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Environmental obligations of business entities during armed conflicts

Sâ Benjamin Traoré[1]* and Ezéchiel Amani Cirimwami[2,3]†**

[1]Associate Professor of Law, African Institute for Research in Economics and Social Sciences, Faculty of Governance, Economics and Social Sciences, Mohammed VI Polytechnic University, Rabat, Morocco
[2]Professor of International Law, University of Kinshasa, Democratic Republic of the Congo
[3]Guest Professor, Vrije Universiteit Brussel and Royal Military Academy of Belgium
*Email: SaBenjamin.TRAORE@um6p.ma
**Email: amani.cirimwamie@gmail.com

Abstract

International humanitarian law (IHL) does not address business entities, except in situations where they directly participate in hostilities, and there is no reference to business actors in the International Committee of the Red Cross's recent Guidelines on the Protection of the Natural Environment in Armed Conflict. *Yet,*

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there has been an increasing reaffirmation of specific "duties", "obligations" or "responsibilities" imposed on private companies operating in conflict zones. For instance, the UN Guiding Principles on Business and Human Rights suggest that business entities should respect IHL rules in addition to human rights during armed conflicts, and the third revised draft of the international legally binding instrument on transnational corporations and other business enterprises refers to IHL as an interpretative framework of human rights obligations of States and businesses. The International Law Commission's 2022 Draft Principles on the Protection of the Environment during Armed Conflicts are even more specific, providing that corporations should exercise due diligence concerning the protection of the environment when acting in conflict-affected areas. However, these references to IHL as applicable to business activities remain vague and lack elaboration. This paper intends to close this gap by clarifying whether and, if so, the extent to which IHL imposes environmental obligations upon private companies in conflict situations. It submits that business entities bear environmental duties during armed conflicts deriving from IHL rules and other complementary sources of international law. The paper further discusses the content of the obligation of business entities not to harm the environment as well as their due diligence obligation.

Keywords: armed conflicts, business entities, environmental obligations, do no harm, due diligence, liability, environmental harm.

Introduction

Although its development as a specific set of rules was linked to a personal business venture,[1] international humanitarian law (IHL) does not address business activities directly. IHL rules focus mainly on "parties to armed conflict", whether international armed conflicts (IACs) or non-international armed conflicts (NIACs). Business entities do not fall under the category of "parties", except in situations where they directly participate in hostilities, such as with private military companies (PMCs). Yet, it is close to a truism to affirm that private companies are critical actors in conflict-affected areas.[2] Business entities may get involved in conflict situations in various ways. Such involvement depends on different factors, such as the nature of the business activity, its size, and its business objectives and strategies.[3] For

1 It was for business-related motives that Henry Dunant found himself in Solferino, as he was desperately trying to obtain a business permit from Napoleon III to grow his business in northern Africa. See Francois Bugnion, "Henry Dunant", in David P. Forsythe (ed.), *Encyclopedia of Human Rights*, Oxford University Press, Oxford, 2009, p. 6.

2 See the thematic issue of the *Review* on "Business, Violence and Conflict", *International Review of the Red Cross*, Vol. 94, No. 887, 2012. Among many others, see Tom Burgis, *The Looting Machine: Warlords, Oligarchs, Corporations, Smugglers, and the Theft of Africa's Wealth*, Public Affairs, New York, 2015; Philippe Le Billon, *Fueling War: Natural Resources and Armed Conflict*, Routledge, London, 2005; Jelena Aparac, *Business et droits de l'homme dans les conflits armés*, Bruylant, Brussels, 2021.

3 Hugo Slim, "Business Actors in Armed Conflict: Towards a New Humanitarian Agenda", *International Review of the Red Cross*, Vol. 94, No. 887, 2012, p. 910.

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instance, one cannot put on the same footing a bakery ensuring minimum bread delivery in a conflict zone,[4] a PMC engaged in hostilities alongside a warring party,[5] and a business actor supporting a party to the conflict financially in order to help it continue its armed activities.[6] Similarly, a transnational corporation (TNC) carrying out an extraction activity in a conflict zone and trading with State or non-State actors[7] or doing business in territories that are illegally occupied,[8] on the one hand, and a business entity supporting a regime that has launched an aggressive war against its neighbour,[9] on the other, should not be put in the same box. Generally, however, when it comes to their relationship with IHL, business entities can be considered either as civilians and potential victims of armed conflicts, or as being involved in infringing IHL rules. In the latter case, they can act as perpetrators of IHL violations or accomplices.[10]

