor, finally, does legal precedent provide much guidance. As Morison puts it:

[O]ne version [of the test of duty] decides the case one way; the choice of the other the opposite way. And the law itself does not compel the court to choose one version rather than another. Judicial freedom, too, is extended rather than otherwise by the existence of various subordinate versions within each version.⁵⁵

If there are specific requirements of military/security measures, these are defined either by the standards of the companies or organizations themselves (as in *Dennis v. NRC* referenced above) or through contracts with other companies, and most notably insurance companies, that will impose specific security measures.⁵⁶ This elusiveness about what the DoC requires, whom it requires it from and for whom, makes it helpful in marketing. The affective/emotional surplus of the words Care, Duty, and Protection—particularly in the context of military/security services⁵⁷—is bound to make this even more true.

53. David Howarth, *Many Duties of Care—Or a Duty of Care? Notes from the Underground*, 26 OXFORD J. LEGAL STUD. 449, 454 (2006).

54. See Andrew Leyshon & Nigel Thrift, *Lists Come Alive: Eletronic Systems of Knowledge and the Rise of Credit-Scoring in Retail Banking*, 28 ECON. & SOC’Y 434, 435 (2009); Urs Stäheli, *Listing the Global: Dis/connectivity Beyond Representation?*, 13 DISTINKTION 233 (2012); Jutta Weber, *Keep Adding. On Kill Lists, Drone Warfare and the Politics of Databases*, 34 ENV’T & PLAN. D 107 (2016).

55. Morison, *supra* note 22, at 85.

56. For discussions of the place of insurance in producing security requirements, see, for example, Luis Lobo-Guerrero, *Lloyd’s and the Moral Economy of Insuring Against Piracy: Towards a Politicisation of Marine War Risks Insurance*, 5 J. CULTURAL ECON. 67 (2012); John J. Salinger, *The Future of Private Political Risk Insurance*, in MANAGING INTERNATIONAL POLITICAL RISK 169–72 (Theodore H. Moran ed., 1998); Scott Watson, *Back Home, Safe and Sound: The Public and Private Production of Insecurity*, 5 INT’L POL. SOC. 160, 173–77 (2011).

57. A careful analysis of the place of protection and care in commercial military/security marketing is a project well worthy of pursuit in its own right. Here there is no space for this, nor would it alter the argument fundamentally. I nonetheless find it important to gesture to the already well established literature on their place in feminist research on the military as well as in work on the DoC. Tronto shows the politics linking the two as she coins the term “protection pass” that is used to claim exemption from other duties of care. But course there is longstanding feminist scholarship for analysing the politics of both protection and care. See, e.g. JOAN C. TRONTO, *CARING DEMOCRACY. MARKETS, EQUALITY AND JUSTICE* 67–94 (2013); MARIA ERIKSSON BAAZ & MARIA STERN,

The DoC, to sum up, takes part in the processes defining the scope of the PPP. As an elusive legal arrangement, it bolsters marketing that promotes, expands and deepens commercial military/security. It also drives the steadily widening range of products and services. As one participant in SCTX commented in a presentation on the DoC, “I find the Duty of Care fascinating. It is so malleable. One can extend it almost indefinitely. Don’t you agree?”⁵⁸ This malleability of the DoC has been noted also more generally. In his historical exploration of the DoC, Davies argues that it emerged in connection with a system of unlimited liability insurance and can function only in that context since effective remedy depends on it.⁵⁹ Therefore, he argues that the “crisis” of the DoC is tied to “a century of deliberate ignorance” of this, which has allowed the DoC to expand and become so entrenched across a wide range of areas that it is now “incapable of effective reform from within.”⁶⁰ Along similar lines, Clark conveys the expansionary logic of the DoC by the following Churchill quote: “I saw exactly how it happened and why the tergiversation was inevitable: and how one step involved all the others. It was like politics But it was after dinner and I let it go.”⁶¹ Just as Churchill “let it go,” the DoC politics of extending the scope of PPP are most likely to be left to go as well. As I proceed to argue, the political work of the DoC weighs in that direction: the DoC depoliticizes the PPP.

