Denver Journal of International Law & Policy

Volume 38
Number 2 *Spring*

Article 1

January 2010

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Keywords

Corporations, Humanitarian Law, International Law: History, United Nations, Human Rights Law, States

MAPPING A RESPONSIBILITY OF CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW SAILING BETWEEN INTERNATIONAL AND DOMESTIC LEGAL ORDERS

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I. INTRODUCTION

"I never had dinner with a legal person – Neither did I, although I often saw it paying the bill."[1] This aphorism, part of the classics heard by every law student in France, remarkably encapsulates the genuine ambivalence of the concept and status of "legal persons."[2] This is more particularly the case with corporations,[3] which have become the main vehicles of human economic activities. As creatures of domestic law, corporations do not enjoy the plenary legal personality of natural persons, which is limited not only by the consent of their creators but also by the scope of rights and duties available for them in the domestic legal order from which they stem. The intense scholarly debate concerning the content of corporate legal personality, going far beyond the legal sphere, has highlighted a critical dividing line on the question of the existence of a moral dimension of corporations. Indeed, they are, for some, potentially "full-fledged moral persons,"[4] while others consider that corporations "lack the emotional make-up that allows natural persons to show virtues and vices."[5] Besides, the lack of consensus on this issue – and therefore on a possibility of the existence of a *mens rea* of such entities – is reflected in the disparities among domestic laws on the criminal responsibility of corporations which, when existing, are often restricted to specific offenses and are triggered under specific conditions.[6]

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1. The first part of the sentence has been attributed to Léon Duguit, one of the most reputed French legal scholars of the early twentieth century, the retort to Professor Jean-Claude Soyer.

2. For a sampling of the seminal analyses of the concept *see, e.g.*, Frederick W. Maitland, *Moral Personality and Legal Personality*, 6(2) JOURNAL OF THE SOCIETY OF COMPARATIVE LEGISLATION 192 (1905); Bryant Smith, *Legal Personality*, 37 YALE L.J. 283 (1928); *see also* LÉON MICHOUD, LA THÉORIE DE LA PERSONNALITÉ MORALE ET SON APPLICATION AU DROIT FRANÇAIS 16 (1908); *see also* ERNST ZITELMANN, BEGRIFF UND WESEN DER SOGENANNTEN JURISTISCHEN PERSONEN 12 (1873).

3. *See* W. Jethro Brown, *The Personality of Corporation and the State*, 21 L. Q. REV. 365 (1905).

4. Peter A. French, *The Corporation as a Moral Person*, 16(3) AM. PHIL. Q. 207 (1979).

5. Robert E. Ewin, *The Moral Status of the Corporation*, 10 J. OF BUS. ETHICS 749 (1991).

6. *See, e.g.*, JONATHAN CLOUGH & CARMEL MULHERN, THE PROSECUTION OF CORPORATIONS (Oxford University Press 2002); JAMES GOBERT & MAURICE PUNCH, RETHINKING CORPORATE CRIME

Beyond the issue of the criminal responsibility for the violations of domestic laws, recent developments have demonstrated the growing outreach of the international humanitarian law ("IHL") framework for corporations, and consequently its possible international criminal responsibility corollaries. Indeed, modern armed conflicts involve more and more non-state actors, notably private military forces,[7] but also implicate, although indirectly, traditional corporations carrying out economic activities, notably in the field of extraction and/or commercial exploitation of natural and mineral resources.[8] In these contexts, it is often the case that "financial gain . . . may be either the cause of atrocities committed in conflicts or the reasons for their continuation."[9] Several acts conducted within the framework of business activities during an armed conflict may eventually fall under the scope of international humanitarian law and constitute war crimes.[10] A recent study of the ICRC mentions the following: unlawful taking of property, forced labor, displacement of populations, severe damage to the environment, and the manufacture and trading of prohibited weapons.[11] Although it should be mentioned that "transnational companies are not necessarily the worst perpetrators,"[12] the trend of their involvement in contentious activities in the context of an ongoing armed conflict raises the legitimate question of the criminal responsibility of these legal entities, especially given that "accountability would be increased if it were possible to prosecute directly the companies participating in such atrocities."[13]

Envisaging the criminal responsibility of corporations for grave violations of IHL necessarily implies a determination of whether they hold rights and duties under the international law of armed conflict. It should be pointed out beforehand that corporations are currently only legal creatures of domestic legal orders and they are not subjects of the international purely interstate legal system. States, however, may adopt norms of public international law recognizing such rights and

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(Butterworths LexisNexis 2003). For a recent and exhaustive contribution to this debate *see* Thomas Weigend, *Societas Delinquere non Potest? A German Perspective*, 6 J. OF INT'L CRIM. JUST. 927 (2008).

7. Emanuela-Chiara Gillard, *Business Goes to War: Private Military Security Companies and International Humanitarian Law*, 88 INT'L REV. OF THE RED CROSS 525 (2006); Cedric Ryngaert, *Litigating Abuses Committed by Private Military Companies*, 19 EUR. J. INT'L L. 1035 (2008).

8. *See, e.g.*, Rights and Accountability in Development, *Unanswered questions – Companies, Conflict and the Democratic Republic of Congo* (2004) [hereinafter RAID], *available at* http://www.raid-uk.org/docs/UN_Panel_DRC/Unanswered_Questions_ES.pdf.

9. ROBERT CRYER, HÅKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, AN INTODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 453 (Cambridge University Press 2007).

10. *See id.*

11. ICRC, BUSINESS AND INTERNATIONAL HUMANITARIAN LAW – AN INTRODUCTION TO THE RIGHTS AND OBLIGATIONS OF BUSINESS ENTERPRISES UNDER INTERNATIONAL HUMANITARIAN LAW 24 (2006) [hereinafter ICRC]; *see also* Erik Møse, *Corporate Criminal Liability and the Rwandan Genocide*, 6 J. OF INT'L CRIM. JUST. 973 (2008) (providing the example of involvement of media corporations in the Rwandan genocide).

12. Malin Helgesen, *War Zones and Grey Zones – Does Legal Liability of Companies Exist Under the International Law of Armed Conflict?*, 4-5 TIDSSKRIFT FOR RETTSVITENSKAP 576 (2005).

13. CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 9, at 453.

duties to non-state actors.[14] This, for instance, is the case for corporations through the network of international investment agreements.[15] While the latter category recognizes rights to corporations, it is doubtful that IHL and international criminal law frameworks embed international duties weighing on domestic legal persons.

On the basis of the foregoing, Part I will assess the existence of legal obligations under international law for corporations and will inquire into the possible channels for the recognition of their responsibility. This analysis will demonstrate that international law provides minimal and fragmented mechanisms of responsibility for violations of IHL by corporations. Domestic legal orders, however, offer a more appropriate and welcoming environment. Being creatures of and enjoying a broader legal personality under domestic law, corporations are subject not only to the purely national regulations but also to the international obligations inserted in domestic law, among which are those of IHL. Part II will consider this emerging application of fundamental IHL norms to corporations, and the litigation ensuing before domestic courts, with a special emphasis on the US Aliens Tort Claims Act.

II. THE MINIMAL RESPONSIBILITY OF CORPORATIONS FOR VIOLATIONS OF IHL IN THE INTERNATIONAL LEGAL ORDER

Despite the growing presence of non-state actors in the majority of armed conflict, IHL remains a "state-based order"[16] and criminal responsibility mechanisms that have been established focus primarily on individuals, leaving no room for the recognition of violations of IHL by corporations at the international level (A). Beyond this structural lack of criminal accountability, alternative channels of responsibility need to be explored as they suggest a growing concern of the international community about the implications of corporations becoming increasingly involved in armed conflict (B).

