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

Simon Chesterman*

Abstract

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. Section II of this paper describes the normative regime that is set up by human rights and international humanitarian law, before Section III turns to 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. Section IV then sketches out a regime that focuses not on toothless regulation, but on a model of governance that combines limited sanctions with a wider structuring of incentives. These three parts are referred to in shorthand as “lawyers,” “guns,” and “money.”

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Table of Contents

I. Introduction.....	322
II. Lawyers	324
A. Human Rights	325
B. International Humanitarian Law.....	328
III. Guns	330
A. The Fall and Rise of Mercenaries.....	330
B. Accountability.....	333
IV. Money.....	338
A. Coherence	338
B. Rationality	339
C. Modesty.....	340
V. Conclusion.....	340

I. INTRODUCTION

It is now twelve years since the Rome Statute of the International Criminal Court was adopted in July 1998.¹ Days after that landmark document was concluded, 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 corporate officers suggested that the breathless tone was a little over the top.

There had, in fact, been a push to include liability for 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 inappropriate for states to agree on the criminal responsibility of all entities

¹ Rome Statute of the International Criminal Court (July 17, 1998), UN Doc No A/CONF 183/9, reprinted in 37 ILM 99 (1998). See generally William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge 2d ed 2004).

² Maurice Nyberg, *At Risk from Complicity with Crime*, *Fin Times* (July 28, 1998).

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

other than states themselves.⁴ The language was ultimately dropped from the square brackets that were initially used to indicate its provisional inclusion in the drafting process.

Six months later, at the 1999 World Economic Forum in Davos, UN Secretary General Kofi Annan proposed the Global Compact. This compact is “not a regulatory instrument—it does not ‘police,’ enforce, or measure the behaviour of companies.” Instead, it relies on “public accountability, transparency and the enlightened self-interest of companies, labor 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, a court was established with potentially universal jurisdiction to prosecute the very worst crimes by individuals. On the other hand, an implicit admission was made 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

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 whom, 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. Do we focus on Nike’s use of sweatshop labor because sweatshops are the greatest human rights problem? Or is it because American university students like to wear Nike sneakers?⁸

⁴ See Albin Eser, *Individual Criminal Responsibility*, in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, eds, 1 *The Rome Statute of the International Criminal Court: A Commentary* 767, 779 (Oxford 2002) (“[I]t was felt ‘morally obtuse for States to insist on the criminal responsibility of all entities other than themselves[.]’”). See also Andrew Clapham, *Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups*, 6 J Intl Crim Just 899, 915 (2008).

⁵ See, for example, *The United Nations Global Compact Operational Guide for Medium-Scale Enterprises*, 3 (UN Global Compact 2007), online at http://www.unglobalcompact.org/docs/news_events/8.1/Operational_guide_ME.pdf (visited Oct 25, 2010).

⁶ A recent Global Compact brochure describes the compact as “voluntary, yet accountable.” *United Nations Global Compact: Corporate Citizenship in the World Economy* 3 *(UN Global Compact 2008) online at http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf (visited Oct 25, 2010).

⁷ See Andrew Clapham, *Human Rights Obligations of Non-State Actors* 195 (Oxford 2006).

⁸ See Justine Nolan and Luke Taylor, *Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?*, 87 J Bus Ethics 433 (2009).

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

The argument presented in this article is 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), and undervalued because IHL may provide a more certain foundation for real norms that can be applied to businesses and the individuals who control them.

The article proceeds in three parts. Section II briefly describes the normative regime that is set up by human rights and IHL. Section III looks at the specific situation of conflict zones and efforts to regulate some of the newer entities on the scene, particularly private military and security companies. Section IV then sketches out a regime that focuses not on toothless regulation, but on a model of governance that combines limited sanctions with a wider structuring of incentives. These three parts will be referred to in shorthand as “lawyers,” “guns,” and “money.”

