Ensuring Responsibility under International Law for Transnational Corporations for Crimes Committed in Situations of Armed Conflicts

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List of Acronyms

ARIO - Articles on the Responsibility of International Organizations

ARSIWA - Articles on Responsibility of States for Internationally Wrongful Acts

ATT   - Arms Trade Treaty

BIT   - Bilateral Investment Treaty

CETA - Comprehensive Economic and Trade Agreement

CIS   - Common-wealth of Independent States

CSR   - Corporate Social Responsibility

DRC   - Democratic Republic of Congo

EC    - European Council

ETS   - European Treaty Series

EU    - European Union

FDI   - Foreign Direct Investment

GATT  - General Agreement on Tariffs and Trade

GDP   - Gross Domestic Product

ICC   - International Criminal Court

ICTR  - International Criminal Tribunal for Rwanda
ICTY - International Criminal Tribunal for the former Yugoslavia

ILA - International Law Association

ILC - International Law Commission

ILO - International Labor Organization

IMF - International Monetary Fund

ISDS - Investor State Dispute Settlement

MNE - Multinational Enterprise

NAFTA - North American Free Trade Agreement

NGO - Non-Governmental Organization

NSA - Non-State Actor

OECD - Organization for Economic Co-operation and Development

PMSC - Private Military and Security Company

SCSL - Special Court for Sierra Leone

TFEU - Treaty on the Functioning of the European Union

TNC - Transnational Corporation

TPP - Trans-Pacific Partnership

TTIP - Transatlantic Trade and Investment Partnership
UK  - United Kingdom

UN  - United Nations

UNCTAD – United Nations Conference on Trade and Development

UNDP - United Nations Development Program

UNGA - United Nations General Assembly

UNTS - United Nations Treaty Series

USA  - United States of America

UNSC - United Nations Security Council

USD  - United States Dollar

WTO  - World Trade Organization
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1. Introduction

1.1 Background

The debate on the responsibility of corporations towards society is not novel. The agitation on ethical implications of business activities predates the industrialization era. However, the concept of corporate social responsibility (CSR) began to gain momentum in the mid-twentieth century, due to increased consumer activism and advances in communication technologies. But, CSR alone has not been able to tame the corporate bulls. One argument has been that governments have used CSR as a substitute for their own failure to address the social consequences of globalization, while others, especially trade unions have argued that businesses were using CSR to go around regulations and trade unions.

This study brings transnational corporations (TNCs) to fore as significant actors in the new world order in the wake of globalization.

1.2 Transnational Corporations (TNCs) Defined

TNCs are known and referred to by different names, including Multinational Enterprises (MNE), multinational or international corporations (MNCs) and so on. In the Report of the UN Secretary General to the Economic and Social Council, the term MNC was originally used, and it was defined as an enterprise that owns or controls production or service facilities outside the country in which the enterprise is based. This terminology later changed to TNCs to emphasize the cross border operation of these companies and to distinguish them

* All websites accessed 1 May, 2017


from MNCs, which are owned and controlled by entities from several countries. This distinction was later abandoned in the 2003 Draft Norms on Transnational Corporations and Other Business with Regards to Human Rights, wherein the term “transnational corporation” (TNC) was defined as an economic entity operating in more than one country, or a cluster of economic entities operating in two or more countries. The OECD and ILO instruments use the term Multinational Enterprises (MNE), to mean companies or entities established in more than one country. The United Nations Conference on Trade and Development (UNCTAD) has defined TNCs as incorporated or unincorporated enterprises comprising parent enterprise and their foreign affiliates. The ILA has defined TNC as a legal entity separate from its owners which have international operations and control productions and services outside its home State. However, scholars are of the opinion that the terms MNCs and TNCS are generally used synonymously. These names are used interchangeably here and where applicable, the term corporation is also used in the same context.

This study traces the legal trajectory of corporate accountability, from CSRs to other initiatives that have sought to vest accountability on corporate entities. It argues that the extant

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6 Peter T. Muchlinski, Multinational Enterprise and the Law (2nd ed, Oxford University Press 2007) 6
7 See article 20, Norms of Responsibility for TNCs 2003
9 OECD Guidelines for Multinational Enterprises (n12) part1 chapter 1 at 4
10 UNCTAD, [www.unctad.org]
11 The International Law Association; Washington Conference of 2014 on Non-State Actors (NSA) p 5
12 Wouters and Chane Multinational Corporations in International Law; Leuven Center for Global Governance Studies Working paper N0 129, December 2013 P.3
regime is not well developed compared with burgeoning economic strength of TNCs. It fur-
ther argues that TNCs are key actors in armed conflict situations as most conflicts do have
economic undertones. But, the extant regime is not well suited to make TNCs answerable for
atrocities committed conflict situations. Hence there is the need for a regime of international
legal responsibility for TNCs.

In this Master thesis, I would use the term responsibility as understood within the law of in-
ternational responsibility, i.e. legal responsibility for corporations or corporate legal respon-
sibility. Legal responsibility in this context entails responsibility that is based on established
legal norms, and the violation of such norm attracts sanctions by the courts. This is distinct
from the broader term of accountability, which requires corporate accountability to society
that is based on voluntary and generally accepted social norms. Accountability therefore is
understood to include non-binding obligations such as CSR and voluntary codes of conducts.

This study analyses the realities of armed conflict situations and proposes a need for a regime
of binding legal obligations for TNCs for crimes committed in such situations. Therefore, the
term responsibility, as captured in Ensuring Responsibility under International Law for TNCs
for Crimes Committed in Situations of Armed Conflict entails binding legal obligations to re-
gulate the conduct of TNCs for atrocities committed in conflict situations.

Responsibility for TNCs exists mainly on the domestic level and within municipal jurisdic-
tions of various States, because of the absence of an international mechanism for corporate
entities in this regard. At the domestic level, responsibility is in twofold: civil liability requi-
ring pecuniary compensation for loss suffered by the victims of corporate crimes, and criminal
sanctions by way of awarding criminal fines and penalties against corporations. A case in
point is the B.P Oil Spill Case.\textsuperscript{13} In this case, B.P incurred both civil and criminal liability for
oil pollution resulting from B.P’s exploration activities on the Gulf of Mexico. B.P agreed to a
plea of guilty to the offences of felony, manslaughter, environmental crime and obstruction of

\textsuperscript{13} U.S.A v B.P Exploration & Production Inc., (Oil Spill by the Oil Rig “Deepwater Horizon”
in the Gulf of Mexico, on April 20, 2010), (2012) United States District Court, East Dis-
trict of Louisiana Case2:10-cv-04536 Doc1 File 12/15/10
Congress and B.P was fined the sum 4 billion U.S.D, for these offences. The U.S government also filed a civil suit against B.P under the Clean Water Act of 1972, for unlawful discharge of oil into and upon navigable waters of U.S.A. The U.S government also sought compensation for cost that the U.S government incurred in cleaning up the oil spill and also claimed damages under the Oil Pollution Act of 1990.

In the *Trafigura case*, Trafigura, a Dutch international petroleum trader had chartered the ship Probo Koala for discharge of toxic wastes. The ship discharged the toxic wastes at Abidjan, Côte d’Ivoire, in open air sites around Abidjan. After the waste from the ship was discharged in Abidjan, people living near the discharge sites began to suffer from a range of illnesses (nausea, diarrhea, vomiting, breathlessness, headaches, skin damage, and swollen stomachs). Sixteen people died, from exposure to this toxic waste, and more than 100,000 sought medical attention. In February 2008, Dutch prosecutors served notice that they intend to file criminal charges against Trafigura, among others, for the company’s alleged part in the disposal of waste in Côte d’Ivoire. In July 2010 the Dutch court ruled that the company had concealed the dangerous nature of the waste aboard the Probo Koala and fined the company €1 million.

This study demonstrates that both civil and criminal liability under municipal law is not enough to curb wrong doing by an enterprise that is transnational in nature. As the transnational flow of international financial capital between TNCs and subsidiaries can be used to circumvent the legal fiction of separate legal personality of a subsidiary company, which is understood as a distinct legal entity from the parent company.

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16 The court found that the company violated art 18(1) of the Council Regulation (EEC) 259/93 implementing the Basel Convention. See the *Trafigura case* (2010) Court of District Amsterdam, Judgment of 23 July 2010 Case number 13/846003-06. The judgment was also confirmed by the Dutch Court of Appeals. See Trafigura Case (2011) *supra*
1.3 The Trajectory of Corporate Accountability

There have been several attempts on the international plane to regulate TNCs, most of which are of a nonbinding character. The most notable guidelines for ethical business behaviors include: the OECD Guidelines for Multinational Enterprises,17 the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy18 and the UN Global Compact that was launched in 1999.19 More recent, is the initiative at the UN Sub Commission on Human Rights and the General Human Rights Obligation of Corporations. The UN Sub Commission in 2003 approved the Norms of Responsibility of TNCs and Other Business Enterprises with Regard to Human Rights, after about four years of consultations and discussions.20 But these norms were not adopted by the Human Rights Commission, when they were transmitted to the Commission.21 In the light of subsequent studies prepared by the Office of the High Commissioner for Human Rights, the Commission decided in April 2005 to request the Secretary General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprise.22

On 16 June 2011 the Human Rights Council in resolution A/HRC/RES/17/4 endorsed Guiding Principles on Business and Human Rights for implementing the UN “Protect, Respect and Remedy” Framework, which provided a global standard for addressing the ad-

19 The mechanism for monitoring the activities of the companies that have signed the compact is not well developed, and the Compact is vague See Andrew Clapham, Human Rights Obligations of Non-State Actors Oxford University Press (2006) (hereafter referred to as A. Clapham 2006). p 225
21 In its Decision 2004/116, the UN Commission on Human Rights affirmed that document E/CN.4/Sub.2/2003/12/Rev.2 had not been requested by the Commission and the draft proposal had no legal standing.
verse impacts on human rights from business activity. The principles are organized under the UN Framework’s three pillars namely:

- The State Duty to Protect Human Rights
- The Corporate Responsibility to Respect Human Rights
- The need for greater Access to Remedy for victims of business-related abuse.

This framework, also known as the Ruggie Principle has been criticized by some scholars because the duty to protect makes the State the predominant institution for regulating TNCs. And denying that companies have any direct human right obligation merely embraces the traditional approach of international law towards NSAs. More so, the Ruggie principles failed to recognize the limitation of soft-voluntary regulations as well as the business case for human rights that has led to a push for a legally binding human right obligation for corporations.

Bilchitz and Deva argues that a binding obligation for corporation can be derived from international human rights law by necessary implication but social expectations are inadequate sources of binding normativity. Other scholars are of the opinion that the general acceptance of the Ruggie principles cannot hide the view of many actors that legally binding rules are needed. The International Commission of Jurists has stated that the UN Protect, Respect and Remedy Framework of 2008 and the Ruggie Principles of 2011 do not address all issues on responsibility of TNCs, nor do they provide solutions to the problems.

At this point, one wonders what the way forward might be, maybe a move from soft law to hard law obligations?

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24 Ibid
25 Bilchitz and Deva 2013 p 19
Chapter 2 of this study shall discuss how the emergence of non-state actors (NSAs) such as TNCs in the face of globalization has undermined the internal political processes of the classical Westphalian State. And demonstrates that this ability of TNCs to undermine internal political process of States is because of the wealth of TNCs that cuts across different national boundaries, which makes TNCs major economic powers in the new order as well as influential entities in their host States. Chapter 3 focuses on how the pursuit of profit by TNCs extends into armed conflict situations, as a result of perverted business practices that fuels armed conflicts by trading in illicit conflict commodities. This research identifies this situation as a lacuna wherein this under developed regime of corporate responsibility in situations of armed conflicts needs to be addressed by international law, in order to make corporations responsible for atrocities that they commit in situations of armed conflict.

