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BUSINESS, HUMAN RIGHTS, AND TRANSITIONAL JUSTICE: OVERCOMING THE REGULATORY DYSFUNCTION OF INTERNATIONAL LAW

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Abstract

It is said that traditional international public law is state–centric and concerns mostly State obligations and responsibility. For this, it excluded corporate actors from any accountability mechanism, even when the corporations contribute to armed conflicts and international crimes. International law does not provide a clear definition of what amounts to "subjects" under this set of rules or criteria for how to determine legal personality. At the same time, some branches of

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international public law directly regulate corporate actions, namely international economic law and international humanitarian law. Conversely, international courts and tribunals have accepted the corporate *jus standi*, in some instances to defend corporate "human rights" or in other cases to allow corporations to defend their economic interest against States. Yet, States and individuals cannot bring claims against corporations before any international mechanism. Ultimately, the international regulatory framework impedes the rights of victims and communities while allowing for greater protection of corporate interest. This article challenges this doctrine by demonstrating that international law can and should apply to corporations, and prosecutions against international crimes should be part of transitional justice and dealing with the past.

Key words: Business and Human Rights in Armed Conflicts, Transitional Justice, Corporations, International Crimes, International Humanitarian Law, Corporate *Jus Standi*, Legal Personality, International Obligations, Non-State Actors

Introduction

The turn of the 21st century marked a profound change in the nature of conflicts around the world and the role of corporations in the context of conflict. In terms of the major issue regarding access to land and water, both the military and economic approaches complement each other.[2] One of the additional phenomena, specifically since the end of the Cold War, is the growing presence of private military companies and their powerful partners consisting of multinational corporations, which include natural resource extraction companies and private financial institutions.[3] Indeed, we are witnessing a growing role for companies in armed conflicts where their presence goes far beyond the simple economic activities they are supposed to carry out.

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[2] Jelena Aparac, *Business et droit de l'homme dans des conflits armés*, Brylant, Brussels, (2021); the military approach can take the form of direct conquest, which is increasingly rare these days (with the recent exception of Russian invasion of Ukraine). A country can also invade a territory in order to profit from the resources of that country. Iraq in 2001 (*a posteriori* authorization, see U.N. Security Council, Letter dated May 8, 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/538 (May 8, 2003); S. C. Res.1483 (May 23, 2003); S. C. Res.1546 (June 8, 2004); See Libya in 2011, S. C. Res.1973 (March 17, 2011); Finally, the third military possibility concerns secret wars, a strategy widely practiced by the United States in South America. The economic approach aims to gain access to the territory through economic games, following the example of what China practices in various African countries and increasingly in Latin America (the economic option par excellence is linked to the provision of environmental services: water, waste and energy management, particularly in the post-war phase, when the theater of operations is polluted by the fighting); *see also* Milson Betancourt, *Mineria, Violencia y Criminalizacion en America Latina, Dinamicas y Tendencias" Observatorio de Conflictos Mineros en America Latina*, 38-45, 2016, https://www.ocmal.org/wp-content/uploads/2017/11/Mineria-violencia-y-Criminalizacion-OCMAL.pdf; *At What Cost?*, Global Witness, (2018), https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/ [last accessed May 24, 2021].

[3] Ole Kristian Fauchald & Jo Stigen, *Corporate Responsibility Before International Institutions*, 40 The Geo. Wash. Int'l L. Rev. 1033-1045 (2009); Andrew Feinstein, *The Shadow World: Inside the Global Arms Trade*, Penguin Books, London (2012).

Multinational corporations have been at the center of debates surrounding their role in the global economy (particularly within the context of the international division of labor), but also for their involvement in serious violations of international law. Cases of corporate violence amounting to serious human rights violations and international humanitarian law abuses have been widely documented in both the Global South[4] and the Global North.[5] The former UN Special Representative on Business and Human Rights recognized in 2011 that "[c]onflict situations are one of the most difficult circumstances for human rights […] [t]he most egregious business-related human rights abuses take place in conflict-affected areas and other situations of widespread violence".[6] However, corporations enjoy almost absolute impunity, even in cases where their abuses amount to international crimes.

Transitional justice took its contemporary form after the post-dictatorial transitions in Latin America in the 1970s-1980s and the post-Cold War era. Post-war trials are understood today as part of the transitional justice mechanisms during a period of democratic or post-conflict transition. While the transitional justice mechanisms often use a different set of judicial and non-judicial mechanisms to deal with past violations and seek reparations (from domestic or international trials to truth seeking and fact-finding commissions),[7] they often focus on conflict management and seek to avoid disrupting the pre-existing social order. The objective of traditional transitional justice[8] is reconciliation between *the parties to the conflict* and the population affected by it, by restoring mechanisms of responsibility and sanctions. The traditional concept of transitional justice thus excludes external actors to the conflict, such as corporations.[9] Moreover, this approach to

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[4] *See* UN Working Group on Mercenaries, *Relationship Between Private Military and Security Companies and the Extractive Industry from a Human Rights Perspective*, U.N. Doc. A/HRC/42/42 (July 29, 2019) (hereinafter "WGM, Extractive report"); Nigel D. White, Mary E. Footer, Kerry Senior, Mark van Dorp, Vincent Kiezebrink, Y. Wasi Gede Puraka & Ayudya Fajri Anzas, *Blurring Public and Private Security in Indonesia: Corporate Interests and Human Rights in a Fragile Environment* 65 Neth. Int'l L. Rev. 217 (2018).

[5] UN Working Group on Mercenaries, *Impact of the Use of Private Military and Security Services in Immigration and Border Management on the Protection of the Rights of All Migrants*, U.N. Doc. A/HRC/45/9 (July 9, 2020); OHCHR, Joint Communication, Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur in the field of cultural rights; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the rights of indigenous peoples; and Special Rapporteur on the human rights to safe drinking water and sanitation, UA USA 14/2016 (Nov 11, 2016).

[6] U.N. Human Rights Council, Rep. of the Special Representative of the U.N. Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Business and Human Rights in Conflict-affected regions: Challenges and Options Towards State Responses*, ¶ 5, U.N. Doc. A/HRC/17/32 (May 27, 2011).

[7] Irene Pietropaoli, *Business, Human Rights and Transitional Justice* Routledge, London (2020) [hereinafter *"Pietropaoli 2020"]*

[8] See Marina Eudes, 'La justice transitionnelle' in Herve Ascensio, Emanuel Decaux, Alain Pellet (eds) *Droit International Pénal*, Pédone, Paris, (2012), 593-594; Marcos Zunino, *Subversive Justice: The Russell Vietnam War Crimes Tribunal and Transitional Justice* 10 (2) Int. J. Transit. Justice 211-229 (2016) [hereinafter *"Zunino"*]; Eric Sottas, *Transitional Justice and Sanctions* 90 Int'L Rev. Red Cross 37 (2008).

[9] Antony Anghie, B. S. Chimni, 77, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, Chin. J. Int. Law 96-97 (2003), [hereinafter *"Anghie and Chimni"*]; Asad Kiyani, *Legitimacy, Legality, and the Possibility of Pluralist International Criminal Law* in N. Hayashi, C. Bailliet, *The Legitimacy of*

transitional justice is well rooted in the international institutional order[10] which, through its documents and discourses, maintains a vision of transitional justice that does not address the power dynamics and external factors that contribute to violence.

Critics of transitional justice argue that the socio-economic aspects of conflicts with external actors need to be better addressed to provide responses to affected communities.[11] Indeed, compromises based on the choice between "economic development or justice"[12] might disregard corporate responsibility. By excluding the social-economic aspects of conflicts, this approach to justice implicitly contributes to the maintenance of the global economic order.[13] This approach further contributes to the *status quo* of international practices that imposes on States from the South "unsustainable economic and social policies policed by international financial and trade institutions,"[14] exacerbating violence in the South while enriching the North. The need to address corporate responsibility increased in the face of the expansion of multinational corporations and the reinforcement of neoliberal ideologies through international institutions. Progressive national efforts are moving towards the recognition that armed conflicts cannot be separated from their economic and social causes, as well as their consequences; thus, they progressively include corporate crimes. However, this is still not systematically adopted.[15]

International Criminal Tribunals (Studies on International Courts and Tribunals) at 101, Cambridge University Press (2017), (According to the author, the legitimacy of the ICC can be questioned because of its case selectivity. He argues that the focus on Africans by an international court reproduces a narrative of violence that leads to a false view of violence because it excludes the states, but also private companies, that stimulated the conflict. Indeed, the author questions whether the Court can be considered legitimate if it excludes the central role played by the plunder of natural resources by corporations and other actors).

[10] U.N. Secretary-General, *The Rule of law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, ¶ 8, U.N. Doc., S/2004/616 (Aug 23, 2004) ("The notion of transitional justice discussed in the present report comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof."). See also U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies'*, ¶ 52, U.N. Doc. S/2011/634 (Oct 12, 2011).

[11] *See* Zunino, *supra* note 8, at 212; *see also* "Driven by scholars from the Third World, TWAIL rejects the traditional tenets and assumptions of traditional international law and argues for a re-imagination of the law of nations to purge it of racial and hegemonic precepts and biases to create a truly universal corpus that embraces inclusivity and empowerment. The movement turns away from the imperialist and colonialist foundation of international law. It argues that international law must be devoid of oppression, exploitation, and domination"; Makau W. Mutua, *What is Twail?*, Am. Society of Int'l L., Proceedings of the 94th Annual Meeting, 31-39 (2000).

[12] *See* WGM, extractive report, *supra* note 4, ¶ 20: "The extractive industry constitutes a major source of national revenue and exports for some States, especially those from the global South."

[13] *See* Zunino, *supra* note 8, at 224.

[14] *See* Anghie and Chimni, *supra* note 9, at 89.

[15] The Liberia Truth and Reconciliation Commission (TRC) report, included corporate abuses; la Sierra Leone Truth Commission decided that "perpetrators may be both natural persons and corporate bodies, such as transnational companies or corporations" and that its mandate "is not confined to violations of human rights that might constitute crimes, under either national or international law, nor is it limited to violations committed by States or governments"; The Timor-Leste Truth Commission investigated violations of social, economic, and cultural rights during the Indonesian occupation and found that "violations of economic and social rights did not occur only as a by-product of military operations", but they were also "intertwined with private and corporate interests"; *see* Ruben Carranza,

To the extent that corporations play a fundamental role in armed conflict, documenting their wrongdoing is directly related to the transitional justice and protection of international peace and security. Therefore, the need to identify and sanction corporate misconduct is part of a transitional justice process. It allows many actors, in particular victims,[16] to benefit from it. For instance, gathering data concerning abuses is essential, although it is the most delicate task during a conflict or immediately *ex post*. Inquiry commissions, fact-finding missions, and investigative mechanisms help establish a certain truth by highlighting the crimes committed and fostering justice by documenting corporate crimes and their impacts on society.[17] These files, if they are built by independent commissions and are sufficiently solid, do not only serve as preventive tools (prevention of abuse), but can also be used during trials. By excluding a category of perpetrators– the corporations–from transitional justice, a question arises: "Do the categories of perpetrators provide only partial transitional justice and unfinished reconstruction of post war society?".

This article aims to contribute to the critical discussion of transitional justice by challenging the traditional approach to international law and proposing an interpretation that addresses the socio-economic aspects of contemporary asymmetric armed conflicts and the role corporations play in them. It will do so by (i) studying the premises of international law as an obstacle to create an international legal framework that is directly applicable to corporations, and (ii) analyzing how the framework favors corporate interests in international truth seeking and proceedings.

I. Conceptually international law could regulate misconduct of multinational corporations

International law regulates inter-State relationships. It does not regulate non-State actors. Rather, it excludes them from any formal international law-making processes because of its traditional state centric approach.

A. The constrained interpretation of international regulatory framework is inadequate for transitional justice

Transitional Justice, Corporate Responsibility and Learning From the Global South, International Center for Transitional Justice (April 28, 2015), http://jamesgstewart.com/transitional-justice-corporate-responsibility-and-learning-from-the-global-south/ (last accessed May 1, 2021); *see also* Pietropaoli, 2020.