II. LAWYERS

There is a proliferation of literature discussing human rights and business, but very little that looks at the issue of businesses operating in conflict zones and the applicability of IHL.

⁹ See generally Simon Chesterman, *An International Rule of Law?*, 56 Am J Comp L 331 (2008).

¹⁰ But see Thomas Nagel, *The Problem of Global Justice*, 33 Phil & Pub Aff 113 (2005).

This is understandable in terms of the prominence and dynamism of human rights as a sub-discipline as contrasted with the conservatism of IHL. 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 IHL.

A. Human Rights

To be sure, businesses are increasingly aware of human rights law.¹¹ In part, this is due to the general expansion in content and broader acceptance of human rights norms in the past two decades. In Southeast Asia, for example, the early 1990s saw the “Asian values” debates that resisted 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 UN Human Rights Council created in 2006, 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.

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, the environment, 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,¹⁴ these include the Organization for Economic Co-operation and Development (OECD) Guidelines for

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*, 37 Colum Hum Rts L Rev 287 (2006); Ann Marie McLoughlin, Comment, *International Trend of Multinational Corporate Accountability for Human Rights Abuses and the Role of the United States*, 33 Ohio N U L Rev 153 (2007); 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*, 5 Nw J Intl Hum Rts 236 (2007); Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 Nw J Intl Hum Rts 222 (2008); 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*, 66 U Toronto Fac L Rev 137 (2008).

¹² See Tan Hsien-Li, *The ASEAN Human Rights Body: Incorporating Forgotten Promises for Policy Coherence and Efficacy*, 12 Singapore Y B Intl L 239 (2008).

¹³ See Simon Chesterman, *The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations—The Case of Norway's Sovereign Wealth Fund*, 23 Am U Intl L Rev 577 (2008).

¹⁴ See UN *Global Compact Operational Guide* (cited in note 5).

Multinational Enterprises,¹⁵ the International Labor Organization's (ILO) 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 Social Accountability 8000 (SA8000) standards,¹⁹ and so on.

The most ambitious initiative was the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (*Norms*), drafted under the auspices of the UN Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission).²⁰ 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 UN in some form, which would have confirmed the content of the obligations as well as implementation mechanisms to monitor and report on compliance.

The drafting process took several years, but when the document moved from the experts in 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

¹⁵ Originally adopted in 1976, the most recent revision of the guidelines was completed in 2000. See *OECD Guidelines for Multinational Enterprises* (Organisation for Economic Co-operation and Development 2000), online at <http://www.oecd.org/daf/investment/guidelines> (visited Oct 29, 2010); Clapham, *Human Rights Obligations* at 201–11 (cited in note 7). Consultation on a further revision took place in December 2009.

¹⁶ *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (International Labour Organization 1977), online at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf (visited Oct 25, 2010); Clapham, *Human Rights Obligations* at 241 (cited in note 7).

¹⁷ *Voluntary Principles on Security and Human Rights* (Voluntaryprinciples.org 2000), online at http://voluntaryprinciples.org/files/voluntary_principles_english.pdf (visited Oct 25, 2010).

¹⁸ *G3 Guidelines* (Global Reporting Initiative 2006), online at <http://www.globalreporting.org/ReportingFramework/G3Guidelines> (visited Oct 25, 2010).

¹⁹ *Social Accountability 8000 (SA8000)* (Social Accountability International 2008), online at http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf (visited Oct 25, 2010).

²⁰ UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

²¹ John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 Am J Intl L 819, 820–21 (2007).

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 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 had made “exaggerated legal claims.”²⁵ 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:

[T]aken 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.²⁶

In essence, what the *Norms* did was merely to take existing human rights norms applicable to states and assert that they also apply to corporations.²⁷

²² UN Commission on Human Rights Res No 2004/116, UN Doc E/CN.4/2004/L.11/Add.7 (2004). See also Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 *Global Governance* 279, 286–87 (2009).

²³ UN Commission on Human Rights Res No 2005/69 ¶ 1, UN Doc E/CN.4/2005/L.87 (2005).