A. A Structural Unsuitability for Corporations to Be Held Responsible of Violations of IHL Before International Criminal Courts and Tribunals

As mentioned above, the first step in the analysis requires determining the content of the international legal personality of corporations. In the *Reparations* case, the ICJ pointed out that "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights."[17] As a state-

14. As pointed out in 1928 by the Permanent Court of International Justice in the case of *Jurisdiction of the Courts of Danzig*, "it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations." Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15, at 17, *available at* http://www.worldcourts.com/pcij/eng/decisions/1928.03.03_danzig/.

15. *See* Patrick Dumberry, *L'Entreprise Sujet de Droit International? Retour sur la Question à la Lumière des Développements Récents du Droit International des Investissements*, 108 REVUE GENERALE DE DROIT INT'L PUBLIC 112-13, 116-17 (2003).

16. Helgensen, *infra* note 122, at 574.

17. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 178 (1949).

centered legal system, States enjoy a plenary international legal personality[18] and "possess a general competence."[19] The content of the legal personality of other subjects of international law may, however, significantly vary from one to another.[20] When it comes to assessing the potential responsibility of corporations at the international level, it is necessary to determine the duties of corporations under the IHL framework (1) and the possible suitability of the existing international mechanisms of accountability for corporations (2).

1. The Potential International Legal Personality of Corporations under IHL

The respect of the core IHL instruments, *i.e.* the 1949 Geneva Conventions and the 1977 Additional Protocols, rests with the High Contracting Parties which have undertaken in common Article 1 "to respect and to ensure [their] respect for the present Convention[s] in all circumstances."[21] However, the fact that non-state actors are mentioned in other passages of these instruments does not *ipso jure* render them accountable for violations of IHL at the international level.[22]

This is notably the case for serious violations of these Conventions since it is the duty of the High Contracting Parties to "enact any legislation necessary to provide effective penal sanctions for *persons* committing, or ordering to be committed, any of the grave breaches" of the fundamental rules of IHL,[23] the same breaches constituting war crimes under the Statute of the International Criminal

18. Grigory Tunkin, *International Law in the International System*, 147 RECUEIL DES COURS 201-2 (1975) ("States possess a full-size international legal personality which comprises, *inter alia*, the following elements: (1) rights and duties under international law; (2) sovereignty which means supreme power over their respective territories and population; (3) sovereign equality of all states; (4) privileges and immunities; (5) the capacity to participate in the process of creating norms of international law; (6) the capacity to participate in international legal relations; (7) the capacity to bring international claims; (8) the capacity to take enforcement actions under international law; (9) the capacity to bear international responsibility.").

19. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Reports 66, 78 (July 8) ("The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence.").

20. CHARLES DOMINICE, *La Personnalité Juridique dans le Système du Droit des Gens*, *in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY – ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 147, 160 (Jerzy Makarczyk ed., Kluwer Law International 1996) ("A cet égard, il faut dire qu'à l'évidence l'ensemble des droits dont un sujet de droit est susceptible d'être titulaire varie grandement selon les sujets de droit mais nous préférons y reconnaître un problème de compétence. Autrement dit ... la personnalité juridique n'est pas divisible – elle est ou elle n'est pas – mais ... en revanche le faisceau de droits, facultés, compétences, est très variable selon les catégories de sujets du droit international.").

21. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art.1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC (I)]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC (II)]; Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S.135 [hereinafter GC (III)]; Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC (IV)].

22. *See* GC (I), *supra* note 21, art. 49; *see aslo* GC (II), *supra* note 21, art. 50; *see also* CG (III), *supra* note 21, art. 129; *see also* GC (IV), *supra* note 21, art. 146.

23. GC (I), *supra* note 21, art. 49; GC (II), *supra* note 21, art. 50; CG (III), *supra* note 21, art. 129; GC (IV), *supra* note 21, art. 146.

Court ("ICC").[24] Additional Protocol No. 1 ("AP(I)") does not mention the incriminations at the domestic level for these violations and, when providing that "[t]he High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches"[25] and that "grave breaches of these instruments shall be regarded as war crimes,"[26] it offers an international incrimination for such violations, but without mechanisms of enforcement.

Considering that the Conventions do not define the meaning of the term "persons," possibly indicating that it includes not only individuals but also legal persons,[27] and considering that AP(I) refers to "war crimes" without mentioning the nature of their authors,[28] it appears that these instruments do not explicitly preclude corporations bearing duties under IHL. Besides, an ICRC study points out that "although states and organized armed groups bear the greatest responsibility for implementing international humanitarian law, a business enterprise carrying out activities that are closely linked to an armed conflict must also respect applicable rules of international humanitarian law."[29] However, while corporations are likely to fall within the scope of IHL, these instruments do not implement mechanisms of enforcement for violations of these obligations.[30] We must therefore determine whether the responsibility of corporations may be held under the international criminal law framework, separately from IHL.

2. The Nonexistent International Legal Personality of Corporations under International Criminal Law

Although international criminal courts and tribunals have decided cases involving activities carried out by corporations, they have persistently refused to consider the possibility of the criminal responsibility of legal persons. Besides, this position has been integrated in the Statute of the International Criminal Court ("ICC") which does not contemplate corporate responsibility.

Regarding the first generation of international criminal tribunals, it should be mentioned that the Charter of the Nuremberg International Military Tribunal ("IMT") had jurisdiction for "the trial and punishment of the major war

24. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S 90, 94 [hereinafter ICC Statute] ("For the purpose of this Statute, 'war crimes' means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention . . .").

25. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 86, June 8, 1977, 1125 U.N.T.S. 3, 42-43 [hereinafter Additional Protocol].

26. *Id.* at 42.

27. GC (I), *supra* note 21, art. 53 (referring to the prohibition of "[t]he use by *individuals, societies, firms or companies either public or private* . . . of the emblem or the designation 'Red Cross' or 'Geneva Cross' . . . ," suggesting that the term "persons" of Article 49 may include all these categories) (emphasis added).

28. Additional Protocol, *supra* note 25, art. 75.

29. ICRC, *supra* note 11, at 14.

30. *See, e.g.*, GC (I), *supra* note 21; *see also* GC (II), *supra* note 21; *see also* CG (III), *supra* note 21; *see also* GC (IV), *supra* note 21.

criminals . . . acting in the interests of the European Axis countries, *whether as individuals or as members of organizations*."[31] The responsibility of legal persons was therefore removed *ab initio* and, besides, the IMT declared in a much-quoted passage that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[32] However, a very distinctive feature of the IMT Charter was the possibility "[a]t the trial of any individual member of any group or organization" to "declare . . . that the group or organization of which the individual was a member was a criminal organization"[33] and, as such, four organizations were declared as criminal by the Tribunal.[34] The recognition of the criminal responsibility of these *de facto* or *de jure* organizations should not, however, be interpreted as a recognition by the IMT of the criminal responsibility of legal persons. Indeed, this specific provision of the IMT Charter was linked to the so-called "Control Council Law No. 10" established to prosecute criminals of lower rank.[35] To be sure, an individual's mere membership in one of the organizations already declared as criminal by the IMT constituted a crime.[36] Therefore, the criminalization of several organizations by the "Control Council Law No. 10" served to provide a legal basis for the prosecution of individuals and should be distinguished from genuine corporate responsibility mechanisms, the rationale of which is not to establish a collective punishment of all persons involved in an organization[37] and does not necessarily imply that the entire organization was inherently criminal in its purpose. Nonetheless, several cases – known as the "Industrial Cases"[38] – decided under the "Control Council Law No. 10" are very instructive as they highlighted the potential relationship between corporate activities and the commission of war crimes and crimes against humanity (*e.g.* manufacturing and supplying poison, spoliation of private property, forced labor), although only individuals, executives of these companies, were ultimately found guilty.[39]

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31. Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280 (emphasis added) [hereinafter IMT Charter].

32. INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, 466 (Int'l Military Tribunal 1948).

33. IMT Charter, *supra* note 31, art. 9.

34. The Leadership Corps of the Nazi Party, the Gestapo, the SD and the SS. *See* OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 91, 97,102 (United States Printing Office 1947).

