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Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones

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Corporations in Armed Conflict: The Role of International Law
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LAWYERS, GUNS, AND MONEY

The Governance of Business Activities in Conflict Zones

*Simon Chesterman**

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It is now almost twelve years since the Rome Statute of the International Criminal Court was adopted in July 1998.[1] Days after that landmark document was concluded,

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[1] Statute of the International Criminal Court (Rome Statute), UN Doc A/Conf.183/9 (1998). See generally William A. Schabas, *An Introduction to the International Criminal Court*, 2nd edn (Cambridge: Cambridge University Press, 2004).

the *Financial Times* published a dire warning for "commercial lawyers" that the accomplice liability provisions in the treaty "could create international criminal liability for employees, officers and directors of corporations."[2] This might have been technically true, but the failure of the International Criminal Court to include the liability of legal persons and the likely difficulties of establishing individual guilt on the part of their officers suggested that the breathless tone was a little over the top.

There had, in fact, been a push to include liability of corporations themselves, led by the French delegation on the basis that this would make it easier for victims of crimes to sue for restitution and compensation.[3] But differences in the ways in which legal persons are treated in national jurisdictions meant that consensus was impossible. Some also argued that it was somehow inappropriate for states to agree on the criminal responsibility of all entities other than states themselves.[4] The language was ultimately dropped from its square brackets.

Six months later, at the 1999 World Economic Forum in Davos, UN Secretary General Kofi Annan proposed the Global Compact. This is not a regulatory instrument — it does not "police", enforce, or measure the behaviour of companies. It relies instead on "public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based."[5]

We had, then, at the end of the twentieth century a remarkable pair of normative transformations. On the one hand, the establishment of a court with potentially universal jurisdiction to prosecute the very worst crimes by individuals. On the other, an implicit admission that efforts to regulate the conduct of business through hard law had failed. "Regulation", if that is even the right word, would have to be voluntary.[6]

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[2] Maurice Nyberg, "At Risk from Complicity with Crime", *Financial Times* (London), 27 July 1998.

[3] Per Saland, "International Criminal Law Principles", in Roy S.K. Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer, 1999), 189 at 199.

[4] Albin Eser, "Individual Criminal Responsibility", in Antonio Cassese (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) vol 1, 767 at 779; Andrew Clapham, "Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups", *Journal of International Criminal Justice* 6 (2008) 899 at 915.

[5] See, eg, The UN Global Compact Operational Guide for Medium-Scale Enterprises (New York: Global Compact, July 2007) available at <http://www.unglobalcompact.org/docs/news_events/8.1/Operational_guide_ME.pdf>, 3.

[6] A recent Global Compact brochure describes the compact as "voluntary, yet accountable". UN Global Compact: Corporate Citizenship in the World Economy (New York: Global Compact, 2008) available at <http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf>, 3.

Today, some things have changed. More businesses talk the talk of human rights, but the legal framework applicable to them remains unclear. The language of "corporate social responsibility" (CSR) begs the questions: responsible *to whom*, and *for what?*[7] One interesting way to find out is to look at who, within a given business, holds the CSR file: Is it the legal division? Or is it marketing? The language of CSR also begs the question of who is setting the priorities here. Do we focus on Nike's use of sweatshop labour because sweatshops are the greatest human rights problem? Or is it because bourgeois university students like to wear Nike sneakers?[8]

We face, then, problems of *incoherence* and *arbitrariness*. By incoherence, I mean that the legal framework applicable to businesses lacks order and clarity. By arbitrariness, I mean that the framework, such as it is, has developed largely through the efforts of activist NGOs and businesses with varying degrees of self-interest. Notably absent — or at least muted — are the voices of victims and governments. As a result, we now have a third problem: normative *overstretch*. By this I mean that rhetoric has outstripped reality, with assertions of a right to this and a right to that, without any clear legal or political foundation.

Some of this normative confusion relates to the idiosyncrasies of international law, where it is quite common to have obligations without formal enforcement mechanisms. Unlike domestic law, which was historically thought of as having a vertical relationship between sovereign and subject, international law operates — at least theoretically — in a realm where states exist in a horizontal plane of sovereign equality.[9] But in the case of business and human rights, the danger is that we may be offering the illusion of regulation, which may be worse than no regulation at all.[10]

What I would like to do this evening is take the theme of this conference, *Corporations in Armed Conflict*, as the basis for an argument that the norms governing businesses in conflict zones are both understudied and undervalued. Understudied because the focus is generally on human rights of universal application, rather than the narrower regime of international humanitarian law (IHL). Undervalued

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[7] Cf Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), 195.

[8] Cf Justine Nolan and Luke Taylor, "Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?", *Journal of Business Ethics* 87(2) (2009) 433.

[9] See generally Simon Chesterman, "An International Rule of Law?", *American Journal of Comparative Law* 56 (2008) 331.

[10] Cf Thomas Nagel, "The Problem of Global Justice", *Philosophy & Public Affairs* 33(2) (2005) 113.

because IHL may provide a more certain foundation for real norms that can be applied to businesses and the individuals that control them.