²⁴ John Gerard Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts* ¶ 20, UN Doc A/HRC/4/35 (2007). See, for example, Philip Allott, *Eunomia: New Order for a New World* 372–73 (Oxford 1990); Rosalyn Higgins, *Problems and Process: International Law and How We Use It* 49–50 (Oxford 1994).

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* ¶ 59, UN Doc E/CN.4/2006/97 (2006).

²⁶ *Id.* ¶ 60.

²⁷ 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* 32–33 (Oxford 2005). But see David Weissbrodt, *International Standard-Setting on the Human Rights Responsibilities of Business*, 26 *Berkeley J Int'l L* 373, 382 (2008).

Ruggie's position, predictably, was not warmly embraced by the business-human rights enthusiasts.²⁸ 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 CSR.

In an attempt to impose some rigor on the 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.²⁹ 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 corporations³⁰—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 (ICRC), sometimes described as the high priesthood of international humanitarian law.

B. International Humanitarian Law

The overwhelming focus on the application of human rights norms to business, rather than IHL, is somewhat ironic given that human rights, *stricto sensu*, bind only states.³¹ States sign human rights treaties and promise to respect

²⁸ See, for example, Weissbrodt, 26 Berkely J Int'l L at 390 (cited in note 27) (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"). But see Nina Seppala, *Business and the International Human Rights Regime: A Comparison of UN Initiatives*, 87 J Bus Ethics 401, 409–10 (2009).

²⁹ Ruggie, 101 Am J Int'l L at 828–37 (cited in note 21).

³⁰ See Clapham, *Human Rights Obligations* at 241 (cited in note 4).

³¹ But see *Business and International Humanitarian Law* 13–14 (International Committee of the Red Cross 2006), online at http://www.icrc.org/eng/assets/files/other/icrc_002_0882.pdf (visited Nov 20, 2010) (stating that although this strict application is the traditional understanding of human rights, some advocates have challenged that position).

and ensure the various rights.³² IHL explicitly binds states and individuals. There is a sound doctrinal basis for holding that business may have obligations under international law, but the limited field in which this has practical effect is primarily international crimes justiciable in national jurisdictions.³³

So why is so little attention paid to IHL? First, and most obviously, only a relatively small number of businesses operate in conflict zones. Second, whereas human rights activism and CSR have encouraged positive activities—with businesses able to declare that they pay fair trade wages, promote 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.³⁴ Easy cases include where a business provides 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 as 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.³⁵ Labor conditions are also regulated, including the labor 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 labor.³⁶ Other provisions cover forced

³² See, for example, International Covenant on Civil and Political Rights (ICCPR) (1966), Art 2(1), 999 UNTS 171.

³³ See, for example, Clapham, 6 *J Intl Crim Just* at 906 (cited in note 4).

³⁴ See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (1977), Art 52, 1125 UNTS 3.

³⁵ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949), Art 33, 75 UN Treaty Ser 287 (1950).

³⁶ Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949), Arts 49–55, 75 UN Treaty Ser 135 (1950); Geneva Convention (IV) at Arts 40, 51, 95 (cited in note 35); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of

displacement,³⁷ damage to the environment (potentially including the sale of defoliants),³⁸ and so on.

Problematic areas include ensuring 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 remain in 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.³⁹

But the most controversy and activity in this area have 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 (EO) 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.

III. GUNS

A. 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. Although EO 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”

Victims of Non-International Armed Conflicts (Additional Protocol II) (1977), Art 5(1)(e), 1125 UN Treaty Ser 609 (1978).

³⁷ Convention (IV) at Art 49 (cited in note 35).

³⁸ Hans-Peter Gasser, *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, 311 Intl Rev Red Cross 230 (1996).