III. DOC DEPOLITICIZING PROTECTION: PERPETUATING THE PUBLIC-IN-THE-PRIVATE FORMS OF PROTECTION

The DoC is doing politics in a third way. It makes the politics surrounding who should be protected, on what terms by whom, less

SEXUAL VIOLENCE AS A WEAPON OF WAR?: PERCEPTIONS, PRESCRIPTIONS, PROBLEMS IN THE CONGO AND BEYOND 12–41 (2013); CYNTHIA ENLOE, GLOBALIZATION AND MILITARISM; FEMINISTS MAKE THE LINK (2007); MAYA EICHLER ET AL., GENDER AND PRIVATE SECURITY IN GLOBAL POLITICS (Maya Eichler ed., 2014).

58. SCTX, *supra* note 39.

59. In Davies’s own words he shows that the “modern concept of duty was shaped by the introduction of virtually unlimited liability insurance in the late nineteenth century. The very concept of duty of care is premised on the unacknowledged presumption that defendants are or can be insured. It follows that when that presumption no longer holds, the concept can no longer function properly. Because of changes in the insurance market, unlimited liability insurance is no longer available, and it is this which is the source of the problems of duty of care.” Davies, *supra* note 7, at 68.

60. He pursues to argue that “the only solution is for Parliament to reform it from without by adopting legal forms that are more appropriate to the task of compensation.” Davies, *supra* note 7, at 83. Of course, in the context of marketing the tendency to expand indefinitely is reinforcing the DoC, not producing a crisis.

61. Malcolm Clarke, *Duty of Care-Insurance Brokers-Advise or Consent?*, 59 CAMBRIDGE L.J. 246, 248 (2000).

visible and “public.” It turns these questions into legal-technical issues to be debated among experts and answered by them. The DoC makes things non-public. It does so firstly because it contributes to the constitution of obedient subjects, who accept this understanding of the politics of protection and who are therefore unlikely to protest against the kinds of protection provided and the restrictions on the space in which it is debated. Secondly, the DoC does so because it contributes to the marginalization or forgetting of the distributional issues at the heart of the politics of protection. The DoC encourages a distributional amnesia of sorts.

A. Constituting Obedient Subjects

One of the presenters discussing the DoC at the ASIS conference made the point that in the military/security area the DoC presupposes a docile and obedient, protected subject with great clarity.⁶² The argument was that those who expect security providers to live up to their DoC in the field of military/security have a duty of their own—namely a “Duty of Obedience.” The presenter graphically illustrated this point with a slide with the title “A Duty of Obedience,” showing the (headless) bust of a woman with big breasts wearing a red corset and long black gloves holding a long, black whip. How, if the protected subjects failed to obey the instructions of their security providers, could they possibly expect their protectors to fulfill their protective duties? The speaker pointed out that this duty of obedience was bound to be stifling, as it would encroach on and limit not only activities but also initiatives and imagination. S/he illustrated this point with a slide depicting a male pelvis squeezed into a pair of Roman Gladiator style metal shorts.

The theme of obedience—and especially the frustration with disobedience—was also a central preoccupation of security providers. For example, one of the promoters of a tracking-software for phones explained in one of the SCTX lectures: “sometimes [clients] behave irresponsibly . . . we actually make it their duty not to leave [the phone] behind or turn it off.”⁶³ Similarly, in discussing the place of the Central Security Officer (CSO) in companies, the representative of a professional organization argued that the greatest challenge facing CSOs was securing a position where their instructions would be followed. He thought that the CSO needed to be integrated into the leadership of the company. As he explained, “security priorities” must

62. Fieldwork Notes of the ASIS International 15th European Security Conference Exhibition Program (London, Apr. 6-8, 2016) (on file with author).