[16] "The importance of victims in international criminal proceedings is recognized by the ICC, which has set up a dedicated body to protects victims' rights, *see* Claude Jorda and Jérôme De Hemptinne, *The Status and Role of the Victim* in: Antonio Cassese, Paola Gaeta and J.R.W.D. Jones (eds.), *The Rome statute of the International Criminal Court: A Commentary* 1387 – 1419, Oxford University Press, Oxford, (2002).

[17] Martha Minow, *The Hope for Healing: What can Truth Commissions do?* in Robert I. Rotberg, Dennis Thompson (eds.), *Truth v. Justice: the Moral Efficacy of Truth Commissions in South Africa and Beyond*, 235 (Princeton University Press, 2000).

Traditional international law rejects the legal personality of corporations, particularly their multinational dimension, and does not adequately respond to relationships between non-state international actors.

1. Constraint one: Rejection of international legal personality of corporations

International law and human rights law regulate corporate obligations indirectly through States. It is primarily through the conduct of States, the principal subjects of international law, that the legal personality of an entity can be identified through its municipal law.[18] The question of whether an international obligation is enforceable upon enterprises is often linked to the recognition of the international legal personality of the corporation. However, these two questions are distinct. The International Court of Justice (ICJ) has recognized the possibility that other subjects may exist in international law without being identical in kind or in rights conferred.[19]

International law thus recognizes that its subjects are not identical and may vary according to social realities and needs.[20] However, international law does not provide a clear definition as to how to define "legal personality." Nor does it provide specific criteria to determine legal personality. Consequently, the legal question that arises is whether, to be a subject of law, one must have the capacity to have rights and obligations (as provided by the ICJ) or whether one is subject by the explicit recognition of States?[21] The capacity of the corporation to comply with international obligations may be a necessary condition, but it is insufficient for establishing its legal personality. However, the question of the enforceability of international law against corporate entities should not be equated with the question of its legal personality. Indeed, a corporation might have the *de facto* legal capacity to comply with international law and may thus enjoy a legal personality.[22] Conversely, the State has a legal personality, but not all the capacities associated with it. For example, the State cannot claim the right to marry.[23] Furthermore, while international law does not have a clear definition of what amounts to "subjects" or criteria on how to determine one, it allows

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[18] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 178-179 April 11, 1949) [hereinafter *"ICJ Reparations"*].

[19] *Id*, at 8.

[20] Diego Quiroz, *Expanding International Law to Non-state Actors (the Corporation)* 32 S.A. Yearb. Int'l L. 68-73 (2007).

[21] According to Professors Cameron and Chetail, the various concepts of legal personality can be summarized in three distinct streams. First, a restrictive conception according to which only those entities are subjects of international law which a) have the capacity to conclude international agreements, b) have the power to have diplomatic relations, and c) have the power to act before an international jurisdiction. A second, less restrictive, school of thought considers that all entities with the capacity to have rights and obligations under international law can be included. Finally, there is an intermediate doctrine according to which two conditions must be met: being the rights holders and duties bearers in the international arena on one side and being able to act before an international jurisdiction on the other side. See Lindsey Cameron, Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law*, (Cambridge University Press, 2013) [hereinafter "*Cameron and Chetail"*].

[22] *Id.*, at 70. In this regard, it should be noted that no subject of international law, State, international organization or individual has the full capacity to enforce all international law.

[23] *Id.*

for prosecution of natural persons and criminal groups for international crimes before international tribunals, which are not explicitly defined as "subjects" of international law. By doing so, international criminal law has disrupted the state-centric concept of public international law and could be the potential avenue for prosecuting corporate crimes. [24]

Even though international law has not fully included corporations into its legal order, we can consider that the conduct of States shows an emerging legal personality of corporations,[25] which corresponds to the progressive recognition of their growing roles in recent decades. According to some authors,[26] forty years of codification of corporate behavior through codes of conduct demonstrate the progressive acceptance of the international legal personality of multinational corporations.

The proliferation of codes of conduct is indeed evidence of the growing role played by companies in international regulation. It is a process of international code development in which business leaders will publicly accept a certain standard of conduct.[27] Voluntary participation implies that the corporation has freely chosen to subscribe to the voluntary commitments (but not the legal obligations) set out in the document. In other words, by participating directly in a multilateral process or by making a unilateral declaration, multinational companies ultimately create their own rules which have international effects. While these rules remain non-binding, they contribute to the creation of more binding rules through various processes, including: reference to the document by the national legislature, replication of the document by intergovernmental bodies, inclusion of the codes in investment contracts, and a contribution to international custom.[28] Thus, a paradox of

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[24] Larissa van den Herik and Carsten Stahn, *Fragmentation, Diversification and "3D" Legal pluralism: International Criminal Law as the Jack-in-the-box?* in Larissa van den Herik and Carsten Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* Martinus Nijhoff Publishers) 27 (2012).

[25] David Kinley, Rachel Chambers, *The UN Human Rights Norms for Corporations: the Private Implications of Public International Law,* 6(3) Hum. Rights L. Rev. 33 (2006) [hereinafter "Kinley and Chambers 2006"]. In the seventeenth and eighteenth centuries, when the state-centric doctrine was at its strongest, British and Dutch companies were invested with state powers, as they were allowed to make treaties, wage war (with a private army), and seize territory; Markos Karavias, *Corporate Obligation Under International Law* 6, Oxford University Press, Oxford, (2014) [hereinafter "*Karavias*"].

[26] *See* Cameron and Chetail, *supra* note 21, at 301-303. The authors refer to several other authors who demonstrate that codes of conduct contain evidence of the willingness of states to assume that multinational enterprises do have a legal personality; " *The legal personality of corporations under international law is limited and derivative*", Stephen Tully, *International Corporate Legal Responsibility*, (Edward Elgar Publishing, 2005) [hereinafter "Tully 2005"], at 9.

[27] OCDE, *Directorate for Financial, fiscal and enterprise affairs, "Code of Corporate Conduct": Expanded Review of their contents 3* (May, 2001).

[28] On the dangers of privatization of the regulatory function *see* Helen Keller, "*Corporate Codes of Conduct and their Implementation: The Question of Legitimacy*", available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.696.2344&rep=rep1&type=pdf (last accessed May 12, 2021), at 57 ; Ans Kolk, Rob van Tulder, *International Codes of Conduct, Trends, Sectors, Issues, Effectiveness*", available at: https://www.researchgate.net/publication/228715653_International_Codes_of_Conduct_Trends_Sectors_Issues_and

contemporary international law is created. On the one hand, the international law rejects legal personality of multinational enterprises in international law and does not recognize them as "subjects" of that law under the argument of avoiding granting them rights and duties in the international arena, and on the other hand, they benefit some of the main inherent State powers in international law, particularly creation of international rules.

Moreover, in many cases, these rules often concern the inherent functions of the State, including the use of force (military action),[29] the management of its natural resources which may call into question the right of peoples to self-determination,[30] or economic and monetary sovereignty.[31] In addition, many recent legal agreements demonstrate the evolution of international relations, producing legal effects without the parties being subjects of international law.[32] In some cases, multinational companies themselves become an international legislator. Undeniably, agreements between major companies in a given sector can create a special international law, a source of law known as a "third order".[33] They can even create "internal legal micro-orders"[34] where all the entities within the same multinational corporation agree to create a rule. An example of this is the

_Effectiveness, at 2 (last accessed 12 May 2021) ; Carola Glinski, *Corporate codes of Conduct: Moral or Legal obligations?* in Doreen McBarnet, Aurora Voiculescu, Tom Campbell (eds.), *The New Corporate Accountability, Corporate Social Responsibility and the Law* 123, Claredon/Oxford Univ. Press, (2007); Bruno Simma, Phillip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles* 12 Austral. Yearb. Int'l L. 82-108 (1992); Stephen Tully, *Corporations and International Lawmaking* 97, Martinus Nijhoff Publishers, Boston (2007), [hereinafter "*Tully, 2007*"). According to Mazuyer, the unilateral declaration will even be considered as soft law, *see* Emmanuelle Mazuyer, *L'autorégulation des entreprises par les codes de conduite : un mécanisme effectif pour les engagements éthiques ?* in Habib Gherari, Yann Kerbrat (eds.), *L'entreprise dans la société internationale* 200, Pédone, Paris, (2010), *See also* Hans Wolfgang Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises* 22 Ger. Yearb. Int'l L. 16-19 (1979).

[29] *See* art. 2-4 and 51 UN Charter; *See also* OHCHR, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7 1990.

[30] G. A. Res. 523 (VI), *Integrated Economic Development and Commercial Agreements*, U.N. Doc. A/RES/523 (Feb 12, 1952). Resolution 523 (VI) recognized the principle of permanent sovereignty for the first time; G.A, Res. 1803 (XVII), *Permanent Sovereignty over Natural Resources*, U.N. Doc. A/RES/1803 (Dec 14, 1962); WGM, Extractive report.

[31] Dominique Carreau, Patrick Juillard, Droit international économique, Dalloz, Paris (2007) [hereinafter " Carreau and Juillard"] ¶1207 at 430 : "*Tout État est souverain et, parce qu'il est souverain, il détermine librement sa politique économique et organise librement son espace économique "*.

[32] See, for example, cease-fire or peace agreements, concession contracts between States and multinational companies, agreements between colonial powers and local leaders (ICJ, Case concerning the land and maritime boundary between Cameroon and Nigeria, (*Cameroon v. Nigeria*, Equatorial Guinea intervening), Judgement of 10 October 2002, at 404-406, ¶¶203-207, ICJ, Recueil 2002. Conversely, could certain agreements between States be considered private contracts? Patrick Daillier, Mathias Forteau, Alain Pellet, *Droit international public*, Paris, L.G.D.J., Paris, (2009) [hereinafter "Daillier et al. 2009"], p. 133; *See also* Keller, at 29.

[33] *See* Carreau and Juillard, *supra* note 31 at 10.

[34] Valérie Pironon, "Groupes multinationaux, filiales et succursales", JCL Droit International, Fasc. 570-75 (2011-3), [hereinafter "Pironon"] at 4.

private monetary and financial market (euro currencies and euro bonds) built by international banks which have experienced a prodigious progress in recent decades. [35]

Juridical personality is not a static concept and can be conferred on a legal person in various forms. Consequently, the difficulty lies in the absence of a central body that can determine who has legal personality under international law.[36]

2. Constraint two: International law does not capture the multinational character of corporations and their transnational operations

A multinational corporation is made up of several entities that are often legally separated. Each entity within the group has the nationality of the state where it is located and is therefore governed by the law of that State.[37] Although international law recognizes the existence of these legally separate entities of the corporation, it does not determine criteria for the attribution of nationality, which is a jurisdictional matter for each of the States concerned to decide.[38] In addition, domestic legal systems sometimes legally recognize these entities, without recognizing the *multinational corporation* as a group. [39] If the legal personality of each entity depends on a domestic law, then a multinational corporation (as a group composed of several entities) is not recognized by international law and thus has no recognized legal existence.[40]

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[35] *See* Carreau and Juillard, *supra* note 31 at 10.

[36] Kinley and Chambers, 2006, *supra* note 25, at 33.

[37] Stephen Tully, *International Corporate Legal Responsibility*, 6 (Walters Kluwer Law & Business, 2012) [hereinafter *"Tully 2012"*]; According to Tully, the nationality of the corporation can also be determined by: a) the location of the registered office; b) the principal place of business; c) the dominant nationality of the management of the corporation; d) the dominant nationality of the shareholders who control the corporation; or e) the dominant nationality of those who control the current business, at 6-7. *See also* Pironon, supra note 34, at 1-39.

[38] *Id*, at 7.

[39] "Dans la plupart des ordres juridiques, le groupe constitue une entité de fait qui n'a ni nature ni régime juridique précisément déterminés. Il n'en va différemment que dans quelques Etats tels l'Allemagne qui ont adopté un droit des groupes […] ". The French legislation does not ignore the " group" because " [s]a réalité économique est prise en considération par certaines branches du droit qui, telles le droit commercial, le droit comptable, le droit bancaire, le droit boursier, le droit de la concurrence, le droit pénal, le droit du travail ou encore le droit fiscal, tirent des conséquences de la domination d'une société sur une autre " in a different way according to these various branches of law, see Pironon, *supra* note 34, at 4.