My presentation will be in three parts. The first part will briefly describe the normative regime that is set up by human rights and IHL. Part two looks at the specific situation of conflict zones and efforts to regulate some of the newer entities on the scene, in particular private military and security companies. Part three then sketches out a regime that focuses not on toothless regulation but on a model of governance that combines limited sanctions with wider structuring of incentives.

1 Lawyers

There is a proliferation of literature discussing human rights and business, but far less that looks at the issue of businesses operating in conflict zones and the applicability of international humanitarian law.

This is understandable in terms of the prominence and dynamism of human rights as a sub-discipline, contrasted with the conservatism of international humanitarian law. But from a doctrinal perspective it is somewhat odd, as the direct applicability of human rights norms to business is far less clear than the applicability of international humanitarian law.

1.1 Human Rights

To be sure, businesses are increasingly aware of human rights law.[11]

In part this is due to the expansion in content and broader acceptance of human rights norms generally in the past two decades. In Southeast Asia, for example, where I am based, the early 1990s saw the "Asian values" debates that resisted

[11] See generally Larry Catá Backer, "Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law", *Columbia Human Rights Law Review* 37 (2006) 287; Ann Marie McLoughlin, "International Trend of Multinational Corporate Accountability for Human Rights Abuses and the Role of the United States", *Ohio Northern University Law Review* 33 (2007) 153; Brandon Prosansky, "Mining Gold in a Conflict Zone: The Context, Ramifications, and Lessons of AngloGold Ashanti's Activities in the Democratic Republic of the Congo", *Northwestern Journal of International Human Rights* 5 (2007) 236; Emeka Duruigbo, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges", *Northwestern Journal of International Human Rights* 6 (2008) 222; Debbie Johnston, "Lifting the Veil on Corporate Terrorism: The Use of the Criminal Code Terrorism Framework to Hold Multinational Corporations Accountable for Complicity in Human Rights Violations Abroad", *University of Toronto Faculty of Law Review* 66 (2008) 137.

arguments that human rights are universal. Today, the Association of Southeast Asian Nations (ASEAN) has established an intergovernmental mechanism to discuss human rights.[12] The Human Rights Council, for all its flaws, now has a process of universal periodic review. China, long suspicious of human rights, went through this process in February 2009. Ireland will do the same in the Council's 12th session in late 2011.

The link between human rights and business is also due to the work of activists and NGOs, often targeting specific practices or industries. This is not limited to "crunchy granola" types, however. An increasing number of institutional investors — notably including Norway's sovereign wealth fund — have linked their investment strategies to human rights, environmental, and other considerations.[13]

There is now a community that includes activists, investors, and some of the businesses themselves. Among other things, this has led to the adoption of various principles and guidelines that offer non-binding standards for business. In addition to the Global Compact mentioned earlier,[14] these include the OECD Guidelines for Multinational Enterprises,[15] the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises,[16] the Voluntary Principles on Security and Human Rights,[17] the Global Reporting Initiative (GRI) Guidelines,[18] the SA8000 standards,[19] and so on.

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[12] See Tan Hsien-Li, "The ASEAN Human Rights Body: Incorporating Forgotten Promises for Policy Coherence and Efficacy", *Singapore Year Book of International Law* 12 (2008) 239.

[13] See Simon Chesterman, "The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations - The Case of Norway's Sovereign Wealth Fund", *American University International Law Review* 23 (2008) 577.

[14] See above n 5.

[15] Originally adopted in 1976, the most recent revision of the guidelines was completed in 2000. See OECD Guidelines for Multinational Enterprises (Paris: Organisation for Economic Co-operation and Development, 2000) available at <http://www.oecd.org/daf/investment/guidelines>; Clapham, *Non-State Actors*, 201-11. Consultation on a further revision took place in December 2009, with an updated version likely in 2010.

[16] Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session, as amended at its 279th (November 2000) and 295th Session (March 2006), done at Geneva, November 1977, available at <http://www.ilo.org/public/english/employment/multi/download/declaration2006.pdf>; Clapham, *Non-State Actors*, 211-8.

[17] Voluntary Principles on Security and Human Rights (2000) available at <http://voluntaryprinciples.org/files/voluntary_principles_english.pdf>.

[18] G3 Guidelines (Amsterdam: Global Reporting Initiative (GRI), 2006) available at <http://www.globalreporting.org/ReportingFramework/G3Guidelines>.

[19] Social Accountability 8000 (SA8000) (New York: Social Accountability International, 2008) available at <http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf>.

The most ambitious such initiative was the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, drafted under the auspices of the UN Sub-Commission on the Promotion and Protection of Human Rights. Unlike the various voluntary principles and codes of conduct that had come before, the *Norms* claimed to set out human rights standards drawing on international humanitarian law and civil, political, economic, social, and cultural rights, as well as consumer protection and environmental practices. The intention was to have them adopted by the United Nations in some form, which would have confirmed the content of the obligations as well as implementation mechanisms to monitor and report on compliance.[20]

The drafting process took several years, but when they moved from the experts of the Sub-Commission to the government representatives of the Commission on Human Rights, the reception was decidedly cool.[21] The Commission passed a short resolution in 2004 stating that the *Norms* had "not been requested", that the document "has no legal standing", and that the Sub-Commission "should not perform any monitoring function in this regard."[22]

In place of the Commission's approach, a new Special Representative of the Secretary-General (SRSG) was appointed with a mandate to "identify and clarify" international standards and policies, research the implications of concepts such as "complicity" and "sphere of influence", and submit views and recommendations to what is now the Human Rights Council.[23]

The SRSG, Harvard's John Ruggie, embraced an important doctrinal move that had long been a stumbling block in the application of human rights to business: the sterile debate over who is and who is not a "subject" of international law. Increasingly, he noted corporations are recognized as "participants" at the

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[20] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights), UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) available at <http://documents.un.org>.