This thesis suggests adopting an international norm of corporate responsibility as a solution to addressing the involvement of TNCs in armed conflict situations. There already exist several regimes of responsibility for different international actors, including States, under the International Law Commissions Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), and International Organizations, under Articles on Responsibility of International Organizations (ARIO). And there is individual criminal responsibility for natural persons in international criminal law, for individual culpability for crimes committed in situations of armed conflict. However, TNCs can walk away for perpetrating the same acts for which international law vests culpability on States and natural persons.

1.4 Objective
This thesis seeks to address the lacuna in the extant international law regime of accountability for corporate entities for atrocities committed in situations of armed conflict. This is in view of the burgeoning roles of TNC’s in armed conflict situations and present day realities of armed conflicts in different parts of the world.

1.5 Research Question
How can international legal accountability for TNCs involvement in international humanitarian law (IHL) violations in situations of armed conflict be improved?

1.6 Research Methods
In exploring the responsibility of TNCs in situations of armed conflicts, this study would take a legal positivist approach by reference to variety of legal sources as contained in article 38 of the ICJ Statute. This study would therefore refer to primary sources of law as contained in international treaties, customary international law, and general principles of international law.
Recourse is also made to other legal sources, such as judicial decisions from international courts and tribunals as a means of delineating the possible construction of treaty provisions as well as understanding the position of the law on corporate responsibility in situations of armed conflict. Recourse is further made to opinions of legal scholars to illuminate on certain areas of scholarly debates. And to newspapers and media publications, to demonstrate how this research engages with recent happenings. Available data from international organizations, research institutions, and Non-Governmental Organizations (NGOs) in relation to TNCs involvement in armed conflict situations are also used to appraise international consensus as well as complement understanding of contentious issues in this regard. This study also takes an axiological approach in evaluating existing international law on corporate accountability for crimes committed in situations of armed conflict, with a view of proposing new norm on corporate legal responsibility in this regard.

1.7 Structure of Research

This study brings to light the rise of NSAs such as TNCs because of globalization. It argues that the State centric international system that led to creation of the UN does not reflect the realities of actors in international law today. And this is because of wealth of some actors such as TNCs and the influence that these TNCs have over political authorities in their host nations.

This study further argues that said influence of TNCs extends to situations of armed conflict. This is because of crude economic motives of some corporation that have lured them to trade in illicit conflict resources in the theaters of war. In doing this, this study analysis State and individual liability under international law and further explains that TNCs with better financial capabilities are also involved even to a higher degree in the same acts for which international law finds States and private individuals culpable. However, international law does not have a developed regime of responsibility for TNCs with regard to atrocities committed in situations of armed conflict.

The study therefore narrows the issue at stake to a void in international law, owing to absence of a defined regime of responsibility for TNCs
2. Transnational Corporations (TNC) as Non-State Actors (NSA)

2.1 Background

Since the 1940s, corporations have played important roles in the economic agenda of nation-states. For example, commercial enterprises such as Continental Oil exploited crude oil on occupied territories in all continental Europe in conjunction with the German Nazi government in the Second World War.28

Also, the production and exporting of agricultural products in colonial Nigeria was dominated by British companies such as the United Africa Company, John Holt, Paterson and Zochonis (PZ) and Lever Brothers, all of which were instrumental in maintaining British control over the Nigerian market.29

This chapter focuses on how the rise of TNCs in contemporary society is undermining the power of nation-states. It analyzes the role of TNCs as important NSAs with significant economic influence arising from neo liberal globalization. In other words, it demonstrates that the State centric system of international law does not reflect the realities of present day actors in international law owing to financial capital of TNCs that now surpass that of many nations, especially developing nations of the global south.30 This also accounts for why corporations have strong political influence in their host States.

30 It is worth mentioning that there are some of the big TNCs that are headquartered in some BRICS (Brazil, Russia, Indian, China and South Africa) nations, for example, the Chinese run copper mine firms like China Luanshya Mine in Zambia.
2.2 Transnational Corporations (TNC) as Non-State Actors (NSA)

The term NSA has been defined as a legally recognized and organized entity that is not comprised of nor governed or controlled by a State nor group of States, but perform functions in the international arena that have real or potential effects on international law.\(^{31}\)

The emergence of various NSAs on the international scene has resulted in a lacuna in the international regime of responsibility, in an international community that is ostensibly State centric. One the most important NSAs are TNCs. In today’s global economy, TNCs possess great economic might and some of them are wealthier than some developing nations.\(^ {32}\)

Through privatization of State assets and different public partnerships, these corporations have assumed responsibilities that traditionally fell to the State. Such responsibilities include the production and distribution of electricity and provision of vital transport and financial infrastructures that were exclusively duties of the State. However, while TNCs increasingly took on State responsibilities both in their home and host countries; they lacked the accountability and transparency of State entities in international law, as they are not parties to international treaties.

It is therefore not surprising that as far as the 1970s there have been initiatives to close the perceived accountability gap and to rein in the power of TNCs by subjecting them to binding obligations under international law.\(^{33}\) This is because of the significant roles corporations play in international scenes as a result of their economic strength. For example, in 1970, an American Multinational Corporation (ITT Corporation) allegedly engineered an attempt to overthrow the democratically elected government of Salvador Allende in Chile.\(^ {34}\) The ILA has also stated that NSAs such as Multinational Corporations (MNC)\(^ {35}\) perform functions in the international arena that have real or potential effect on international law.\(^ {36}\)

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31 See The working definition of NSA adopted by the International Law Association (ILA) Committee on NSA, Working Session Tuesday 9 August, 2016


34 UNESCOR (1222\textsuperscript{nd} Meeting) P. 1922 UN Doc E/SR, 1822 1972


36 Ibid p. 6
It is owing to these realities that the pervasiveness of international law has expanded into much of the areas that were falling primarily or solely within the domestic jurisdiction of States. The need for an international norm of corporate responsibility for serious violations of human rights continues the trajectory that the law has taken, and it also represents new challenges for the enterprise. These emerging international norms challenge the State’s exclusive prerogative to regulate business enterprises, while simultaneously making corporations duty-bound to respect human rights.

### 2.3 The Rise of TNCs – The Power of International Financial Capital

Contemporary global governance is constantly evolving, constituted by formal and informal institutions, relationships among States, and private organizations, groups and individuals through which collective interests in the global sphere are articulated. The State in today’s society appears to be just an embodiment of how governance is ordered as NSAs are performing tasks classically fulfilled by States in the past.

The past four decades have seen the rise of global business. For example, Global Foreign Direct Investment (FDI) inflows grew in 2006 for the third consecutive year to reach 1,306 billion USD, the second highest level ever recorded. All three major country groups – developed countries, developing countries and the transition economies of South-East Europe and the Common-wealth of Independent States (CIS) – have witnessed continuous growth in FDI.

UNCTAD has stated that corporations account for that 29% of the world’s 100 largest economies. In 2000, ExxonMobil with an estimate of 63 billion USD was said to equal the size

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38 Ibid
39 ILA, 2010 Hague Report, P4
40 Ibid
42 Ibid
of economies such as Chile or Pakistan. The 100 largest TNCs accounted for 4.5% of the world’s economy in 2000 as opposed to 3.5 percent in 1990. This shows a steady increase in economic powers of TNCs over time owing to the growth of capitalism and the expansion of free trade through the World Trade Organization (WTO).

If Walmart was a country, its revenue will make it on par with the GDP of the 25th largest economy in the world, surpassing 157 smaller countries. The big corporations in the world have increased their wealth compared to nation-States, illustrating the growing power of transnational businesses. The situation today reveals that the top 100 economies of the world are made up of 31 countries and 69 corporations.

It is therefore not surprising that the drafting of key international economic treaties is often done either at the instigation of, or with the direct involvement of TNCs. For example, the Trade-Related Aspects of Intellectual Property Rights 1994 was a result of corporate lobbying of twelve U.S corporations. Pfizer executives were part of the elite group of business leaders who began to lobby U.S Government for inclusion of intellectual property in GATT.

Also, the ability of TNCs to bring international claims in international economic law is now considerable, as the main participants in several areas in international economic law are primarily States and corporations who are often acting on equal terms. Corporations are more of the global players in today’s world as a result of neoliberal globalization. More so, the pressure to achieve high economic growth rate and attract FDI have

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45 ibid
46 see Vincent Trivett; 27 July 2017; 25 US Mega Corporations: Where They Rank if they were Countries Business Insider; www.businessinsider.com
tempted developing countries to accept even projects that are environmentally risky, as most developing countries mainly turn to TNCs investment.\(^{51}\)

This means that TNCs are in a powerful position in global economy such that nations are conscious of preserving or securing investments and economic ties with corporations. It is this power of TNC’s over a country’s economy or access to resources that accounts for why some States are unable or unwilling to hold TNCs accountable.\(^{52}\)

### 2.4 The Power of International Financial Capital vis-à-vis the Classical Westphalian State

Global power, that is the power of financial capital of big companies, is the livewire of the nation-State economy today.\(^{53}\) Also, the ability of national governments to pursue their economic agenda is dependent on endorsement by international capital and its proxies.\(^{54}\)

It is owing to some of these realities that there has been the need to elaborate an international legally binding instrument on TNCs and other business enterprises with respect to human rights.\(^{55}\) The UN human rights machinery has been exploring ways for corporate actors to be held more accountable for the impact of their activities on human rights.\(^{56}\) This is evident of an awareness of the significance of non-State entities like TNCs.

TNCs now have the ability to use their financial powers to undermine State processes, and the power of the nation-State is gradually diminishing from what was seen as the sole legal entity in international law owing to the assault of transnational capital.\(^{57}\) The old forums still exist – Parliaments and Congress, but some of the power they once contained has reemerged where

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\(^{52}\) Hackett, Moffett (2016) “Mapping the Public/Private-law Divide: A Hybrid Approach to Corporate Accountability”; *International Journal of Law in Context* p.8

\(^{53}\) Gary Younge, Monday 2 June 2004; *Who is In Control – Nation States or Global Corporation?* The Guardian, [www.theguardian.com](http://www.theguardian.com)

\(^{54}\) ibid


\(^{56}\) UN Human Rights Office of the High Commissioner: Business and Human Rights; [www.ohchr.org](http://www.ohchr.org)

\(^{57}\) George Monboit, 6 December 2016; No *Country With A Macdonald’s Can Remain A Democracy*, The Guardian Tuesday (hereafter referred to as Monboit 2016); [www.theguardian.com](http://www.theguardian.com)
the electorates can no longer reach it.\textsuperscript{58} Political powers have slipped into the dictates of international organizations such as the IMF and European Central Banks, which respond not to people but to the financial sector.\textsuperscript{59} International treaties and contracts such as NAFTA, the proposed Transatlantic Trade and Investment Partnership (TTIP) are crafted behind closed doors dominated by corporate lobbyists.\textsuperscript{60} And these lobbyists are able to slip in clauses that might not be approved by informed electorates, such as establishment of opaque offshore tribunals through which corporations can bypass national courts, challenge national laws, and demand compensations for results of democratic decisions.\textsuperscript{61} Monbiot argues that these treaties make a mockery of democracy.\textsuperscript{62} President Roosevelt, in his message to the United States Congress in 1938, warned that the liberty of democracy is in danger where the people allow growth of private power to a point that it becomes stronger than the democratic State.\textsuperscript{63}