35. *See* Jia Bing Bing, *Control Council Law No. 10*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 281-2 (Antonio Cassese ed., Oxford University Press 2009).

36. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 Appendix D, art. II (Government Printing Office 1949) ("Each of the following acts is recognized as a crime . . . (d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.").

37. Helgesen, *supra* note 12, at 584.

38. *Id.* at 580.

39. *See* William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 INT'L REV. OF THE RED CROSS 439, 442 (2001); Kyle Rex Jacobson, *Doing Business*

Subsequent developments in the field of international criminal law have confirmed the lack of power to prosecute corporations in the international arena. In this regard, the statutes of the international criminal tribunals for the Former Yugoslavia and for Rwanda (respectively "ICTY" and "ICTR") expressly provided that they have jurisdiction "over natural persons."[40] However, while Article 25 of the Statute of the ICC provides identically jurisdiction "over natural persons," therefore "implicitly negat[ing] – at least for its own jurisdiction – the punishability of corporations and other legal entities,"[41] its drafting history shows that some negotiating States considered the possibility of implementing a criminal responsibility over legal persons.[42] Indeed, the 1998 Draft Statute for the ICC provided that, in addition to natural persons and to the exclusion of States, "[t]he Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives."[43] This proposal, made with the idea of easing access to restitution and compensation,[44] was not eventually adopted by state parties and several arguments were raised against such a possibility, including, among dominant ones, evidentiary problems as well as the rejection of corporate criminal responsibility concept in many domestic laws, which would have impaired the complementary mechanism of the ICC[45] (although some authors have suggested that these obstacles are far from being insurmountable).[46] It should also be stressed that the fictional dimension of legal persons, through which responsibilities may be shielded and assets protected by the corporate veil, renders effective criminal responsibility more complex.[47]

Therefore, while IHL imposes obligations on legal persons and while the case law of the IMT has shown how their activities may facilitate or serve as a basis of commission of serious violations of IHL, corporations have stayed outside the

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with the Devil: The Challenges of Prosecuting Corporate Officials whose Business Transactions Facilitate War Crimes and Crimes Against Humanity, 56 AIR FORCE L. REV. 167, 178 (2005); Helgesen, *supra* note 12, at 580.

40. Statute of the International Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 art. 6 (1993); Statute of the International Tribunal for Rwanda, U.N. Doc. S/RES/955 art. 5 (1994); *see* Micaela Frulli, *Jurisdiction Ratione Personae*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY I, at 527, 530-1 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

41. Albin Eser, *Individual Criminal Responsibility*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY I, at 767, 778 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

42. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15 – July 17, 1998, *Draft Statute for the International Criminal Court*, art. 76, n.9, U.N. Doc. A/CONF.183/2/Add.1 (April 14, 1998).

43. *Id.* art. 23(5).

44. Eser, *supra* note 41, at 779.

45. Frulli, *supra* note 40, at 532-33; Eser, *supra* note 41, at 779; WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 101 (2nd ed., Cambridge University Press 2004).

46. For a comprehensive analysis *see* Joana Kyriakakis, *Corporations and the International Criminal Court: The Complementary Objection Stripped Bare*, 19 CRIM. L.F. 115, 120-21 (2008).

47. Helgesen, *supra* note 12, at 585.

scope of *ratione personae* jurisdiction of international criminal tribunals. Corporate criminal conduct may therefore be judged in the international arena only throughout the residual criminal responsibility of the natural persons[48] deciding, directing or implementing these activities, and leaving unsolved the matter of compensation of victims and the maintaining of an activity that structurally fuels the conflict and the commission of crimes.[49] However, concluding the complete inexistence of responsibility of corporations for violations of IHL at the international level seems an excessive position as recent developments have shown the development of alternative channels of responsibility.

B. Fragmented and Alternative Channels of non-Criminal International Responsibility of Corporations for Breaches of IHL

The lack of international criminal accountability of corporations for violations of IHL does not entirely overshadow the growing concern of the international community about contentious corporate activities in the armed conflict context. Thus, several international law mechanisms have in fact addressed the need of corporate accountability. This is particularly reflected in the sanctions of the UN Security Council (1) and other mechanisms of soft international responsibility (2).

1. UN Security Council Sanctions for Violations of IHL

As the guardian of the collective security system, the Security Council may, under Article 41 of the UN Charter, adopt non-military coercive measures, including "the complete or partial interruption of economic relations" (known as "economic sanctions").[50] Thus, the Security Council has the power to interfere with the course of business activities in case of threats to peace, and impose sanctions – without any *ratione personae* limitations – on States, individuals, groups of individuals or legal persons.[51]

Following an evolution of armed conflicts implicating more non-state actors, the practice of the Security Council since the nineties has highlighted a growing focus of its sanctions on non-state individuals and entities, also known as "targeted" or "smart sanctions."[52] This new policy has resulted in measures such as

48. Outside the realm of international criminal tribunals, and under stringent conditions, they could also fall under the scope of state responsibility, notably concerning the growing phenomenon of outsourcing of military operations to private entities. *See, e.g.,* Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies,* 19 EUR. J. INT'L L. 989, 1014 (2008).

49. Helgesen, *supra* note 12, at 585 (concerning a declaration of the Prosecutor of the ICC pointing out that "[t]here is general concern that the atrocities allegedly committed in the country may be fuelled by the exploitation of natural resources there and the arms trade, which are enabled through the international banking system" and that "investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes."); *see also* Press Release, Int'l Crim. Ct., (Prosecutor) Communications Received by the Office of the Prosecutor of the ICC, No.: pids.009.2003-EN (July 16, 2003).

50. U.N. Charter art. 41.

51. *See, e.g.,* Christopher C. Joyner, *United Nations Sanctions After Iraq: Looking Back to See Ahead,* 4 CHI. J. INT'L L. 329, 330-32 (2003).

52. For an overview *see* SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT (David Cortright & George A. Lopez eds., Rowman & Littlefield Publishers, Inc. 2002).

embargoes on arms and petroleum against an Angolan military group in 1993[53] and on diamonds exports in the Sierra Leone Conflict in 2000.[54] In this latter situation, the Security Council specifically expressed its concern "at the role played by the illicit trade in diamonds in fuelling the conflict in Sierra Leone."[55] Other examples may be found with the Security Council resolutions imposing sanctions against the Taliban regime and Al-Qaida,[56] the Democratic Republic of Congo,[57] Côte d'Ivoire[58] or Sudan,[59] as well as establishing committees for the monitoring of their implementation.

Two distinct kinds of corporations may be taken into account in these decisions: those already involved in a given armed conflict and directly targeted by the sanctions, and all the others that are preventively prohibited from carrying out certain activities linked to this conflict.

Certainly, UN sanctions are practically limited, and cannot be compared in terms of efficacy with the actual laws holding corporations accountable for breaches of IHL. Given that it is the role of the UN member States to ensure the compliance with these resolutions, the UN Security Council has no authority to directly prosecute individuals, groups and legal persons violating its embargoes.[60] Nevertheless, the practice of the UN Security Council in imposing targeted sanctions preventing or restricting economic activities, and thus impacting corporate behavior in armed conflict, highlights the existence of selective mechanisms for imposing indirect responsibility on corporations for violations of IHL.

2. Soft Responsibility Mechanisms

Some international organizations, notably the UN and the Organization for Economic Co-operation and Development (OECD), have taken several initiatives aimed at improving the corporate compliance with rules of fundamental IHL.[61] These initiatives focus mainly on multinational corporations and target, in the context of IHL, corporate conduct in developing countries.[62] Although the standards promulgated by the UN and the OECD are not *per se* binding and are not

53. S.C. Res. 864, ¶ 19, U.N. Doc. S/RES/864 (Sept. 15, 1993).

54. S.C. Res. 1306, ¶ 1, U.N. Doc. S/RES/1306 (July 5, 2000).

55. *Id.* at Preamble, ¶ 6.