[21] John Gerard Ruggie, "Business and Human Rights: The Evolving International Agenda", *American Journal of International Law* 101 (2007) 819 at 820-1.

[22] Commission on Human Rights Resolution 2004/11, UN Doc E/CN.4/2004/L.11/Add.7 (2004). See also Giovanni Mantilla, "Emerging International Human Rights Norms for Transnational Corporations", *Global Governance* 15 (2009) 279.

[23] Commission on Human Rights Resolution 2005/69, UN Doc E/CN.4/2005/L.87 (2005).

international level, with the capacity to bear some rights and some duties under international law.[24]

In terms of content, however, Ruggie, was deeply critical of the *Norms*, suggesting that they had become victims of their own "doctrinal excesses" and made "exaggerated legal claims". He challenged in particular the view that they could be both a path-breaking advance and yet also merely restate international law applicable to businesses:

> taken literally, the two claims cannot both be correct. If the Norms merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so. And if the Norms were to bind business directly then they could not merely be restating international legal principles; they would need, somehow, to discover or invent new ones.[25]

In essence, what the *Norms* had done was merely take existing human rights norms applicable to states and assert that they applied to corporations also.[26]

Ruggie's position, predictably, was not warmly embraced by the business-human rights enthusiasts.[27] But he was drawing an important line that is often blurred in the area of human rights between *ought* and *is*. Not every human wrong can be remedied by a human right. And there is a danger that playing fast and loose with the language of human rights dilutes its value. To put it crudely, there is universal acceptance that torture is a violation of human rights; there is no such acceptance that growing coffee beans in the shade, say, is in the same sense, a human right. Asserting that human rights requires all manner of constraints on business risks moving the entire discourse into the same vague category of corporate social responsibility.

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[24] John Gerard Ruggie, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc A/HRC/4/035 (2007), para 20. See, eg, Philip Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990), 372-3; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), 49-50; Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006).

[25] John Gerard Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc E/CN.4/2006/97 (2006), paras 59-60.

[26] Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-state Actors?", in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), 3 at 13-4. Cf David Weissbrodt, "International Standard-Setting on the Human Rights Responsibilities of Business", *Berkeley Journal of International Law* 26 (2008) 373 at 382.

[27] See, eg, Weissbrodt, "International Standard-Setting", at 390 (stating that the SRSG "was supposed to develop standards, but has instead attempted to derail the standard-setting process and bow to the corporate refusal to accept any standards except voluntary codes"). Cf Nina Seppala, "Business and the International Human Rights Regime: A Comparison of UN Initiatives", *Journal of Business Ethics* 87 (2009) 401.

In an attempt to impose some rigour on that discourse, Ruggie identified five categories of norms, moving from those most deeply rooted in international law to voluntary standards. The two categories with the most solid foundation were state duties to protect against corporate abuses and corporate responsibility for international crimes prosecuted in domestic courts; other possible sources of norms were corporate responsibility for certain human rights violations extrapolated from general human rights norms, soft law mechanisms, and self-regulation.[28] It is possible that this ground is shifting — there is, for example, an argument that at least within the EU legal system treaty law has created direct international obligations for corporations[29] — but it is shifting slowly.

This need for doctrinal purity is not a purely academic conceit. Indeed, maintaining the purity of doctrine is one of the basic purposes of the International Committee of the Red Cross, sometimes described as the high priesthood of international humanitarian law.

1.2 International Humanitarian Law

The overwhelming focus on the application of human rights norms to business, rather than international humanitarian law, is somewhat ironic given that human rights, *stricto sensu*, binds only states.[30] States sign human rights treaties; states promise to respect and ensure the various rights.[31] IHL explicitly binds states and individuals. The doctrinal basis for holding that business may have obligations under international law is sound, though this is clearest in the area of international crimes justiciable in national jurisdictions.[32]

So why is so little attention paid to IHL? First, and most obviously, only a relatively small number of businesses operate in conflict zones. Secondly, whereas human rights activism and corporate social responsibility have encouraged positive activities — with businesses able to declare that they pay fair trade wages, promote

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[28] Ruggie, "Business and Human Rights", at 828-37.

[29] Clapham, *Non-State Actors*, 241.

[30] Cf Business and International Humanitarian Law (Geneva: International Committee of the Red Cross, 2006) available at <http://www.icrc.org>, 13-4.

[31] See, eg, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171, in force 23 March 1976, available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>, art 2(1).

[32] See, eg, Clapham, "Extending International Criminal Law", at 906.

girls' education, and so on — one is unlikely to see the same developments with respect to IHL compliance.

What, then, does IHL say about business in conflict zones? It offers some protections, and some limitations. A preliminary question is whether IHL applies. This depends on whether the activity in question is closely linked to armed conflict.