In recent years, there has been an increasing reaffirmation of specific "duties", "obligations" or "responsibilities" imposed on private companies operating in conflict zones. For instance, under the UN Guiding Principles on Business and Human Rights (UNGPs), business entities are responsible for respecting human rights. This responsibility implies that business entities respect the standards of IHL during armed conflicts.[11] Moreover, the third revised draft of the international legally binding instrument on TNCs and other business enterprises refers to IHL as an interpretative framework of human rights

4 Such business activity could even be considered highly necessary for the effectiveness of IHL rules on the general protection of the civilian population. See, for instance, Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 54.

5 When taking part in hostilities, such companies are "parties" to whom IHL applies. Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law*, Cambridge University Press, Cambridge, 2013, pp. 313–316.

6 For instance, Lafarge in Syria. See Sandra Cossart, Anna Kiefer, Cannelle Lavite and Claire Tixeire, "Multinational Lafarge Facing Unprecedented Charges for International Crimes: Insights Into the French Court Decisions", *Opinio Juris*, 15 November 2022, available at: http://opiniojuris.org/2022/11/15/ (all internet references were accessed in December 2023).

7 This occurs mostly – but not exclusively – in NIACs. See J. Aparac, above note 2, pp. 201–206.

8 See Antoine Duval and Eva Kassoti (eds), *The Legality of Economic Activities in Occupied Territories: International, EU Law and Business and Human Rights Perspectives*, Routledge, Abingdon, 2020.

9 In the context of the war against Ukraine, we have witnessed significant awareness of this issue. This is not new, however, as the Nuremberg trials demonstrated. On the sanctions against Russian business individuals and entities, see EU Commission, "EU Sanctions against Russia following the Invasion of Ukraine", available at: https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en; see also Tomas Hamilton, "Corporate Accountability and Iranian Drones in the Ukraine war: Could Sanctions Lead to Prosecutions for International Crimes?", *EJIL: Talk!*, 23 November 2022, available at: www.ejiltalk.org/corporate-accountability-and-iranian-drones-in-the-ukraine-war-could-sanctions-lead-to-prosecutions-for-international-crimes/.

10 H. Slim, above note 3, p. 912; Inés Tófalo, "Overt and Hidden Accomplices: Transnational Corporations' Range of Complicity for Human Rights Violations", in Olivier De Schutter (ed.), *Transnational Corporations and Human Rights*, Hart, Oxford, 2006; William A. Schabas, "Enforcing International Humanitarian Law: Catching the Accomplices", *International Review of the Red Cross*, Vol. 83, No. 842, 2001.

11 United Nations, *Guiding Principles on Business and Human Rights: Implementing the Protect, Respect and Remedy Framework*, New York and Geneva, 2011 (UNGPs), commentary on Principle 12, p. 14. See also Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action*, UN Doc. A/75/212, 21 July 2020.

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obligations of States and businesses.[12] The International Law Commission's (ILC) 2022 Draft Principles on the Protection of the Environment during Armed Conflicts (ILC Draft Principles) are even more specific. The Draft Principles provide that private corporations exercise due diligence concerning the protection of the environment, including human health, when acting in areas affected by armed conflict.[13]

Unfortunately, these references to IHL as applicable to business activities remain vague and lack elaboration. They provide no detail on the nature of the rules applicable to business entities during armed conflicts. However, businesses in conflict-affected situations carry out activities that may relate to the armed conflict. As an armed conflict inevitably impacts the natural environment, such activities may also cause environmental harm.[14] This makes the lack of systematic articulation of business obligations in such situations concerning, and the lack of business environmental obligations in armed conflict (BEOAC) even more so. For instance, the ILC did not elaborate on the actual conceptual and normative grounds of BEOAC in its Draft Principles, despite reference to the environmental "responsibilities" of private companies.[15] Further, there is no reference to business actors in the International Committee of the Red Cross's (ICRC) recent *Guidelines on the Protection of the Natural Environment in Armed Conflict* (ICRC Guidelines).[16] The same is true with the recent increasing literature on environmental issues related to armed conflicts, whose focus has been quite far from the role of business actors.[17]

12 Human Rights Council (HRC), *Text of the Third Revised Draft Legally Binding Instrument with the Textual Proposals Submitted by States during the Seventh Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights*, UN Doc. A/HRC/49/65/Add.1, 28 February 2022, preambular para. 6 and Art. 16(5), available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/268/13/PDF/G2226813.pdf?OpenElement.