³⁹ *Business and International Humanitarian Law* at 21 (cited in note 31).

companies (EO and Sandline have since been shut down, although many key individuals quickly resurfaced in new corporate guises).⁴⁰

It is also misleading in that it implies that the comparison is negative. This glosses over much of the history of mercenaries. Although the adjective “mercenary” today means to be 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 still 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.⁴¹

The discrediting of skilled warriors offering their services at a price in favor of national armies was partly a function of technology. Around the time of 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 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.”⁴² 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.⁴³ Reliance upon mercenaries was no longer necessary and also came to be seen as suspect: a country whose men would not fight for that country lacked patriots; those individuals who would fight for reasons other than love of country lacked morals.⁴⁴

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 (OAU) and the UN to prohibit mercenarism completely.⁴⁵

⁴⁰ Section III.A draws on several passages previously published in Simon Chesterman, *Leashing the Dogs of War: The Rise and Regulation of Private Military Companies*, 5 *Carnegie Rep* 36 (2008).

⁴¹ See generally P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell 2003).

⁴² Deborah Avant, *From Mercenary to Citizen Armies: Explaining Change in the Practice of War*, 54 *Intl Org* 41, 41 (2000).

⁴³ See generally Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge 2005); Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford 2007).

⁴⁴ See Avant, *Market for Force* (cited in note 43); Percy, *Mercenaries* (cited in note 43).

⁴⁵ See, for example, Convention of the OAU for the Elimination of Mercenarism in Africa (1977), OAU Doc CM/433/Rev L Annex 1; International Convention against the Recruitment, Use, Financing, and Training of Mercenaries (1989), 63 *UNTS* 75; Angela McIntyre and Taya Weiss,

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.⁴⁶

These trends explain the rise of Blackwater and its peers but not their attractiveness to Washington. The US retains such companies for reasons very different than those of Sierra Leone, Angola, and Papua New Guinea. In the 1991 Gulf War, it employed one contractor for every fifty active-duty personnel; by the 1999 Kosovo conflict, contractors made up 10 percent of US personnel and served as the US force's supply and engineering corps. After the US went into Iraq in 2003, contractors made up the second largest group of personnel after the US military—far more than the number of British troops at their highpoint. Other accounts put contractor numbers in excess even of US personnel.⁴⁷

The growing reliance on contractors by the US 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 US 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.⁴⁸ Subsequent investigations produced mixed results.⁴⁹

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* 67–84 (Oxford 2007).

⁴⁶ See generally Singer, *Corporate Warriors* (cited in note 41).

⁴⁷ See T. Christian Miller, *Contractors Outnumber Troops in Iraq*, LA Times A1 (June 4, 2007) (stating that, at the time of the article, there were 180,000 civilians “working in Iraq under US contracts” as opposed to “160,000 soldiers and a few thousand government employees [who] are stationed in Iraq”).

⁴⁸ *Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans* (US Government Accountability Office 2003), online at <http://www.gao.gov/new.items/d03695.pdf> (visited Oct 25, 2010).

⁴⁹ See, for example, *Warfighter Support: A Cost Comparison of Using State Department Employees versus Contractors for Security Services in Iraq* (US Government Accountability Office 2010), online at <http://www.gao.gov/new.items/d10266r.pdf> (visited Oct 18, 2010) (concluding that contractors were cheaper in four out of five cases examined).

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 US, 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—artificially low. The use of contractors enabled the US to keep its troop numbers around twenty thousand below what would have been required to field equivalent strength in Iraq. And although precise figures are difficult to obtain, excluding contractor deaths from official US casualties has kept those figures many hundreds lower than they might have been.⁵⁰

B. Accountability

It is frequently asserted that private military companies such as Blackwater operate in a legal vacuum.⁵¹ 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 its 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 thirty-four years in prison for his role in an attempted coup in Equatorial Guinea.⁵² 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.⁵³ For present purposes, I will highlight three areas in which there have been some interesting developments.

