



Volume 22

Issue 2 Symposium: *Critical Intersections for Energy & Water Law: Exploring New Challenges and Opportunities*

Article 10

1-1-2010

Bridging Accountability Gaps—The Proliferation of Private Military and Security Companies and Ensuring Accountability for Human Rights Violations

Amol Mehra

Human Rights Advocates

Follow this and additional works at: <http://digitalcommons.mcgeorge.edu/globe>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

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 (2009).

Available at: <http://digitalcommons.mcgeorge.edu/globe/vol22/iss2/10>

This Article is brought to you for free and open access by the Law Review at Pacific McGeorge Scholarly Commons. It has been accepted for inclusion in *Global Business & Development Law Journal* by an authorized administrator of Pacific McGeorge Scholarly Commons. For more information, please contact msharum@pacific.edu.

Bridging Accountability Gaps—The Proliferation of Private Military and Security Companies and Ensuring Accountability for Human Rights Violations

*Amol Mehra**

I. INTRODUCTION

Globalization has increasingly expanded opportunities for growth of transnational business sectors like the private security industry. Further, trends towards outsourcing government functions to the private sector borne from neo-liberal ideologies have led to the blossoming of military and security functions being performed by private firms.¹ And, while mercenaries and armed forces-for-hire are by no means new, the corporatization of military service is a relatively recent phenomenon.²

Considering this, the classifications of combatants conceived over a century ago may be ill-suited to address the emerging phenomenon of heavily-armed contractors engaging in the use of force on behalf of corporate employers, who in turn are sanctioned by—if not in the employment of—nation-states.³ The fact there are now three players—the contractors themselves, their corporate employers, and the nations that contract out the security and military tasks—complicates any means of accountability for human rights violations.

The following article addresses the need for increased accountability over the actions of private military and security companies (“PMSCs”). Part II will highlight the current reality of the use of PMSCs. Part III discusses the history of international humanitarian law and human rights law applicable to the use of mercenaries and PMSCs, including a consideration of the legal loopholes therein. Part IV briefly considers a normative framework as embodied in the Montreux Document, spearheaded by the Government of Switzerland and the International Committee of the Red Cross and signed on 17 September 2008, which sets forth obligations on various stakeholders and could be seen as providing a model for addressing the proliferation of PMSCs. Part V concludes by stressing that accountability can only be effectively achieved by having member States sign and ratify the Convention Against Mercenaries, build and enforce strong

* Amol Mehra, Legal Advisor, Human Rights Advocates, J.D. 2009, University of San Francisco School of Law.

1. P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 49-54 (2003); Joanna Spear, Market Forces: the Political Economy of Private Military Companies, FAFO (2006).

2. SINGER, *supra* note 1, at 19-39.

3. See Richard Morgan, *Professional Military Firms Under International Law*, 9 CHI. J. INT’L L. 213, 237 (2008).

domestic regulation over PMSCs (including regulatory and administrative laws, licensing requirements for contracts, training of PMSC personnel, human rights monitoring and reporting, sanctions for violations and reparations for victims), and to ultimately consider the Norms on the responsibilities of transnational corporations and other business enterprises with respect to human rights (“the Norms”) as a foundation for developing a set of legally binding standards addressing the obligations of PMSCs.

II. CURRENT REALITY

The use of PMSCs in Iraq is illustrative of the complexity stemming from the proliferation of this group of actors. “At least 310 private security companies from around the world have received contracts from the United States agencies to protect American and Iraqi officials, installations, convoys and other entities in Iraq since 2003.”⁴ Further, with more than six years into the conflict in Iraq, there is no centralized database to account for all the security companies in Iraq financed by American money.⁵ Along with the heavy reliance upon PMSCs in Iraq, many other powerful democratic States are dependent on PMSCs to deploy and operate their armed forces. The United Kingdom, for example, has contracted out to PMSCs for training in operation and maintenance of its nuclear submarines, aircraft support units, tank transporter units and air-to-tanker refueling fleet.⁶ Australia and Canada have entirely privatized many of their military services, including military recruiting in Australia and electronic warfare in Canada.⁷