56. S.C. Res. 1267, ¶ 4, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

57. S.C. Res. 1493, ¶ 20, U.N. Doc. S/RES/1493 (July 28, 2003).

58. S.C. Res. 1572, ¶ 7, U.N. Doc. S/RES/1572 (Nov. 15, 2004).

59. S.C. Res. 1591, ¶ 3, U.N. Doc. S/RES/1591 (Mar. 29, 2005).

60. 2 INTERNATIONAL COMMISSION OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: CRIMINAL LAW AND INTERNATIONAL CRIMES 50 (2008).

61. For an overview *see* John Gerard Ruggie, *Business and Human Rights: The Evolving Agenda*, 101 AM. J. INT'L L. 819, 819-20 (2007).

62. *See* Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, ¶ 7, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, U.N. Doc. A/9559 (May 1, 1974); OECD, Annual OECD Roundtable on Corporate Responsibility, *The OECD Guidelines and Developing Countries: Building Trust, Summary* (June 14, 2005), *available at* www.oecd.org/dataoecd/42/23/35394320.pdf.

accompanied with judicial accountability mechanisms,[63] they tend to develop a body of soft norms playing a great role in practice.

Among the leading soft law standards for corporations are those promulgated by the OECD. Since 1976, the OECD has developed "Guidelines" for multinational enterprises (the latest version released in 2000),[64] which constitute a comprehensive instrument viewed as "the central international normative framework for corporate behaviour."[65] As such, these guidelines have a broader scope than IHL as they deal with issues such as disclosure, taxation and competition. However, they are governed by the general principle that enterprises should "[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments"[66] and include rules on employment, environment and bribery, all of them being vehicles for the integration of IHL rules.[67] An illustration of the outreach of these Guidelines in an IHL context may be found with the report of the UN Panel of Experts on the "Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo" that used the OECD standards as a "yardstick."[68] The panel listed the corporations considered to be in violation of the OECD Guidelines and recommended, *inter alia*, that "Governments and the UN should co-operate fully with investigations which are being launched by the ICC into, *inter alia*, the complicity of business in war crimes in the DRC"[69] (for the purpose of holding individuals accountable under international criminal law), highlighting the potential connections between the Guidelines and the implementation of IHL in the context of economic activities. More recently, in 2006, the OECD developed a "Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones," supplementing the Guidelines of 2000, in order to provide a stronger guidance for corporations in situations of government failures.[70] The innovative aspect of this instrument lies in its explicit reference to IHL, and notably in the scope of application of this instrument as it indicates that "weak governance zones can be identified by . . . serious violations of human rights and international humanitarian law and endemic violent conflict . . . involving potentially diverse combatants."[71] Special attention should therefore be paid to this new instrument in the coming years.

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63. Bernali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses*, 26 NW. J. INT'L L. & BUS. 43, 63-66 (2005).

64. OECD Guidelines for Multinational Corporation: Revision 2000, art. 2(2), June 27, 2000, 40 I.L.M. 237, available at http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532 _1_1_1_1, 00.html [hereinafter OECD Guidelines].

65. Helgesen, *supra* note 12, at 591.

66. OECD Guidelines, *supra* note 64, art. II(2).

67. *Id.* arts. IV-VI.

68. RAID, *supra* note 8, at 1.

69. *Id.* at 7. On this report and the OECD Guidelines, *see* Daniel Leader, *Business and Human Rights – Time to Hold Companies to Account*, 8 INT'L CRIM. L. R. 447, 451 (2008).

70. OECD, Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (June 9, 2006), *available at* http:// www.oecd.org/dataoecd/26/21/36885821.pdf.

71. *Id.* at 42.

The issue of corporate responsibility has also been put on the agenda of the UN.[72] Among the latest initiatives aimed at better framing corporate activities having human rights and IHL negative impacts, the "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights" adopted in 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights has reaffirmed and clarified the duty of corporations to respect IHL norms, notably concerning the security of persons and the rights of workers.[73] Although this instrument was not adopted by the Commission on Human Rights, the Commission requested the Secretary General to appoint a special representative on this issue with the mandate, *inter alia*, "[t]o identify and clarify standards of corporate responsibility and accountability for transnational corporations . . . with regard to human rights" and "[t]o research and clarify the implications for transnational corporations . . . of concepts such as 'complicity' and 'sphere of influence'."[74] As part of this mission, the recent reports published by the special representative John Ruggie have drawn up an inventory of the most relevant soft law instruments with their compliance and accountability mechanisms, including the OECD Guidelines,[75] highlighting how soft law has strengthened standards of corporate behavior in terms of compliance with IHL.

Interestingly, the Ruggie reports have devoted substantial attention to domestic judicial mechanisms for corporate responsibility, one of the reports pointing out "the extension of responsibility for international crimes to corporations under domestic law"[76] through the incorporation of the aforementioned international frameworks. This highlights the necessity to have recourse to domestic legal orders for an effective implementation of IHL rules.

III. THE EMERGING RESPONSIBILITY OF CORPORATIONS FOR VIOLATIONS OF IHL IN DOMESTIC LEGAL ORDERS

Previous developments have demonstrated that although there are emergent mechanisms aimed at improving standards of corporate behavior on an international level, the legal responsibility of corporations in the international legal

72. For a broad and recent analysis *see* Karin Buhmann, *Regulating Corporate Social and Human Rights Responsibilities at the UN Plane: Institutionalising New Forms of Law and Law-making Approaches?*, 78 NORDIC J. OF INT'L L. 1 (2009).

73. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion and Prot. of Human Rights, Fifty-fifth Session, *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,* UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (August 26, 2003). For an overview *see* David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 912 (2003).

74. ECOSOC, Commission on Human Rights, *Promotion and Prot. of Human Rights, Human Rights and Transnational Corporations and Other Business Enterprises,* U.N. Doc. E/CN.4/2005/L.87 (April 15, 2005).

75. *See* U.N. Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶¶ 45 – 62, U.N. Doc. A/HRC/4/35 (February 19, 2007); *see also* U.N. Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 92, U.N. Doc. A/HRC/8/5 (April 7, 2008) (*prepared by* John Ruggie).

76. U.N. Doc. A/HRC/4/35, *supra* note 75, ¶ 22.

order remains limited. Corporations bear duties under IHL but the *ratione personae* limitations of international criminal courts and tribunals as well as the lack of coercive powers of the Security Council to compel the implementation of its sanctions prevent their automatic enforcement. To some extent, these duties and sanctions are almost purely declaratory at the international level. As such, their enforcement lies in domestic legal orders. In fact, UN Member States have the obligation to implement Security Council resolutions adopting sanctions (A) as well as their specific IHL obligations, stemming from the various IHL Conventions, the Statute of the ICC or customary international law (B). As it requires a prior decision of the Security Council, the former may be described as an "indirect" channel of responsibility, whereas the latter results from "direct" prosecution or suits by victims against corporations at the domestic level.

A. Indirect Responsibility of Corporations Through the Domestic Implementation of Security Council Sanctions

Although indirect, the responsibility of corporations stemming from sanctions adopted by the Security Council is, in practice, the most effective tool to enforce IHL norms (2) given the almost "untouchable" legal authority of these resolutions that States have the obligation to implement (1).

1. The Duty of UN Member States to Implement Security Council Sanctions

Under Articles 25 and 48 of the UN Charter, UN member States have the duty to comply with the resolutions of the Security Council.[77] While they have the obligation to implement such decisions, "[r]esolutions of the Security Council leave to States the choice of means of implementation"[78] and there are almost as many forms and vehicles of implementation as there are States.[79] Given this diversity, only a few general remarks on the issue of implementation of these sanctions merit some attention.

Not implementing a resolution adopting sanctions under Article 41 would trigger the international responsibility of the recalcitrant State.[80] However, this

77. Article 25 provides that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council" and Article 48 that "(1) [t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. (2) Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are member". U.N. Charter arts. 25, 48.