⁵⁰ See, for example, John M. Broder and James Risen, *Contractor Deaths in Iraq Soar to Record*, NY Times (May 19, 2007), online at http://www.nytimes.com/2007/05/19/world/middleeast/19contractors.html?_r=1&scp=1&sq=Death%20Toll%20for%20Contractors%20Reaches%20New%20High%20&st=cse (visited Nov 20, 2010).

⁵¹ See, for example, James Risen, *Efforts to Prosecute Blackwater Are Collapsing*, NY Times A1 (Oct 21, 2010).

⁵² Mann was pardoned and released in November 2009. See Adam Nossiter and Alan Cowell, *Guinea Frees British Mercenary*, NY Times A6 (Nov 4, 2009).

⁵³ See generally Simon Chesterman and Chia Lehnardt, eds, *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford 2007); Jenny S. Lam, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 Cal L Rev 1459 (2009); Adam Ebrahim, Note, *Going to War with the Army You Can Afford: The United States, International Law, and The Private Military Industry*, 28 BU Intl L J 181 (2010); Amol Mehra, *Bridging Accountability Gaps: The Proliferation of Private Military and Security Companies and Ensuring Accountability for Human Rights Violations*, 22 Pac McGeorge Global Bus & Dev L J 323 (2010).

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 seventeen states that signed onto the Montreux Document include prominent home and contracting states such as the US, 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 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.”⁵⁴ It is not nothing—but not much, either. It is, maybe, an advance beyond 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.”⁵⁵ The difficulty of proving such motivation led one writer to suggest that anyone convicted of the offense should be shot—as should his lawyer.⁵⁶

The second area of movement has been in the drafting of codes of conduct and other non-binding approaches to regulation. Following from the Montreux process, a code of conduct was drafted with extensive consultation and was signed in November 2010.⁵⁷ The code refers to the obligation of companies to respect relevant obligations and principles of IHL and human rights law; in particular that they will not “participate in, encourage, or seek to benefit from any national or international crimes including but not limited to war crimes, crimes against humanity, genocide, torture, enforced disappearance, forced or

⁵⁴ *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* Part I, ¶ 26(a) (Swiss Federal Department of Foreign Affairs & International Committee of the Red Cross 2008), online at <http://www.eda.admin.ch/psc> (visited Oct 29, 2010). See generally James Cockayne, *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 13 J Conflict & Security L 401 (2008).

⁵⁵ International Convention against the Recruitment, Use, Financing, and Training of Mercenaries Art 1(1)(b), General Assembly Res No 44/34, UN Doc No A/Res/44/34 (1989).

⁵⁶ Geoffrey Best, quoted in David Shearer, *Private Armies and Military Intervention* 18 (Oxford 1998).

⁵⁷ *International Code of Conduct for Private Security Companies and Private Military Companies* (Federal Department of Foreign Affairs 2010), online at <http://www.dcaf.ch/privatisation-security> (visited Oct 25, 2010) (draft for consultation as of Oct 8, 2010).

compulsory labor, hostage-taking, sexual or gender-based violence, human trafficking, the trafficking of weapons or drugs, child labor or extrajudicial, summary or arbitrary executions.”⁵⁸

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 2007.⁵⁹ 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.⁶⁰ The member companies include well-known bodies such as ArmorGroup, DynCorp International, and Triple Canopy.

Yet the limitations of voluntary codes of conduct were displayed when IPOA authorized the first investigation of one of its members for alleged excessive use of force. This took place a few weeks after the Nisour Square incident of September 2007 in which Blackwater personnel killed seventeen 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.⁶¹ 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 none other than Blackwater itself. Following protests,

⁵⁸ Id ¶ 22.

⁵⁹ *Greentree Notes: Regulating the Private Commercial Military Sector (Chair's Summary)* (Institute for International Law and Justice, New York University School of Law 2007), online at <http://www.iilj.org/research/GreentreeNotes.asp> (visited Oct 25, 2010).