[40] "More than 40 per cent of foreign affiliates worldwide have multiple "passports." These affiliates are part of complex ownership chains with multiple cross-border links involving on average three jurisdictions. The nationality of investors in and owners of foreign affiliates is becoming increasingly blurred. "Multiple passport affiliates" are the result of indirect foreign ownership, transit investment through third countries, and round-tripping. About 30 per cent of foreign affiliates are indirectly foreign owned through a domestic entity; more than 10 per cent are owned through an intermediate entity in a third country; and about 1 per cent are ultimately owned by a domestic entity. These types of affiliates are much more common in the largest MNEs: 60 per cent of their foreign affiliates have multiple cross-border ownership links to the parent corporation. The larger the MNEs, the greater the complexity of their internal ownership structures. The top 100 MNEs in UNCTAD's Transnationality Index have on average more than 500 affiliates each, across more than 50 countries. They have 7 hierarchical levels in their ownership structure (i.e. ownership links to

This prompts us to make another paradoxical observation: although various entities of a same multinational group have legal personalities recognized in their respective countries and are potentially liable there, they largely escape the control of States in their multinational dimension.[41] They take advantage of legal loopholes and escape all responsibility, including at the international level, where they are not recognized as either a subject of that law or in their multinational dimension.

Furthermore, within the internal corporate network, the power holders are not necessarily natural persons, but other abstract entities. There could be several parent companies within the same group. Therefore, the "international corporate responsibility" approach allows for bypassing the complex constructions of corporate organization charts. It also avoids distorting the attribution of liability because the liability of the legal entity should not be strictly dependent on that of the natural person, particularly when corporations conduct systematic human rights abuses across several jurisdictions.

The only way to evoke the international responsibility of a multinational corporation is not to base it on the legal status of each subsidiary, but rather to recognize it as having a unique international legal personality that goes hand-in-hand with its cross-border actions. International law should recognize multinational corporations as a group composed of a multitude of superior-subordinate relationships and between subsidiaries within a single entity, but also of a multitude of nationalities. Pointing the finger at the individual who, at the lowest level of the hierarchy, can be held responsible when the crime is the product of a corporate dynamic[42] may be complex when the evidence may be sufficient to show that the corporation, as a legal entity, has indeed participated in an international crime.

3. Constraint three: Traditional doctrine on state responsibility does not capture new forms of corporate relationships

The law of state responsibility is central in international law; it results from the fact that states have legal personality under international law and are considered to be principal bearers of international obligations. Under the state responsibility law, the responsibility of a State can be engaged if the

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affiliates could potentially cross 6 borders), they have about 20 holding companies owning affiliates across multiple jurisdictions, and they have almost 70 entities in offshore investment hubs", UNCTAD, World Investment Report 2016 : Investor nationality : policy challenges, at ix-x.

[41] Saman Zia-Zarifi, Menno T. Kamminga, *Liability of Multinational Corporations under International Law* at 5 Massachusetts, Kluwer Law International, Boston (2000); *see also* UNCTAD, 2016 Rapport.

[42] Michael J. Gilbert, Steve Russell, *Globalization of Criminal Justice in the Corporate Context* 38 Crime, Law Soc. Change 211 (2002), According to the authors, individuals may come and go within the firm, but the pattern of values, norms and expectations that characterize the entrepreneurial organization does not change. According to them, the larger the corporation, the more difficult it is to transform it, especially in terms of its entrepreneurial culture, p. 219; Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law*, at 111-112, Intersentia, Utrecht (2010), [hereinafter "Stoitchkova 2010"], The *Chiquita* case makes the same point, *see* Factual Proffer, U.S.A. v. Chiquita Brands International, (No. 07-055) (D.C. Circuit Mar. 19, 2007), March 19, 2007, ¶ 25.

actions of its agents or otherwise actions of private actors can be attributable to the state. This suppose that there is a potential link between the actions of private actors and the state. However, contemporary armed conflicts have seen multiplication of non-state actors which cannot always integrate the state responsibility doctrine.

At its 33rd International Conference, the Red Cross and Red Crescent (ICRC) highlighted the transformation of modern warfare and noted the multiplication of armed non-state groups (ANSGs) in contemporary armed conflicts. As the report states, "[a] central feature of the changing geopolitical landscape of the last decade has been the proliferation of non-state armed groups. In some of the most complex recent conflicts, analysts observed hundreds, if not thousands, of groups engaging in armed violence."[43] The increase in armed non-state actors in recent conflicts has yielded another dynamic related to corporate conduct—corporations increasingly recruit private security and operate alongside ANSGs to continue their economic activities.

In its 2019 report, the Working Group on the use of mercenaries analyzed the "Relationship between private military and security companies and the extractive industry from a human rights perspective."[44] The Working Group noted that the most important client base today for private military and security companies (PMSC) are the extractive industries and not states.[45] The experts highlighted that:

> [G]iven the economic interests prevalent in the extractive industry and the environments in which they operate, it is not surprising that security plays a fundamental role in the exploitation of natural resources. Although a number of actors actually provide security services to the extractive industry, their respective roles, responsibilities, and reporting lines are not always legally defined and are rarely publicly disclosed.[46]

The Working Group raised the issue of the relationship between ANSGs that further obfuscates any corporate responsibility:

> [I]n some contexts, paramilitary groups and non-State armed actors may also be involved. Transparency with regard to private security arrangements within the extractive industry may be further complicated by the use in some regions of both formal private military and security companies (that is, those registered and authorized to offer security services in accordance with relevant national rules and regulations) and informal private security providers (those operating without a license or with links to criminal entities).[47]

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[43] ICRC, International humanitarian law and the challenges of contemporary armed conflicts: recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions, 33IC/19/9.7 (Geneva: ICRC, 2019), 39.
[44] *See* WGM, extractive report, *supra* note 4.
[45] *Id.*, ¶20.
[46] *Id.*, ¶.25.
[47] Ibid.

Other fact-finding bodies have raised the issue of corporations doing business with armed groups.[48] I previously raised the issue of ANSGs' need to sustain operations, including their finances and militaries, that is often provided by business entities, particularly when ANSGs exercise state-like functions or *de facto* authority.[49]

Some of the main obstacles for corporate accountability are opaque contractual and extra contractual arrangements. For instance, in the extractive industry, it is "extremely difficult to ascertain chains of command, responsibilities and levels of coordination among the different security actors, and undermine transparency and monitoring efforts. Furthermore, it is usually difficult to find public confirmation of the identity of subcontractors […]."[50] This makes it very difficult to establish the exact relationships, obligations, and ultimately, the responsible actors for any human rights abuses. Importantly, it further demonstrates the limits of the *state responsibility doctrine* which might not be applicable in all complex relationships between various non-state actors.

B. Transitional justice limited by the narrow interpretation of corporate obligations under international law

In times of armed conflict, several bodies of international law apply. International human rights law and international humanitarian law (IHL) complement each other,[51] as they both developed from similar legal philosophy and ideologies.[52] While there is still some debate about the enforceability of human rights law in respect to corporations, there is nothing in IHL that prevents it from applying to corporations that operate in the context of armed conflicts. IHL is the predominant legal regime tailored to the exceptional circumstances of both international and non-international armed conflict. IHL applies to state and non-state actors, regardless of their legal status[53] or extraneous considerations, such as the objective of the former or the ideology of the

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[48] U.N. Security Council, Letter dated 6 December 2019 from the Panel of Experts on the Central African Republic extended pursuant to resolution 2454 (2019) addressed to the President of the Security Council', U.N. Doc. S/2019/930 (Dec 14, 2019), ¶¶ 144, 151–152, 156–157; UN Security Council, 'Letter dated November 29, 2019, from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council', U.N. Doc. S/2019/914 (Dec 9, 2019*). See also*, OHCHR, Joint Statement by independent United Nations human rights experts on human rights responsibilities of armed non-State actors, (Feb 25, 20219), available at: https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26797&LangID=E (last accessed May 3, 2021).

[49] Jelena Aparac, *Business and Armed Non-State Groups: Challenging the Landscape of Corporate (Un)accountability in Armed Conflicts* 5 270–275 Bus. & Human Rights J. (2020).

[50] WGM, Extractive report, ¶ 59.

[51] Hans-Peter Gasser, *International humanitarian law and human rights in non-international armed conflict: Joint venture or mutual exclusion ?* 45 Ger. Yearb. Int'l L. 162 (2002).

[52] Natalia Szablewska, *Non State Actors and Human Rights in Non-International Armed Conflicts* 32 S.A. Yearb. Int'l L. 346 (2007) [hereinafter "Szablewska, 2007"].

[53] Special Court for Sierra Leone, Appeals Chamber, *The Prosecutor v. Sam Hinga Norman*, Decision on preliminary motion based on lack of jurisdiction (child recruitment), SCSL-2004-14-AR 72(E) (31 May 2004) ¶22; *Kadic et al. v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), ¶ 239; Lutz Oette, Ilias Bantekas, *International Human Rights Law and Practice* 659, Cambridge University Press (2nd edition, 2016) [hereinafter "Oette and Bantekas, 2016"), Mamadou Hébié,

latter. It constitutes an exception to the normative approach of public international law by not requiring non-state actors to recognize international legal personality as a precondition to the imposition of direct international obligations on them.[54]

1. Lack of corporate responsibility under the international human rights law framework

The legal relationship that concerns international human rights law is the vertical relationship between individuals and States. Moreover, according to the triptych "respect, protect, and sanction," the State has positive obligations to guarantee the respect of human rights horizontally between two private persons.[55] Thus, even if individuals are deemed to have rights, the obligation to guarantee these rights belongs to the State. John Ruggie translated these obligations into his triptych "protect, respect, and remedy," which is incumbent on States with regard to the behavior of companies.[56] The European Court of Human Rights has deepened the doctrine of positive obligations of the State, which is at the heart of the horizontal effect of human rights and serves as a tool to guarantee their respect between private actors.[57]

From a normative point of view, human rights have historically regulated the relationship between an individual and a sovereign State. As a result, human rights are perceived as a body of international law that protects the rights and freedoms of individuals against the arbitrariness of the State. However, for human rights law to truly fulfill its protective function, it cannot ignore abuses committed by corporations; protection cannot be based solely on the relationship of the individual to a sovereign power because that power may be limited when corporate actors exercise their power over individuals. Protection must be based on the idea that human rights are inherent to human

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Chapitre 7 : L'implication des sociétés militaires privées dans les conflits armés contemporains et le droit international humanitaire in Vincent Chetail eds., *Permanence et mutation du droit des conflits armés* 292, Bruylant, Bruxelles, (2013), Yves Sandoz (eds.), *Commentary on the Additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Leiden, Martinus Nijhoff, 1987, ¶ 4444, at 1345; Jean-Marie Kamatali, *The application of international Human Rights Law in non-international Armed conflicts, from Rhetoric to Action* 4 J. Int'l. Humanit. Leg. Stud. 233 (2013); Philip Alston (eds), *Non-state actors and Human Rights* at 197 (Oxford University Press, 2005); Cameron and Chetail, 2013, *supra* note 21, at 379.

[54] Geneva Conventions of 12 August 1949, 75 UNTS 970, common art 3. *US v Alfried Krupp, et al*., United States Military Tribunal III (1948), at 1352-1353.

[55] In Europe, ECHR, *Z and Others v. the United Kingdom*, no. 29392/95 (May 10, 2001) ¶ 73 ; *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988), in Africa *Purohit and Moore v. Gambia*, African Comm. on Human and Peoples' Rights, Merits, Decision, Communication no. 241/01 (May 29, 2003), ¶ 57. See also Kathia Martin Chenut *Panorama en droit international des droits de l'homme* in Kathia Martin Chenut, René, De Quenaudon (eds.) *Responsabilité sociétale des entreprises, la RSE saisie par le droit, perspectives internes et internationales* at 44, Pédone, Paris (2016), [hereinafter « Martin Chenut, 2016 »].

[56] *See* Martin Chenut 2016, *supra* note 55, at 44.

[57] *See* Karavias 2014, *supra* note 25, at 36.

beings.[58] Therefore, the focus of this set of law is to protect the inherent right of individuals against abuses, not the rights and obligations of a State[59] which has the "power" to abuse.