63. SCTX, *supra* note 39.

be reflected in decisions at all levels and pertaining to the full range of company activities, to ensure that they do not remain “confined to a corner called security but followed through the entire organization.”⁶⁴

The prospect of the CSO becoming central to the core leadership team may appear dim in most contexts. However, obedience in the military/security area is a feature increasingly taken for granted in most organizations. The constant reiteration of the importance of obedience in military/security matters by security experts (including of course, CSOs) is reinforced by practices intended to recall it. Hence, in many organizations, security training has become a standard part of operations. A company specialized in hotel security insisted that security training demonstrably improved the likelihood that staff would handle emergencies well and remain calm enough “to follow instructions.” The same logic is also at work for non-staff visitors. For example, an SCTX visitor working with the evaluation and certification of Corporate Social Responsibility mainly in mining explained to me that “the first thing that happens when I arrive to any mine is a security induction. Most of the time we are told some basic stuff and then to obey instructions”⁶⁵ Emphasis on sensitizing the non-security professionals to their duty of obedience is also integrated in general best practices and guidelines. For example, a recently issued report for EU institutions expected to “rapidly enact a fully-fledged DoC to take responsible action on the international scenario” insists that “adequate training” is not merely the duty of the EU as an employer (recognized by the Administrative Tribunal of the International Labor Organization (ILO)) but also “a criteria that could and should be used in staff recruitment.”⁶⁶ Education is mobilized to inculcate obedience and at the same time obedience is made defining for career paths.

The Duty of Obedience—the flipside of the DoC in security—comes at a price. It stifles resistance to the politics of the protection entailed by any specific guideline. In a narrow sense this limits contestation of the form of security embraced by professional experts, and hence, also the space for imagining and debating alternatives. Those with strong alternative views on how security is best ensured and (perhaps more importantly) in possession of the resources to realize them often refuse

64. *Id.*

65. *Id.*

66. Andrea de Guttery, *Introducing a New Set of Guidelines to Implement the ‘Duty of Care’ of the EU Institutions and Agencies Towards Their Internationally Mobile Workforce*, 9 EUR. J. INT’L MGMT. 673, 673, 680 (2015). The scenario in question is that of the “increasing number of international civilian operations, most of which are deployed in high or critical risk countries” *Id.*

security on the terms offered by security providers.⁶⁷ However, for many or most, to step outside and refuse the Duty of Obedience will not be an option or even a desire. Instead, their acquiescence will deepen the prevailing de-politicization of a protection defined and determined by professional experts.

B. Deepening Distributional Amnesia

The DoC further contributes to the depoliticization of protection by generating a context where it becomes exceedingly difficult to question and resist the way protection is provided and distributed. Indeed, locating decisions about protection and security with expert professionals is a way of dislocating reflection and debate about the issue from general, public fora.

The ways in which the DoC works to obscure collective distributional issues has been widely recognized in the broader discussions about the DoC. Here, it is indeed suggested that the DoC is resorted to precisely because it shifts difficult distributional choices linked to care in a neoliberal context from the collectivity to the individual care worker. An ethical advisor in the health care sector, for example, introduces her commentary on the implementation of the DoC by underlining the unease she feels about stepping out of her usual role of advising individuals, but then proceeds to argue that because the implementation is making staff both stressed and overworked, she considers this necessary. She then insists that “there exists a fundamental problem with duty of care in that by pushing the boundaries and expectation of healthcare workers and devolving the risk to individuals, the global responsibility for such decisions [about