The protections afforded to business may include non-combatant status. Even if an entity is providing food or shelter to a party to the conflict, it may not lose that status. Whether specific facilities are targets will depend on whether they make an effective contribution to military action.[33] Easy cases include where a business is providing direct support to one side in a conflict.

In terms of limitations on business activities, obvious prohibitions would include committing or knowingly assisting in grave breaches of the Geneva Conventions. This would cover arms manufacturers who produce prohibited weapons such chemical or biological weapons — and perhaps cluster munitions and landmines — or who knowingly supply weapons to end-users who then violate IHL. Other obligations include the prohibition of pillage — the unlawful taking of private property for personal use.[34] Labour conditions are also regulated, including the labour of civilians, prisoners-of-war (POWs), and concentration camp detainees. States may compel certain categories of person to work, but businesses themselves cannot do so. In any case, IHL prohibits uncompensated or abusive labour.[35] Other provisions cover forced displacement,[36] damage to the environment (potentially including the sale of exfoliants),[37] and so on.

Problematic areas include how to ensure the security of legitimate business activities in a conflict zone. In some situations, a business may be required to retain the services of the government or a particular armed group in order to continue

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[33] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, available at <http://www.icrc.org/ihl>, art 52.

[34] Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), done at Geneva, 12 August 1949, available at <http://www.icrc.org/ihl>, art 33.

[35] Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), done at Geneva, 12 August 1949, available at <http://www.icrc.org/ihl>, arts 49-55; Fourth Geneva Convention, arts 40, 51, 95; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 8 June 1977, 1125 UNTS 609, available at <http://www.icrc.org/ihl>, art 5(1)(e).

[36] Fourth Geneva Convention, art 49.

[37] "Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict", *International Review of the Red Cross* 311 (1996) 230.

business. Hiring groups that do not respect IHL while engaged in armed conflict, for example by attacking civilians, may expose the business to legal liability even if it did not intend the violations to occur and even if the actions were not carried out on its behalf.[38]

But the most controversy and the most activity in this area has been with respect to private military and security companies (PMSCs) not simply operating in conflict zones but providing services directly connected to the conflict itself. PMSCs have been responsible for some of the most egregious cases of violations of IHL, such as the use of cluster munitions by Executive Outcomes in African conflicts in the 1990s, the killing of protected persons by Blackwater in Iraq, and unlawful interrogation practices used by CACI and Titan in the Abu Ghraib detention facility.

PMSCs are of interest in part because it is routinely and incorrectly asserted that they operate in a normative vacuum, but also because they reflect a transformed relationship to the state, with increasing reliance on outsourcing to businesses.

2 Guns

2.1 The Fall and Rise of Mercenaries

Private military and security companies such as Blackwater, Triple Canopy, ArmorGroup and their ilk are frequently compared to mercenaries. This is partly accurate: they are private actors offering military services ranging from training and advice to combat. It is misleading, however, in two very different ways. The first is that no major firm today offers to fight wars for a fee. Though Executive Outcomes and Sandline International did provide such services to Sierra Leone, Angola, and Papua New Guinea in the 1990s, that aspect of the industry has come to be discredited — epitomized in the move from private "military" to "security" companies. (EO and Sandline have since been wound up, though many key individuals quickly resurfaced in new corporate guises.)[39]

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[38] Business and International Humanitarian Law, 21.

[39] This sub-section draws on some passages first published as Simon Chesterman, "Leashing the Dogs of War: The Rise and Regulation of Private Military Companies", *Carnegie Reporter* 5(1) (2008) 36.

It is also misleading in that it implies that the comparison is negative. This glosses over much of the history of mercenaries. Though the adjective "mercenary" today means motivated chiefly by the desire for gain, until around two centuries ago mercenaries were very much the norm in European armies. Indeed, the Pope is today guarded by a contingent of Swiss mercenaries first retained in 1506. Less pejorative meanings live on in terms such as "freelance", which now describes a writer operating on short-term contracts but previously denoted someone with a lance and some spare time.

The discrediting of skilled warriors offering their services at a price in favour of national armies was partly a function of technology. Around the Napoleonic Wars, the introduction of the musket greatly reduced the time required to train an effective soldier. Quantity soon became more important than quality, and national conscription became a more efficient way of generating an army than outside hiring. These military and economic shifts were reinforced by politics and culture. Around the nineteenth century mercenaries "went out of style."[40] Notably, the social contract and the Enlightenment transformed the individual's relationship to the state, which came to be based not on a feudal allegiance but the idea of citizenship. Reliance upon mercenaries was no longer necessary, but also came to be seen as suspect: a country whose men would not fight for it lacked patriots; those individuals who would fight for reasons other than love of country lacked morals.[41]

Mercenaries never really went out of business, however, and continued to be important in low-technology wars where the quality of troops and their weapons still mattered. This explains both their ongoing significance in Africa through the twentieth century — frequently in attempting to overthrow weak governments — and efforts by those governments through the Organization of African Unity and the United Nations to prohibit mercenarism completely.[42]

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[40] Deborah Avant, "From Mercenary to Citizen Armies: Explaining Change in the Practice of War", *International Organization* 54 (2000) 41.