If companies have direct obligations under international law, the concrete question is how to define the scope of human rights obligations that can be enforced against them. If a multinational corporation must respect certain obligations under international human rights law, must it also guarantee compliance? Indeed, companies are not in a position to ensure the implementation of human rights to the same degree as States. It is unrealistic to ask a corporation to guarantee a fair trial, even in a territory it controls. The State, in the exercise of its sovereignty, grants concession contracts to foreign companies. The State thus retains control of the territory. This does not discharge it of its positive obligations to guarantee the protection of human rights and to prosecute those who violate them. Concomitantly, according to Professor Steven R. Ratner, this relationship between the corporation and the government (notably through concession contracts) expands the number of obligations that can be enforced against companies in the field of human rights because human rights obligations are simultaneously enforceable against companies whenever they are imposed on the State.[60]According to Professor Andrew Clapham, there is a "paradigm shift" that replaces the traditional view of state-non-state and public-private relations and imposes positive obligations of international human rights law on non-state actors, including multinationals.[61] This is particularly the case when the corporation is invested with a public service mission or ensures its execution, such as water management and supply.[62] Dismantling the strict separation between the private and the public reinforces the argument that human rights are applicable to companies, even when they do not fulfill a public service mission.[63]

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[58] *See* UDHR, 1948, Preambles: "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people […]every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."*

[59] *See* Karavias, 2014, *supra* note 25, at 19-21.

[60] Steven R. Ratner, *Corporations and Human Rights: a Theory of Legal Responsibility* 111(3) Yale L. J. 497 (2001) [hereinafter "Ratner 2001"].

[61] Andrew Clapham, Silvia Danailov, *Whiter the State of Human Rights Protection? New Ways to Hold Non-State Actors Accountable*, background paper for the International Council on Human Rights Policy (Geneva), June 1998.

[62] *See* Oette and Bantekas, 2016, *supra* note 53, at 665.

[63] Isabelle Fouchard, *La souveraineté étatique à l'épreuve de l'autorégulation : le cas des entreprises militaires et de sécurité privées* in Kathia Martin Chenut, René, De Quenaudon (eds.) *Responsabilité sociétale des entreprises, la RSE saisie par le droit, perspectives internes et internationales* 233-255, Pédone, Paris (2016), [hereinafter "Fouchard, 2016"].

Consequently, human rights obligations do not require companies *to guarantee* economic and social rights to individuals (which requires State action), but rather *to protect* certain rights such as the right to life.[64] The negative obligations of the corporation (not to violate human rights) do not preclude a positive obligation on the part of the State to implement the conditions necessary to guarantee all rights.[65] While there is a growing doctrine arguing in favor of direct applicability of international human rights law to corporate actors[66], this is still not translated in law and practiced by an enforcing mechanism.

2. Applicability of IHL obligations to corporations: a legal basis that could advance transitional justice

Notwithstanding the obligations of States, IHL reinforces the theory of the direct applicability of certain obligations to multinationals. Indeed, in IHL, it is not necessary to establish that an actor has a legal personality before attributing obligations to it and making it responsible for violating them.[67] IHL has, so to speak, its own particular system, since it applies to "anyone engaged in the conflict in any manner whatsoever."[68] Therefore, persons participating in hostilities, as well as

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[64] See Article 5-1 of the IPCPR ; *see* Oette and Bantekas, 2016, *supra* note 53, at 668; *See* Szablewska, 2007, *supra* note 52, at 352, U.N. Human Rights Committee (HRC), General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (May 26, 2004), ¶8 : "[…] the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities"; UN Human Rights Committee (HRC), *Paul Arenz, Thomas Röder et Dagmar Röder vs. Germany*, Communication no. 1138/2002), ¶8.5 (March 24, 2004).

[65] The International Covenant on Civil and Political Rights creates rights for individuals that require state abstention (not to violate the right to life), while the International Covenant on Economic, Social and Cultural Rights requires state action to guarantee these rights (claim rights). The Commission for Economic, Social and Cultural Rights has never referred to positive obligations in relation to the situation raised by the horizontal effect of human rights, since these rights are already seen as positive in themselves. *see* Karavias 2014, *supra* note 25, at 45.

[66] See also OHCHR, *Joint Statement by independent United Nations human rights experts on human rights responsibilities of armed non-State actors*, *supra* note 48.

[67] See art. 2 of the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 recognizing the resisting movements (people who spontaneously take up arms), art. 1-4 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 recognizing peoples who are "fighting against colonial domination and alien occupation and against racist régime", common art. 3 to Geneva Conventions from 1949 making reference to "Party to the conflict" and not the High Contracting Parties and imposes human rights and international humanitarian law obligations directly on non-state actors, art. 1-1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 referring to "dissident armed forces or other organized armed groups. All these actors are recognized as actors in armed conflicts with international obligations without having an international or even internal legal personality. *See also* Oette and Bantekas, 2016, *supra* note 53, at. 660.

[68] *See* Cameron and Chetail 2013, *supra* note 21, at 353. According to the authors, this is the principle of effectiveness of international humanitarian law, especially since the new conflicts no longer correspond to classic inter-state conflicts.

civilians, are bound by the rules of IHL.[69] This is due to the fact that IHL aims to protect certain categories of people, and it focuses on the character of the protected person, not the nature of the perpetrator who violated the obligation.[70] It follows that the duty bearers under this body of law can also be legal persons.[71] The most significant summary of this doctrine can be found in the commentary of the Additional Protocol II:

> [...] the commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State. Although this argument has occasionally been questioned in legal literature, the validity of the obligation imposed upon insurgents has never been contested.[72]

From the moment IHL is directly applicable to companies, the question of its legal personality in international law no longer arises. Indeed, by providing that IHL also applies to non-state actors (including economic actors),[73] this law ignores the traditional debate as to whether or not the

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[69] *E.g.* art. 17 -1 Additional Protocol I: du PA I: "The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party"; art. 18 Geneva Convention I: "The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence."; art. 53 Geneva Convention I : "The use by individuals, societies, firms, or companies either public or private […] of the emblem or the designation "Red Cross" or "Geneva Cross", […] shall be prohibited at all times ".

[70] Mamadou Heibe, *Chapitre 7 : L'implication des sociétés militaires privées dans les conflits armés contemporains et le droit international humanitaire*, in Vincent Chetail eds. *Permanence et mutation du droit des conflits armés*, Bruylant, Bruxelles (2013), ("Heibe, 2013"), at 292 ; Jelena Aparac, *Panorama des outils juridiques mobilisés ou mobilisables par ou pour la RSE dans le respect et la mise en œuvre du droit international humanitaire* in Kathia Martin Chenut, René, De Quenaudon (eds.), *Responsabilité sociétale des entreprises, la RSE saisie par le droit, perspectives internes et internationales* at 49, Pédone, Paris, (2016).

[71] STL, *NEW TV S.A.L. Karma Mohamed Thasin Al Khayat*, Decision on interlocutory appeal concerning personal jurisdiction in contempt proceedings, STL-14-05/PT/AP/ARI26.1 (2 October 2014), para. 46; SCSL, *The Prosecutor v. Sam Hinga Norman*, Appeals Chamber, Decision on preliminary motion based on lack of jurisdiction (child recruitment), SCSL-2004-14-AR 72(E) (May 31, 2004), para.22; *Kadic et al. v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). Para.239; *See* Oette and Bantekas, 2016, s*upra* note 53, at 659; Heibe, 2013, *supra* note 69 at 292; Jean-Marie Kamatali, *The Application of International Human rights Law in Non- international Armed Conflicts, from Rhetoric to Action* 4 J. Int'l Humanit. Leg. Stud. 233 (2013); Ralph Steinhardt, *Corporate Responsibility and the International Law of Human Rights: the new Lex Mercatoria* in Phillip Alston (eds.) *Non-state actors and human rights* Oxford University Press, Oxford (2005) at 197; *See* Cameron and Chetail 2013, *supra* note 21, at 379; OHCHR, *Joint Statement by independent United Nations human rights experts on human rights responsibilities of armed non-State actors*, *supra* note 48.

[72] Ives Sandoz and al. (eds.), *supra* note 53, ¶ 4444, at 1345. In order to complement the IHL, the international criminal law is enlarged to consider non-state actors such as paramilitary groups or terrorists, ICTY, *The Prosecutor v. Karadzic and Mladic*, Trial Chamber, Review of the indictments pursuant to rule 61of the rules of the procedure and evidence, ICTY-95-5-R61/ICTY-95-18-R61, (July 11, 1996) ¶¶ 60-64.

[73] *See US v Alfried Krupp et al*, United States Military Tribunal III (1948), 1352–1353; *see also* Geneva Conventions of August 12, 1949, 75 UNTS 970, common art 3. Art. 3 is recognized as international customary law (prohibition of torture, obligation to human treatment, right to a fair trial), see ICJ, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Judgment of June 27, 1986, ¶ 218; ICJ, *Legality of the Threat or*

multinational corporation is a subject of international law. Moreover, the Geneva Conventions are directly binding on all participants in the armed conflict, as the abundant case law of the two international criminal tribunals show,[74] not all of them are subjects of international law.

The doctrine of international obligations directly enforceable against individuals[75] can be applied by analogy to companies as powerful private actors with a strong presence on the international scene.[76] Indeed, there is nothing in international law to indicate that the individual should be distinguished from the corporation. It can even be argued that the analysis applicable to individuals can be *a fortiori* applicable to companies, notably because of their structure that, as a legal person, resembles the two other subjects of international law: States and international organizations.[77]

Furthermore, the distinction between a direct and indirect obligation is sometimes conflated with primary and secondary rules of international law. The assumption that international obligations regulate corporate behavior indirectly because they refer to domestic law to ensure compliance is thus incorrect. In fact, if an international obligation prescribes a behavior to be adopted by the corporation, it is a primary obligation of international law. It is the secondary rule that regulates the modality of the corporation's responsibility and compliance if this primary rule has been violated.[78] In general, according to the theory of the duplication of the role of the State, the primary rule of international law prohibits conduct, while it is up to national courts to sanction the prohibited act.[79] For instances, primary rules, if violated by individuals, trigger their *individual criminal liability* (secondary rules) which is well recognized since the Nuremberg trials. In the case of corporations, it is precisely the secondary rule, namely the theory of *corporate criminal liability* which is missing in international law. International criminal law can be adapted to the context of corporations, probably even more so than the numerous primary rules of human rights law that are

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Use of Nuclear Weapons, Advisory Opinion of 8 July 1996 ¶79; ICTY, *Prosecutor v. Dusko Tadic aka "Dule"*, Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1 ¶ 98 (Oct 2, 1995); ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgement, ICTR-96-4¶ 608 (Sept 2, 1998).

[74] The case law shows that it is the physical persons, and not the State parties, to a treaty who were prosecuted before international criminal courts for grave breaches of international humanitarian law. The International criminal tribunal for Rwanda (ICTR) declared guilty the director of the corporations for his participation in genocide and crime against humanity; *see* ICTR, *Prosecutor v. Musema*, Appeals Chamber, Judgement, ICTR- 96-13-A (Nov 16, 2001). The same Tribunal raised the question of the responsibility of legal persons but did not have the jurisdiction over them. ICTR, *The Prosecutor v. Nahimana et al*, Trial Chamber, Judgement, ICTR-99-52-T (Dec 3, 2003) ¶ 8.

[75] PCIJ, Polish Postal Service in Danzig, Advisory Opinion, CPJI, B Series (May 16, 1925); *see* Karavias, 2014, *supra* note 25, at 7; *see* Ratner, 2001, *supra* note 60, at 449 : « […] *international law generally places duties on states and, more recently, individuals* […] ».

[76] According to Steven Ratner "international law *should and can provide for such obligations* "[human rights obligations directly opposable to corporations], *see* Ratner, 2001, *supra* note 60, at 449.

[77] *See* Karavias, 2014, *supra* note 25 at 7 (discussing that international organizations have been recognized as subjects of international law).

[78] *See* Ratner, 2001, *supra* note 60, at 492-496; Carlos Manuel Vázquez, *Direct vs. Indirect obligations of Corporations under International Law* 43 Colum. J. Transnatl. L. 933 (2005).