Yet another complexity stems from the wide range of corporate structures and job functions engaged in by the PMSCs. At one end of the spectrum, supply firms like Halliburton or Kellogg, Brown & Root rarely, if ever, engage in direct combat.⁸ Another grouping, private military firms (PMFs), offer combat capabilities, tactical analysis and other direct military support. These PMFs have been known to provide services for governments or rebel groups in Ethiopia, Angola, Zambia, Ghana, Algeria, Ivory Coast, Rwanda, Uganda, Croatia, Indonesia and many other countries.⁹ Still another grouping, private security companies, are the most prominent and controversial category of outsourced military work. These firms fall between both PMFs and supply firms, as they do not typically engage in direct combat but may be assigned duties likely to draw

4. James Glanz, *Report on Iraq Security Lists 310 Contractors*, N.Y. TIMES, Oct. 28, 2008.

5. *Id.*

6. *See, e.g.*, Andrew Gray, *Private Contractors are a Growing Force in War Zones*, REUTERS, Sept. 18, 2007.

7. *See SINGER, supra* note 1, at 14.

8. *See id.* at 8-9 (these firms provide their clients with logistics, intelligence, technical support, supply and transportation).

9. *See id.* at 9-15.

fire, including guarding U.S., British or NATO military bases, embassies, checkpoints or convoys. Considering these groups as distinct service providers does not accurately depict the reality that they are all, in some way, engaged in services traditionally performed by governments and more importantly, often in hostile areas. Thus, for the purposes of accountability, these groupings must be seen as one and the same, treated and held to the same standards and regulations.

The increased rise in PMSCs has also been met with growing controversy over reports of unpunished criminal misconduct and human rights abuses. In the 1990s, DynCorp employees hired to represent the U.S. contingent in the U.N. Police Task Force in Bosnia were involved in sex-trafficking scandals.¹⁰ In Africa, the private military firm Executive Outcomes was criticized for using cluster bombs and other military methods that were questionable under international humanitarian law.¹¹ In Iraq, security contractors employed as interrogators by CACI International and Titan were involved in the Abu Ghraib prison abuses.¹² Recently, Blackwater contractors came under scrutiny for the apparently unjustified killing of 17 Iraqi civilians while they were providing mobile convoy protection for USAID employees.¹³

The aforementioned examples are just some of the ongoing reports that have surfaced about PMSCs. It is precisely this misconduct that has led to the association of PMSC actors with the term mercenaries.¹⁴ Beyond the dangers of the mercenaries themselves, the corporatization of mercenary forces consequently “reduc[es] the control States have over their own warfare and the overall level of state-based control over the use of force.”¹⁵ Given continued involvement of PMSCs in conflict situations, the potential for abuse will continue to increase.

III. A PATCHWORK OF LAWS AND LOOPHOLES

Although international humanitarian law as embodied in the Geneva Conventions Protocol I, Article 47, denies mercenaries the privileges of lawful combatants, the first legal precedent to condemn mercenary activity stemmed from a regional African convention in 1977. Following this, the 1989 U.N.

10. Robert Capps, *Crime Without Punishment*, SALON.COM, June 27, 2002 <http://dir.salon.com/story/news/feature/2002/06/27/military/print.html>.

11. See SINGER, *supra* note 1, at 116.

12. Joel Brinkley & James Glanz, *The Struggle For Iraq: Civilian Employees; Contract Workers Implicated in February Army Report on Prison Abuse Remain on the Job*, N.Y. TIMES, May 4, 2004, at A6.

13. James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES, Oct. 3, 2007, at A1.

14. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation*, ¶ 57, U.N. Doc. E/CN.4/2004/15 (Dec. 24, 2003).

15. E.L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implication for International Humanitarian Law Enforcement*, 49 HARV. INT'L L. J. 221, 235 (2008).