13 ILC, *Draft Principles on the Protection of the Environment in Relation to Armed Conflicts*, in *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2022 (ILC Draft Principles), Principles 10, 11, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf.

14 Mara Tignino, "Corporate Human Rights Due Diligence and Liability in Armed Conflicts: The Role of the ILC Draft Principles on the Protection of the Environment and the Draft Treaty on Business and Human Rights", *Questions of International Law Zoom-in*, No. 83, 2021.

15 For instance, the commentaries to the ILC Draft Principles do not explain such conceptual grounds on which business environmental responsibilities are based. See ILC Draft Principles, above note 13, commentaries to Principles 10 and 11, pp. 125–135.

16 ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary*, Geneva, 2020 (ICRC Guidelines), available at: www.icrc.org/en/publication/4382-guidelines-protection-natural-environment-armed-conflict.

17 The recent special issue on the environment and armed conflict of the *Journal of International Criminal Justice* (Vol. 20, No. 5, 2022) provides a good illustration of the absence of such a focus in international law literature. Some recent studies discuss some aspects of these issues but do not provide for a comprehensive analysis of the conceptual and legal foundations of corporate obligations in armed conflict, or the nature of such obligations. Robinson and Shah's study is an exception, but they discuss the issue from a philosophical perspective. See James Tsabora, "Illicit Natural Resource Exploitation by Private Corporate Interests in Africa's Maritime Zones during Armed Conflict", *Natural Resources Journal*, Vol. 54, No. 1, 2014; M. Tignino, above note 14; Richard Robinson and Nina Shah, "Business' Environmental Obligations and Reasoned Public Discourse: A Kantian Foundation for Analysis", *Journal of Business Ethics*, Vol. 159, 2019; Marie Davoise, "Business, Armed Conflict, and Protection of the Environment: What Avenues for Corporate Accountability?", *Goettingen Journal of International Law*, Vol. 10, No. 1, 2020.

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The aim of this article is, therefore, to contribute to filling this gap. The article proposes to discuss whether and, if so, the extent to which IHL imposes environmental obligations upon private companies in conflict situations. We submit that business entities have environmental duties during armed conflicts. These obligations derive from IHL rules and – perhaps more importantly – other complementary international law rules and principles. In the context of this article, business obligations mean legal duties and not merely "social responsibility", which, in its initial conceptions at least, is based on the idea that business companies have no legal obligations but rather moral and ethical responsibilities.[18] As this article will demonstrate, such a narrow conception of the role of business entities no longer stands. The reference to business entities in this contribution is broad: although most of the legal difficulties lie in the conduct of TNCs, other business entities are also of concern. Finally, although this contribution focuses only on the question of businesses' obligations, it must be stressed that business entities also have rights and must benefit from protection from the effects of hostilities.[19]

As the body of law concerning armed conflicts, IHL rules are of primary pertinence in delineating the contours of BEOAC. This article reflects this relevance while acknowledging IHL's limits and the need to call complementary rules from other (international) legal regimes into play. Such complementarity is a useful tool for ascertaining the environmental obligations imposed on corporations during armed conflicts; IHL rules serve as an interpretative framework for other regimes, which in turn assist in interpreting IHL rules.[20]

The first part of the article discusses the conceptual foundations of BEOAC, while the second part addresses the substantive nature of such obligations. The third part focuses on the issue of enforcement mechanisms, and the final part concludes the authors' assessment.

Clarifying the conceptual and normative foundations of BEOAC

Business entities are not parties to international conventions, and customary international law applicable to States may not be directly applicable as far as businesses are concerned. Hence, the preliminary question arises as to whether IHL and other international norms could provide for corporate environmental

18 John Gerard Ruggie, "Business and Human Rights: The Evolving International Agenda", *American Journal of International Law*, Vol. 101, No. 4, 2007. On the idea that corporations must respect and protect the environment based on ethical values, see R Robinson and N. Shah, above note 17.

19 See "Ten Questions to Philip Spoerri, ICRC Director for International Law and Cooperation", *International Review of the Red Cross*, Vol. 94, No. 887, 2012, p. 1128.