78. Vera Gowland-Debbas, *Implementing Sanctions Resolutions in Domestic Law*, *in* NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY 33, 37 (Vera Gowland-Debbas ed., 2004). For an illustration of this latitude *see* U.N. Doc. S/RES/1572 (Nov. 15, 2004), *supra* note 58 (concerning the Côte d'Ivoire where the Security Council decided that "all States shall . . . *take the necessary measures* to prevent the direct or indirect supply . . . of arms or any related materiel, in particular military aircraft and equipment. . . ." (emphasis added)).

79. For a comparative study covering Argentina, Belgium, the European Union, Finland, France, Germany, Japan, Jordan, the Netherlands, Poland, The Czech Republic, South Africa, Namibia, Sweden, Switzerland, the United Kingdom and the United States *see* NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY (Vera Gowland-Debbas ed., 2004).

80. *See, e.g.*, Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925, 938-39 (2000).

obligation under the Charter does not necessarily mean that such resolutions are self-executing in domestic law. As an instrument derived from a treaty these sanctions have, most of the time, no direct effect and require a specific measure of implementation, highlighting "the importance of collaboration between what has been perceived as two autonomous legal orders."[81] However, this operation of transposition subjects the international sanction to domestic law which may gives rise to a conflict between the two and, as pointed out by one author, "conflicts between domestic and international law will be dealt with in accordance with the law of the forum; domestic courts bound by their own rules may not always uphold the primacy of international law and the consequences will depend on the place attributed to international law in the national system."[82]

In this context, issues have arisen from the judicial review of Security Council resolutions by national courts and the extent to which the latter could second-guess their validity,[83] particularly in the context of resolutions mandating targeted sanctions. Individuals and legal persons have indeed challenged national measures of implementation on the ground that they were adopted in violation of their fundamental rights. The recent judgment of the European Court of Justice (ECJ) in 2008 in the *Kadi & Al Barakaat* case highlights what may constitute an indirect judicial review of UN economic sanctions.[84]

This case arose from the Security Council sanctions against the Taliban regime pursuant to resolutions 1267 (1999) and 1333 (2000), and the establishment of the so-called "the Al-Qaida and Taliban Sanctions Committee" having the mission to designate individuals and entities targeted by these sanctions. Mr. Kadi and the Al Barakaat International Foundation, the latter being a Swedish legal person, contested before the ECJ the validity of the Regulation of the European Council implementing these sanctions[85] and notably their inclusion on the list updated by the Sanctions Committee on the grounds, *inter alia*, that their right to be heard and to an effective judicial review have not been respected.[86] Beyond discussions of the legal value of such resolutions in the European legal order,[87] the ECJ challenged the presumed immunity from jurisdiction of European measures implementing binding Security Council resolutions when such an implementation would do violence to the fundamental human rights safeguarded by the European legal order, and it pointed out that "in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and

81. Gowlland-Debbas, *supra* note 78, at 34.

82. *Id.* at 35.

83. Matthias Herdegen, *Review of the Security Council by National Courts: A Constitutional Perspective*, *in* REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 77 (Erika de Wet & André Nollkaemper eds., 2003).

84. Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council & Comm'n, 2008 E.C.R. I-06351.

85. Council Regulation 881/2002, art. 2, 2002 O.J. (L139) 10 (EC).

86. Kadi, 2008 E.C.R. I-06351, para. 40, 49.

87. Stefan Griller, *International Law, Human Rights and the European Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in Kadi*, 4 EUR. CONST. L. REV. 528 (2008).

entities covered by the restrictive measures . . . it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected."[88]

Thus, although it appears almost impossible to challenge the internal legality of a Security Council resolution (whether, for instance, there was a situation justifying the adoption of economic coercive measures under Article 41 of the UN Charter), when it comes to sanctions targeting individuals or legal persons, there exists a possibility to review the external legality of the resolution, that is to say, its implementation in the domestic legal order. Transposing these conclusions to resolutions having an impact on corporations, it seems therefore that the legal authority of general embargo measures is unchallengeable and corporations have to comply with these economic sanctions indirectly implementing IHL norms.

2. The Implementation of Security Council Sanctions Towards Corporations

The effectiveness of UN Security Council sanctions adopted in relation to violations of IHL compared with the prosecution before international or domestic tribunals lies in the absence of any *ratione personae* limitations, therefore facilitating the inclusion of activities conducted by corporations. One illustration may be found in the resolution 1493 (2003) concerning the conflict in the Democratic Republic of Congo where the Security Council decided "that all States . . . shall . . . take the necessary measures to prevent the direct or indirect supply, sale or transfer, *from their territories or by their nationals, or using their flag vessels or aircraft*, of arms and any related material . . . to all foreign and Congolese armed groups and militias . . ."[89] In a nutshell, "it is States that must enact domestic legislation to guarantee that those within their jurisdiction are not violating embargoes."[90]

At the same time, there are few examples of domestic prosecutions for violations of these Security Council embargoes. The International Commission of Jurists has recently reported two cases, in Italy and the Netherlands, involving legal actions against individuals, for illicit arms sales to Sierra Leone and Liberia.[91] Although none of them resulted in convictions, this NGO pointed out that "they may signal a new willingness on the part of national authorities to initiate prosecutions against business people who are involved in sanctions violations which give rise to crimes under international law."[92] Beyond the rare cases of prosecutions, it must be stressed that UN embargoes do not only potentially target those blatantly violating these sanctions but may affect corporations in the regular course of their activities. The case of the Turkish corporation Bosphorus is particularly illustrative of this dimension.

In 1992 Bosphorus Airways, a Turkish charter airline company, entered into an agreement with the Yugoslav national airline JAT, pursuant to which it leased

88. Kadi, 2008 E.C.R. I-06351, para. 334.
89. S.C. Res. 1493, ¶ 20, U.N. Doc. S/RES/1493 (July 28, 2003).
90. INTERNATIONAL COMMISSION OF JURISTS, *supra* note 60, at 50.
91. *Id.*
92. *Id.* at 50-1.

one of its airplanes for a period of four years, the Turkish company having control of the aircraft while JAT retained ownership.[93] Following the implementation of UN sanctions against the Federal Republic of Yugoslavia at the European level,[94] the Irish authorities impounded the aircraft while on maintenance at the Dublin airport,[95] although the lease agreement was not adopted to circumvent the UN sanctions and the rent due was paid into block accounts.[96] Bosphorus instituted proceedings in Irish courts to challenge the seizure of the aircraft, and the dispute was ultimately brought before the ECJ.[97] The European Court, despite recognizing that Bosphorus was a completely innocent party acting in good faith, considered, on the infringements of "Bosphorus' fundamental rights . . . to peaceful enjoyment of its property and its freedom to pursue a commercial activity,"[98] that:

> "[a]s compared with an objective of general interest so fundamental for the international community, which consists in putting an end . . . to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question . . . cannot be regarded as inappropriate or disproportionate."[99]

This case eventually ended before the European Court of Human Rights (ECtHR), Bosphorus alleging a violation of its fundamental right to property.[100] Recalling "that the general interest pursued by the impugned measure was compliance with legal obligations flowing from the Irish State's membership of the European Community,"[101] the ECtHR decided that "the impoundment of this aircraft did not give rise to a violation of this right."[102] The *Bosphorus* case is illustrative of how the enforcement of UN economic sanctions may affect corporations that would have not necessarily been considered accomplices of violations of IHL in other contexts.

In addition, the impact of UN sanctions may even exist regardless of their domestic implementation. Indeed, one author has underlined "that provisions of a Security Council resolution may affect the legal situation of individuals in their

93. Case C-84/95, Bosphorus Airways v. Minister for Transp., Energy and Commc'ns, Ir., para. 2, 1996 E.C.R. I-3953.

94. Council Regulation 990/93, 1993 O.J. (L 102) (EEC) (implementing UN Security Council Resolution 820 (1993)).

95. On the basis of Article 8 of the Council Regulation 990/93 which provides "[a]ll vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States." Council Regulation 990/93, art. 8, 1993 O.J. (L 102) (EEC); Bosphorus Airways, 1996 E.C.R. I-3953, para. 4.