67. Jarle points out that his fieldwork in Somalia only can be carried out because he relies on “networked,” local security. Similarly, Strazzari sees his own work in Northern Mali as dependent on ignoring security policies. Both think that very little is known about places such as these precisely because so few people are able to step out of the terms set by security officers. See Workshop on the Duty of Care at the Clingendael Institute (June 16-17, 2016); see also Mateja Peter & Francesco Strazzari, *Securitization of Research: Fieldwork Under New Restrictions in Darfur and Mali*, 38 *THIRD WORLD Q.* 1531 (2017). For the indication that this is a recurring issue for aid organizations and providers of humanitarian relief, see Andrea Schneiker & Jutta Joachim, *Warum so freundlich? Der Umgang von NGOS mit privaten sicherheits- und Militärfirmen*, in *SICHERHEITSKULTUR: ANALYSEN ZUR SOZIALEN PRAXIS DER GEFAHRENABWEHR* 277 (Christopher Daase et al. eds., 2012); Christopher Spearin, *Enduring Challenges of Security Privatization in the Humanitarian Space*, in *ROUTLEDGE HANDBOOK OF PRIVATE SECURITY STUDIES* 109–17 (Rita Abrahamsen & Anna Leander eds., 2016).

the distribution of care] is shirked.”⁶⁸ Along similar lines, an epidemiologist argues that the DoC is an excuse for not assisting staff in prioritizing, with the effect that their efforts may aggravate rather than alleviate epidemics and pandemics. As he puts it, “the phrase ‘duty of care’ is, at best, too vague and, at worst, ethically dangerous. The nature and scope of the duty need to be determined, and conflicting duties must be recognized and acknowledged.”⁶⁹ As this underlines, the problem posed by the DoC is that it paves the way for refusing collective responsibility for choices and prioritizations. It instead reframes these as individual and ethical, marginalizing the *cui bono* questions of politics in the process.

By contrast to this awareness and debate about the ways in which the DoC marginalizes distributional issues in other areas, in relation to protection, the politics of the DoC are scarcely recognized, and the ethical/moral dilemmas related to its exercise are often dismissed or neglected. The hard realities on the ground are sometimes invoked as imposing their own solutions. As an argument about the DoC from military nurses puts it:

[T]he “painful truth” may be that, when practising nursing in the battlefield and ‘when the stakes are sufficiently high’, to allow patients the same duty of care relationship as they would have with civilian health care professionals is not practicable or reasonable in such hostile conditions and is too onerous a legal task for military nurses.⁷⁰

More generally, guidelines, training manuals, and instructions for the providers of protection offer absolutely no guidance on how to handle the (not only possible but exceedingly likely) dilemmas created by decisions about how to distribute protection, and, most obviously, the dilemmas that emerge when the protection due to the own staff conflicts with that due to others/outside. For example, the EU guidelines for implementing the DoC in conflict zones is concerned with “the implementation of the DoC of EU institutions and agencies toward *their*

68. A Munro & AWM Turner, *Pushing the Envelope: Whose Duty of Care?*, 11 J. INTENSIVE CARE SOC’Y 5, 8 (2010).

69. Daniel K. Sokol, *Virulent Epidemics and Scope of Healthcare Workers’ Duty of Care*, 12 EMERGING INFECTIOUS DISEASES 1238, 1238 (2006).

70. Janet Kelly, *Battlefield Conditions: Different Environment but the Same Duty of Care*, 17 NURSING ETHICS 636, 643 (2010). See generally ROSEMARY KENNEDY, DUTY OF CARE IN THE HUMAN SERVICES: MISHAPS, MISDEEDS AND THE LAW (2009) (addressing the response of legal and quasi-legal bodies to human care failures).

internationally mobile workforce” by offering them safety, sufficient information, dignity, procedures of investigation, medical services, diplomatic protection, and adequate training.⁷¹ It makes no mention of the protection of local employees, let alone of how to adjudicate situations where the protection provided to their own staff generates insecurity for local civilians more generally. This is characteristic and holds true even in contexts where the core mission is to provide protection for local civilians. A study of the security practices of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) for example found no mention—at any level—of how the security guaranteed to its own staff might conflict with the overall mission to protect civilians, nor how to handle these kinds of conflicts.⁷²