Convention Against Recruitment, Use, Financing, and Training of Mercenaries (“Convention Against Mercenaries”)¹⁶ went into effect in 2001.¹⁷

In July 2005, the Economic and Social Council endorsed the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (“Working Group”). The Working Group was tasked, among other things, to monitor and study the effects on the enjoyment of human rights, particularly the right of peoples to self-determination. It also studied the activities of private companies offering military assistance, consultancy, and security services on the international market, and prepared a draft of international basic principles that encouraged respect for human rights by those companies in their activities.¹⁸

The U.N. General Assembly has been aware of the threat posed by private security services, and have passed several resolutions to address the problem. One such resolution was passed on February 13, 2009, the General Assembly adopted Resolution 63/164 which calls on States “to exercise the utmost vigilance against any kind of recruitment, training, hiring or financing of mercenaries, including nationals, by private companies offering international military consultancy and security services, as well as to impose a specific ban on such companies intervening in armed conflicts or actions to destabilize constitutional regimes.”¹⁹

The problems with the patchwork of precedents prohibiting mercenary activity are numerous. For instance, although the Convention Against Mercenaries makes it a crime to be a mercenary, the enforcement of this crime depends on implementing legislation by the relevant state party.²⁰ Additionally, as of publication, only thirty-two States were party to the Convention, and only ten

16. International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, opened for signature Dec. 4, 1989, 2163 U.N.T.S. 75 (entered into force Oct. 20, 2001).

17. *Id.* art. 1. The Convention defines a mercenary to be any person who:

- (a) Is specifically recruited locally or abroad in order to fight in an armed conflict;
- (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) Is not a member of the armed forces of a party to the conflict; and
- (e) Has not been sent by a State, which is not a party to the conflict on official duty as a member of its armed forces.

18. G.A. Res. 62/145, U.N. Doc. A/RES/62/145 (Mar. 4, 2008); *See also* Human Rights Council, Working Group on the use of Mercenaries as a Means of Violating Human Rights, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/10/14 (Jan. 21, 2009) (prepared by Alexander Nikitin) [hereinafter Working Group Report].

19. *See, e.g.*, G.A. Res. 63/164, ¶ 5, U.N. Doc. A/Res/63/164 (Feb. 13, 2009).

20. International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries art. 7, 9, opened for signature Dec. 4, 1989, 2163 U.N.T.S. 75 (entered into force Oct. 20, 2001).

have signed it.²¹ What's more, the right mentioned in the Convention Against Mercenaries is that of self-determination. However, business activity impacts multiple internationally recognized rights, including the right to life, liberty and security of the person. This right ensures protection from war crimes, genocide, torture, forced disappearance, forced labor, and other such acts. The September 16, 2007 shooting in Nisoor Square involving PMSC Blackwater is an example of a violation of this right. Seventeen civilians were killed and twenty-four wounded.²² U.N. Mission spokesperson Said Arikat condemned the actions, stating “[w]hen you kill 17 people like that, it’s a crime against humanity if it is proven that it was done in cold blood.”²³

Another concern is that neither Protocol I nor the Convention Against Mercenaries has explicit provisions making state use of mercenaries an offense.²⁴ More problematic, the requirements for qualifying as a mercenary under the Convention are difficult to apply to the majority of PMSC actors, as they may not be recruited to and actually take “direct part” in the conflict.²⁵ In the context of Iraq and Afghanistan, contractors who are citizens of either the US or coalition partners would be disqualified under the provision concerning nationals of a party to the conflict. So too would Iraqi or Afghan nationals hired by these countries be disqualified under the provision excepting a resident to a territory controlled by a party to the conflict.²⁶ Additionally, and perhaps most importantly, none of the aforementioned treaties or resolutions are directed at the corporate entity itself, but rather at the contractors employed to carry out the work.

The tremendous loopholes in coverage over PMSC actors under the Convention Against Mercenaries, the Geneva Convention and other such international treaties showcases the urgent need for an international consensus on accountability for the corporate entity and not just the contractors. With expanding voices calling on governments to do more to protect their populations from harm, regulatory models need to be adopted to hold accountable those with the greatest power in today’s world: the corporations themselves.