96. Bosphorus Airways, 1996 E.C.R. I-3953, para. 3.

97. *Id.* para. 6.

98. *Id.* para. 19.

99. *Id.* para. 26.

100. Bosphorus Airways v. Ireland, App. No. 45036/98, (2005), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=45036/98&sessionid=33090221&skin=hudoc-en.

101. *Id.* para. 150.

102. *Id.* para 167.

direct consequences on contractual obligations, even in the absence of domestic implementing legislation"[103] and therefore rendering possible termination of contracts "on the basis of *force majeure.*"[104] Identically, such sanctions are applied by arbitrators, who are not subject to a domestic legal system, as an international public order.[105] These situations highlight, therefore, the existence of a little self-executing dimension of UN sanctions in contractual and/or arbitral disputes.

Thus, once IHL violations have passed through the filter of the UN Security Council, the sanctions adopted by the Security Council have a broad effect and may significantly impact corporations in the course of their economic activities, even those not closely connected to the IHL violations to which these sanctions relate. However, this mechanism of indirect corporate responsibility remains somewhat selective and limited as it requires a prior Security Council resolution and, most importantly, does not take into account the compensation of victims. This lack of restorative justice of UN sanctions may be corrected through more traditional – and direct – mechanisms of liability that have been gradually applied to corporations.

B. An Emerging Direct Liability of Corporations Through the Application of their International Obligations in Domestic Legal Orders

The integration of international obligations in domestic legal orders has created two channels of liability of corporations for violations of IHL norms: criminal and civil. However, establishing a strict distinction between the two remains a questionable stance. Indeed, in both cases, the liability stems from similar international obligations and, moreover, similar standards of corporate complicity are used, regardless of the civil or criminal form of liability.[106] But while the distinction between civil and criminal liability of corporations tends to be blurred from a substantive perspective,[107] it gives a clearer picture of two procedurally different channels of liability, the criminal (1) and the civil (2) mechanisms presenting distinct jurisdictional challenges.

1. Domestic Criminal Liability of Corporations

According to the widely accepted *nulla poena sine lege* principle, the prosecution and conviction of corporations for violations of IHL are subject to the existence of such offences in domestic legal systems as well as their applicability to legal persons.[108]

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103. Gowlland-Debbas, *supra* note 78, at 40.

104. *Id.*

105. Geneviève Bastid-Burdeau, *Les Embargos Multilatéraux et Unilatéraux et leur Incidence sur l'Arbitrage Commercial International*, REVUE DE L'ARBITRAGE 753, 775 (2003).

106. *See* Lillian Manzella, *The International Law Standard for Corporate Aiding and Abetting Liability*, 2006 EARTHRIGHTS INT'L 14 (observing that "U.S. civil aiding and abetting standards are remarkably similar to the customary international law standard"); *see also* G.A. Res. 8/16, ¶¶ 45-53, H.R.C., 8th Sess., U.N. Doc. A/HRC/8/16 (May 15, 2008) (discussing domestic criminal liability and domestic civil liability in relation to international standards).

107. Weigend, *supra* note 6, at 944.

108. The principle of *nulla poena sine lege* holds that there can be "no punishment without a law authorizing it." BLACK'S LAW DICTIONARY (8th ed., 2004).

The existence of domestic offenses for violation of IHL should stem primarily from the State obligations enshrined in the 1949 Geneva Conventions. Indeed, the four conventions impose on High Contracting Parties the obligation "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches,"[109] but also "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and . . . bring such persons, regardless of their nationality, before its own courts,"[110] not to mention that they may "hand such persons over for trial to another High Contracting Party"[111] under the principle *aut dedere aut judicare*. Despite these provisions offering States a broad jurisdictional basis to prosecute violations of IHL,[112] "the system is jeopardised by the fact that most States do not have suitable legislation."[113] These conventions include a substantive basis for prosecution of such crimes, but the absence of procedural norms as well as mechanisms of coordination between High Contracting Parties have jeopardized their effective and homogeneous implementation, if any.[114]

The implementation of the ICC Statute in the domestic legal systems of state parties has significantly reduced these national disparities and developed the inclusion of such crimes in national legislations. Although the ICC is subject to the "complementarity" principle[115] according to which the ICC shall determine that a case is inadmissible where it "is being investigated or prosecuted by a State which has jurisdiction over it"[116] or it "has been investigated by a State which has jurisdiction over it,"[117] it must be noted beforehand that the ICC Statute does not expressly compel state parties to implement the criminal prohibitions within its jurisdiction (genocide, crimes against humanity and war crimes – among which genuine IHL obligations) in their domestic laws. However, its ratification by state

109. GC (I), *supra* note 21, art. 46; GC (II), *supra* note 21, art. 50; GC (III), *supra* note 21, art. 129; GC (IV), *supra* note 21, art. 146.

110. GC (I), *supra* note 21, art. 46; GC (II), *supra* note 21, art. 50; GC (III), *supra* note 21, art. 129; GC (IV), *supra* note 21, art. 146.

111. GC (I), *supra* note 21, art. 46; GC (II), *supra* note 21, art. 50; GC (III), *supra* note 21, art. 129; GC (IV), *supra* note 21, art. 146.

112. Damien Vandermeersch, *La Compétence Universelle*, *in* JURIDICTIONS NATIONALES ET CRIMES INTERNATIONAUX 589, 891 (Antonio Cassese & Mireille Delmas-Marty eds., 2002).

113. Paolo Benvenuti, *Complementarity of the International Criminal Court to National Criminal Jurisdictions*, *in* ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT I, at 21, 29 (Flavia Lattanzi & William A. Schabas eds., 1999).

114. *See, e.g.*, David Turns, *Prosecuting Violations of International Humanitarian Law: The Legal Position in the United Kingdom*, 4 J. ARMED CONFLICT L. 1, 6 (1999).

115. John T. Holmes, *Complementarity: National Courts Versus the ICC*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY I, at 667 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

116. ICC Statute, *supra* note 24, art. 17(1)(a) ("The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.").

117. *Id.* art. 17(1)(b) ("The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.").

parties (110 so far) has led to a process of incorporation of these crimes in domestic laws.[118]

The existence of such legal bases is not enough alone in order to prosecute corporations as none of the existing IHL instruments "were drafted with legal persons in mind"[119] and, moreover, as mentioned above, the ICC Statute excludes legal persons from its *ratione personae* jurisdiction. Nonetheless, the growing recognition of the general criminal liability of legal persons and notably corporations in national legal orders,[120] added to the domestic transposition of international crimes, have been the vehicle for liability of corporations for violations of IHL. As pointed out by a recent report on this issue, "[s]ince most of the countries that have incorporated [international criminal law] into their domestic statutes also do not make a distinction between natural and legal persons . . . , these jurisdictions include corporations and other legal persons in their web of liability."[121]

A final aspect of domestic criminal liability of corporations compared with the vacuum left by the ICC deserves attention. The jurisdiction of the ICC is indeed limited *ratione personae* not only to individuals, but also by provisions stipulating that persons amenable to ICC jurisdiction must either be nationals of a State party to the Rome Statute,[122] or must have perpetrated their criminal conduct on the territory of a State party.[123] In the absence of one the two conditions, individual conduct must be related to a situation "referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."[124] It is significant that domestic criminal legislation does not include such limitations and makes possible, on certain conditions, the prosecution of a natural or legal person of any nationality and even for a conduct occurring abroad.[125] Therefore, it could be argued that the potential extension of domestic criminal laws to

118. Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*, FAFO, No. 536, 15 (2006), *available at* http://www.fafo.no/pub/rapp/536/536.pdf; *see* Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes*, 5 J. INT'L CRIM. JUST. 809, 814 (2007) (discussing the Australian case); *see* W. Cory Wanless, *Corporate Liability for International Crimes Under Canada's Crimes Against Humanity and War Crimes Act*, 7 J. INT'L CRIM. JUST. 201, 206 (2009) (discussing the Canadian case).

119. Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, 17 (December 2006) (unpublished manuscript), *available at* http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extrat rritorial-jurisdiction-Dec-2006.pdf.

120. *See* Weigend, *supra* note 6, at 928; *see also* FAFO surveys covering Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, the Netherlands, Norway, South Africa, Spain, Ukraine, the United Kingdom and the United States, *available at* http://www.fafo.no /liabilities/index.htm.

121. Ramasastry & Thompson, *supra* note 118, at 16.

122. ICC Statute, *supra* note 24, art. 12(2)(b). "[O]r, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft." *Id.* art. 12(2)(a).

123. *Id.* art. 12(2)(a).

124. *Id.* art. 13.

125. Ramasastry & Thompson, *supra* note 118, at 16-7.

corporations, coupled with the extended jurisdictional basis of domestic laws, "fill the impunity gap left by the ICC's focused jurisdictional approach [and] we should expect national courts to cast a wider prosecutorial net than the ICC."[126]

Therefore, the potential inclusion of corporate misbehaviors into domestic criminal law frameworks seems significant. It has, however, not been implemented in practice so far. Actually, the major cases involving corporate violations of IHL have arisen primarily within the civil liability framework, and notably in the United States under the Alien Tort Claims Act.

2. Domestic Civil Liability of Corporations

On paper, domestic civil liability mechanisms seem to be a more welcoming environment than domestic criminal law frameworks for the prosecution of corporations. In a nutshell, as pointed out by a recent report of the International Commission of Jurists on corporate complicity in international crimes, "[i]n every jurisdiction, despite differences in terminology and approach, an actor can be held liable under the law of civil remedies if through negligent or intentional conduct it causes harm to someone else."[127] Civil liability therefore gives more latitude than criminal liability in three main fields: (1) it applies indiscriminately to natural and legal persons whereas criminal law often restricts the liability of legal persons; (2) the characterization of a negligent or intentional conduct is not subject to the principle of legality; (3) it operates on a lower standard of proof than does criminal liability and; (4) it offers an independent source of financial redress for victims.[128]

However, important drawbacks of choosing the civil liability avenue must be highlighted: (1) *ratione temporis*, it is generally restricted in time and does not benefit from the absence of statutes of limitations (*imprescriptibilité*) attaching to violations of IHL in domestic law[129] (which is of great importance considering the frequent long time lapse between the perpetration of the crimes and the moment when victims get organized to seek a remedy); (2) it is limited by more stringent jurisdictional considerations and, *inter alia*, is not governed by universal jurisdiction mechanisms[130] (therefore it seems impossible to sue on civil grounds in State X for a violation of IHL perpetrated abroad on a foreign victim by a foreign corporation, which could be possible in a criminal prosecution under certain conditions); (3) the negligent or intentional conduct is not necessarily assessed by the yardstick of international humanitarian and criminal law, and the standard of causality between the conduct and the harm may differ from the one of complicity in a criminal context[131] and; (4) a civil liability claim, implicating persons with different nationalities, or dealing with harm that occurred abroad, involves the application of conflict of laws principles and, although the majority of countries

126. Wanless, supra note 118, at 205-06.

127. INT'L COMM'N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY VOL. 3, 10 (2008).

128. *Id.* at 4-6.

129. *Id.* at 44-5.

130. *Id.* at 49-51.

131. *Id.* at 13, 21.

apply the *lex loci delecti* principle (application of the law of the country where the harm occurred), domestic courts may implement different standards (the law of the country having the most significant relationship with the parties, the law of the country where the damage has arisen), therefore leaving an uncertainty surrounding the rules governing the dispute.[132]

Civil and criminal avenues both have their advantages and drawbacks and neither is a *per se* panacea. However, one ancient and long time dormant 1789 American federal statute, the Alien Tort Claims Act ("ATCA"), pursuant to which "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,"[133] deserves the utmost attention since it has combined the large scope of application of civil claims (favoring the inclusion of corporations and the more generous torts compensation standards), the incrimination stemming from international humanitarian law, an absence of time limitations on claims and an "universal jurisdiction" approach to extraterritorial reach.[134] These elements, coupled with the fact that the United States hosts a large number of major international corporations with worldwide branches and subsidiaries – thereby facilitating personal jurisdiction as well as the satisfaction of the claim – have generated an explosive legal mixture attracting civil litigation implicating corporate violations of IHL.

The recent growing application of this statute has given rise to countless literature dealing with several of the aforementioned procedural aspects.[135] The present discussion will be limited to the issues in connection with corporate violations of IHL and is comprised of the following points: (1) whether the ATCA covers violations of IHL (*ratione materiae*); (2) whether the ATCA applies to corporations (*ratione personae*) and whether corporations can be held liable of violations of IHL, notably as accomplices; (3) whether a parent company can be held liable for the misconduct of one of its subsidiaries; and (4) whether the ATCA permits an individual right of redress.

(1) Liability under ATCA depends on a violation of either "the law of nations" or of "a treaty of the United States."[136] The key issue, therefore, is whether IHL can be considered as one of these two sources. In this regard, the recent decision of the U.S. Supreme Court in *Sosa v. Alvarez-Machain* does not provide an unambiguous guide.[137] In this case, the U.S. Supreme Court stated that

132. *Id.* at 51-53; *see also* Eric Mongelard, *Corporate Civil Liability for Violations of International Humanitarian Law*, 88 INT'L REV. RED CROSS 665, 687 (2006).

133. 28 U.S.C. § 1350 (1991).

134. Corporations may not be prosecuted in the U.S. for international crimes considering that the relevant federal criminal statutes apply only to individuals. *See* Robert C. Thompson, *Survey Questions & Responses, Laws of the United States of America*, FAFO, 12-14 (2006), *available at* http://www.fafo.no/liabilities/CCCSurveyUS06Sep2006.pdf.

135. For the most comprehensive overview *see* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 259 (Ralph G. Steinhardt & Anthony D'Amato eds., 1999).

136. 28 U.S.C. § 1350 (1991).

137. Sosa v. Alvarez-Machain, 542 U.S. 692, 714-15 (2004).

beyond the three primary offenses that were foreseen in 1789 (violation of safe conducts, infringement of the rights of ambassadors, and piracy), the room is "open to a narrow class of international norms today."[138] It pointed out, however, that "federal courts should not recognize claims under federal common law for violations of any international law norm *with less definite content and acceptance among civilized nations* than the 18th-century paradigms familiar when §1350 [*the ATCA*] was enacted,"[139] endorsing therefore the inclusion of several related-IHL norms by lower federal courts which considered that genocide,[140] torture,[141] war crimes and violations of IHL (regardless of the international or non-international dimension of the conflict)[142] fall within the scope of the ATCA.

(2) On the *ratione personae* prong, it has been admitted in *Kadic v. Karadzic* that some violations of the law of nations may be committed by non-state actors, including war crimes and violations of IHL.[143] The extension of the ATCA to corporations was also expressly acknowledged in *Doe I. v. Unocal*[144] but explained in greater detail in *Presbyterian Church of Sudan v. Talisman Energy* where the court considered that "corporations may also be held liable under international law, at least for gross human rights violations."[145] Despite the absence of an international precedent explicitly attributing a violation of international law to a private legal person, some federal courts cited the Nuremberg "Industrial cases"[146] which demonstrate how certain corporations could be "[an] instrumentality of cohesion in the name of which the enumerated acts . . . were committed."[147] Relying on this authority which, as already discussed, did not recognize the actual

138. *Id.* at 715, 729.

139. *Id.* at 694 (emphasis added).

140. Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995) ("In the aftermath of the atrocities committed during the Second World War, the condemnation of genocide as contrary to international law quickly achieved broad acceptance by the community of nations.").

141. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) ("In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world . . . we find that an act of torture committed by a State official against one held in detention violates established norms of the international law of human rights, and hence the law of nations").

142. *Kadic*, 70 F.3d at 243 ("The District Court has jurisdiction pursuant to the Alien Tort Act over appellants' claims of war crimes and other violations of international humanitarian law."); *see also* In re Agent Orange Product Liability Litigation, 373 F.Supp.2d 7, 113 (E.D.N.Y. 2005) ("Although *Kadic* predates *Sosa*, the former's reasons for recognizing civil liability for war crimes under the ATS remains sound.").

143. *Id.* ("[U]nder the law of war as codified in the Geneva Conventions, all 'parties' to a conflict-which includes insurgent military groups-are obliged to adhere to these most fundamental requirements of the law of war . . . The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II").

144. Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002).

145. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003). The Court stated further that "[g]iven that private individuals are liable for violations of international law in certain circumstances, there is no logical reason why corporations should not be held liable, at least in cases of *jus cogens* violations". *Id.*

146. Jacobson, *supra* note 39, at 170.

147. In re Agent Orange, 373 F. Supp. 2d 7, 57 (E.D. N.Y. 2005) (quoting United States v. Krauch (the I.G. Farben case), 8 TRIALS WAR CRIM. 1081, 1152-53 (1952)).

criminal liability of corporations, the District Court however considered that "limitations on criminal liability of corporations do not necessarily apply to civil liability of corporations,"[148] thereby exploiting the civil aspect of the ATCA to extend its reach to corporations.[149]

(3) Considering the "complexity of modern business structures,"[150] another important element of ATCA litigation over corporations lies in the possibility to reach the parent entity when the violation has been committed by one of its subsidiaries. Contrary to the "aiding and abetting" standard where federal courts have eventually relied on international criminal law, courts have implemented domestic approaches when it comes to piercing the corporate veil.[151] Two arguments may be put forward to support this approach: the incompleteness of international law in this field,[152] and the necessity to respect federal due process standards since the piercing will also permit to establish personal jurisdiction over the defendant (usually the so-called "doing business" jurisdiction), which is a distinct issue from the subject matter jurisdiction stemming from the ATCA.[153] Federal courts are therefore more likely to apply alter-ego and agency theories in order to decide whether a parent company can be held liable for the conduct of one of its subsidiaries.[154]

(4) The issue of compensation is of the same nature. *Kadic v. Karadzic* underlined that "[t]he law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations,"[155] recognizing therefore the role of domestic law as a gap-filler and the use of a domestic standard for the reparation of a violation of the law of nations. The remedy available under

148. *Id.* at 57.

149. Regarding the "aiding and abetting" standard, federal courts have shown inconsistency, using both international criminal law as well as federal common law approaches of the concept. For a comprehensive analysis, *see* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 79 (2008). However, a recent decision of the Second Circuit indicates that liability for aiding and abetting in ATCA cases for corporations requires that the defendant "(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime." Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 277 (2d Cir. 2007).

150. INT'L COMM'N OF JURISTS, *supra* note 127, at 45 (pointing out that "[i]t is not uncommon for one business enterprise to now consist of a parent company with many subsidiaries . . . . In this context, there are a number of reasons why it may be important to consider the involvement of a parent company in the conduct of its subsidiary, when allegations of complicity in gross human rights abuses arise.").

151. In re South African Apartheid Litigation, 617 F. Supp. 2d 228, 271 (S.D.N.Y. 2009).

152. *Id.* ("Piercing of the corporate veil reflects the protection provided to business organizations by domestic law. Therefore, the question of alter ego liability does not raise the same universality concerns as does the recognition of individual torts under *Sosa* . . . [and] the international law of agency has not developed precise standards for this Court to apply in the civil context. Therefore, I will apply federal common law principles concerning agency.").

153. *Id.* at 277.

154. *See id.* at 271 for a recent application in an ATCA case.

155. Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995); *see also* Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 269 (2d Cir. 2007) ("The common law thus permits the 'independent judicial recognition of actionable international norms'.").

the ATCA is therefore subject to the generous monetary compensations awarded in tort disputes[156] and claimants have been awarded relief "often including millions of dollars in punitive damages,"[157] although the damages obtained against individuals have rarely been recovered.[158]

In a nutshell, as pointed out in a recent ATCA case, "[t]he task of a domestic court is to provide a forum, procedures, and a remedy,"[159] that are not available in the international arena against corporations. While the conditions of its application are stringent and it should not be seen as an easy source of redress for victims,[160] the ATCA has proven to constitute one of the mechanisms, among others, of enforcement of IHL norms. Its uniqueness lies in the way it has operated to encompass both IHL norms and international criminal law within the domestic law of torts, two spheres fundamentally unfamiliar to each other but having established their compatibility when their respective role is adequately allocated.

IV. CONCLUSION

An analysis of the responsibility of corporations for violations of IHL has highlighted the crucial role of States. Indeed, the limitation to the *ratione personae* jurisdiction of the ICC as well as the necessity of a domestic implementation of the UN Security Council resolutions have demonstrated that the accountability of corporations in the international arena is still largely hypothetical and requires the competences of national legal orders.

UN sanctions, although requiring a Security Council resolution, have constituted an original and effective mechanism of indirect enforcement of IHL norms with a broader scope of application potentially affecting innocent bystanders, *e.g.* corporations that would have never been held liable for violations of IHL under the ATCA even by implementing the looser "aiding and abetting" standards.

From a judicial perspective, while domestic criminal liability of corporations for IHL violations is in ferment and its potential has not been widely explored yet, the civil liability framework of the ATCA has demonstrated its broad potential to hold corporations accountable. Besides, one of the recent Ruggie reports has implicitly advocated the development and the implementation of the ATCA model abroad, recommending notably that "[s]tates should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory [and] should address obstacles to access to justice, including for

156. Thompson, *supra* note 134, at 13 ("The U.S. has a robust tort system, both at the state and federal levels, and victims of torts connected with violations of international criminal law or international humanitarian law may sue for damages and other relief, either individually or as part of a class action suit.").

157. *Id.* at 16. Footnote 54 of the preceding source lists examples of damages awarded under ATCA cases. *Id.*

158. ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW 63-4 (Martinus Nijhoff Publishers 2004).

159. In re South African Apartheid Litigation, 617 F. Supp. 2d 228, 256 (S.D.N.Y. 2009).

160. Harold Hongju Koh, *Separating Myth From Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 269 (2004).

foreign plaintiffs – especially where alleged abuses reach the level of widespread and systematic human rights violations."[161]

While we are witnessing an internationalization of criminal law as well as an impressive international criminalization of violations of IHL by individuals, the most promising future for the liability of corporations for the same violations – although their involvement is usually not of same amplitude – possibly lies in an expansion of domestic civil liability frameworks, overcoming the reluctance of some States to recognize the criminal liability of corporations. At the same time, it is possible that this development in the civil liability arena would constitute just one step towards the emergence of a most comprehensive global framework for corporate responsibility.

The international community, through the development of several soft law instruments, has shown its will to better regulate the activities of multinational corporations. The possible expansion and progressive customary crystallization of domestic civil liability of corporations for IHL violations could pave the way to an initiative for an internationalization of this process and – why not – lead to the establishment of an international civil tribunal to this end. Just like States, corporations have been excluded from the *ratione personae* jurisdiction of the ICC[162] and, as States, corporations are sometimes the social instrumentalities of IHL abuses. However, international responsibility exists for the former, but it is still at the stage of chrysalis for the latter. More comprehensive legal accountability mechanisms for corporations would certainly be an effective tool for implementing IHL, economic and reputational pressure and the fear of the financial stick being the best carrots to drive corporations towards a more global and effective compliance with IHL.

161. *Protect, Respect, and Remedy*, *supra* note 75, ¶ 91.

162. Eser, *supra* note 4141, at 779.