⁶⁰ *Code of Conduct 12* (International Peace Operations Association 2009), online at <http://ipoaworld.org/eng/codeofconduct/87-codecodeofconductv12enghtml.html> (visited Oct 25, 2010).

⁶¹ The Institute now appears to be defunct. The rebranding of Blackwater as Xe Services is discussed in Section IV.C.

the FBI announced that in order to avoid “even the appearance” of a conflict of interest, its agents would be protected by US government personnel.⁶²

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 US has been illegally outsourcing “inherently governmental” functions. But a definition of what that covers is maddeningly hard to find.

This is partly because the US attitude toward 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 US, the question is framed as whether certain functions should be public in the first place. In the US 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.⁶³

There are two basic reasons why certain functions should never be outsourced. First is if it would make effective accountability impossible—as in the case where a program operates in secret and has the potential for abusive conduct. Second is 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 defense operations. That may, of course, be the point: it is clear that no one intended the CIA’s assassination program to be made public until Leon Panetta, President Obama’s director of the CIA, was briefed on it four months into his tenure. He sensibly terminated the program, briefed Congress, and successfully blamed the whole thing on his predecessors.⁶⁴

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

⁶² *Security for FBI Personnel Investigating Blackwater* (Federal Bureau of Investigation Press Release 2007), online at <http://www.fbi.gov/news/pressrel/press-releases/security-for-fbi-personnel-investigating-blackwater> (visited Oct 25, 2010).

⁶³ 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*, 19 Eur J Int L 1055, 1069–73 (2008).

⁶⁴ See Mark Mazzetti, *Outsiders Hired as CIA Planned to Kill Jihadists*, NY Times (Aug 20, 2009); Joby Warrick and R. Jeffrey Smith, *CIA Hired Firm for Assassin Program: Blackwater Missions Against Al-Queda Never Began*, Wash Post (Aug 20, 2009).

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 program and severely restrict the role of contractors in interrogations. It may be the reason why a recent spate of Alien Tort Claims Act cases has progressed further than normal, notably including a suit against Blackwater’s corporate reincarnation, Xe Services, that was settled in January 2010.⁶⁵ (A counter-trend may be seen in a Second Circuit Court of

⁶⁵ 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 nearly 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 USC § 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*, 108 Colum L Rev 1718, 1732 (2008). 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 for any recovery of damages.

In a footnote in its *Sosa* decision, the US 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 US 692, 732 n 20 (2004). The footnote cited, as an indication of different possible answers, a 1984 DC Circuit Court decision which said that, at that time, there was insufficient consensus that torture by private actors violates international law. *Tel-Oren v Libyan Arab Repub*, 726 F2d 774, 791–95 (DC 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 F3d 232, 239–41 (2d Cir 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 DC Circuit decision concluded that “[e]ven if torture suits cannot be brought against private parties—at least not yet—it may be that ‘war crimes’ have a broader reach.” *Saleh v Titan Corp*, 580 F3d 1, 15 n 13 (2009).

Various cases have held that there is no reason to distinguish between natural and juridical persons in such actions. See, for example, *Presbyterian Church of Sudan v Talisman Energy, Inc*, 244 F Supp 2d 289, 319 (SDNY 2003) (“[a] private corporation is a juridical person and has no *per se* immunity under US domestic or international law”); *Khulumani v Barclay Natl Bank Ltd*, 504 F3d 254, 282 (2d Cir 2007) (“[T]he issue of whether corporations may be held liable under the 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 (EDNY 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

Appeals decision in September 2010, holding that the Alien Torts Claims Act allows jurisdiction only over crimes committed by natural rather than juridical persons—a point certain to be challenged on appeal.⁶⁶)

Unfortunately, debates about US reliance on contractors tend to focus on questions of cost and periodic outrage at corruption. A consensus appeared to emerge that contractors should not be in charge of “enhanced” interrogation, but this seemed driven by the fact that each of the alleged torturers cost the US taxpayer about double the salary of a Federal employee. Even the assassination program 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.⁶⁷

IV. MONEY

The last topic I touch on is the underlying theoretical question of what is meant when words like “regulation”, “accountability”, or “governance” are used with respect to businesses operating in conflict zones. As I highlighted above, 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.