[41] See generally Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge: Cambridge University Press, 2005); Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford: Oxford University Press, 2007).

[42] Convention of the OAU for the Elimination of Mercenarism in Africa, done at Libreville, 3 July 1977, in force 22 April 1985, available at <http://www.icrc.org/ihl.nsf/FULL/485?OpenDocument>; International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, 4 December 1989, in force 20 October 2001, available at <http://www.ohchr.org/english/law/mercenaries.htm>; Angela McIntyre and Taya Weiss, "Weak Governments in Search of Strength: Africa's Experience of Mercenaries and Private Military Companies", in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007), 67.

But it was the end of the Cold War that saw an explosion in mercenary activity. The 1990s saw a proliferation of small-scale conflicts and a demand for skilled military services matched by a sudden supply of trained soldiers. State militaries by the end of that decade employed roughly seven million fewer soldiers than they did in 1989; some units that were retired, such as the South African 32nd Recon Battalion and the Soviet *Alpha* unit, kept the outline of their structure and simply reconstituted themselves as corporations.[43]

These trends explain the rise of Blackwater and its peers but not their attractiveness to Washington. The United States retains such companies for reasons very different than Sierra Leone, Angola, and Papua New Guinea. In the 1991 Gulf War, it employed one contractor for every 50 active-duty personnel; by the 1999 Kosovo conflict, contractors made up ten percent of U.S. personnel and served as the U.S. force's supply and engineering corps. After the United States went into Iraq in 2003, contractors made up the second largest grouping of personnel after the U.S. military — far more than the number of British troops at their highpoint. Other accounts put contractor numbers in excess even of U.S. personnel.

The growing reliance on contractors by the U.S. military was driven in part by the need to increase capacity swiftly (and flexibly) after the slow downsizing of the post-Cold War decade. It must also be seen in the context of the larger trend towards outsourcing in the U.S. government. A 2003 Government Accountability Office report examined these trends and concluded that outsourcing by the military provided access to specialized technical skills, enabled it to bypass limits on military personnel able to be deployed to certain regions, and ensured scarce resources would be available for other assignments. What it did not support is the normal justification for outsourcing: that it saves money.

In fact, as the periodic scandals emerging from the contracts awarded to security and reconstruction firms in Iraq have demonstrated, relying on private companies can be very expensive. For a country lacking an effective military, such as Sierra Leone in the 1990s facing Foday Sankoh's Revolutionary United Front, investing in a private army might make at least short-term sense. For the United States, however, it is apparent that the turn to contractors is driven by the ideological conviction that the private sector is inherently more competent than the public sector, and the political necessity of keeping troop numbers — and casualty numbers —

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[43] See generally P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, NY: Cornell University Press, 2003).

artificially low. The use of contractors enabled the United States to keep its troop numbers around 20,000 below what would have been required to field equivalent strength in Iraq. And though precise figures are difficult to obtain, excluding contractor deaths from official U.S. casualties have kept those figures many hundreds lower than they might have been.

2.2 *Accountability*

It is frequently asserted that private military companies such as Blackwater operate in a legal vacuum. This is simply not true. In theory, at least, they are subject to the laws of the land in which they are operating, in particular the criminal law. In practice, however, these companies operate in places with weak or dysfunctional legal systems. There are occasions where contractors have been tried and convicted of crimes. In July 2008, for example, Simon Mann was sentenced to 34 years in prison for his role in an attempted coup in Equatorial Guinea. But such trials are exceptional.

It will not be possible to offer a general survey of the various ways in which PMSCs might be held accountable.[44] For present purposes, I just want to highlight three areas in which there has been some interesting movement.

The first is in the reaffirmation of "hard" law as it applies to PMSCs. The ICRC — the "high priests" of IHL, as I called them earlier — working with the Swiss government, convened a process that in September 2008 adopted the Montreux Document on PMSCs. Unlike the UN and OAU conventions, the 17 states that signed onto the Montreux Document include prominent home and contracting states such as the United States, Britain, and South Africa, as well as territorial or host countries such as Angola, Sierra Leone, Afghanistan, and Iraq.

The purpose of the document was to clarify the normative environment within which PMSCs operate. Among other things, it constitutes a formal rejection of the widespread perception that such bodies operate in a legal vacuum. It carefully maps out the various obligations owed by different parties — contracting states, territorial states, home states, as well as the PMSCs themselves and their personnel. At the same

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[44] See generally Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007); Jenny S. Lam, "Accountability for Private Military Contractors Under the Alien Tort Statute", *California Law Review* 97 (2009) 1459; Adam Ebrahim, "Going to War with the Army You Can Afford: The United States, International Law, and The Private Military Industry", *Boston University International Law Journal* 28 (2010) 181; Amol Mehra, "Bridging Accountability Gaps: The Proliferation of Private Military and Security Companies and Ensuring Accountability for Human Rights Violations", *Pacific McGeorge Global Business & Development Law Journal* 22 (2010) 323.

time, however, it is charmingly vague in the content of those obligations. For PMSCs and their personnel, for example, it merely states that they are "obliged, regardless of their status, to comply with applicable international humanitarian law".[45] Not nothing, perhaps — but not much, either. It is, perhaps, an advance on the efforts to criminalize mercenarism that required proof that a person was "motivated to take part in the hostilities essentially by the desire for private gain".[46] The difficulty of proving such motivation led one writer to suggest that anyone convicted of the offence should be shot — as should his lawyer.[47]