[79] Nicolas Castell, Claire Derycke, *Les Entreprises* in Hervé Ascensio, Emmanuel Decaux et Alain Pellet (eds.), *Le droit international pénal*, at 160, CEDIN Paris X/Pédone, Paris (2000).

enforceable on States.[80] Since its inception, it is both international criminal law and the courts that have advanced the theory of international criminal liability of corporations.[81] Recently, the Special Tribunal for Lebanon specified that international law creates direct obligations on legal entities: "We consider that international human rights standards and the positive obligations arising therein are equally applicable to legal entities."[82]

States have traditionally refrained from codifying corporate behavior through international treaties that are perceived to compete with their sovereignty prerogatives. At the same time, the States have not hesitated to confer State inherent functions to the private corporate entities.[83] Yet, it is by exercising their sovereignty that States can decide to create obligations directly incumbent on companies and strengthen the protection of rights by recognizing corporate international responsibility. This approach is not new, and States have regulated corporate conduct in the context of international investment law[84] and European law by recognizing the "direct effect" of the Treaty of Rome to corporations.[85] The willingness of States to impose direct obligations on companies is

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[80] *See* Ratner, 2001, *supra* note 60 at 494.

[81] *US v Alfried Krupp et al*, United States Military Tribunal III (1948): « The Krupp firm, through defendants […] voluntary and without duress participated in these violations by purchasing and removing the machinery and leasing the property of the Austin plant and in leasing the Paris property. » (p. 1336-1337); In the *Flick* case, in order to find that a corporation had been accomplice in the criminal activities of the SS, the tribunal declared: « one who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not principal, certainly an accessory to such crimes ». *US . Friedrich Flick, et al.*, United States Military Tribunal III (1947), p. 1217. In the *I.G. Farben* case, the tribunal focused its analysis on the structure and organization of the corporation which had been used as *instrumentum* by its executives to commit international crimes (crime against peace, war crime, and crime against humanity). The tribunal subsequently recognized: "Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulation, is in violation of international law. (…) Similarly where a private individual or a juristic person becomes a party to unlawful confiscation of public or private property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations." *US v Carl Krauch, et al*., United States Military Tribunal III (1948), p. 1132.

[82] TSL, *NEW TV S.A.L. Karma Mohamed Thasin Al Khayat*, Decision on interlocutory appeal concerning personal jurisdiction in contempt proceedings, *supra* note 70, ¶46.

[83] But paradoxically, states are not hesitating to delegate more and more intrinsically state functions to private actors *cf*. Montreux Document (2008); Fouchard, 2016, *supra* note 62, at 233-255. *See also* the Human Rights Council resolution 36/11 from September 28, 2017; the *Second session of the Open-ended intergovernmental working group to elaborate the content of an international regulatory framework, without prejudging the nature thereof, relating to the activities of private military and security companies* (April 26 to 30, 2021) documents available at: https://www.ohchr.org/EN/HRBodies/HRC/IGWG_PMSCs/Pages/Session2.aspx (last accessed May 1, 2021).

[84] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, known as the Washington Convention, convention offers companies the possibility to initiate arbitration proceedings before the ICSID, which is an international procedure. By its Article 25, the Convention creates the center for international dispute settlement related to investment (ICSID).

[85] In its landmark cases of the 1970s, the Court of Justice of the European Union clarified that the provisions of the Treaty of Rome, an international treaty of public international law which established the European Economic Community, apply directly to companies. CJCE, *B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale*, Judgment of the Court of 12 December 1974, Case 36-74. CJCE, *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos contre Administration fiscale néerlandaise*, Judgement of the Court of 5 February 1963, Case 26-62.

also illustrated by environmental law.[86] However, as with other branches of international law, the sanction for their violation (the secondary rules) refers to traditional procedures of liability before domestic courts or state responsibility for an internationally wrongful act.

Regardless of the progress of the *corporate liability doctrine*, the traditional approach to international law, in particular by international institutions and courts, fosters corporate impunity for grave abuses of human rights and international humanitarian law.

II. The current approach to the regulatory regime favors corporate impunity

Any process of establishing a corporate international responsibility is divided into two stages. First, it is necessary to gather information and document the human rights abuses and violence perpetrated by corporations.[87] This is the most crucial step in the whole process. Yet, it is also the most difficult one from a practical perspective and the most under-researched one from a scholarly perspective. Documentation is the key step in the process because the findings of the investigation may or may not lead to trials. Additionally, the findings should be presented in court (domestic or international). Multinational corporations who may contribute to the sustainability of wars and military capacity of parties to a conflict increasingly transcend borders with their multilayered and transnational operations, thus evading all jurisdictions.

A. Lack of documentation and accountability due to the traditional approach

Due to the gradual inclusion of IHL in the wider UN system,[88] fact-finding and investigative mechanisms often have a mandate to investigate violations of both branches of international law: international human rights law and IHL.[89] These international investigative bodies were established by the Security Council, the General Assembly, the Human Rights Council (and its predecessor,

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[86] *See* International Convention on Civil Liability for Oil Pollution Damage (Brussels, Nov 29, 1969), art. 3: "The owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident"; *see also* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, March 22, 1989), art. 4-3: "The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal."

[87] See also Jelena Aparac, *Gaps in Corporate Liability: Limited Investigations of Corporate Crimes in Armed Conflicts* 23 Int'l Community L. Rev. 486-502 (2021).

[88] The International Humanitarian Fact Finding Commission provided for in Article 90 of Additional Protocol I has never functioned; Additional Protocol I, Art. 90. See official website of the Commission: https://www.ihffc.org/index.asp?Language=FR&page=home (last accessed May 13, 2021).

[89] The inclusion of IHL as a basis for investigations has considerable advantages. IHL has a wider acceptability (in terms of the rate of ratification of conventions) than human rights instruments. Furthermore, states may, under certain conditions, derogate from certain human rights in the event of declared war or internal disturbance, whereas IHL applies during the entire armed conflict. Moreover, it provides clarification, notably concerning the rules relating to judicial guarantees, means, and methods of warfare.

the Commission on Human Rights), the Secretary-General, and the Office of the High Commissioner for Human Rights.

1. UN–Security Council and General Assembly have potential to capture the role of corporations in conflicts and crimes through their documentation

At the outset, the UN's role, albeit limited, in the enforcement of IHL was expressly recognized by Article 89 of Additional Protocol I, which allows it to act in cooperation with States in the event of serious violations of this Protocol and of the Geneva Conventions of 1949.[90] In recent times, the proliferation of international investigations and mechanisms reflects not only the worsening contexts of armed conflict, but also a desire to document violence with a view to act when a domestic or international jurisdiction is granted jurisdiction to conduct a trial.

The investigations conducted under the Security Council mandate are linked to its evolving interpretation of a "threat to international peace and security," which is not defined by the Charter.[91] Thus, its interpretation depends on the interests and political considerations of States. During the Cold War, the Security Council tended to interpret this notion in a restrictive manner by excluding questions of human rights and international humanitarian law.[92] Since the end of the Cold War, it has adopted a broader interpretation of the notion of threat to international peace and security in order to progressively include violations of human rights and international humanitarian law. This makes it possible to justify measures taken on the basis of Chapter VI or VII.[93] The establishment of commissions of inquiry by the Security Council is therefore conditional on threats to international peace and security, which must be established on the basis of Article 39 of the Charter. In addition to commissions of inquiry, the Security Council can also take measures to maintain or restore international peace and security by adopting the sanction regime set forth in Article 41 of the Charter.

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[90] Art. 89 of the Additional protocol I: "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter." The role is limited in that the UN cannot develop IHL norms and can only implement them. On the other hand, the UN can only act in the context of serious violations, *cf.* Slvain Vité, *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, at 56-57, Bruylant, Brussels (1999) [Hereinafter "Vité"]

[91] Jean-Pierre Cot, Alain Pellet, Mathias Forteau, *La Charte des Nations Unies, Commentaire article par article*, 3ème édition Economica, Paris, vol I et II. (2005). For the commentary of the art. 39 see at 1131-1170.

[92] Ludovic Hennebel, Helen Tigroudja, *Traité de droit international des droits de l'homme*, Pédone, Paris (2016) [hereinafter "Hennebel and Tigroudja"] at 251; *See* Vité, *supra* note 90, at 163

[93] Hennebel and Tigroudja *supra* note 92, at 251; *See* Vité, *supra* note 90, at 163-166. Although his first investigation dates back to 1979 concerning the Israeli-Palestinian conflict, it was with the Commission of Experts for the former Yugoslavia that he expressly included widespread violations of international humanitarian law in the territory of the former Yugoslavia as constituting threats to international peace and security, U.N. Security Council Res 780, U.N.Doc. S/RES/780 (Oct 6, 1992).

Since the end of the Cold War, the Security Council and General Assembly have made increasing use of economic sanctions in order to protect international peace and security.[94] When the Security Council takes sanctions measures, such as arms embargoes, travel bans, or financial restrictions, it requests States to take measures to sanction corporations.[95] Therefore, these sanctions are mainly directed against States.[96] The UN is an intergovernmental organization governed by the international public law, and as such, its political organs address only States without directly addressing the companies themselves. However, as the international humanitarian and security environment has evolved over the past decades, the sanction regime has increasingly affected non-state actors directly.[97]

Each of these sanction regimes is administered by a sanctions committee with varying mandates. The committees, as part of their mandate, may designate individuals and entities that meet the criteria as defined in the relevant resolutions.[98] To this end, they established a list on which companies can be included, along with individuals and other entities, in order to better guide states on the implementation of the embargo. Thus, each committee can include companies on the list, not because of violations of the embargo resolutions, but because the Council has identified them as perpetrators of violations of international humanitarian law and international human rights law. This is all the more the case if the Council links the companies' activities to armed conflict, as it did in the context of the violence in the Central African Republic in 2013.[99] It should be noted that of all the situations in which the Council has ordered an investigation, it is only for the Central African Republic that it has explicitly referred to the link between economic activities and conflict.[100] Other reports provide specific details regarding the trafficking of natural resources and

[94] Art. 11, 25, 39 and 41 UN Charter.
[95] It creates obligations on States.
[96] *See* Ratner 2001, *supra* note 60, at 483.
[97] See for South Africa, G.A. Resolution 2671(XXV), The policies of apartheid of the Government of South Africa, A/RES/2671(Dec 8, 1970); for Iraq, U.N. Security Council, Resolution 986, U.N. Doc S/RES/986 (April 14, 1995). It should be noted that in some cases the embargo is aimed directly at companies. Sandra C. Wisner, *Criminalizing Corporate Actors for Exploitation of Natural Resources in Armed Conflict: UN Natural Resources Sanctions Committees and the International Criminal Court 16-5* J. Int'l Crim. Justice 963 (2018), sanction measures must be transposed into national legislation before being applied to companies; Tully 2005, *supra* note 26, at 494.
[98] See S.C. Res 1533, U.N. Doc S/RES/1533 (March 12, 2004) regarding Democratic Republic of Congo, Security Council creates a Sanction Committee to identify individuals and entities who violated the embargo; *See also* S.C. Res 1493, U.N. Doc S/RES/1493, (July 28, 2003) regarding military assistance. For Libya see S.C. Res 1970 U.N. Doc. S/RES/1970 (February 26, 2011) ¶17, where Council decides « that all Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in Annex II of this resolution or designated by the Committee established pursuant to ¶ 24 below, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, and decides further that all Member States shall ensure that any funds, financial assets, or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in Annex II of this resolution or individuals designated by the Committee." For Afghanistan, see S.C. 1988 U.N. Doc. S/RES/1988 (June 17, 2011).
[99] S.C. Res. 1653, U.N. Doc. S/RES/1653 (Jan 26, 2006); S.C. Res 1625, U.N. Doc. S/RES/1625 (Sept 14, 2005).
[100] *Id.*, the Security Council « Condemns the illegal exploitation of natural resources in the CAR which contributes to the perpetuation of the conflict and underlines the importance of bringing an end to these illegal activities, including by applying the necessary pressure on the armed groups, traffickers, and *all other actors involved*" [our italics].

the behavior of companies,[101] or other commercial entities, in the conduct of conflicts, including arms trafficking.[102]

Besides sanctions imposed on the identified natural and legal persons, in cases where there is an international or internationalized tribunal already established, the Security Council may, by virtue of the powers conferred by the Charter, refer persons to such a tribunal in case of a threat to international peace and security.[103] This could be the case for natural persons and legal persons whenever courts' jurisdictions would allow prosecutions of legal entities. Nevertheless, it is worth noting that, to date, the Security Council has not referred any corporate director to the ICC for their involvements in international crimes.