The ease with which the neglect, dismissal, and disavowal of the distributional *cui bono* questions associated with the DoC in the area of protection can be dismissed, is no doubt closely related to its practical import. The DoC answers many intractable questions about responsibility for protection in situations where it is unsettled who is entitled to protection by whom. However, the neglect of *cui bono* questions is both self-serving and politically nefarious. It imposes and confirms privileges that are nowhere discussed. In so doing, it reproduces historically generated injustices.⁷³ Why should the staff or the client be privileged just because of their professional status/ability to pay? And why, indeed, should this privilege be upheld if/when it comes at the expense of others such as local residents, refugees, or rebels? It has been argued that these dilemmas of deciding on distribution can be alleviated if service providers just realize that they only have a duty *to* and not *for* their clients.⁷⁴ Unfortunately, such solutions are merely assuaging the service providers’ unease with making choices. It does not deal with the broader distributional implications. Rather, by providing pragmatic ways to ignore these questions, the DoC effectively not only brushes aside their significance

71. Guttry, *supra* note 66, at 676–681 (emphasis added).

72. Elke Krahnmann & Anna Leander, *Contracting (In)Security: Markets in the Making of MONUSCO’s Peacekeeping* (2016) (unpublished manuscript) (on file with author).

73. The “law of inverse care” as T.H. Julian termed the tendency of markets to provide most care for those who least need it may be affirmed also in the context of the provision of protection. For a discussion, see TRONTO, *supra* note 57.

74. “Service providers have to negotiate between what may seem like the competing demands of empowerment and the duty of care. On closer inspection, however, worry can be alleviated if providers acknowledge that they have a responsibility to, and not a responsibility for, service users.” Sue Baxter & Helen Carr, *Walking the Tightrope: The Balance Between Duty of Care, Human Rights and Capacity*, 10 HOUSING CARE & SUPPORT 6, 11 (2007).

but displaces them from public discussion. The thoroughly commercialized context further diminishes the likelihood that they will be reopened. As Tronto puts it: “the phenomenology of ignoring the past while benefiting from it cannot be made visible if market activity is so compartmentalized that each transaction is seen to be ‘free’ from all others.”⁷⁵

To sum up, the DoC works in the direction of a dual depoliticizing of protection by producing obedient subjects and a context of distributional amnesia that helps enshrine the prevailing protection order. This, obviously, does not exclude critique and questions. “Popular tactics . . . that take the actual order of things” and turn it to an advantage “without any illusion that it will change any time soon”⁷⁶ will no doubt abound. However, and as de Certeau underlines in the preceding citation, such tactics are unlikely to undermine or even seriously question the prevailing order, let alone present an alternative view on distribution or the political process for handling it, in order that the prevailing “order of things” might change some time soon. On the contrary, it is likely to give a veneer of openness to the discussion that will do more to enshrine than to challenge the depoliticization of protection and hence the power relations and hierarchies of protection associated with it.

CONCLUSION

This article has shown in considerable detail the ways in which the DoC is doing politics in relation to protection, and specifically in relation to the Public-in-the-private forms of Protection at display at the SCTX, the starting-point of this article. I have argued that the DoC is justifying the PPP by legitimating and legalizing the decentering of responsibility for protection; that it is extending the scope of the PPP by accentuating the commercialization of protection, and that it is perpetuating the PPP by depoliticizing it through the constitution of obedient subjects and distributional amnesia. Justifying, delimiting the scope of, and perpetuating a specific order of things are profoundly political processes. In other words, the article has made an argument about how to understand and conceptualize the politics of legal arrangements (through a focus on their role in justifying, delimiting, and perpetuating political orders) based on close observation of the way the DoC engages in the politics of protection.