I return to the three problems I identified at the beginning—that the business and human rights discourse is plagued by *incoherence*, *arbitrariness*, and *overstretch*—and offer some concrete suggestions as to how these problems might be addressed.

A. Coherence

To deal with the problem of incoherence, one requires clarity. Clarity, for example, about what is an international crime, what is a human right, and what would be ideal in a perfect world. These are, in many ways, strategic questions.

(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 Litig., 665 F Supp 2d 569, 588 (ED 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.

⁶⁶ *Kiobel v Royal Dutch Petroleum*, No 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir 2010).

⁶⁷ See Chesterman, 19 Eur J Intl L at 1073 (cited in note 63); Simon Chesterman and Angelina Fisher, eds, *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (Oxford 2009).

The danger of clarity is that it might create a race to the bottom in terms of formal regulation. But clarity can also apply to what is intended to be achieved through the *market* rather than through the *law*.

Clarity can also be useful in sharpening policy choices, in forcing decision-makers to articulate *why* particular norms are being asserted and to what end. This leads to addressing the second problem: arbitrariness.

B. Rationality

Dealing with the problem of arbitrariness suggests the need for a rational allocation of resources. It may still make sense to focus on bourgeois consumer tastes, because that is where there may be leverage. Pressing for fair trade café lattes and rainforest alliance certified timber offers the possibility of relatively “quick wins.” But real change requires looking upstream at the supply chains of major manufacturers and retailers, such as Wal-Mart, and at the extraction of natural resources. This can pose some awkward decisions for the voluntary regimes—as we have seen, for example, in the efforts to keep the Global Compact at arm’s 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 the anthropomorphism—the attribution of human characteristics to non-human entities—of corporations. It is common, for example, to see references to what corporations “may feel . . . is in their interests[.]”⁶⁸ 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 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 may be shut down. 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.”⁶⁹

More fundamentally, however, we need to be sure that we are not allowing the corporate veil to serve as a shield for the individuals who actually perpetrate the wrong.⁷⁰

⁶⁸ Clapham, *Human Rights Obligations* at 231 (cited in note 7).

⁶⁹ See John Poynder, 1 *Literary Extracts from English and Other Works; Collected During a Half-Century: Together With Some Original Matter* 268 (John Hatchard & Son 1844), quoting Lord Chancellor Thurlow (1731–1806).

⁷⁰ Simon Chesterman, *The Corporate Veil, Crime and Punishment*, 19 Melb U L Rev 1064, 1073–4 (1994).

C. Modesty

The last problem is normative overstretch, and I 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 fulfill multi-million dollar contracts in Iraq; this creates monopoly-like 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 and that it will not establish a precedent for future conduct. And where there might be leverage and established relationships—as in the many contracts issued by the US 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 encouraged 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 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 by punishing companies for behaving badly but also by encouraging them to behave well.

V. CONCLUSION

In his defense of the approach he has taken as SRSG, John Ruggie argued in the *American Journal of International Law* that the most important area of work at present lies in consolidating norms that exist and clarifying norms that are required. At the same time, he argues 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."⁷¹ 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.⁷²

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 rigor on the business-human rights discourse. But a coherent, rational, modest approach must strike a balance between commercial and public interests as well as 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 for abuse. It should also use the market to shape incentives that encourage good and discourage bad behavior. 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.

⁷¹ Ruggie, 101 Am J Intl L at 839–40 (cited in note 21).

⁷² John Gerard Ruggie, *Protect, Respect, and Remedy: A Framework for Business and Human Rights* ¶¶ 17–25, UN Doc A/HRC/8/5 (2008). The 2009 report 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* ¶ 64, UN Doc A/HRC/11/13 (2009).