Outside of the sanction regime, UN political organs have the power of investigation, which gives them insight into the situations on which they must act. Security Council resolutions show a progressive tendency to relate international peace and security to economic activities that stimulate armed conflict[104] which are not always accompanied by sanction regime. The International Humanitarian Fact-Finding Commission established by Additional Protocol I[105] can only investigate in the context of international armed conflicts and is subject to acceptance by all parties to the conflict of which reports should remain confidential. However, the investigative mechanisms established by the Security Council when they are mandated to investigate IHL violations can palliate the defaults of the International Humanitarian Fact-Finding Commission. Whenever the Council refers to IHL, it can broaden its scope of action and ask *all parties* to the conflict, including non-state actors, to respect this set of rules.[106] Consequently, if IHL also applies to multinational corporations and the Security Council is authorized to implement IHL by Article 89 of Additional Protocol I,[107] there is nothing to legally prevent the Council from addressing companies directly and extending the mandate of investigations to their alleged abusive conduct. Indeed, in linking the trafficking of natural resources to the armed conflict in the Central African Republic, the Security

[101] U.N. Security Council, Final report of the Group of Experts on the Democratic Republic of the Congo, U.N. Doc. S/2018/531 (June 4, 2018), ¶134.
[102] *Id.*, at ¶¶. 186, 187, 189, 193, 195, 201.
[103] S. C. Res. 1638, U. N. Doc. S/RES/1638 (Nov 11, 200), introduction 4 and ¶1; S. C. Res. 1688, U. N. Doc. S/RES/1688 (June16, 2006), ¶¶ 1-7.
[104] S. C. Res. 1173, U.N. Doc. S/RES/1173 (June 12, 1998), ¶¶11 and following (situation in Angola, first resolution of the SC on the link between diamonds and armed conflicts); S.S. Res 1237, U. N. Doc. S/RES/1237 (May 7, 1999), ¶ 8 (situation in Angola, first resolution in relation to diamonds and private actors); S. C. Res. 1343, U.N. Doc. S/RES/ 1343, (March 7, 2001), ¶¶ 7 and following (situation in Sierra Leone, traffic of arms and diamonds through Liberia).
[105] Art. 90 of the Additional Protocol I. The Commission has, in fact, already interpreted Art. 90 of Additional Protocol I to extend its competence to non-international armed conflicts with the consent of the parties to the conflicts, *see*: http://www.ihffc.org/Files/ihffc_brochure_2015_final_thilo.cha.pdf (last accessed December, 22, 2020).
[106] S. C. Res. 2127, (Dec 5, 2013) (situation in CAR) introduction 4, ¶¶. 17, 19, 20, 22, 23; S.C. Res. 1564, S/RES/1564 (Sept 18, 2004) (Soudan-Darfour), at 11, ¶¶ 4, 5, 10, 12; or when the Council authorizes an investigation into any alleged violation of IHL, regardless of the identity of the perpetrators, S.C. Note by the President of the Security Council, U.N. Doc. S/25198 (June 9, 1993) (Liberia), introduction 3.
[107] *See* Vité, *supra* note 90, at 56-57.

Council referred to "all other actors,"[108] which may include companies that directly, or through their supply chain, stimulate the conflict.

In this regard, it is interesting to note that the commission's mandate for Liberia made no reference to the exploitation of natural resources, although these elements were extensively analyzed in the judgment of the former head of state, Charles Taylor:

> *The Prosecution has proved beyond reasonable doubt that diamonds were delivered to the Accused by Sam Bockarie directly, as well as indirectly through intermediaries, such as Eddie Kanneh and Daniel Tamba (a.k.a. Jungle) from February 1998 to July 1999, and that these diamonds were delivered to the Accused for the purpose of obtaining arms and ammunition from him.*[109]

For its part, the General Assembly, through its resolutions, can point out key obstacles in the field of the maintenance of international peace and security. Thus, the Assembly has been able to pronounce itself based on the link between "international transfer and international production of conventional arms [...] in illicit channels that can influence the scourges of war and have a direct impact on international peace and security."[110] It should be noted that the Assembly is directed only at States, and it also takes into account the role that non-state actors play in the illegal trafficking of arms.[111] In addition, the Assembly has recognized the role of corporations in the trafficking of "blood diamonds" in armed conflicts.[112]

While both Security Council and General Assembly recognized on several occasions the link that may exist between corporations (economic actors) and armed conflict, they never examined the role of companies nor did they take any further actions.

2. The OHCHR fact-finding reports do not document the role of corporations in the theater of war

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[108] S/RES/2127, ¶ 16.

[109] SCSL, Trial Chamber II, The Prosecutor of the Special Court for Sierra Leone v. Charles Ghankay Taylor, Judgment, case no. SCSL-03-1-T (May 18, 2012), ¶ 5948. *See also* ¶¶ 5839, 5841, 5948. *Note the exclusion of the mentioned diamond and arms companies from investigation and prosecution in this case.*

[110] G. A. Res. 46/36' *H- International transfer of arms,* U.N Doc. A/RES/46/36 (Dec 6, 1991), at 74 and following.

[111] In its resolutions, the Assembly can address non-state actors directly, *see* G. A. Res. 54/185. *Question of human rights in Afghanistan*, U.N. Doc. A/RES/54/185 (Feb 29, 2000), ¶4 where the Assembly "calls upon the Taliban to fulfill their stated commitment to cooperate in urgent investigations of these heinous crimes with a view to bringing those responsible to justice" and ¶10: «Urges all the Afghan parties, in particular the Taliban, to bring to an end without delay all violations of human rights against women and girls and to take urgent measures to ensure […]".

[112] G. A. Res. 55/56, *The role of diamonds in fueling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts*, U.N. Doc. A/RES/55/56, (Jan 29, 2001), introduction 5.

The UN Human Rights Council may deploy independent fact-finding missions or support those established by other UN bodies. These commissions are mandated to conduct independent investigations into serious human rights violations in specific contexts.[113]

Over the past decades, the Human Rights Council has been confronted with increasingly complex situations of violence and armed conflict. Thus, the mandates of the commissions are not homogeneous and "their wording may vary considerably depending on the situation under investigation, the nature of the violations, and the purpose of the investigation."[114] One factor that is becoming increasingly common, however, is that investigations are primarily deployed in armed conflicts where there is a need to assess the most serious violations of international law. Consequently, where appropriate, inquiry commissions and fact-finding missions may refer to international humanitarian law.[115] For example, the original mandate of the Commission of Inquiry on Syria included only references to human rights.[116] When the country context evolved into an armed conflict, the Council expanded the Commission's mandate to include IHL.[117] The inclusion of IHL as a reference in its investigations brings greater credibility to the reports produced.[118] Indeed, the monitoring of human rights violations is only limited to the positive obligations of

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[113] U.N. Human Rights Council, Res. S-15/1, Situation of human rights in the Libyan Arab Jamahiriya, A/HRC/RES/S-15/1 (March 3, 2011), ¶1 where Council "[e]xpresses deep concern at the situation in the Libyan Arab Jamahiriya and strongly condemns the recent gross and systematic human rights violations committed in that country, including the indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful demonstrators, some of which may also amount to crimes against humanity." *See also* U.N. Human Rights Council, Res. S-16/1 (in A/66/53 at 27-29) (April 29, 2011), the current human rights situation in the Syrian Arab Republic in the context of recent events, para. 1 where the Council "condemns the use of lethal violence against peaceful protesters by the Syrian authorities and the hindrance of access to medical treatment, urges the Government of the Syrian Arab Republic to immediately put an end to all human rights violations, protect its population and respect fully all human rights and fundamental freedoms […]."

[114] OHCHR, Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice at 10, (New York and Geneva, 2015), [hereinafter "OHCHR Guidance"].

[115] It is worth recalling the distinction between grave breaches of IHL and serious violations of IHL. With regard to grave breaches of IHL, States have a treaty obligation to prosecute or extradite perpetrators of violence. Grave breaches apply only in IACs. Serious violations of IHL oblige states to take the necessary measures to bring them to an end; art. 49/50/129/146, ¶ 3 common to all four articles of Geneva Conventions 1949. In the NICs, there is no real distinction between serious violations and grave breaches of IHL; *See* Theodor Meron, *The international criminalization of internal atrocities* 89 Am. J. Int'l L. 554-577 (1995) *See also* ICTY, *Prosecutor v. Dusko Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction), ¶¶ 87-93. IT-94-1, (Oct 2, 1995)

[116] U.N. Human Rights Council, Res. S-17/1, *The Human Right Situation in the Syria Arab Republic*, A/HRC/S-17/1 ¶¶1- 2. (Aug 22, 2011).

[117] U.N. Human Rights Council Res. 21/26, The human rights situation in the Syria Arab Republic, A/HRC/RES/21/26 (Oct 17, 2012), ¶10 where Council « *Stresses the need to follow up on the report of the commission of inquiry and to conduct an international, transparent, independent and prompt investigation into abuses and violations of international law, with a view to hold to account those responsible for violations and abuses, including those that may amount to crimes against humanity and war crimes* […] ». The Council extends the mandate to war crimes, which allows for the assessment of serious violations of IHL. However, the Council does not decide on the nature of national or international armed conflicts, given the complexity of the relations between the parties to the conflict.

[118] U.N. Human Rights Council Res. S-28/1, Violations of international law in the context of large-scale civilian protests in the Occupied Palestinian Territory, including East, U.N. Doc. A/HRC/RES/S-28/1 (May 18, 2018), ¶1; U.N. Human Rights Council Res 36/31, Human rights, technical assistance and capacity-building in Yemen, U.N. Doc. A/HRC/RES/36/31 (Sept 29, 2017), ¶ 1 where Council "[c]ondemns the ongoing violations and abuses of human rights and violations of international humanitarian law in Yemen."

States. The introduction of IHL as a legal basis for monitoring makes it possible to assess the compliance of *all parties* to the conflict.[119]As a result, these reports gain in impartiality insofar as they also monitor compliance with international law by non-state actors.[120]

Where a commission does not have a mandate to investigate violations of IHL, it may nevertheless identify the crime against humanity[121] as an international crime. This approach supports the doctrine that certain violations are universally unacceptable.[122] Therefore, in addition to the fact that commissions of inquiry and fact-finding missions are often mandated to investigate violations of international human rights law and IHL, the finding that international crimes have taken place in the territories covered by their mandates makes it legally possible to investigate abuses committed directly or in complicity by multinational corporations.

Limited by time and logistical constraints, the fact-finding missions under the HRC mandate focus on *systematic aspects of violence*, thus excluding single incidents which are only considered to the extent that they reveal a certain pattern of violent behavior. This makes it possible to recognize patterns in a given conflict and to label acts linked to given categories of perpetrators, groups, or institutions as "politics of violence."[123] In countries where armed conflict is regularly fueled by corporate activities, it is essential to investigate this type of behavior and understand root causes of war, when it is identified as recurrent by multinational corporations.[124] However, the Human Rights Council does not have a mandate to preserve international peace and security. Therefore, linking

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[119] Common art. 3 to Geneva Conventions, 1949, art. 1 of the Additional Protocol II. The obligation to respect and ensure respect for IHL (limited to common Article 3) also rests on non-State actors, *See* Vité, *supra* note 88, at 30.

[120] OHCHR Guidance, *supra* note 114, at 16. The Guidance refer to the Commission of Inquiry on Libya : "Non-State actors in Libya, in particular the authorities and forces of the National Transitional Council [NTC], cannot formally become parties to the international human rights treaties and are thus not formally given obligations under the treaties. Although the extent to which international human rights law binds non-State actors remains contested as a matter of international law, it is increasingly accepted that where non-State groups exercise *de facto* control over a territory, they must respect fundamental human rights of persons in that territory. The Commission has taken the approach that, as NTC has been exercising *de facto* control over territory akin to that of a governmental authority, the Commission will also examine allegations of human rights violations committed by NTC force", U.N. Human Rights Council, "Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya" U.N. Doc. A/HRC/17/44 (Jan 12, 2012), ¶ 62.