21. International Humanitarian Law- State Parties / Signatories, <http://www.icrc.org/ihl.nsf/INTRO/530?OpenDocument> (last visited Dec. 17, 2009).

22. SCOTT HORTON, KEVIN LANIGAN, & MICHAEL MCCLINTOCK, HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS AT WAR—ENDING THE CULTURE OF IMPUNITY 1 (2008).

23. Katarian Kratovac, *UN Warns of War-crime Charges, Cites Shootings by US Contractors*, BOSTON GLOBE, Oct. 12, 2007.

24. Bohunka O. Goldstein, *Merceanarism*, in INTERNATIONAL CRIMINAL LAW, 454 (M. Cherif Bassiouni ed., 2d ed. 1999).

25. International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries art. 1(a), opened for signature Dec. 4, 1989, 2163 U.N.T.S. 75 (entered into force Oct. 20, 2001).

26. *Id.* art. 1(c).

IV. A STEP FORWARD—MONTREUX DOCUMENT

A recent development towards an international consensus on the accountability of PMSCs is the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (“Montreux Document”).²⁷ Part I of the Montreux Document recalls pertinent international legal obligations relating to PMSCs. The section also considers obligations extending to “all other States,” to the duties of the PMSCs and their personnel, as well as to questions of superior responsibility. Part II contains a set of over seventy “Good Practices,” or recommendations to assist States in complying with their international legal obligations.

Although not legally binding, the Montreux Document does have the support of seventeen States, some of which happen to be the largest users of PMSCs.²⁸ Thus, even if a definitive step forward in accountability of PMSCs, the limited adoption of the Montreux Document coupled with its lack of legal significance severely weakens its power. However, if State parties do adopt the Montreux Document in significant numbers, it may gain the dimension of becoming ‘soft law,’ and through influencing the practice of States, could become binding customary international law.²⁹ In other words, to the extent that the Montreux Document and its contents are adopted by States, it may acquire a firmer root in the legal realm.

One inadequacy of the Montreux Document is the fact that it is limited to armed conflict situations. However, PMSCs are not so limited, existing in multiple forms and engaged in myriad situations. Experience has shown that even PMSCs personnel engaged in a support or consulting capacity are still likely to have to use force to defend themselves if they are attacked while performing their services.³⁰ By limiting the application of the Montreux Document to PMSC activity to armed conflict situations, the Document fails to account for other PMSC activities such as supply services, logistics and training.

Another shortcoming of the Montreux Document is the relative lack of States who have communicated support for it. Currently only seventeen States have done so, and for the Document to gain any effect, more States must lend it support.

27. Swiss Initiative in Cooperation with the International Committee of the Red Cross, Montreux, *Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, U.N. Doc. A/63/467 (Sept. 17, 2008) [hereinafter Montreux Document].

28. *Id.* (States include: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom, Ukraine and the United States of America).

29. See generally Hartmut Hillgenberg, A Fresh Look at Soft Law, 10 EUR. J. INT’L L. 499 (1999).

30. Richard Morgan, *Professional Military Firms Under International Law*, 9 CHI. J. INT’L L. 213, 216 (2008).

Furthermore, although the goal of the Montreux Document is to clarify the pertinent international legal obligations under international humanitarian law and human rights law, it lacks either a concrete and clear categorization of applicable laws, or the enforcement mechanisms necessary to address violations. This only weakens the effectiveness of the “Good Practices” section as it creates confusion about the legal mooring of accountability for PMSCs.