A case in point is the Apple Tax Case, between Apple, Ireland and the European Commission (EC),\textsuperscript{64} wherein notwithstanding the ruling of the EC that Apple owed the Irish Republic 13 billion Euros (11 billion British Pounds), the government of Ireland disagreed with the ruling of the EC, instead supported Apple in appeal against the tax ruling and thereby refusing windfall in taxation that would mean a lot to the Irish economy. According to the EC, Apple paid an effective corporate tax rate of 1 per cent on its European profits in 2003 down to 0.005 per cent in 2014, equivalent of 50 Euros for every million.\textsuperscript{65} The EC found that Ireland was in violation of Article 108(3) on TFEU and Article 2 of Council Regulation (EU) 2015/1589 on aid notification obligation, as it did not inform the Commission of any plan to grant aid.\textsuperscript{66}

\textsuperscript{58} Ibid
\textsuperscript{59} Monboit 2016
\textsuperscript{60} Monboit 2016
\textsuperscript{61} Monboit2016
\textsuperscript{62} Monbiot 2016
\textsuperscript{63} Franklin D Roosevelt; April 29, 1938 “Message to Congress on Curbing Monopolies”; online by Gerhard Peters and T. Woolley; The American Presidency Project; www.presidency.ucsb.edu
\textsuperscript{65} European Commission Press Release Database; State Aid: Ireland Gave Illegal Tax Benefit to Apple Worth up to 13 billion Euros Brussels 30 August, 2016 www.europa.eu
\textsuperscript{66} European Commission’s Decision of 30.8.2016 on State Aid SA.38373 supra p 119
The EC also stated that by the provisions of article 1(f) of Regulation (EU) 2015/1589, the tax contested by Ireland constituted unlawful aid, in contravention of Article 108(3) of the TFEU.67

In the debate at the Irish parliament, Prime Minister Enda Kenny had stated that “the ruling (against Apple) could not be allowed to stand”. Whereas, Gerry Adams, the leader of the opposition party had stated that “we wanted companies like Apple in Ireland but this does not mean that one should turn blind eyes to tax evasion or avoidance.”68

The Irish support for Apple in the face of an EC ruling is evident in the fact that FDI has been a cornerstone of the Irish economic strategy since 1980.69 This speaks a lot of the type of influence TNCs have over their host States.

In the wake of Brexit, which is a topical issue in the Eurozone, one reason for concern has been the growing threat by corporations to pull investment from the U.K after Brexit.70 This is also evident of the influence of corporate entities over the economic agenda of the nation-State.

Little wonder why the UN High Commissioner for Human Rights has recently called on business leaders to use their considerable influence to prevent human rights violation in countries where they operate.71 Even though technically speaking, corporations are not signatories to international human rights treaties.

In the case concerning the Ok Tedi Copper and Gold Mine72 in Papua New Guinea, the activities at Ok Tedi Copper and Gold Mine had caused pollution of the environment through riverine disposal of tailings and other mine wastes. The Wau Ecological Institute of Papua New Guinea assisted several representatives of the OK Tedi River present their grievances against the mine at the Second International Water Tribunal in The Hague in 1992. The Tribunal

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67 Ibid
68 Agence France-Presse; 8 September 2016 ‘Irish MP’s Back Apple in Appeal Against EU Tax Ruling’ www.telegraph.co.uk
70 Independent News, Tuesday 24 January 2017; Brexit: Microsoft is the Latest Major Company to Threaten to Pull Business From the U.K; www.independent.co.uk/
found that the company Broken Hill Propriety Company, Ltd. (BHP), was guilty of violating the rights of people living downstream and criticized the company for using its foreign earning power to compel the government of Papua New Guinea to lower its environmental standards.\(^\text{73}\)

This was also the situation in Bangladesh, where the garment industry represents 80 percent of the country’s manufacturing export, many garment factory owners are entrenched in the nation’s power elite, and factory owners are financiers of campaigns during national elections, thereby wielding broad political influence.\(^\text{74}\)

This is evidenced in the unwillingness of the government of Bangladesh to bring garment factory owners to justice in spite of evidence of negligence on the part of the factory owners. A case in point is the Ranza Plaza incident. On 24 April 2013, the Ranza Plaza located in Savar, an industrial suburb of Dhaka, collapsed. On the morning of the collapse, factory workers had been ordered into the building, even though cracks had appeared a day earlier, and an engineer had warned that the structure was unsafe. The building later collapsed, which resulted in the death of over one thousand people.\(^\text{75}\)

According to one of the victims Mr. Mohammad Abdul Jabbar, (a victim who lost his wife in the collapse of the factory, and had tried in vain to seek compensation or government help), “All I only wanted to see is Mr. Hossain (owner of a garment factory) convicted.”\(^\text{76}\) Unsurprisingly, the apparel industry in partnership with human rights NGOs has adopted various workplace codes of conduct and principles of monitoring to eliminate sweatshop practices.\(^\text{77}\)

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\(^{74}\) Jim Yardely; June 29 2013 “Justice Still Elusive in Factory Disaster in Bangladesh”; The New York Times (hereafter referred to as Jim Yardely 2013) [www.nytimes.no](http://www.nytimes.no)

\(^{75}\) Ibid

\(^{76}\) Jim Yardely 2013

The reality of the burgeoning prominence of TNCs in the new economic order was aptly captured in the report of the Commission on Global Governance (a commission that was endorsed by the UN Secretary General and funded through the UNDP) where the commission stated that when the United Nations system was created, Nation-States, some of which at the time were imperial powers, were the dominant actors on the international scene. And that the faith in the ability of governments to protect citizens and improve their lives as at that time was strong, since the State had few rivals, and the world economy was not closely integrated as it is today; more so, the vast array of global firms and corporate allies that has emerged was just beginning to develop and the huge global capital market, which today dwarfs even the largest national capital markets, was not foreseen.

The commission appears to admit that there are global players today whose significant strength in world affairs were not conceived at the formation of the State centric United Nations.

2.5 Findings

The findings from the foregoing reveal that TNCs are burgeoning economic powers of the new global order in the wake of globalization. Corporations are today in a unique position on the international landscape, because of the significant influence they have over political authorities in host States.

The significance of corporate influence in global economies extends to situations of armed conflict, as present day conflicts always have economic undertones. The role of corporations in supporting repressive regimes was first addressed in the Nuremberg and Tokyo war crimes trials, where the tribunal found the directors of German company I.G Farbens guilty of mass murder and slavery due to their direct involvement in gross human rights abuse.

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78 Report of the Commission on Global Governance “Our Global Neighborhood” Published by Oxford University Press, 1995 P. 2
79 ibid
The ICTR found that the corporate acts of Kanguara newspapers instigated the killing of Tutsi civilians and paved way for genocide in Rwanda whipping up Tutsi sentiments into a killing frenzy.\textsuperscript{83} The Tribunal also found the Radio Télévision Libre des Mille Collines (RTLMC) to have generated a climate of terror and that the broadcast of the names of Tutsi individuals and their families (who were later identified and killed) was causally linked to their death.\textsuperscript{84}

In the environmental pollution caused by the mining operations in Bougainville, which led to civil war and blockade of the island, it was claimed that an official of the Rio Tinto urged the Papua New Guinea Defence Forces to “starve the bastards out some more” and they will come around.\textsuperscript{85}

Talisman Energy of Calgary has also been criticized in the Canadian media for its role in providing revenue to the government of Sudan that supported its brutal war against rebel forces in the southern part of the country.\textsuperscript{86}

The next chapter shall analyze the involvement of TNCs in armed conflicts.

\textsuperscript{82} Prosecutor v Nahimana, Barayagwiza & Negeze, Case No: ICTR-99-52-T Judgment and sentence (Dec. 3, 2003) p 325 para 977A \url{www.ictr.org}

\textsuperscript{83} ibid p. 318 para 950

\textsuperscript{84} Ibid p 165 para 487

\textsuperscript{85} Sarei v Rio Tinto plc, 221 F Supp 2d 1116, 1126 (CD cal 2002); see also Simon Baughen, Human Rights and Corporate Wrongs: Closing the Governance Gap; Edward Elgar Publishing 2015 page 1

\textsuperscript{86} BBC News: Talisman Pulls out of Sudan Monday 10 March 2003 \url{www.news.bbc.co.uk}
3. Transnational Corporations (TNCs) and Armed Conflicts

3.1 Background

Significant efforts have been put in place by the organized international community to maintain some humaneness in periods of armed conflict, as well as to see that crimes of serious concern do not go unpunished. However, the realities of contemporary actors in international law reveal an existing void of responsibility for certain NSAs (such as TNCs) that play significant roles in the prolonged existence of violent conflict situations. Some scholars are of the opinion that although international criminal tribunals have given some leeway to the development of doctrines that recognize the systemic nature of genocide, war crimes and crime against humanity, however efforts to shift the accountability lens to collective entities have been effectively stalled. This is despite the fact that it has been established that bad managerial decisions have resulted in death and harm to a large number of victims.

Scholars have argued that the factors that trigger a corporation’s involvement in corporate crime can be detected in instances where businesses are involved in mass atrocities. The abundance of natural resources in many parts of the developing world, coupled with the unwillingness or inability of regulatory and enforcement mechanisms in host States has the propensity to lure corporations into grey areas of the law and even beyond. This also occurs as a result of the need for rebels and governments to engage in protracted violence and finance their military spending, and this has made the exploitation of natural resources a priority in

87 The Four Geneva Conventions are among the few international treaties that are considered universally ratified. See https://ihl-database.icrc.org/ihl
88 See preamble to the Rome Statute of the International Criminal Court (ICC). The ICC has currently 124 Member States
92 See Stoitchkova 2010 p 27
the theaters of war. These situations give strong incentives to TNCs to engage in businesses with either side of the warring divide. And these avenues for lucrative expansion of business activities by resort to illegal means (either directly or as accomplice, with the acquiescence and participation of corrupt governments or rebel factions) is one that has compounded the existing mechanism of accountability for TNCs in periods of armed conflict on the international plane.

This chapter starts by analyzing how international humanitarian law binds TNCs. It proceeds to demonstrating the significant involvement of TNCs in the entire process of gross human right violations and violation of IHL in armed conflict situations. It argues that international law has recognized both individual and State responsibility, however international law merely turns a blind eye on responsibility for non-natural persons masquerading themselves behind corporate veils in situations of armed conflicts.

It further argues that a void of responsibility has become a serious issue of international concern and there is a need to address the place of TNCs in situations of armed conflict. As David Crane (Chief Prosecutor of the Special Court for Sierra Leone) aptly stated, “the time is ripe to put the corporate world on notice that they just cannot move about the world, rape, pillage and plunder and then walk away from something just because they are for profit or for other ulterior motives…”

3.2 TNCs and the Laws of Armed Conflict

International humanitarian law (IHL), also known as the law of armed conflict or the law of war, has its fundamental premise in preserving human dignity and regulating methods and means of warfare in periods of armed conflict. IHL applies to both State and non-State entities in the case of an armed conflict that is not of an international character (i.e. armed conflict occurring within the territory of a State or High Contracting Party to the Geneva Convention).

93 See Stoitckkova 2010 supra
94 Stoitckkova 2010 supra
95 See David M Crane (Chief Prosecutor, Special Court for Sierra Leone) Accountability for Crimes against Humanity: Sierra Leone, Briefing at United States Holocaust Memorial Museum, (Hereafter referred to as David Crane 2003) Washington Friday 16 May 2003; https://www.ushmm.org
96 See article 3 common to the Four Geneva Conventions
While the provisions of article 3 common to the Geneva Conventions address non-international armed conflicts, the said provisions do not distinguish between obligations of States and NSAs. This is because IHL does not only bind States, organized armed groups and soldiers; it binds all actors whose activities are closely linked to an armed conflict.