[121] U.N. Human Rights Council, *Report of the Commission of Inquiry on Burundi*, A/HRC/39/63 (Aug 8, 2018), ¶8: « The law applicable to the work of the Commission, namely international human rights law and international criminal law, has also remained the same […]. Over the past year, there have been no new developments pointing to the existence of an armed conflict to which the rules of international humanitarian law would apply. Having decided to place greater emphasis on economic and social rights, the Commission based its legal analyses on the relevant instruments to which Burundi is a party. »

[122] Steve Wilkinson, *Standards of proof in international humanitarian and human rights fact-finding and inquiry commissions*, Geneva Academy of International Humanitarian law and Human Rights, Geneva, at 52. (2012) [hereinafter "Wilkinson"].

[123] Ibid.

[124] A particular example can be given with the OHCHR report on the DRC. The Mapping Report, which is the result of a survey conducted from 1993 to 2003, analyzes behaviors that are particularly present in the Congo conflict, such as sexual violence. *See* HCDH-MONUC, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, [hereinafter « DRC Mapping Report »].

corporate crimes to armed conflicts is not an objective of the commissions' mandate. The Council focuses on the systematic abuses that are part of the conflict dynamics, as the OHCHR Mapping Report found in relation to the situation in Democratic Republic of Congo.[125]

Commissions may be mandated to investigate *those responsible for violations and abuses*[126] and they can formulate recommendations to States. If the reports identify companies and national legislation provides this possibility of trials against corporations, fact-finding can be a fundamental documentation tool for dealing with the past through domestic proceedings, as suggests by the Independent International Fact-Finding Mission on Myanmar:

> *[I]nternational law also permits States to hold corporation officials criminally liable for their direct acts or omissions and for involvement with others in crimes under international law, if they aid, abet or otherwise assist in genocide, crimes against humanity and war crimes. It is particularly relevant to the situation in Myanmar that these modes of criminal liability can arise when business officials engage in acts or omissions that assist, encourage or lend moral support to the perpetration of a crime. This can include financial assistance and the provision of goods, information and services, including banking and communications services. If businesses rely on the services or resources of the States or encourage the State to provide it with services and resources, with the knowledge that these services might result in crimes under international law, the relevant business officials risk criminal liability.*[127]

Commissions and fact-finding missions can provide judicial proceedings with crucial evidence of serious violations of international law.[128] By providing analysis of the root causes of conflicts and violations, commissions of inquiry could contribute to transitional justice and enable victims to obtain justice, reparations, and even guarantees of non-repetition, thereby contributing to reconciliation efforts and lasting peace. Although OHCHR fact-finding and inquiry commissions have incredible potential to document corporate abuses to date, there have been very limited investigations into corporate abuses, Myanmar Commission and South Sudan Commissions being notable exceptions.[129] Furthermore, there are no investigations of corporations based in the Global North or any legal repercussions on the domestic level towards those same corporations for their abuses in the Global South.

3. Corporate misconduct documented by Special procedures of the OHCHR

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[125] *Id.*, ¶733. The report also identified the role of multinational corporations in fueling the conflict.
[126] HRC Res 21/26, *supra* note 115, ¶10.
[127] U.N. Human Rights Council, Independent International Fact-Finding Mission on Myanmar, *The Economic Interests of the Myanmar Military*, A/HRC/42/CRP.3 ¶ 43 (Sept12, 2019).
[128] OHCHR Guidance, *supra* note 114 at 7.
[129] HRC, Commission on Human Rights in South Sudan, Human rights violations and related economic crimes in the Republic of South Sudan, A/HRC/48/CRP.3 (Sept 23 2021).

The Human Rights Council has absorbed an institution created by the Commission on Human Rights called "Special Procedures."[130] It is a mechanism composed of Special Rapporteurs, Independent Experts, and Working Groups that have a country or thematic mandate to monitor human rights across all regions of the world. In order to fulfill their mandate, the mandate holders carry out activities, such as studies, advice on technical cooperation at the country level or the production of reports, thematically or by country. However, with regard to corporate activities, the main focus is on the possibility of responding to individual complaints through "communications."

Due to the State-centric nature of the human rights system, communications are, first and foremost, addressed to States on the basis of their territorial jurisdiction. This is also explained by the effective capacity to protect human rights and to prosecute those suspected of violations that States are supposed to have.[131] In practice, this translates to an official communication in the form of a diplomatic letter addressed to the permanent mission based in Geneva requesting information and observations on the allegation and, if necessary, to take preventive or investigative measures.

Communications also consist of an intervention with the corporation concerned following allegations of human rights violations. Today, this is the only mechanism at the international level that can directly address corporate human rights and IHL abuses. In this regard, two Working Groups are particularly engaged in the area of corporate responsibility: the Working Group on mercenaries with the mandate to monitor private military and security companies (PMSC) and the Working Group on the issue of human rights and transnational corporations and other business enterprises, which are responsible for communicating directly with companies when they are accused of being involved in human rights violations. Indeed, the independent experts of the Special Procedures have already addressed requests for clarification directly from companies on situations concerning reprisals against migrant workers committed by private companies due to complaints filed by the victims for inhumane working conditions,[132] or arbitrary detention and abuses of criminal procedure against environmental rights defenders denouncing mining

[130] Since their inception in 1967, the Special Procedures have been widely regarded as one of the pillars of human rights at the United Nations. Their rapid development in the 1990s has been one of the most significant changes in the UN's human rights programs; *see* Janusz Symonides, *Human rights: international protection, monitoring, enforcement* 49-50, Routledge, London (2003).

[131] See OHCHR Joint Communication, Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on violence against women, its causes and consequences; and the Working Group on the issue of discrimination against women in law and in practice, AL PNG 2/2017 (Sept 22, 2017) on sexual violence in mining companies in Papua New Guinea; OHCHR, Joint Communication, Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on violence against women, its causes and consequences and the Working Group on the issue of discrimination against women in law and in practice, OL CAN 3/2017 (Sept 25, 2017).

[132] OHCHR, Joint communication, Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; and the Special Rapporteur on trafficking in persons, especially women and children, AL OTH 15/2018 (May 10, 2018).

projects,[133] or when corporations are involved in the extractive industry and military trainings.[134] The corporation addressed in the communication may respond to the allegations, but the procedure ends here. The allegation letters are sealed for 60 days, after which time they become public and can be used for advocacy or documentation in other proceedings.

B. Corporations have rights but no corresponding responsibility before international courts.

Binding international legal instruments have expressly confirmed that corporations have rights guaranteed by international law.[135] Corporations can also enjoy the *jus standi* before international courts and tribunals including defending their own "human rights," while the victims of corporate abuses cannot bring claims for human rights committed by those corporations before those same courts. In addition, in order to access international or regional courts, the applicant must have exhausted domestic remedies.[136] Exhaustion of domestic remedies is a rule of customary international law[137] that reflects the complementary or subsidiary nature of human rights courts. States are responsible for ensuring that rights are respected. Generally, the condition for the exhaustion of domestic remedies is the exhaustion of complaints proceedings.[138] While the applicant has the free choice of seeking legal remedies, this fundamental principle must still allow

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[133] OHCHR, Joint communication, Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, OL OTH 19/2017 (Sept 19, 2017); see also OHCHR, Joint communication, Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; and the Special Rapporteur on the situation of human rights defenders, AL OTH 12/2017 (Aug 21, 2017).

[134] OHCHR, Joint communication, 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 on the issue of human rights and transnational corporations and other business enterprises, Working Group on Enforced or Involuntary Disappearance, Special Rapporteur on extrajudicial, summary or arbitrary executions, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, AL OTH 182/2021 (March 26, 2021) (regarding the situation in Central African Republic).

[135] See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Paris March 20, 1952, art.1 (Protection of property): "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." See also, WHO Framework Convention on Tobacco Control, art. 16-1-a « *requiring that all sellers of tobacco products place a clear and prominent indicator inside their point of sale about the prohibition of tobacco sales to minors*».

[136] Art. 35-1 ECHR, art. 46-1-a IACHR, art. 50 African Charter of People and Human Rights, art. 2 Optional Protocol to the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) (Dec 16, 1966). The exhaustion of domestic remedies before human rights courts can be distinguished between horizontal and vertical exhaustion. The former requires the national judge to first rule on human rights violations in order to be attentive and to identify violations ex officio. In the second case, this obligation falls on the victim and concerns the stages of the procedure.

[137] ICJ, Interhandel (*Switzerland v. United States of America*) Preliminary Objections, judgement, March 21, 1959, at 27 "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law".

[138] Fréderic Soudre, *Droit européen et international des droits de l'homme*, PUF, Paris (2006), at 638; Hennebel and Tigroudja, *supra* note 92, at 503.

the State to remedy the alleged violation internally. This presupposes that the remedy is adequate and useful.[139]

1. Corporate jus standi before international human rights courts

According to Article 34 of the European Convention on Human Rights, individual applications can be filed by non-governmental organizations.[140] It is in this category that companies will be classified in order to access the Court. The first version of the Convention referred to applications by "any legal person." In later drafts, the terminology evolved and eventually the term "non-governmental organization" was adopted.[141] There is no indication, however, that this final regulation was intended to exclude corporations from the scope of the Convention. Indeed, since the first *Sunday Times* case,[142] there have been many other significant cases brought before the Court by corporations seeking to protect their "human rights". In this respect, it is worth noting that there has been an increase in the number of cases brought before the European Court of Human Rights where the Court has recognized the applicability of human rights to corporations.

Corporation are an abstract entity. Consequently, the question arises as to how to identify the exact rights to which a corporation may be entitled. The list is probably not exhaustive, but the procedural rights seem easily applicable to corporations.[143] Beyond these rights, the question becomes more complex because of the difficulty of reconciling the provisions of the text with the interests of the corporation. In the case of *Autronic AG v. Switzerland*, the ECHR goes further than just the right to private property recognized to corporations:

> [I]n the Court's view, neither Autronic AG's legal status as a limited corporation nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10 (art. 10). The Article (art. 10) applies to "everyone," whether natural or legal persons.[144]

It is surprising to note that the European Court of Human Rights goes beyond the simple protection of the right to private property; it extends the protection of corporate rights to other rights, such as the right to a fair trial or freedom of expression.[145] The provisions relating to non-discrimination or the right to respect for private and family life are somewhat controversial,[146] as it is difficult to

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[139] Hennebel and Tigroudja, *supra* note 92, at 505.

[140] Art. 1 of the First Additional Protocol to ECHR, and art 34 of the ECHR : "The Court may receive applications from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right. Both articles must be read in conjunction with art. 35 on admissibility criteria (which recalls the individual requests as provided for in art. 34).

[141] Winfried H.A.M. van den Muijsenbergh and Sam Rezai, *Corporations and the European Convention on Human Rights* 25 Global Bus. & Development L. J. 43 (2012) [hereinafter "Muijsenbergh and Rezai"].

[142] ECHR, Plenary, *Sunday Times v. United Kingdomi*, Judgement, 6538/74, A series (April 26, 1979).

[143] These include the right to a fair trial (art. 6), no punishment without law (art. 7), the right to an effective remedy (art. 13), and limitations on the use of restrictions on rights (art. 18).

[144] ECHR, Plenary, *Autronic AG v. Switzerland, Judgement,* 12726/87 (May 22, 1990), ¶47.

[145] ECHR, *OAO Neftyanaya Kompaniya Yukos v. Russia*, Judgement, 14902/04 (Sept 20, 2011); ECHR, Plenary, *Centro Europa 7 S.R.L. et Di Stefano v. Italy*, Judgement, 38433/09 (June 7, 2012).