Lastly, the Montreux Document neglects recent attempts to create a framework for corporate activity and human rights. This framework has been suggested by the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, as well as the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (“the Norms”). The Ruggie Report presented a conceptual and policy-based framework for dealing with business and human rights. That framework revolves around three core principles: “(1) the State duty to protect against human rights abuses by third parties, including business; (2) the corporate responsibility to respect human rights; and (3) the need for more effective access to remedies.”³¹ However, the Montreux Document does not follow this framework. By choosing to create its own framework, the Montreux Document in effect creates a separate way of examining PMSCs even though they are themselves business entities. This choice is unfortunate because it undermines the effort towards consistency in the drafting of international obligations. Consistency is important to ensure the uniform application of common principles to corporate entities, and to minimize any confusion over applicable obligations.

V. ENSURING ACCOUNTABILITY—SIGNING THE CONVENTION AGAINST MERCENARIES, BUILDING AND ENFORCING STRONG DOMESTIC REGULATION AND DRAWING FROM THE TNC NORMS

A starting point in building a system of accountability is to encourage all States to sign onto the Mercenary Convention. Doing so would serve to regulate and prohibit the actions of contractors themselves. The next step would be to create and enforce domestic regulation through legislation geared at holding PMSCs accountable for international human rights abuses. Of the nation’s a party to the Mercenary Convention, only Croatia, Georgia and New Zealand have developed laws in compliance with obligations under the Convention. Cuba, Uruguay, and Azerbaijan, other State parties to the Convention, have statutes in either their criminal or penal codes relating to mercenaries. Outside of the Convention, Namibia and South Africa have legislation specifically on

31. U.N. Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

mercenaries, while the Russian Federation and France have statutes within their respective criminal or penal codes pertaining to mercenaries.³²

Although the use of domestic laws providing criminal prosecution for mercenary-related activities is important, individual criminal prosecution is ineffective for addressing widespread abuses committed by corporations. Thus, domestic regulation must include regulatory and administrative laws, licensing requirements for contracts, human rights monitoring and reporting, sanctions for violations and reparations for victims.

Given the prominence of non-state actors in sectors of the economy previously relegated to States, the fact remains that international law overwhelmingly speaks expressly to States (as opposed to individuals or corporate entities) and imposes legal obligations upon them.³³ Thus, as the Working Group recently noted, accountability gaps exist where the State does not have effective domestic regulation, or lacks regulation over PMSCs entirely.³⁴ These gaps can only be addressed by placing non-state actors under direct international legal obligations.

The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights provide the strongest framework for ensuring accountability at the corporate level. The Norms began by recalling that the Universal Declaration of Human Rights was addressed to individuals and organs of society, as well as governments.³⁵ The Norms clearly state that within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation “to promote, secure the fulfillment of, respect, ensure respect of and protect human rights” as recognized in international as well as national law.³⁶ The legal authority of the Norms derives principally from the fact that they are a restatement of existing international and legal principals found in treaties and customary international law, including dozens of UN declarations and resolutions.³⁷ The Norms themselves espouse that States will retain primary responsibility for the protection of human rights³⁸ and paragraph 19 of the Norms confirms that nothing

32. U.N. Human Rights Council, Sub-Comm’n. on Human Rights, *Use of Mercenaries As a Means of Violating Human Rights and Impeding the Exercise of the Right of the Peoples to Self-Determination*, ¶ 33, U.N. Doc. A/60/263 (Aug. 17, 2008).

33. See generally David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUMAN RIGHTS L. REV. 447, 479-93 (2006).

34. See Human Rights Council, Working Group Report, ¶¶ 38-67; G.A. Res. 62/145, ¶ 2(a), U.N. Doc. A/RES/62/145 (Mar. 4, 2008).

35. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on the Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Businesses with Regard to Human Rights*, pmbll., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *The Norms*].

36. *Id.*

37. David Weissbrodt & Maria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’LL 901, 913 (2003).

38. *The Norms*, *supra* note 35 (The Preamble states: “Recognizing that even though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights,

in the document shall be construed as diminishing the human rights obligations of States.³⁹ Thus, the Norms are supplements to the human rights obligations of States, and not a substitute or replacement.