The second area of movement has been in the drafting of codes of conduct and other non-binding approaches at regulation. Following on from the Montreux process, there is now a draft code of conduct that is undergoing a consultation phase.[48] The code refers to the obligation of companies to respect relevant obligations and principles of international humanitarian law and human rights law; in particular they promise not to "commit, assist, or improperly benefit from international crimes such as war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage taking, or extrajudicial, summary or arbitrary execution."[49]

This follows a variety of other attempts to develop codes of conduct. I was involved in one of the less successful initiatives that produced the "Greentree Notes" in 2007.[50] Industry associations, notably the International Peace Operations Association (IPOA), have had more purchase. The IPOA Code of Conduct, now in its twelfth iteration, includes expansive acknowledgement of the applicability of IHL and human rights. The member companies include well known bodies such as ArmorGroup, DynCorp International, and Triple Canopy.

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[45] The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (Montreux: Swiss Federal Department of Foreign Affairs & International Committee of the Red Cross, 17 September 2008) available at <http://www.eda.admin.ch/psc>, Part I, para 26(a). See generally James Cockayne, "Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document", *Journal of Conflict and Security Law* 13 (2009) 401.

[46] International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, art 1(1)(b).

[47] Geoffrey Best, quoted in David Shearer, *Private Armies and Military Intervention*, Adelphi Paper 316 (Oxford: Oxford University Press, 1998), 18.

[48] Global Code of Conduct for Private Security Companies and Private Military Companies (Draft for consulation as of 7 January 2010) (Bern: Federal Department of Foreign Affairs, Switzerland, 2010).

[49] Ibid, Part I.B.

[50] Greentree Notes: Regulating the Private Commercial Military Sector (Chair's Summary) (New York: Institute for International Law and Justice, New York University School of Law, 22-24 March 2007) available at <http://www.iilj.org/research/GreentreeNotes.asp>.

Yet the limitations of voluntary codes of conduct were displayed when IPOA authorized the first investigation of one of its members. This took place a few weeks after the Nisour Square incident in September 2007, in which Blackwater personnel killed 17 Iraqi civilians. IPOA opened an investigation into whether Blackwater was in compliance with the code. Two days after the investigation was announced, Blackwater withdrew from the association entirely and announced that it was setting up its own association, the Global Peace and Security Operations Institute. The boilerplate website included a few platitudes but made it clear that Blackwater is the only member of this institute and that it does *not* have a code of conduct.[51] IPOA's code remains essentially untested.

The third area of movement is in the gradual, belated recognition that the relentless drive to privatize every aspect of government might have its limits. In the wake of the Nisour Square incident, the FBI opened an investigation and half a dozen investigators prepared to fly to Baghdad to examine the crime scene and interview witnesses. Under its State Department contract, initial plans provided for the investigators' security and transportation outside the Green Zone to be provided by… Blackwater. Following protests, the FBI announced that in order to avoid "even the appearance" of a conflict of interest their agents would be protected by U.S. government personnel.

After revelations of these and other abuses — the CACI and Titan interrogations in Abu Ghraib, official testimony that CIA contractors participated in the waterboarding, and a contract that paid Blackwater to plan the assassination of senior al Qaeda leaders — there has been some discussion as to whether the U.S. has been illegally outsourcing "inherently governmental" functions. But a definition of what that covers is maddeningly hard to find.

This is partly because the U.S. attitude to privatization is radically different from the European understanding. In Europe, there is a debate over whether public functions should be transferred to private actors. In the United States, the question is framed as whether certain functions should be public in the first place. In the United States, then, the "inherently governmental" label operates not as a protected area of public interest so much as an increasingly narrow exception to the presumption that *all* aspects of government should be considered for privatization. This has undermined accountability and justified some terrible policies.

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[51] The Institute now appears to be defunct. The rebranding of Blackwater as Xe Services is discussed below.

There are two basic reasons why certain functions should never be outsourced. First, if it would make effective accountability impossible — as in the case where a programme operates in secret and has the potential for abusive conduct. Secondly, where the public interest requires oversight by a governmental (and therefore politically accountable) actor.

The first is really a legal argument for the possibility of accountability. Allowing the delegation of covert action to private actors undermines even the limited checks on defence operations. That may, of course, be the point: it is clear that no one intended the CIA's assassination programme to be made public until Leon Panetta, President Obama's director of the C.I.A., was briefed on it four months into his tenure. He sensibly terminated the programme, briefed Congress, and successfully blamed the whole thing on his predecessors.[52]

The second argument is a political one. It accepts that even in a democracy it is sometimes necessary to push at the limits of law to deal with threats. But such actions can only be justified if they are linked to the democratic structures they are intended to protect. A workable definition of "inherently governmental" would cover the exercise of discretion in actions that significantly affect the life, liberty, or property of private persons. Such a definition would prohibit the Blackwater assassination programme and severely restrict the role of contractors in interrogations. It may be the reason why a recent spate of Alien Tort Claims Act cases have progressed further than normal, notably including a suit against Blackwater's corporate reincarnation that would have gone to trial had it not been settled in January 2010.[53]

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[52] Mark Mazzetti, "CIA Sought Blackwater's Help to Kill Jihadists", *New York Times*, 19 August 2009; Joby Warrick and R. Jeffrey Smith, "CIA Hired Firm for Assassin Program", *Washington Post*, 20 August 2009.