[146] Art. 14 and 8 respectively; *See* ECHR, Second Section, *Case of Societe Colas Est and Others v. France*, Judgement, 37971/97 (April 16, 2002). In this case against the French Republic and three French companies, Colas Est, Colas Sud-

grant these rights to an abstract entity such as a corporation. On the other hand, there seems to be a consensus on the non-enforceability of rights that are particularly attached to the very nature of human beings (*e.g.*, right to life, prohibition of torture).[147]

By referring to its own dynamic interpretation, the Court is progressively extending the application of the Convention to corporations:

> [T]he Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions […]. [With regards to] the rights secured to companies by the Convention, it should be pointed out that the Court has already recognized a corporation's right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6 § 1 of the Convention […]. Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances, the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a corporation's registered office, branches or other business premises […].[148]

This approach by ECHR raises the question of how far the Court will go in the dynamic interpretation of its own cases and which rights will it include.[149] Can the "humanization of corporations"[150] go so far as to recognize rights, such as the right to life of corporations, despite the controversies this may present?

The American Convention on Human Rights provides that various entities may lodge a complaint with the Court.[151] But the Inter-American Court of Human Rights has not developed its reasoning in the same way as its European counterpart. In the absence of explicit recognition of the possibility for corporations to file an application before the Court, it has based its jurisprudence on the "rights" recognized to corporations.[152] The Inter-American Court has been seized with cases allowing shareholders to pursue protection of interests in lieu of the corporation. In the 2002 landmark case, *Cantos v. Argentina*, the owner of a large corporation and its principal shareholder petitioned the Commission, and then the Court, for indirect protection of his companies after suffering losses as well as accounting and administrative seizure. In response to Argentina's argument that the case

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Ouest and Sacer, respectively located in Colmar, Mérignac and Boulogne-Billancourt ("the applicants"), had filed a complaint with the European Commission of Human Rights ("the Commission") on December 2, 1996, under former art. 25. The companies alleged violation of home and private and family life (art. 8).

[147] Art. 2 and 3 respectively. These rights include the right to marriage (art. 12) and the prohibition of arbitrary detention (art. 5).

[148] ECHR, *Case of Societe Colas Est and Others v. France*, *supra* note 146, ¶41.

[149] See ECHR, *OAO Neftyanaya Kompaniya Yukos v. Russia*, Admissibility, 14902/04, (Jan 29, 2009); ECHR, *OAO Neftyanaya Kompaniya Yukos v. Russia, Judgement,* Judgement, 14902/04, ¶¶1-10. (Sept 20, 2011); violation of the art. 1 and 6 of the ECHR and art. 1 of the Optional Protocol 1.

[150] Muijsenbergh and Rezai, *supra* note 141, at 60.

[151] American Convention on Human Rights, adopted in San José on November 22, 1969, art. 44: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

[152] The Inter-American Convention on Human Rights (IACtHR) explicitly rejects the protection of "legal persons."

was inadmissible (arguing that the Court had no jurisdiction over legal persons), the Court replied: "[T]he rights and obligations attributed to companies become rights and obligations for the individuals who comprise them."[153] In other words, the Court recognized the rights of the corporation through its shareholder. Thus, while legal persons (companies) cannot apply directly to the Court, the Court nevertheless protects the interests of the corporation by potentially granting shareholders the right to apply on behalf of a corporation.[154]

2. Corporate jus standi before international economic tribunals

The WTO is a unique international organization responsible for trade relations between States. Created by the Uruguay Round negotiations,[155] it is based in Geneva. Together with other specialized agencies, it develops economic policies at the global level.[156] Although corporations are *de jure* excluded from the proceedings, their interests are nonetheless well protected before the organization. Indeed, the practice before the Dispute Settlement Body (DSB) of the WTO is open to the possibility for companies to file *amicus briefs*.[157] Moreover, through its principles, such as the most-favored-nation clause and national treatment, the WTO can diminish the ability of States to take measures relating to Corporate Social Responsibility (CSR) or human rights.[158] In addition to WTO regulations, the liberalization process can lead to "corporate social irresponsibility"[159] for the sole purpose of preserving their commercial advantages in a highly competitive global market. Finally, one should not underestimate a corporation's capacity to exert considerable pressure on States to resort to the WTO's dispute settlement system which gives them indirect access to this body.[160]

International investment law has been built around two sets of rules: the law on the status of foreigners and the mobility of factors of production.[161] Given this dual origin, several elements characterize international investment. On the one hand, international investment law favors bilateralism rather than multilateralism to guarantee greater mobility. On the other hand,

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[153] IACHR, *Cantos c. Argentine*, Preliminary Objections, Judgement (Sept 7, 2001), C series, no. 85, ¶27.
[154] *Id.*, ¶ 29: "*The Court finds an individual can seek the protection of the Inter-American system, even when the rights he seeks to protect are encompassed in a legal entity such as a corporation. Here, Mr. Cantos's claim was in his name and his companies' and thus the Court finds the violation falls within the jurisdiction of the Convention*."
[155] Marrakesh Declaration of 15 April 1994 establishing the World Trade Organization (WTO), art.1.
[156] It should be noted that in comparison with other international organizations, the WTO does not particularly develop policies, let alone CSR and human rights policies, *see* Nicola Jägers, *Bringing corporate social responsibility to the World Trade Organization* in Doreen McBarnet, Aurora Voiculescu, Tom Campbell (eds.), *The new corporate accountability, corporate social responsibility and the law* 178, (Cambridge University Press, Cambridge (2007), [hereinafter "Jägers"].
[157] ORD, Australia - Measures Affecting Importation of Salmon - Recourse to Article 21.5 by Canada - Report of the Panel WT/DS18/RW (Feb18, 2000).
[158] The ban on imports of products suspected of modern slavery can be interpreted as an illegal trade barrier since it discriminates between the products of trading partners, *see* Jagers, *supra* note 156, at 179.
[159] *Id.*, at 180.
[160] See WTO, United States- Standards for reformulated gasoline and conventional gasoline, WT/DS2/AB/R/ (March 20, 1996), WTO, Appelate Body Report, European Communities - regime for the importation, sale and distribution of bananas, WT/DS27 (Sept 25, 1997).
[161] Carreau and Juillard, *supra* note 31, at 398-399.

investment is conceived in a varied manner and contains different sources, which explains its lack of definition in international law.

The Convention on the Settlement of Investment Disputes, known as the Washington Convention of 1965, does not define international investment either,[162] although it creates an International Centre for Settlement of Investment Disputes (ICSID).[163] This Centre, which is part of the World Bank Group, provides conciliation and arbitration facilities to settle any investment dispute. The implementation of the Convention is the most important innovation and consists of three phases: (i) the Convention must be signed by the States, including the State of nationality of the investor and the host State; (ii) the right to refer to the ICSID—an international body—is granted to multinational companies as the investors; and[164] (iii) this right is translated into a written document of acceptance to submit the dispute to the Center.[165]

The ICSID procedure contains several elements that actually contribute to the impunity of corporations and reinforce their power in international relations. In general, the claimants are investment companies with the nationality of a State Party, while the defendant to the dispute is a State Party to the Washington Convention. It should be noted that, before the ICSID, the procedure is one-way:

> [I]n the past two decades, thousands of investment agreements (mostly bilateral) have been negotiated. Their predominant focus on protecting investors' rights coupled with their insular investor-State dispute settlement process not only constrains the regulatory space available to a State to protect and fulfill the human rights of its people but also limits the opportunities to seek effective remedies for business-related human rights abuses. Investors, although not a party to these agreements, are able to sue the relevant State to protect their commercial interests, but States or the affected communities cannot generally bring an action against an investor under these agreements for alleged human rights abuses linked to an investment project.[166]

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[162] It is up to the arbitrators themselves, as part of their verification of their competence, to define the investment ICSID, *Kaiser Bauxite Corporation v. Jamaica*, Award, ICSID Case No. ARB/74/3 (July 6, 1975).

[163] Article 1-1 of the Washington Convention of March 18, 1965, created under the auspices of the IBRD. The convention entered into force on October 14, 1966.

[164] Art. 1-2 of the Washington Convention.

[165] Either in an investment contract between the company and the host state, or by national legislation of the host state that the company must accept, or by a clause incorporated in a (bilateral or multilateral) investment treaty.

[166] UN General Assembly, 'Resolutions 72/162, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprise', A/72/162 (July 18, 2017), ¶ 76. *See also* Nitish Monebhurrun, « Arbitrage international et droit international des investissements: la question des devoirs des investisseurs » in Kathia Martin-Chenut, Réné de Quenaudon (eds.), *Responsabilité sociétale des entreprises, la RSE saisie par le droit, perspectives internes et internationales* at 649, Pédone, Paris (2016), « […] hormis quelques rares cas de demandes reconventionnelles, l'investisseur est toujours le demandeur et l'État, le défendeur ». Moreover, the database of ICSID cases shows a striking North-South divide. Multinational enterprises are generally from Northern countries, while defendant states are mainly from the South. *See also*, the case of *Chevron vs. Ecuador*, where the principles of

State sovereignty is directly affected by ICSID proceedings for several reasons. First, the right to bring a case before the Centre is an opportunity which, in return, prevents the home State from exercising its diplomatic protection or its traditional powers.[167] Second, when the corporation has the right to refer a case to the ICSID, it is not necessary for the corporation to exhaust the domestic remedies of the host State[168] (a rule that is well known in customary international law and is imposed on all international proceedings open to individuals).[169] Third, when it comes to defending the interests of companies, international mediation and conciliation channels are favored to the detriment of domestic courts: "[A] large fraction of disputes related to foreign investments nowadays is settled by private arbitration and not by national courts. So corporate law firms and accounting firms add yet additional layers to routine transnational rule-making."[170]

Undoubtedly, international economic courts and dispute settlements favor corporate interests over human rights of individuals and communities.

Conclusion

By excluding corporations from international documentation and proceedings, mechanisms uphold the false narrative that violence and crimes are specific to the Global South.[171] Justice must be a collective responsibility and should adopt all-inclusive approaches to dealing with the past. To achieve this goal, a profound institutional reform is needed that would adapt the international regulatory frameworks and mechanisms to the contemporary socio-economic developments. Concretely, the ongoing diplomatic processes negotiating the treaty regimes for corporate conduct should adopt the normative framework that provide a possibility for victims to raise complaints against business entities and require corporations to, at the very least, report before those institutions on their human rights conduct and measures adopted. Furthermore, the inter-governmental negotiations under the Human Rights Council should not prevent States from adopting the necessary amendments to include corporations into the Rome Statute. According to Professors Anghi and Chimni, the prosecution of corporations before the ICC could correct the

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international economic law, notably the corporation's right to profit, were favored over communities affected by those companies' operations and protective human rights laws promoted by the State, WGM extractive report, ¶61.

[167] Daillier et al. 2009, *supra* note 32, at 770.

[168] However, in some cases, companies must demonstrate reasonable efforts to obtain redress before the domestic courts, ICSID, *Generation Ukraine Inc. c. Ukraine*, Award, ICSID Case No. ARB/00/9 ¶¶20 and 30. (Sept 16, 2003).

[169] According to art. 25-2-a of the 1965 Washington Convention, the Center is open to natural persons who are nationals of the State party to the international convention on investment.

[170] Commission of Human Rights, *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, E/CN.4/2006/97), 12 (Feb 22, 2006).

[171] *See* Anghie and Chimni, 2003, *supra* note 9, at 79, 81, 83, and 96-97; *See also* Claire Nielsen, *From Nuremberg to the Hague: the civilization mission of international criminal law* 14 Auckland U. L. R. 81 (2008).

misrepresentation of “Third World conflicts” in the Global South and thus bring more legitimacy to the Court if political obstacles are removed.[172]

It is necessary to reconsider international law and adapt it to the development of international society. Above all, it is essential to reflect on the rise of multinational corporations with complex, even opaque, legal structures, in a global order that benefits them. Finally, we must question the consequences of their activities on populations (and peoples) within unequal power relationships and on the respect of international law by these companies. International law must therefore be a tool to hold multinational corporations accountable for their international crimes and not a pretext to avoid such accountability.

[172] *See* Anghie and Chimni, 2003, *supra* note 9, at 89-90; more lawsuits against corporations could demonstrate a link between the role of international institutions, economic interdependence and powerful states in their involvement in armed conflict. See also Kai Ambos, *Expanding the focus of the African Criminal Court* in William Schabas, Yvonne McDermott, Niamh Hayes (eds.), *The Ashgate research companion to international criminal law*, 499-530, Routledge, London (2013).