Further, and amongst some debate, the Norms are clearly applicable to non-state parties such as PMSCs under international law. Legal personality is not a static concept, but rather one that is flexible.⁴⁰ The behavior of States in respect to activities of corporations indicates an emerging recognition of this personality. For instance, States have applied international rules prohibiting genocide, slavery and torture against individuals, companies and the government. Certain treaties themselves specifically refer to corporate crimes, including the Apartheid Convention and treaties governing corruption and bribery.⁴¹ Even the International Court of Justice has asserted that international organizations are subject to “general rules of international law.”⁴²

It is by including corporations under such an accountability framework that the obligation to respect human rights is shared across the different entities that can affect them. This is a view consistent with the case law of supervisory bodies of the principal UN human rights treaties. These treaty bodies have found that privatizing a state’s functions - for example the provision of drinking water - does not absolve the state from its responsibility to ensure respect for human rights.⁴³

The value of the Norms, as compared to voluntary compliance regimes, is that they also contain an implementation process, calling on each transnational corporation to “adopt, disseminate and implement internal rules of operation in compliance with the Norms.”⁴⁴ Secondly, the UN shall conduct periodic monitoring and verification of the corporations’ efforts and investigate complaints of violations.⁴⁵ Thirdly, States are responsible for adopting and enforcing a regulatory scheme consistent with the Norms.⁴⁶ Lastly, the corporations are required to provide “prompt, effective and adequate reparation to those persons, entities and communities” harmed by their conduct, as determined by national courts and/or international tribunals.⁴⁷

transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.”)

39. The Norms, *supra* note 35, ¶ 19.

40. Nicola Jägers, *The Legal Status of the Multinational Corporation Under International Law*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 262 (Michael K. Addo ed., 1999).

41. International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S 243.

42. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS, 83 (2006).

43. MENNO T. KAMMINGA, CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW (2004), <http://www2.ohchr.org/english/issues/globalization/business/docs/kamminga.doc>.

44. The Norms, *supra* note 35, ¶ 15.

45. *Id.* ¶ 16.

46. *Id.* ¶ 17.

47. *Id.* ¶ 18.

The importance of such an international consensus is obvious. Domestic regulation alone, no matter how strict or well designed, will not be able to reach all PMSC activity or personnel. PMSCs often work outside of the States of their incorporation, recruiting personnel from third-party States that may be outside the reach of the domestic regulation of the States where the PMSCs are incorporated.⁴⁸ Further, absent a global agreement, a “race to the bottom” could ensue, with PMSCs incorporating in States with the least stringent domestic regulations.⁴⁹

VI. CONCLUSION

In 1999, the U.N. Development Program concluded, “multinational corporations are already a dominant part of the global economy—yet many of their actions go unrecorded and unaccounted. They must, however, go far beyond reporting just to their shareholders. They need to be “brought within the frame of global governance, not just the patchwork of national laws, rules and regulations.”⁵⁰ The Working Group has itself commented on the need for new international regulations, most likely in the form of an international convention, in order to bring PMSCs fully out of their legal grey zone.⁵¹ There is a need to move beyond setting purely aspirational goals for corporate behavior and towards a more holistic view of PMSC accountability. This can be accomplished through a combination of international agreements and domestic regulations. International agreements that establish these rights are vital because “the declaration of these rights in international terms establishes an avenue of public accountability . . . serving as a basis for the public and the media calling any party government to the challenge of public justification, but not more.”⁵² In order to ensure the promotion and protection of human rights, the culture of impunity within which PMSCs operate must end. States must build strong domestic regulation over these non-State actors, and an international agreement modeled after the Norms must be developed to ensure human rights are no longer subject to abuse.

48. Gaston, *supra* note 15, at 241.

49. *Id.*

50. U.N. Dev. Programme (UNDP), *Human Development Report 1999*, 100, available at http://hdr.undp.org/en/media/HDR_1999_EN.pdf.

51. Working Group Report, ¶¶ 75-85.

52. Jack I. Garvey, *A New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards Through Extraterritorial Regulation*, 5 *UCLA J. INT’L L. & FOREIGN AFF.* 1, 21 (2000).