The Trial Chamber of the ICTR in the Akayesu case stated that the provision of common article 3 to the Geneva Conventions is part of customary international humanitarian law (CIHL). In other words, the provisions would bind all parties involved in armed conflict irrespective of whether they are State parties to treaty or not. The Chamber also concluded that most States have criminalized acts which constitute violation of common article 3 in their penal codes. This was also the position of the ICTY in the Tadic case. The ICJ in the Nicaragua case also applied common article 3 as customary international law.

If common article 3 binds all parties to NIAC as a provision of CIHL, it therefore follows that a business enterprise carrying out activities that are closely linked to armed conflict must observe applicable rules of CIHL. In other words, TNCs such as Private Military (and Security) Companies (PMSCs) participating in armed conflicts must observe rules of CIHL and

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97 The ICJ has stated that article 3 constitutes a minimum yardstick applicable to non-international armed conflict and International armed conflicts. See the Case Concerning Military and Para Military Activities in and Against Nicaragua (Nicaragua v U.S.A) Merits, Judgment of 27 June, 1986 p.114 para 218 and 219

98 Article 3 is to the effect that in the case of an armed conflict occurring in the territory of one of the High Contracting party each party to the conflict (which in every instance consist of a State and NSA) shall be bound …

99 The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), para 608 – 609. 2 September 1998 (hereafter referred to as Akayesu Case)

100 See Akayesu Case supra

101 Prosecutor v. Tadic, Case No. IT-94-1 (Trial Chamber), para 609 May 7, 1997 (here after referred to as Tadic Case)

102 See Tadic Case supra

103 Ibid, see also J.M Henckaerts and L Doswald-Beck Customary International Humanitarian Law Rules, ICRC; (Cambridge University Press 2005) Vol 1 p 246; see also, Customary International Humanitarian Law Database; www.ihl-databases.icrc.org

104 Prof. Noortmann stated that PMSCs were corporate entities and as such not different from business enterprises like Nike. See Committee on Non-State Actors, Report of Working Group on NSAs, ILA NSA Working Session of Tuesday 9 August 2016 (ILA Johannesburg 2016). PMSCs would also be addressed below
indeed other TNCs not necessarily PMSC must observe rules of CIHL to the extent that they either do not breach rules of CIHL or are not complicit in breach of the CIHL.

By the provisions of article 23 of the Norms on the Responsibility for Transnational Corporation and Other Business Enterprise with Regard to Human Rights, the phrases human rights and international human rights are interpreted to include rights recognized by international humanitarian law. It may be worth mentioning that the norms do not impose new standards, but merely assert that existing human rights framework already demands that business must comply with human rights standards.\textsuperscript{105} Scholars have also argued that the subsequent Ruggie principles build on the existing framework of the norms.\textsuperscript{106} Weissbrodt argues that the Guiding Principle’s normative contribution is not premised on the creation of new international law obligation, but in the elaboration of the implication of existing standards and practice for States and businesses.\textsuperscript{107}

It was on this understanding of IHL obligations of TNCs that the ICRC started to engage with several corporations operating in areas of conflict or weak governance with the aim of making these companies aware of their obligations under IHL.\textsuperscript{108} This, in itself, is evidence of awareness on the part of the ICRC that TNCs activities can violate IHL obligations in situations of armed conflicts.\textsuperscript{109}

As a result, several business enterprises have declared their commitment to conducting their activities in a morally and legally sensitive way.\textsuperscript{110} For example, the Kimberley Process Certification Scheme (KPCS) was set up to ensure that diamonds purchased by the diamond industries were not financing rebel movements and their allies seeking to undermine legitimate

\textsuperscript{107} See Weissbrodt 2014 supra
\textsuperscript{108} Angelo Gnaedinger (2008); “War and Business Enterprises”; ICRC; www.icrc.org
governments. In other words, transactions for purchase of diamonds must be sensitive to the conflicts and possibilities of such trade financing conflicts.

The UN General Assembly has stated the need for close collaboration between diamond producing States to work in collaboration and the diamond industry to develop international certification scheme for rough diamonds in the KPCS. The event that led to the voluntary principle on Security and Human Rights established in 2000 is widely viewed as linked directly to activist concerns raised during the 1990s about responsibilities of major oil and mining companies operating in conflict zones. For example, BP faced growing scrutiny over hiring security forces in Colombia known to have been complicit in abuses of human rights in communities where the company operated.

It is becoming clear that perverted investment decisions of TNCs in conflict zones can exacerbate tension and produce conflicts. More recently, we have witnessed the emergence of PMSCs, where State military functions are entrusted to nonmilitary entities such as private companies. Today, PMSCs are viewed in some quarters as indispensable ingredients of military undertakings.

Since the end of the Cold War, demand for PMSCs have increased to the extent that there is now a lively PMSC industry offering an ever-wider range of services with some companies employing over 10,000 staff.

In fact, private corporations were said to be the second biggest contributor to coalition forces in Iraq after Pentagon. The UN Special Rapporteur on Mercenaries, Enrico Ballestros, has

111 See About Kimberley Process; Kimberley Process Website; www.kimberleyprocess.com
112 See Fifty Fifth Session of the UNGA; UNGA Res; A/Res/55/56 29 January 2001; www.un.org
116 Montreux Document 2008 supra
117 Ian Traynor, 10 December 2003; The Privatization of War; The Guardian www.theguardian.com
argued that the participation of mercenaries in armed conflicts always hampers the enjoyment of human rights for those affected by their presence.\textsuperscript{118} The UN General Assembly has also expressed concern, over the rise of PMCs in Africa where it is claimed that PMSCs have a deleterious impact on the ability of States to maintain order, and have encouraged the militarization of civil society, rapid growth in small arms market, and the rise in the use of weaponry.\textsuperscript{119}

This explains why there are initiatives requiring PMSCs to comply with IHL, in addition to international human rights law obligations imposed on PMSCs by national laws,\textsuperscript{120} and other specific regulations regarding their services.\textsuperscript{121} Personnel of PMSCs are also obliged, \textit{regardless of their status} to comply with applicable rules of IHL.\textsuperscript{122} Flowing from the foregoing, it follows that even though corporate entities are not signatories to treaties, IHL binds corporate entities as CIHL. Applicable rules of IHL in national laws also bind PMSCs that are involved in armed conflict as well as personnel of PMSCs irrespective of their status.\textsuperscript{123} Furthermore, the ICTY in \textit{Prosecutor v Tadic}, has stated that in appraising the formation of CIHL or general principles, reliance must primarily be placed on elements such as “...official pronouncements of States, military manuals and judicial decisions...”\textsuperscript{124} It may be worth mentioning that the fact that parties to the Geneva Conventions


\textsuperscript{120} It may be worth mentioning that judicial enforcement of IHL relies primarily on domestic courts; this structure was foreseen by the 1949 Geneva Conventions in articles 49, 50, 129 and 146 respectively of the Four Geneva Conventions which imposed an explicit obligation on State parties to incorporate the relevant IHL rules into domestic legislations. By article 1 of the Four Geneva Conventions, “\textit{The High Contracting parties undertake to respect and to ensure respect for the present Convention in all circumstances}” See also Sharon Weill; \textit{The Role of National Courts in Applying International Humanitarian Law Oxford University Press} 2014 P.7, p 8 and 11

\textsuperscript{121} See Obligation 22 of Part 1 of Montreux Document \textit{supra} on Pertinent International Obligations Relating to PMSCs

\textsuperscript{122} See obligation 26(a) of Montreux Document 2008 \textit{supra}

\textsuperscript{123} By obligation 26(a) personals of PMSC are bound by applicable rules of IHL under national law. As earlier stated judicial enforcement of IHL relies primarily on domestic laws

\textsuperscript{124} Tadic Case, IT-94-I-AR 72 Decision on Defence Motion for Interlocutory Appeal on Jurisdiction 2 October 1995. Para 99
have incorporated the provisions of these Conventions into their national military manuals and domestic law give them status of CIHL. One may also add, that the facts the Geneva Conventions are one of the few treaties to have been universally ratified is evidence of an established practice among States on the laws governing armed conflicts. Universal ratification of the Conventions also evidences wide-spread and consistent practice among of State parties to the Conventions. Thus, the Conventions are evidence of a general practice in situations of armed conflict by State parties that have been accepted as law, therefore they are CIHL.125

It therefore follows that corporate entity such as PMSCs that are involved in armed conflict must observe all provisions of CIHL as contained in the Four Geneva Conventions, as well as applicable rules of IHL in domestic laws. And other TNCs besides PMSCs, must observe CIHL to the extent that they are not complicit in the breach of CIHL.

3.3 The Involvement of Transnational Corporations in Armed Conflicts

The involvement of TNCs in armed conflict is not new. The role of business enterprises in situations of armed conflict was recognized as far back as the days of the Nuremberg and Tokyo War Crime Trials.126 For example, corporate entities such as Bayer were involved in development and manufacturing of a range of poisonous gasses used in trenches, including chlorine gas and mustard gas.127 Carl Duisberg, the head of Bayer, had personally propagated the concept of forced labor during WWI and the company was significantly involved in planning, preparing and implementing both world wars.128 The dynasty behind the BMW luxury car had in 2011 admitted using slave labour, taking over Jewish firms and doing business with the highest echelons of the Nazi party during WWII.

125 See article 38(b) of the 1945 Statute of the ICJ; see also ICRC CIHL Database; Practice Rule 142 - Military Manual; www.ihldatabases.icrc.org
126 See Trials of War Criminals before Nuremberg Tribunal supra
127 Dietrich Stolzenberg (1997) (hereafter Dietrich Stolzenberg 1997) Scientist and Industrial Manager: Emil Fischer and Carl Duisberg, Center for German and European Studies, University of California, Berkeley www.ciaonet.org; see also Corporate Watch www.corporatewatch.org
128 See Dietrich Stolzenberg 1997
BMW was said to have used about 50,000 persons in slave labours.\textsuperscript{129} Daimler (Mercedes) was said to have used about 40,000 persons in slave labour, Bosch 20,000, and VW 20,000.\textsuperscript{130} TNCs also played significant roles in orchestrating the crime of apartheid in South Africa. The UNGA had stated that apartheid in South Africa constituted a serious threat to international peace and security and a total negation of the purpose and principles of the UN Charter.\textsuperscript{131} The UNGA also stated also that TNCs were complicit in the perpetration of apartheid.\textsuperscript{132} In the \textit{Amici Curiae} brief filed by the NGO Redress before the United States Court of Appeal,\textsuperscript{133} Redress associated itself with an earlier decision of the District Court, wherein the District Court refused to dismiss the suit filed by the plaintiffs (relatives of the victims of apartheid in South Africa). The plaintiffs had alleged that corporations were complicit in apartheid, to the extent that corporate entities supplied equipment and resources that were used to perpetrate apartheid. For example, Shell supplied oil that kept military machines that were used for apartheid in working order, and IBM supplied computers that were used to track the whereabouts of African individuals.\textsuperscript{134} The impact of business enterprises and commercial actors in situations of armed conflict have not changed in recent times, as armed conflict in various part of the world reveals that corporations and commercial actors fuel conflicts by trading in illicit conflict commodities.\textsuperscript{135} This is also the reason why most violent conflicts are provoked by the desire to capture and control strategic resources. As the International Criminal Court in its decision confirming

\begin{flushleft}
\textsuperscript{129} See Alan Hull; How the Nazis helped German Companies Bosch, Mercedes, Deutsche Bank and VW get very rich using 300,000 Concentration Camp Slaves; Mail online, 20 June 2014; \url{www.dailymail.co.uk}
\textsuperscript{130} Ibid
\textsuperscript{131} UNGA Resolution A/RES/41/103 of 4 December 1986 97th plenary meeting, \url{www.un.org}
\textsuperscript{132} UNGA Resolution A/RES/41/103 Supra,
\textsuperscript{133} See brief of Amici Curiae, filed by the NGO (Redress) Committed to Human Rights in Support of Plaintiff and in support of dismissal of interlocutory Appeal before the U.S Court of Appeal for Second Circuit; \url{www.redress.org}, See also also \textit{Khulumani and Others v Barclay National Bank Ltd and Others} 02 MDL 1499 (SAS) U.S District Court, Southern District of New York 8 April, 2009
\textsuperscript{134} Ibid
\textsuperscript{135} See UN Report of Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC, S/2002/1146 (hereafter referred to as DRC Report on Exploitation of Natural Resources) page 22 \url{www.securitycouncilreport.org}
\end{flushleft}
charges against Germain Katanga stated, the competition over the control of Ituri’s natural resources was a major reason for continued conflict in the region.\textsuperscript{136}