[53] The Alien Tort Claims Act (ATCA, also referred to as the Alien Tort Statute) is an idiosyncratic piece of legislation. Its drafting history is obscure, its scope highly contentious, and for near two centuries it all but lay dormant on the US statute books. In its entirety, it provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Its resurrection in 1980 earned it the label the "Rip Van Winkle of statutes". Karen Lin, "An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act", *Columbia Law Review* 108 (2008) 1718 at 1732. For the most part, it was used in actions that were largely one-sided against uniquely unpopular defendants. Many such cases were essentially symbolic, with little hope of any recovery of damages.

In a footnote in its *Sosa* decision, the U.S. Supreme Court raised the question of "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n20 (2004). The footnote cited, as an indication of different possible answers, a 1984 D.C. Circuit Court decision that, at that time, there was insufficient consensus that torture by private actors violates international law. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-5 (D.C. Cir., 1984). A decade later, the Second Circuit held that there was a consensus that genocide by private actors did violate international law. *Kadic v. Karadzic*, 70 F.3d 232, 239-41 (1995).

It is arguable that the two cases are not so inconsistent as torture by definition requires a connection with public authority. A more recent D.C. Circuit decision concluded that "Even if torture suits cannot be brought against private

Unfortunately, debates about the U.S. reliance on contractors tend to focus on questions of cost and periodic outrage at corruption. A consensus appeared to be emerging that contractors should not be in charge of "enhanced" interrogation, but this seemed to be driven by the fact that each of the alleged torturers cost the U.S. taxpayer about double the salary of a Federal employee. Even the assassination programme failed to start a meaningful debate on what should and what should not be outsourced. At the very least, the responsibility to determine what is and is not "inherently governmental" should itself be an inherently governmental task.[54]

3 Money

The last topic I want to touch on is the underlying theoretical question of what we mean when we think of regulation, or accountability, or governance of business in conflict. As I highlighted at the beginning, loose talk of responsibility begs the questions of responsibility *to whom* and *for what*. I would submit that "voluntary accountability" is an oxymoron. That does not mean we should give up on corporate accountability. But it does suggest that we should be a little more careful.

If I can return to the three problems I identified at the beginning — that the business and human rights discourse is plagued by *incoherence*, *arbitrariness*, and

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parties — at least not yet — it may be that 'war crimes' have a broader reach." *Saleh v. Titan Corp.*, 580 F.3d 1, 43 (2009).

Various cases have held that there is no reason to distinguish between natural and juridical persons in such actions. See, eg, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 319 (S.D.N.Y., 2003) (a "private corporation is a juridical person and has no per se immunity under U.S. domestic or international law"); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 282 (2d Cir., 2007); ("the issue of whether corporations may be held liable under [ATCA is] indistinguishable from the question of whether private individuals may be"). As one court observed: "Limiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world." *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 58-9 (E.D.N.Y., 2005).

An October 2009 decision in the District Court for the Eastern District of Virginia summarized the position as follows:

> Congress, by ratifying the Geneva Conventions and by enacting the War Crimes Act, has defined the international law norm governing war crimes. This norm is binding, universal, and precisely defined. Accordingly, the ATS recognizes a cause of action alleging war crimes, and claims arising under this cause of action are cognizable against non-state actor defendants, including corporations. This cause of action requires plaintiffs to show that defendants (i) intentionally (ii) killed or inflicted serious bodily harm (iii) upon innocent civilians (iv) during an armed conflict and (v) in the context of and in association with that armed conflict.

In re Xe Services Alien Tort Litigation, 665 F. Supp. 2d 569, 588 (E.D. Va., 2009). This case involved five lawsuits brought by Iraqis against Xe Services and other corporate reincarnations of Blackwater, as well as the owner of these entities Erik Prince. Due to problems with the manner in which facts had been pleaded, the plaintiffs were required to re-file in four of the cases. The case was settled in January 2010.

[54] See Simon Chesterman, ""We Can't Spy… If We Can't Buy!": The Privatization of U.S. Intelligence Services and the Limits of Outsourcing "Inherently Governmental" Functions", *European Journal of International Law* 19 (2008) 1055; Simon Chesterman and Angelina Fisher (eds), *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (Oxford: Oxford University Press, 2009).

overstretch — let me offer some concrete suggestions as to how we might address these problems. The bottom line, so to speak, will be my third and final leitmotif for the evening: money.

3.1 Coherent

To deal with the problem of incoherence requires clarity. Clarity, for example, about what is an international crime, what is a human right, and what would be nice in a perfect world. These are, in many ways, strategic questions. The danger of clarity is that you might have a race to the bottom in terms of formal regulation. But clarity can also apply to what we are seeking to do through the *market* rather than through the *law*.

Clarity can also be useful in sharpening the policy choices before us, in pressing us to articulate *why* particular norms are being asserted and to what end. This leads to addressing the second problem: of arbitrariness.