75. TRONTO, *supra* note 57, at 127.

76. MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* 26 (Steven F. Rendell trans., 1984).

The contention that the DoC does politics has implications for debates about the regulation of the PPP, that is for the regulation of commercial military/security activities. In the lively, ongoing discussion about regulation there is considerable disagreement about what kind of regulation is best suited. Much of the recent attention has focused on non-legal governance arrangements. They have been developing rapidly and (therefore) appear more feasible. They are also often argued to be more effective and therefore, desirable. Scholars such as Dickinson or Avant, for example, have been suggesting that networked governance arrangements are and should be the way forward in regulating the PPP because—by contrast to law—they are more effective as they do not stifle and/or outlaw the activities.⁷⁷ This article points in a rather different direction. I have underlined the continued and perhaps also growing importance of more conventional law in this area. But beyond this, I have disentangled the form of regulation from assumptions about effectiveness and aims of regulation. I have shown that the politics of law is not working in the sense of reining in, stifling, or outlawing the PPP, but rather is very effective in justifying, expanding, and consolidating them. Whether this is normatively desirable remains open to debate.⁷⁸ What is not debatable is that legal choices are profoundly political and that these choices may reinforce neoliberal forms of governance, as the DoC reinforces the PPP discussed in this article.

The claim that hard law can be profoundly managerial also has implications for the general debates surrounding the politics of law in a neoliberal context. Recent debates have centered on the effects of the fragmentation of law in this context, and, in particular, on the rise of “governance” through codes of conduct, best practices, benchmarks and standards. Some contend that fragmentation is necessary to deal with the growing complexity of social and economic life. On this account, preserving the unity of law and clear legal hierarchies is at best, but probably more counterproductive.⁷⁹ Inversely, others see the

77. See Deborah D. Avant, *Pragmatic Networks and Transnational Governance of Private Military and Security Services*, 60 INT'L STUD. Q. 330 (2016); LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS* (2011).

78. My position is that it is problematic because decentering responsibility, extending the scope of the commercial and depoliticizing protection deepen an unequal and militarized form of protection and entrenches it by making it difficult to contest. However, my argument is NOT a reflection of this position.

79. See Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004); Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT'L L. 576 (2006); JAN KLABBERS ET AL., *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009); Jan

fragmentation in the rise of governance as exceedingly problematic in that it generates de facto impunity by reducing law to a managerial tool for the powerful. They therefore advocate a return to more formal hard law; to a “culture of formalism,” a “Constitutionalist Mindset” or a “faculty of judgement” to reiterate Koskenniemi’s influential formulations.⁸⁰ On this account, “law” needs to be purified from the polluting and corrupting effects of other disciplines.⁸¹ What these opposed positions have in common is that they consider the implications of governance as the core issue around which controversy turns. The argument in this article points in a different direction. Conventional law—such as the DoC—may be just as managerial as governance. The issue at stake then becomes the question of how that managerialism works; that is, what the politics of legal arrangements are. An interdisciplinary, critical social science approach such as that adopted in this special issue—is therefore, much needed. It can not only direct attention to, but proceed to analyze, the politics of law, including the culture of formalism and the faculty of judgement.⁸² One way of pursuing this interdisciplinary engagement is to closely observe the politics of specific legal arrangements in interdisciplinary fashion as this article has done for the Duty of Care. Doing so directs attention to how the politics work and, by the same token, to where there may be scope for and limits to political agency aimed at the Public-in-the-private forms of governance pervasive in a thoroughly commercialized context.

Klabbers, *Controlling International Organizations: A Virtue Ethics Approach*, 8 INT’L ORGANIZATIONS L. REV. 285 (2011); Andreas Nollkaemper, *Constitutionalization and the Unity of the Law of International Responsibility*, 16 IND. J. GLOBAL LEGAL STUD. 535, 535 (2009).

80. Martti Koskenniemi, *Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9, 10, 24 (2006).

81. *Id.*; MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (reissue with new epilogue) (reprint 2007) (2005).

82. See NIKOLAS M. RAJKOVIC ET AL., THE POWER OF LEGALITY: PRACTICES OF INTERNATIONAL LAW AND THEIR POLITICS (2016).