In its 2002 report, the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC also identified the consolidation of economic strength in the region as the ultimate objective of the feud between both factions of the Hema and Lendu clan.\textsuperscript{137}

The activities of commercial or financial actors trading in such illicit conflict commodities in theaters of war for predatory profit motives are always dependent on armed conflicts, and such illicit trades in conflict commodities also prolong the existence of such conflicts.\textsuperscript{138}

It is because of these trends that warlords, financial institutions, TNCs, money launderers, arms dealers, and mercenaries have become the new actors in violent intra-State conflicts.\textsuperscript{139}

These changes have contributed to increased complexity of the nature of armed conflicts and have saddled the international community with the enormous task of confronting issues of international responsibility, and seeking appropriate solutions for this type of NSAs.\textsuperscript{140}

In one of his first declarations dealing with prosecutorial strategies and orientation on 16 July 2003, the ICC Prosecutor had focused on the role of economic actors in armed conflicts. After indicating that the crisis in Ituri region of DRC would be the likely target of his initial investigations, he turned to what was described as money laundering and other crimes committed outside the DRC, which may relate to the atrocities in DRC:

Various reports have pointed to links between the activities of some African, European and Middle Eastern companies and the atrocities taking place in the Democratic Republic of Congo…the atrocities allegedly com-

\textsuperscript{136} Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Decision on confirmation of charges, ICC-01/04-01/07-717, 30 September 2008 para 3

\textsuperscript{137} See DRC Report on Exploitation of Natural Resources para 119

\textsuperscript{138} It is this element of existence of armed conflict that distinguishes a war crime from similar domestic crimes. See Prosecutor v Dragoljub Kunarac Radomir Kovac and Zoran Vukovic Judgment 12 June 2002 IT-96-23& IT-96-23/1-A p17 para 58; where the Appeals Chamber of the ICTY stated that “what ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed…”


\textsuperscript{140} ibid
mitted in the country may be fueled by the exploitation of natural resources there…which are enabled through the international banking system…the Prosecutor believes that investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed. If the alleged business practices continue to fuel atrocities, these would not be stopped even if current perpetrators were arrested and prosecuted…141

3.4 Trade in Illicit Conflict Commodities

The expansion of commercial activities in response to market demands, has led many corporations to operate in volatile regions of the world.142 Even in situations of armed conflicts or violence against civilians, TNCs find it hard to resist opportunities for financial gains, and this has led corporations into enterprises that borders on criminal behavior either as principal offenders or as accomplices in gross human right violations and war crimes.143 It is worth mentioning, that illicit trade in conflict commodities by commercial actors and TNCs has become of serious international concern.144 The UN General Assembly has emphasized the need to address all parties involved in the trading and supply chain of illicit conflict commodities, as such trade fuel conflicts in most part of the world where there are ongoing armed conflicts.145

In the report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC, the panel stated that the armed conflict between members of the Hema and Lendu clans stems, partly from attempts by powerful Hema businessmen and politicians to increase the benefits they derive from the commercial activities of the elite network through their front companies, the Victoria Group and Trinity Investment, in the Ituri area.146

141 ‘Communications Received by the Office of the Prosecutor of the ICC’, Press Release No.: pids.009.2003EN, 16 July 2003, pp. 3-4. (emphasis added)
142 Desislava Stoitchkova 2010 p1
143 Ibid
144 See Fifty Fifth Session of the UNGA, Res /55/56 on The Role of Diamonds in Fueling Conflicts, 29 January 2001; www.un.org
145 Ibid
146 DRC Report on Exploitation of Natural Resources page 22
The fact that exploitation and trade of conflict minerals originating in the DRC was helping to finance conflict characterized by extreme levels of violence in the Eastern DRC has received legal recognition of some nations.\textsuperscript{147} The Swiss Federal Prosecutors, in their decision to prosecute the Swiss corporation Argor, reached a conclusion that looted gold that funded armed conflict in DRC was refined by the Argor in Switzerland.\textsuperscript{148} More so, in an assessment by TRIAL International (TRIAL) on the feasibility of judicial action in the light of Swiss and international law, TRIAL also concluded that there was sufficient suspicions of commission of a crime to lodge a complaint against Argor for complicity in the war crime of pillage because Argor purchased looted gold which in turn funded conflicts in DRC.\textsuperscript{149}

The sale of timber played a role in perpetuation of the conflict in Liberia, where weapons continued to find their way into the country mostly in logging vessels of multinational timber companies with links to black arms markets, despite a UN Security Council sanction imposed in 2002 prohibiting sale of arms to Liberia.\textsuperscript{150}

Trade in illicit commodities was identified as one of the key reasons for the conflict in Sierra Leone.\textsuperscript{151} The first export of petroleum from Sudan in August 1999 marked the turning point in the country’s civil war as oil became the main objective of the war, and indeed the key obstacle to a lasting peace,\textsuperscript{152} because of large-scale exploitation of oil by foreign companies in the theatre of war in Southern Sudan.\textsuperscript{153}

\textsuperscript{147} See section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act in the U.S.A, www.sec.gov/

\textsuperscript{148} Prosecutor v Argor, Swiss Federal Criminal Court, B.B 2013.173, 24 January 2014

\textsuperscript{149} Benedict Moerloose, November 2016 ‘Legal Remedies for Grand Corruption, Challenging the Pillage Process: Argor-Heraeus and Gold from Ituri’ Open Society Foundations P.4


\textsuperscript{151} See Prosecutor v Charles Ghankay Taylor (Judgment Summary) Special Court for Sierra Leone Trial Chamber II SCSL-03-1-T 26 April, 2012 www.rscsl.org; see David Crane 2003) P 8, Page 13

\textsuperscript{152} Human Rights Watch, Sudan, Oil and Human Rights (2003) 50 para 1

\textsuperscript{153} Ibid
The trade in Cambodian timber in violation of UN prohibition on exports enabled the Khmer Rouge regime to hold onto power and perpetuate more than twenty years of the most brutal civil war in human history.\textsuperscript{154}

The Anfal extermination operation in Halabja in 1988 culminated into what was known as the largest-scale chemical attack against civilians after WWI.\textsuperscript{155} The incident witnessed indiscriminate gassing, which killed at least 5,000 Kurds and 7,000 injured of suffered exposure to Tabun, Sarin, VX as well as Mustard, all of which are prohibited gases under the UN Chemical Weapon Convention.\textsuperscript{156} The crime of Genocide against the Kurds received an overwhelming recognition by the British Parliament.\textsuperscript{157} Another resolution to recognize the Kurdish genocide was approved by the Norwegian and Swedish Parliament\textsuperscript{158} and the EU Parliament also hosted a Conference to commemorate the Halabja Genocide.\textsuperscript{159} The UN Specialist Missions documented repeated use of chemical weapons during the armed conflict between Iran and Iraq.\textsuperscript{160}

It may be worth mentioning that corporate entities and business enterprises also had a role to play in this crime of genocide that received wide international recognition. A case in point

\begin{itemize}
\item \textsuperscript{155} See UNPO, The Kurdish Genocide: Achieving Justice through Recognition, \url{www.europal.europa.eu}
\item \textsuperscript{156} See Guidelines for Schedule of Chemicals, Schedule B Para A (1)(2)(3)(4) of The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, See also Human Rights Watch/Middle East Watch Report, Genocide in Iraqi: The Anfal Campaign against the Kurds 1993 (Report version)
\item \textsuperscript{157} See Gary Kant, 4 March 2013, \textit{Historic Database Secures Parliamentary Recognition of Kurdish Genocide}, Kurdish Globe \url{www.kurdishglobe.net}; see also Laura Pitel1 March 2013 MPs Recognize Saddam Hussein’s Kurdish Massacre as Genocide, The Times, \url{www.thetimes.co.uk}
\item \textsuperscript{158} Motion 2012/13:U253 Betrakta Anfal I Kurdistan som folkmord, available at \url{http://www.riksdagen.se/sv/}
\item \textsuperscript{159} Halabja Conference in European Parliament Discusses Kurdish Genocide A.K.News 8 March 2012, \url{http://spain.krg.org}
\item \textsuperscript{160} Report of the Mission Dispatched by the Secretary General to Investigate Allegations of Use of Chemical Weapons in the Conflict between Islamic Republic of Iran and Iraq; s/19825; 25 Aprt,1988; \url{www.securitycouncilreport.org};
\end{itemize}

Iraq had declared it consumed about 1,800 tons of mustard gas, 140 tons of Tabun, and over 600 tons of Sarin see also Central intelligence Agency (CIA), Iraq’s Chemical Warfare Program, \url{www.cia.gov/library}
was the trial of the Dutch businessman, Frans van Anraat who was jailed for 15 years by the Dutch District Court for complicity in war crimes, by selling chemicals to Iraq that Saddam Hussein's regime used in lethal gas attacks on Kurdish villages.\footnote{Public Prosecutor v F.C.A. Van Anraat, District Court of The Hague, C/no 09/751003-04 25 December 2005; see also \url{www.internationalcrimesdatabase.org}}

The Dutch Court of Appeal and the Dutch Supreme Court both upheld the sentences, and on appeal to the European Court of Human Rights on the ground of jurisdiction, the ECHR in its decision of 6 July 2010, rejected Van Anraat’s appeal challenging the jurisdiction of the Dutch courts and the legal certainty of the criminal acts being prosecuted.\footnote{See Van Anraat v The Netherlands (Application no. 65389/09) \url{www.echr.coe.int}.}

Some Dutch companies like Melchemie B.V had also supplied Iraq chemicals, including chemicals considered precursors for production of poison gas,\footnote{See Campagne tegen Wapenhandel Dutch Campaign Against Arms Trade Iraq Chemical Weapons, Dutch Government and Companies Partly Responsible May 2007, \url{www.stopwapenhandel.org}.} even though Melchemie at the time was aware of the possibility of using these chemicals to produce weapons.\footnote{Ibid}

The ongoing situation in Syria has been described by António Guterres, (former High Commissioner for Refugees and currently Secretary-General of the UN) as the biggest humanitarian emergency of our era.\footnote{See UN News Center, \url{www.un.org}.} The UN High Commissioner for Human Rights, Zeid al-Hussein, has described the war in Syria as the worst man-made disaster since WWII.\footnote{Dylan Collins 15 March 2017 Syria war: “Worst Man-made Disaster Since World War II” \url{www.aljazeera.com}.}

The ongoing Syrian conflict has also been fueled by the role of non-State commercial actors that are trading in oil.\footnote{See Anna Swanson 18 November 2015 “How the Islamic State Makes its Money” The Washington Post. \url{www.washingtonpost.com}.}

The Islamic State has been estimated to generate about 50 million USD every month, by trading in conflict resources – oil which is said to be the extremists' largest single source of continual income.\footnote{Hamza Hendawi and Qassim Abdul-Zahra 23 October 2015 “ISIS is Making Up to $50 Million a Month from Oil Sales” Business Insider \url{www.businessinsider.com}.}

The sale of oil has been described as the key reason that has enabled the Islamic State to maintain their rule over their self-declared “caliphate”. Illicit trade in conflict commodities has also given the Islamic State funds to rebuild infrastructure and provide the
largesse that shore up its fighters’ loyalty. Oil has been described as “the black gold that funds the Islamic State’s black flag and fuels its war machine”.