3.2 Rational

Dealing with that problem suggests the need for a rational allocation of resources. It may still make sense to focus on bourgeois consumer tastes, because that's where you may have leverage. And so it's easier to press for fair trade café lattes and rainforest alliance certified timber. But real change requires looking upstream at the supply chains of major manufacturers and retailers, such as Wal-Mart, and the extraction of natural resources. This can pose some awkward decisions for the voluntary regimes — as we've seen, for example, in the Global Compacts efforts to stay at arms length from tobacco companies.

A slightly different question is whether it is worth going after corporations at all. Should we instead be addressing our attention to the individuals that control them? This raises the problem of anthropomorphism, the attribution of human characteristics, to corporations. It is common, for example, to see references to what corporations "may feel … is in their interests", for example.[55] The difficulties of going after corporations include evidentiary and practical problems. In terms of evidence, it may be hard to establish the mental state of a corporate entity sufficient to

[55] Clapham, *Non-State Actors*, 231.

establish guilt. In practical terms, a corporation may be harder to discipline than an individual — the only costs to be imposed are financial, and if these are excessive then the enterprise can be wound up. An eighteenth century Lord Chancellor of England summed it up nicely when he observed that corporations "have neither bodies to be punished, nor souls to be condemned; they therefore do as they like."[56]

More fundamentally, however, we need to be sure that we aren't allowing the corporate veil to serve as a shield for the individuals who actually perpetrate the wrong.[57]

3.3 Modest

The last problem is normative overstretch, and I want to suggest that one approach to dealing with this is modesty. Modesty about what we can achieve through the law, but also modesty about what we can achieve through the markets.

Markets can be an effective form of regulation, but operate best where there is competition, an expectation of repeat encounters, and a free flow of information. It is far from clear that any of these conditions exist for businesses in conflict zones, especially for those whose business *is* conflict. Demand often outstrips supply, as we saw in the scramble to fulfil multi-million dollar contracts in Iraq; this creates monopoly-type problems and reduces the potential leverage of the hiring agency to impose strong oversight provisions. Even where such leverage exists it may not be exercised because the hirer regards the contract as an exceptional event in the life of the nation that will not establish a precedent for future conduct. And even where there might be leverage and established relationships — for example in the many contracts issued by the U.S. Departments of State and Defense — there has been minimal public scrutiny or active efforts to avoid it.

It is possible to shape that market, however. Scandal can be a useful discipline and has been encouraging the adoption of codes of conduct by bodies such as IPOA. This is, of course, self-serving: the creation of a "legitimate" business through professionalization and the creation of industry associations may distinguish reputable companies from cowboys, raising the cost of entry for competitors and enabling the

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[56] Lord Chancellor Thurlow (1731–1806) cited in John Poynder, *Literary Extracts from English and Other Works* (London: John Hatchard, 1844) vol 1, 2.

[57] Simon Chesterman, "The Corporate Veil, Crime and Punishment", *Melbourne University Law Review* 19 (1994) 1064.

charging of higher fees for similar services. But it may also point to the most promising way of dealing with an area in which governments have failed. Modest examples of this are the disbanding of Sandline and EO, and the more recent repositioning of Blackwater as Xe Services.

None of this is a substitute for regulation intended to deter and punish abuse. Indeed, one might argue that poor regulation is *worse* than nothing, as it gives the illusion of accountability while taking away the impetus for reform. Yet focusing only on after-the-fact accountability, particularly in an environment where investigations will always be difficult and prosecutions unlikely, overlooks the role that regulation can play not just punishing companies for behaving badly but encouraging them to behave well.

4 Conclusion

In his defence of the approach he has taken as SRSG, John Ruggie argued in the *American Journal of International Law* that we need to focus on consolidating norms that exist and clarifying norms that are required. At the same time, he argued that the focus needs to move away from seeking individual corporate liability for wrongdoing. Citing Amartya Sen's work on rights, he argued that just as the human rights community has long urged a move "beyond voluntarism" in the area of business and human rights, this must be accompanied by a willingness to look "beyond compliance".[58] In his later reports this has become formalized as the distinction between the obligation of states to *protect* human rights, and that of businesses to *respect* them.[59]

I fear that this may be giving too much of the game away. From my brief survey of lawyers, guns, and money, I think that he is correct in imposing some rigour on the business-human rights discourse. But a coherent, rational, modest approach must strike a balance between commercial and public interests, between voluntary and imposed regulation. It must draw upon international law to establish baseline norms and domestic institutions to oversee the activities of companies and punish individuals

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[58] Ruggie, "Business and Human Rights", at 839-40.

[59] John Gerard Ruggie, Protect, Respect, and Remedy: A Framework for Business and Human Rights, UN Doc A/HRC/8/5 (2008), paras 17-25. The 2009 reports notes that this distinction may be problematic when corporations exercise public functions. See John Gerard Ruggie, Business and Human Rights: Towards Operationalizing the "Protect, Respect, and Remedy" Framework, UN Doc A/HRC/11/13 (2009), para 64.

for abuse. It should also use the market to shape incentives that encourage good and discourage bad behaviour. In the absence of such a regime, the marketplace of war will continue to be regulated — if it is regulated at all — by bankruptcy and death.