Recently, the chief executive officer (CEO) of LafargeHolcim (a French cement manufacturing company) announced his resignation after it was discovered that LafargeHolcim had paid armed groups in Syria in order to keep the company in business. It was alleged that LafargeHolcim entered into negotiation with Islamic State to purchase oil, pozzolan, and to obtain Islamic State pass for crossing check points, in order to maintain production in the company’s cement factory in the North of Syria. In September 2016, the French Finance Minister filed a complaint before the Paris Prosecutor against LafargeHolcim for alleged illegal purchase of oil in Syria despite an EU embargo that was issued in 2012. Some human rights organizations also filed complaints on against LafargeHolcim for financing Islamic State and complicity in war crime.

A close look into the role of illicit trade in conflict commodities and armed conflicts in various regions of the world reveals 27 cases of illicit trade in conflict resources fueling armed conflict in Africa, 21 cases in the Americas, 11 cases Asia, and Oceania, 7 cases in the Middle East, and 4 cases in Europe. This situation is not static as there is the risk of deeper conflict engineered by trade in conflict commodities. In fact, a recent report estimated that in 2016

169 Ibid
173 ibid
174 See European Center for Constitutional and Human Rights Case Report, Lafarge in Syria: Accusations of Complicity in War crimes and Crimes against Humanity, November 2016 www.ecchr.eu
175 See Conflict Barometer, Heidelberg Institute for International Conflict Research, 2012
176 ibid
alone 49 situations of armed violence on the territories of 28 States amounted to armed conflicts according to international humanitarian law and international criminal law.\textsuperscript{177} Little wonder why the Joint Communication by the European Commission and the High Representative in its 2011 and 2012 Communications\textsuperscript{178} stated its intention to explore ways in which improved transparency and due diligence in supply chains can curb situations in which revenues from extractive industries are used to fund wars or internal conflicts in resource-rich developing countries.\textsuperscript{179} It therefore follows that there is a need for the extant regime of international accountability to demonstrate willingness in taking up the difficult task of linkage between illicit trading in conflict resources and the atrocities committed in situations of armed conflict.\textsuperscript{180}

3.5 State and Individual Responsibility vis-à-vis Corporate Responsibility for Fueling Armed Conflict

3.5.1 State Responsibility

International law imposes responsibility on States to desist from certain commercial transactions that would exacerbate conflict, or that are likely to exacerbate conflict or result in violations of IHL.\textsuperscript{181} The objective of this regulation under the Arms Trade Treaty (ATT)\textsuperscript{182} is to

\textsuperscript{179} See EC on Responsible Sourcing supra
\textsuperscript{180} Special Court for Sierra Leone, Press and Public Affairs Office Monday May 17, 2004; See also David Crane 2003 page 9 where David Crane emphasized the willingness to take up difficult issues such as linkage between illicit diamond trading and the atrocities committed in Sierra Leone.
\textsuperscript{181} By article 6 of the Arms Trade Treaty New York 2 April 2013 entered force, 24 December 2014 UNTC No 52373 (hereafter referred to as ATT), transfers of conventional arms, ammunition and parts and components are prohibited if the transfer would violate its relevant international obligations under international agreements to which a State is a party. The Convention also prohibits State parties from authorizing any transfer if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions, attacks directed
reduce human sufferings by establishing common international standards for regulating or improving the regulation of the international trade in conventional arms. There is an understanding by the organized international community, that there is a nexus between the misuse of arms in violation of IHL by national security forces and the lack of responsibility on the part of the State providing such arms.

Article 4 of ATT, is evidence of an acknowledgment on the part of State parties that weapon transfer can destabilize a country or region when weapons or key components of such weapons are exported to places where there is risk of gross IHL violations.

There is an understanding that rigorous application of ATT on export prohibition, export assessment, import regulation, brokering and transit, transshipment, and prevention of diversion of weapons, would contribute to reducing the flow of arms to areas under Security Council arms embargo, conflict zones, areas of high tension volatility, and governments engaged in systematic human rights abuses.

It therefore follows that a State party to the treaty that supplies arms to government forces complicit in human right abuse or that receives illicit conflict commodities in exchange for

against civilian objects or civilians, or other war crimes defined by international agreements to which the State is a party.

It may be worth mentioning that the ATT is a treaty, therefore it imposes internationally binding obligation on member States in accordance with article 26 of the Vienna Convention on the Law of Treaty.


See UN Office for Disarmament Affairs, The Impact of Poorly Regulated Arms Transfer on the Work of the UN, UNODA Occasional Papers N0. 23, March 2013 p5 www.un.org

Article 6 ATT
Article 7 of ATT
Article 8 ATT
Article 10 ATT
Article 9 ATT
Article 11 ATT


By the provisions of Article 16 of the ILC Articles on Responsibility of State for Internationally Wrongful Act 2001(ARSIWA), a State that aids or assist another State in the commission of an internationally wrongful act is internationally responsible for doing so
supply of arms used in violation of IHL and committing war crimes would be in violation of the ATT.\textsuperscript{193} 

Even before the ATT entered into force, the ICJ, in the \textit{Case Concerning Military and Paramilitary Activities}, held that the U.S.A, by financing, aiding and giving military assistance to Contra rebels to carry out military and paramilitary activities against Nicaragua violated international law on non-intervention.\textsuperscript{194} 

The ICJ while referring to its judgment in the \textit{Nicaragua case} also found that Uganda violated international law on non-intervention in the financing and support of Movement for the Liberation of Congo (MLC), an irregular force that fought against the DRC government.\textsuperscript{195} 

However, the law of international responsibility is not the same for corporate entities orchestrating exactly the same acts, as responsibility in the extant regime is shielded by the corporate veil. A case in point is the case of Mil-Tec, a British company that delivered weapons to the Rwandan armed forces after the genocide was underway.\textsuperscript{196} The government that led the Rwandan genocide took power following the April 6, 1994 killing of then President Juvenal Habyarimana and one of the first acts was to contact Mil-Tec to place an urgent order for 854,000 U.S.D worth of arms and ammunition. Ultimately, Rwandan records show that Mil-Tec provided 5.5 million U.S.D. worth of ammunition and grenades in five separate deliveries on April 18, April 25, May 5, May 9, and May 20. The last of these violated a mandatory U.N. arms embargo imposed on May 17, 1994.\textsuperscript{197} The genocide was underway during the time of the arms deliveries and was widely reported. However, Mil-Tec was registered in the Isle of Man, which at the time was not covered in the U.K. legislation codifying the U.N. arms embargo into British law.\textsuperscript{198} And due to this loophole, the company also escaped liability under U.K. arms export controls, as the activities of Mil-Tec could not be the basis for a prosecution under national law nor international law (emphasis mine).

\textsuperscript{193} By article 2 ARSIWA, an act or omission that is in breach of an international obligation, as in this case ATT, would constitute an internationally wrongful act

\textsuperscript{194} \textit{Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Merits Judgment of 27 June 1986 para 206}

\textsuperscript{195} \textit{Case Concerning Armed Activities on The Territory of The Congo (Democratic Republic of The Congo v Uganda) Judgment Of 19 December 2005, para 164}


\textsuperscript{198} See, “Human Rights Watch Calls on Britain to Crack Down on Violators of International Arms Embargoes,” Press Release, November 25, 1996
3.5.2 Responsibility for Natural Persons

Natural persons who violate rules of IHL and perpetrators of war crimes can be held responsible under international law for serious offenses committed in situations of armed conflict.\textsuperscript{199} Individual criminal responsibility is included in the statutes of several international criminal courts and tribunals. Thus, under article 25 of the ICC Statute, the court \textit{shall} have jurisdiction over \textit{natural persons}.\textsuperscript{200} By the provision of article 7 of the ICTY Statute, a person who aids or abets the planning, preparation or execution of war crimes or grave violations of the laws of war \textit{shall be individually responsible for the crime}. This is in \textit{pari materia} with the provisions of article 6 of the Statute of ICTR to the effect that a person who aids or abets in the planning, preparation or execution of a war crime or gross violations of IHL referred to in articles 2 to 4 of the Statute, shall be individually responsible for the crime.\textsuperscript{201}

“Aiding” in international criminal law entails providing practical assistance that has a substantial effect on the commission of the crime.\textsuperscript{202} According to the ICTY, an “aider” must intentionally provide assistance to the perpetrator with knowledge of the perpetrator’s intent to commit a crime, but need not himself or herself support the aim of the perpetrator.\textsuperscript{203} Moreover, the ICTY has stated that a person may be liable as an accessory whether the assistance is provided before, during, or after the specific crime in question is committed.\textsuperscript{204} The ICTR has further outlined what the specific crime of complicity in genocide entails to the effect that there are three elements of complicity in genocide: complicity by procuring means

\textsuperscript{199} See Article 5 ICTR Statute
\textsuperscript{200} See also, article 6 of the ICTY Statute
\textsuperscript{201} There also exist a similar provision in article 6 of the Statute of the Special Court for Sierra Leone
\textsuperscript{203} \textit{Blaskic}, (Trial Chamber), March 3, 2000, para. 286; \textit{Furundzija}, (Trial Chamber), December 10, 1998, para. 246; and \textit{Furundzija}, (Trial Chamber), December 10, 1998, para. 245, 249
\textsuperscript{204} \textit{Vasiljevic}, (Trial Chamber), November 29, 2002, para. 70; and \textit{Blaskic}, (Trial Chamber), March 3, 2000, para. 285.
to commit genocide, by knowingly aiding and abetting genocide, or by instigating genocide.\textsuperscript{205}

The ICTR Trial Chamber explicitly linked providing weapons to genocide, by stating that one may be complicit in genocide “by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose.”\textsuperscript{206}

In the trial of Charles Taylor,\textsuperscript{207} the Trial Chamber found that there was continuous supply of diamonds mined from areas in Sierra Leone by the RUF/AFRS to Charles Taylor (the accused) in exchange for arms and ammunitions.\textsuperscript{208} The court therefore found Charles Taylor guilty with individual criminal responsibility pursuant to article 6(1) of the Statute of the Special Court for Sierra Leone (SCSL).\textsuperscript{209} In other words, Charles Taylor’s trade in illicit conflict resources in exchange for ammunitions fueling conflict in Sierra Leone was enough to ground individual criminal responsibility under the Statute of SCSL.\textsuperscript{210}

On the other hand, the conflict in Liberia, witnessed instances where the sale of timber helped in the perpetuation of conflict, as weapons continued to find their way into the country mostly in logging vessels of multinational timber companies with links to black arm markets, irrespective of a UN Security Council arms embargo imposed in 2002, prohibiting the selling of arms to Liberia.\textsuperscript{211}

### 3.5.3 Responsibility for Corporate Entities?

The role of corporations in fueling the circuit of predation by trading in illicit conflict commodities in the extant accountability regime is one that is worth reexamining, in the light of contemporary happenings in armed conflict in various parts of the world.

\textsuperscript{205} Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Chamber), September 2, 1998, para. 533-537. See also, Prosecutor v. Semanza, Case No. ICTR-97-20 (Trial Chamber), May 15, 2003, para. 393, 395.

\textsuperscript{206} Akayesu, (Trial Chamber), September 2, 1998, para. 533-537. The Chamber defined complicity “per the Rwandan Penal Code

\textsuperscript{207} Prosecutor v Charles Ghankay Taylor (judgment Summary) Special Court for Sierra Leone Trial Chamber II SCSL-03-1-T 26 April, 2012 [www.rscsl.org](http://www.rscsl.org)

\textsuperscript{208} Ibid para 100

\textsuperscript{209} Ibid para 133

\textsuperscript{210} Cf article 6 SCSL supra

The UN Security Council had stated that the role of large reputable companies operating in confidence was very vital to fueling the conflict in DRC. The UNSC stated that the link between the continuation of the conflict and the exploitation of natural resources would have not been possible if some entities not parties in the conflict had not played a key role, willingly or not...and the role of private companies and individuals has also been vital.

It may be worth mentioning that the main UN organ vested with primary responsibility for maintenance of international peace and security, has on various instances acknowledged the key role of corporations in fueling wars and conflict. It therefore follows as an inexorable logic that inability of international law to hold corporations to account for perpetrating the same act which international law does not condone for both States and natural persons in situations of armed conflict is evident of a lacuna in the international law regime of responsibility for offences perpetrated in situations of armed conflict.

The position in international law so far has been the famous finding by the Nuremberg Tribunals that “crimes against international law are committed by men and not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

The fact that the existence of ATT and the individual criminal responsibility system under international criminal justice mechanisms have not prevented the rolling of weapons into theaters of war and illicit trade in conflict resources reveals that there is still more to be done in this regard.

It is my opinion that this difficult task of linkage between illicit trading in conflict resources and the atrocities committed in situations of armed conflict, as suggested by David Crane would only be addressed if all entities – including corporations that play key roles in the circuit of illicit trade - are brought under the responsibility lens of international law. While corporations have the capacity to carry out the same acts as States and private individuals and in fact do carry out such acts, they have been let off the responsibility hook. This thesis argues that the extant mechanism of international responsibility that does not address corporate legal responsibility in this regard is one that calls for attention. Furthermore, a true determination

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212 DRC Report on Exploitation of Natural Resources
213 ibid
214 See article 24 of the 1945 UN Charter
215 See Trial of major War Criminals before the International Military Tribunal Vol, 1, Nuremberg 1947 p 223
by “… the people of the United Nations” “to save succeeding generations from the scourge of war,” is a determination that must give pain taking attention to all relevant factors and actors that fuel conflict situations. And the role of TNCs that are trading in illicit conflict commodities that fuel the circuit of gross human right violations and rules of IHL is one that should be adequately addressed through effective mechanisms to ensure international responsibility for TNCs.

3.6 Findings

Customary IHL binds NSAs including TNCs, and the fact that TNCs play key roles in armed conflict by trading in conflict commodities is one that has been recognized by the international courts, as well as by the Security Council and the General Assembly of the UN. While there have been efforts to address the role of States as well as natural persons fueling conflicts for predatory profit motives, the same cannot be said for corporations, even when they carry out acts that defeat the object and purpose of extant treaty regimes like the ATT, such as supplying weapons to warring factions.

It is also becoming apparent that the ability of individual States acting separately to regulate activities of TNCs remains limited because of the ability of TNCs to move capital between countries and to create a flexible structure that exploits the legal fiction that subsidiaries are different from their parent companies, as illustrated with the British company that was registered in the Isle of Man above. Some scholars have argued the reason why the corporation IG Farbens was not convicted even though the finding of guilt for the directors was based on a finding the company had committed war crime was only for jurisdictional reasons rather than substantive reasons.

In the face of the important role played by TNCs in the international plane, one wonders whether international law should still continue to grant safe haven to corporate war crimes

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216 Cf Preamble to the UN Charter para 1; It may be worth mentioning that by the provisions of article 31(2) of the Vienna Convention on the Law of Treaties the context of a treaty shall comprise...its preamble and annexes

217 See Olivier De Schutter; The Accountability of Multinationals for Human Rights Violations in European Law in Non-State Actors and Human Rights Edited by Philip Alston, (Oxford University Press 2005) p 229

218 Ibid. p. 233
fueling conflict by trade in conflict commodities instead of providing norms of responsibility for TNCs.

The next chapter shall examine in detail the need for a regime of responsibility that resembles to some extent that for States and International Organizations, respectively under the International Law Commission’s 2001 Articles on Responsibility of States for Internationally Wrongful Acts and the 20011 Articles on the Responsibility of International Organizations.
4. Filling the Accountability Gap

In this chapter, I will demonstrate that international law does regulate conduct of TNCs. In doing this, I shall discuss the provisions of different treaty regimes, the jurisprudence of the ICJ, judicial decisions from different national jurisdictions, and some national legislation from different countries.

I shall also discuss the need for the organized international community to stop shying away from the important task of binding legal obligation for TNCs. As stated by the NGO Friends of Earth International on the ongoing UN Treaty on Business and Human Rights:

   We cannot rely on voluntary measures alone, as these fail to hold corporations to account. Promising developments are now taking place in Europe, such as the French law on duty of care and the Dutch child labor due diligence law. We hope these examples will help build support for the UN treaty. But we see big business resisting any attempt at binding regulation. It is therefore essential that we protect the discussions on the treaty from corporate capture. 219

There is a need for improvement on the extant international law regime for TNCs to reflect the reality of contemporary situations, because international law on responsibility for TNCs is much less developed than that of States and international organizations. 220 I would end by proposing possible mechanisms to ensure corporate legal responsibility for TNCs under the ongoing UN treaty on business and human rights.


4.1 TNCs as Entities Regulated by International Law?

The growing power and transboundary reach of many businesses have allowed some of these businesses to escape national legal responsibilities. International attention therefore is the new hope to rein in the powers in TNCs. 221 Wolfgang Friedman had suggested long ago that private corporations are participants in the evolution of modern international law. 222 While the organized international community have shied away from the idea of vesting binding legal obligations of international law on corporate entities, the fact that international law can and does bind TNCs is not new. For example, the provisions of article 1 of the international Convention on Civil Liability for Oil Pollution and Damage, 223 defines persons to mean any individual or partnership or any public or private body whether corporate or not. By the provisions of article 2(6) of the Council of Europe’s Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, the word person is defined to include corporate entities. 224 Article 2 (14) of the Basel Convention defines the word person to mean natural or legal person. 225 Furthermore, the Organized Crime Convention requires that legal persons be liable for participating in serious crimes including trafficking in persons. 226 By article 1 of the 1997 Vienna Convention, 227 the word person was defined to include a corporate entity.

223 International Convention on Civil liability for Oil Pollution Damage adopted in Brussels on 29 November 1969 UNTS 20973; www.treaties.un.org
226 Article 10(1) of the Organized Crime Convention is to the effect that each State party establishes liability for legal persons for participation in serious crimes involving organized criminal groups and for offences established in accordance with the Convention. See also See UNODC Toolkit to Combat Trafficking in Persons www.unodc.org
The Council of Europe in 1988 accepted the recommendation of its selected committee that member states consider the promotion of corporate liability.\textsuperscript{228}

By the provisions of article 2 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction, each party shall take such measures as may be necessary in accordance with its principles to establish the liability of \textit{legal persons} for bribery of foreign public officials. The provisions of these treaties are clear that businesses are recognizable entities capable of being regulated by international law.

One may also add that the principle upon which culpability of corporate entities is premised in most municipal jurisdictions is the principle of independent legal personality of a corporation as distinct from that of the shareholders. And this principle of legal personhood for a corporation is not strange to international law. The ICJ in the \textit{Diallo Case},\textsuperscript{229} on Guinea’s argument that it was impossible to distinguish Mr. Diallo from the company\textsuperscript{230} stated that the direct right as an \textit{associe} exists because a company has juridical personality distinct from those of \textit{associe}. In the \textit{Barcelona Traction case},\textsuperscript{231} the ICJ stated that international law has had to recognise corporate entity as “an institution created by States in a domain essentially within their jurisdiction.” Implicit in that statement by the ICJ is the fact that the idea of legal personality of a corporate entity is a general principle of law recognized by civilized nations.\textsuperscript{232}

The Universal Declarations of Human Rights (UDHR) emphasizes the fundamental rights of individuals and places responsibility on both governments and “other organs of society” for affording those rights. Scholars have argued that organs of society in this context include actors beyond just the State and indeed businesses, since they play a clear economic and increasingly social function in the society.\textsuperscript{233} Heskin asserts that “Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company,

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\textsuperscript{228} Recommendation No R (88) 18
\textsuperscript{229} See \textit{Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v DRC) Merits, Judgment}, ICJ Reports 2010 para 103.
\textsuperscript{230} See Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v DRC) Merits, Judgment, ICJ Reports 2010 para 103.
\textsuperscript{231} See case concerning \textit{Barcelona Traction Light and Power Company Limited (Belgium v Spain)} Second Phase Judgment. ICJ Reports 1978 pp 33-34
\textsuperscript{232} See article 38 (1) (c) of the Statute for the International Court of Justice
\end{flushleft}
no cyberspace. Other scholars have argued that wherever international law implicates individuals, it also includes corporations to the extent that individuals have rights and duties under customary international law and international humanitarian law, and multinational corporations as legal persons have the same set of rights and duties. More so, the International Labour organization (ILO) Tripartite Declaration of 1977 called on corporations to respect the Universal Declaration of Human Rights and the principal human rights Covenants (the ICCPR and the ICESCR).

Over the last decade in both Europe and the United States, there have been national legislations for assuring that survivors of the Nazi Holocaust are offered compensation from the companies that were complicit in genocide, crimes against humanity, war crimes and other egregious violations of human rights. Some of these laws require disclosure of businesses in Europe during the Nazi regime, especially in the insurance sector. Some of these laws allow anyone who was a victim of Nazi slave labor between the periods of 1929 and 1945 to bring an action against the corporate entity for whose interest such labor was used, or the successor of such an entity and such suit may be brought directly against the entity, through its subsidiary or affiliate.

Under the Alien Torts Statute (ATS) in the United States, the District Court has original jurisdiction to the over civil action on torts committed in violation of the law of nations or a treaty of the United States. Some of the leading multinationals in the world have been sued in the U.S for alleged complicity in human rights violation under the ATS, some of the cases have

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238 See Holocaust Victims insurance Relief Act supra

been dismissed on *forum non conveniens*, jurisdictional, political or factual grounds, but none have been dismissed because private entities are in principle immune from liability under international law.\(^{240}\) Some scholars have stated that the debate is no longer one on whether to have corporate liability, but what form corporate liability should take.\(^{241}\) More so, the idea of legal responsibility of juridical persons under the jurisdiction of the Rome Statute was canvassed by the French delegates and a final proposal presented to the Working Group also sought including private corporations.\(^{242}\) These arguments were rejected because it could detract from the courts jurisdictional focus on individuals, absence of universal standard of corporate liability and overwhelming problems of evidence.\(^{243}\) In the entire gamut of arguments advanced, the parties did not exclude TNCs owing to the fact that TNCs cannot be liable or complicit in offences within the jurisdiction of the ICC. One may wonder: whether wealthy corporations complicit or involved in war crimes can find safe heavens under international law merely by masquerading behind the corporate veil? Scholars have argued that the ease with which the concept of joint enterprise ("a provision relying on the inherently tricky concept of group intent") was adopted could be an indication that the doctrinal objection to group intent in relation to corporate liability was shallow.\(^{244}\) Contemporary international law does not meet the justice of the extant situation that TNCs have been the first to benefit from globalization, but the responsibility for coping with the effect is one to be shouldered exclusively by less wealthy developing States\(^{245}\) that are in most cases unable to match the financial capacities of the transnational entities. More so, most of these States are either unable or unwilling to hold TNCs to account in order to attract invest-


\(^{243}\) See Otto Triffterer Commentary on the Rome Statute of the ICC, Observers’ Notes, Article by Article (Beck.Hart. Nomos 2nd edition) P746

\(^{244}\) See Celia Wells and Juanita Elias, Catching the Conscience of the King: Corporate Players on the International Stage in Non-State Actors and Human Rights, edited by Philip Alston, Oxford University Press (2005) p 167

ments. Some scholars have argued that this inability of host States to hold corporations liable creates a void in the present accountability regime.\textsuperscript{246}

4.2 The Need for a Norm of International Responsibility

Some initiative like the multi-stakeholder initiatives seeks to represent the interest of States, business and the civil societies, and this has resulted into important developments in this regards, for example, the establishment of Code of Conduct for Private Security Providers.\textsuperscript{247} The Montreux Document also provides rules for Private Military and Security Companies, but these initiatives only cover a limited scope of actors, and are not intended to be seen as substitute for international law in this regard.\textsuperscript{248} Although there are established procedures for individual complaints under the UN human rights treaties, however, such complaints can only be brought against a State party to any of the UN human right treaties which the petitioner alleges has been violated.\textsuperscript{249}

In this context, a defined regime of responsibility would help the victims of corporate atrocities in situations of armed conflicts to get remedy before international courts or any specialized body as may be deemed necessary to administer judicial or quasi-judicial functions under the treaty.

One of the underlying principles of reparation is that it must wipe the consequences of an illegal act, restore the victim into a position where s/he would have been but for the wrongful act.\textsuperscript{250} This would mostly entail payment of a sum corresponding to the value which restitution in kind would bear, where restitution in kind is not possible.\textsuperscript{251} It only flows as a matter of logic that wealthy TNCs are better equipped to pay monetary compensation to victims of corporate criminal act that are committed in situations of armed conflicts.

\begin{itemize}
\item \textsuperscript{246} See M.T Kamminga, “Corporate Obligations Under International Law” paper presented at 71\textsuperscript{st} Conference of the ILA Plenary Session on Corporate Social Responsibility and International Law, Berlin 17 August 2004
\item \textsuperscript{247} International Code of Conduct for Private Security Providers, Available at: http://www.icoc-psp.org/
\item \textsuperscript{248} ICJ 2014 p 10
\item \textsuperscript{249} See UN Human Rights, Office of the High Commissioner “Individual Complaint Procedure under UN Human Rights Treaty” Fact Sheet N07/Rev 2 UN New York and Geneva 2013, p.3
\item \textsuperscript{250} See Factory of Chorzow, Merits, Judgment No 13, 1928, PCIJ, Ser A, No 17 at p 47
\item \textsuperscript{251} ibid
\end{itemize}
A defined regime of international responsibility would also account for certitude and clarity among legal scholars and as to when a corporation has committed an internationally wrongful act for which there must be corporate legal responsibility. This is also very important in view of the ongoing treaty negotiation by the UN on Business and Human Rights. As a treaty, its obligations are determined when it comes into force in accordance with the rules of interpretation of customary international law and the Vienna Convention on the Law of Treaties (VCLT). But the rules as to when a corporation has breached an obligation and the legal consequences in terms of such matters as reparation are ones that would be provided for in the proposed regime of responsibility for TNCs. It is in this context that I would also suggest that the ongoing UN treaty on Transnational Corporations and Human Right adopts a model that is similar to the Rome Statute of the ICC. Consequently, the treaty would contain primary norms for corporations’ legal obligations and relevant provisions for secondary norms of responsibility, which would define instances when a corporation can be deemed guilty of corporate wrongful acts. Just like the Rome Statute of the ICC provides for primary norms for crimes within the court’s jurisdiction and secondary norms on individual criminal responsibility, including the defined rule on responsibility of commanders and other superiors.

It may also be worthy of mention, that under Chapter VII of the UN Charter, the Security Council has a very wide discretion within its authority. The text does not limit the ratione personae reach of application of the Security Council’s decision, thus, the Security Council can address every subject or group that it considers having an influence on international peace and security. In imposing economic embargo for instance, the Security Council can without difficulty determine TNCs falling within the scope of application of such measures. But, the Security Council has refrained from doing this; the reason for this is because imposing such orders in the absence of a defined regime would make any attempt by the Security Council to establish a direct contact illusory. A defined regime in this regard would also

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252 See Evans 2014 P450
253 See article 38 of the Rome Statute of the ICC
255 Christian Tomuschat 2010 supra
256 ibid
allow the Security Council to impose direct order on TNCs particularly since the Council has acknowledged the key roles played by private businesses in armed conflict situations.

Furthermore, international law has provided a protectionary system of Investor State Dispute Settlement, (ISDS) through which companies can sue their host States and get justice for rights due to them in law. ISDS today is contained in bilateral investments treaties (BITs) as well as in many international investment treaties, such as NAFTA, TPP and CETA. But while international law has provided for avenue in which TNCs can sue States and demand redress for violation of their legal rights, the situation is entirely different for TNCs that violates international law in armed conflict situation as a result of perverted business practices in theaters of war. It is suggested that BITs be drafted to contain provisions wherein States can also sue TNCs in arbitration proceedings before institutions like the Permanent Court of Arbitrations in order to remedy this injustice.

4.3 The Proposed Mechanism for Ensuring Responsibility for TNCs under a Binding International Legal Instrument.

In this section, I shall focus on a possible mechanism for ensuring legal responsibility for TNCs at the domestic level. There are also similar mechanisms that can operate at regional levels under regional law and at international level under international law. But, the scope of this thesis would be limited to a mechanism for ensuring responsibility at domestic level.

4.3.1 Responsibility Mechanism under Domestic Law

Responsibility under domestic law at the national level would take the form of a shared responsibility between home State and the host State. In other words, the proposed binding legal obligation is one that would vest a legal obligation of cooperation on the home State and host State, to ensure corporate legal responsibility for crimes committed in situations of armed conflicts in accordance with principles of international law.

Some scholars have argued that there exists shared responsibility between host State and home State for human rights violations by TNCs, in the sense that the single wrongful outcome is a resultant effect of the failure of both States to act.258

257 See Chapter 11 NAFTA, Trans Pacific Partnership Chapters 9 and 28, Comprehensive Economic Trade Agreement, sections 3 and 4
Furthermore, the UN Committee on the Rights of the Child has stated that part of the obligation of States to protect human rights is that States in which corporations have their main offices take steps to prevent human rights violation abroad by those corporations.\(^{259}\) The Committee on Elimination of Racial Discrimination in its recommendation stated that Canada take appropriate legislative measures to prevent TNCs registered in Canada from carrying out activities that negatively impact the rights of indigenous people outside Canada.\(^{260}\) This was also the position of the Committee on Economic, Social and Cultural Rights.\(^{261}\)

More so, by the provisions of Article 56 of the UN Charter, “All Member States pledge themselves to take joint and separate action…” in achieving the purpose set forth in Article 55, which include: “universal respect for and observance of human rights.”\(^{262}\)

It therefore follows that international law allows for corporation between member States of the UN to regulate acts of TNCs in order to prevent human rights violations as may occur situations of armed conflict. It is on this premise that the ongoing UN Treaty on Business and Human Rights ought to provide for a duty of cooperation between the host State and home State of TNCs as a mechanism to ensure responsibility at domestic level. This would also help in reducing the hurdles of *forum non conveniens* and jurisdiction that is faced by victims of corporate atrocities seeking legal redress through transnational litigation.

Furthermore, the said treaty should have a provision for self-reporting wherein States report measures taken for ensuring corporate liability for gross human right and IHL violations, and a monitoring mechanism for monitoring practice of States in ensuring liability for corporations for IHL and human rights violations.

\(^{259}\) See Committee on the Right of the Child, General Comment 16 on States Obligation regarding the Impact of Business Sector on Children’s Right UN Doc. CRC/C/GC/16, 17 April, 2013

\(^{260}\) See CERD, Concluding Observation of the Committee on Elimination of Racial Discrimination – Canada, UN Doc. CERD/C/CAN/C0/19-20 (4April 2012)


\(^{262}\) See Article 56 (3) of the UN Charter.
4.4 Findings

The elephant in the room i.e. international responsibility for TNCs has not been addressed. The idea of keeping corporations outside the reach of hard international law obligations in situations of armed conflict appears to be obsolete. TNCs have benefited from increase in their capital base, and international law has almost given TNCs a perfect assurance against possible fears of losing investments under BITs. But international law is yet to provide for a regime on responsibility for involvement of TNCs in perverted investment decisions as a result of predatory profit motives that fuels armed conflicts.
5. Conclusion

TNCs are beneficiaries of the modern economy that transcends political boundaries. Through privatization, public private partnership and foreign direct investments TNCs can carry out economic activities in numerous States, thereby exploiting several economies. This has led to increase capital base for these TNCs, as they are today wealthier than most developing countries of the world.

The pursuit of financial gains has led TNCs into enterprises that borders on criminal behavior even in situations of armed conflicts. This is also because control over economy and scarce natural resources is one of the causes of armed conflicts. And morally wrong business decisions with predatory profit motives have led TNCs to trade in theatres of war and fuel situations of armed violence. This study demonstrates that CIHL binds TNCs and impose an obligation on TNCs not to breach rules of CIHL or be complicit in the breach of CIHL. CIHL imposes similar obligations on States as affirmed in the jurisprudence of the ICJ and on individuals as affirmed in the famous finding of the Nuremberg Tribunal.

However, while international law has provides responsibility for States and private individuals for exploiting armed conflict situations to make profits, TNCs that account for the largest economies of the world today are not held responsible under international law for similar practices.

This study demonstrates that TNCs are regulated entities under international law, and it follows that there is a need to address the responsibility gap for TNCs. This thesis proposes a mechanism for ensuring responsibility for TNCs under domestic law. And to remedy the current difficulty faced by victims of corporate atrocities seeking redress through transnational litigation under ACTA, and litigation in the home State of TNCs, in order to hold TNCs liable for human right violations committed in host State.

263 Nuremberg Prosecutor Ben Ferencz also stated that one of the cause of armed conflict is the need for economic security see BBC Hard Talk with Ben Ferencz, Prosecutor at Nuremberg Trials www.bbc.co.uk

264 See Alfred Friday Akpan v Shell C/09/337050 / HA ZA 09-1580 2 30 January 2013, A case litigated before the Dutch courts against Shell for poor environmental standards in oil explorations in the Niger Delta region of Nigeria
Therefore, there is the need to tame the corporate bulls with the instrumentality of international law, and indeed a need for a legal regime that would ensure responsibility under international law for TNCs for crimes committed in situations of armed conflicts.
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