20 In a similar sense, see Raphaël van Steenberghe, "The Interplay between International Humanitarian Law and International Environmental Law: Towards a Comprehensive Framework for a Better Protection of the Environment in Armed Conflict", *Journal of International Criminal Justice*, Vol. 20, No. 5, 2022; Onita Das, "Environmental Protection in Armed Conflict: Filling the Gap with Sustainable Development", in Rosemary Rayfuse (ed.), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict*, Brill, Leiden and Boston, MA, 2014, p. 129; Mara Tignino and Tadesse Kebebew, "The Legal Protection of Freshwater Resources and Related Installations during Warfare", *Journal of International Criminal Justice*, Vol. 20, No. 5, 2022, p. 1199.

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obligations. This section engages with this critical conceptual difficulty and identifies the specific normative basis of BEOAC.

Conceptual clarification

Are business entities addressees of international law rules? It is frequently argued that business entities are not international obligation bearers, allegedly because they lack international personality.[21] From a classic "State-centric approach" regarding the possession of international rights and subjection to international obligations, this conception contends that corporations do not bear international obligations. John Ruggie – the mastermind behind the UNGPs – has explained that multinational entities "barely exist under international law" and that international law imposes duties only on States, not on companies directly.[22] However, the preconceptions of this dominant approach around subjectivity play out as a kind of sleight of hand, attributing or denying international status and legal responsibilities. This narrow opposition between "being" and "not-being"[23] has become an "intellectual prison" clouding all discussion on this issue.[24] It is beyond the scope of this article to dwell on the intricacies of this debate in international scholarship. At any rate, as pointed out by Alvarez, "skepticism about the personhood of corporations should not be confused with doubts about whether international corporations have responsibilities under international law".[25] In our view, the following practical considerations would suffice to explain conceptually the grounds on which BEOAC stand.

Firstly, it is undeniable that international acts and rules address various non-State actors. This raises legitimate questions on how such actors respond to the attribution of legal responsibilities bestowed upon them.[26] As far as private entities such as corporations are concerned, it is our view that international law

21 For an account of such positions, see Vincent Chetail, "The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward", in Denis Alland, Vincent Chetail, Olivier de Frouville and Jorge E. Viñuales (eds), *Unité et diversité du droit international: Ecrits en l'honneur du professeur Pierre-Marie Dupuy* [*Unity and Diversity in International Law: Essays in Honour of Professor Pierre-Marie Dupuy*], Martinuis Nijhoff, Leiden and Boston, MA, 2014, p. 110.

22 John G. Ruggie, "Multinationals as Global Institution [*sic*]: Power, Authority and Relative Autonomy", *Regulation and Governance*, Vol. 12, 2018, pp. 320–321. See also Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*, 3rd ed., Cambridge University Press, Cambridge, 2020, p. 842.

23 Philip Alston captured this very well by showing that, ultimately, what we call "being" here is defined by reference to the State, leaving only the binary option of "being a cat (State)" or "not being a cat". See Philip Alston, "The 'Not-a-Cat' Syndrome", in Philip Alston (ed.), *Non-State Actors and Human Rights*, Oxford University Press, Oxford, 2005, p. 5.

24 Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, New York, 1994, p. 49.

25 Jose E. Alvarez, "Are Corporations 'Subjects' of International Law?", *Santa Clara Journal of International Law*, Vol. 9, 2011, p. 31 (explaining that "international lawyers should spend their time addressing which international rules apply to corporations rather than whether corporations are or are not 'subjects' of international law").

26 See P. Alston, above note 23; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006; Jean d'Aspremont, *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, Routledge, Abingdon, 2011.

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not only acknowledges their existence – or presence, if one prefers – but also, more significantly, accords them rights and imposes duties upon them. The ability of the international legal system, through existing subjects, to grant rights and impose obligations on private entities is a settled issue.[27] Such a *prise en consideration* of the corporation was brought to light by the International Court of Justice (ICJ) in the *Barcelona Traction* case. The Court indicated that international law concerns the corporation as "a development brought about by new and expanding requirements in the economic field". It clarified that "international law is called upon to recognise institutions of municipal law that have an important and extensive role in the international field".[28] The corporate presence entails interfering with the application of some international rules and some concurrence with traditional actors such as States.

Secondly, the situation warrants a pragmatic approach. There is a need to give effect to international rules and principles whose application necessarily involves corporations, either as beneficiaries or duties bearers. It is indeed hard to contest that international law, as it stands today, creates obligations for corporations as much as it confers rights to them. Authors who deny international personality to corporations have acknowledged this fact, although they only see these obligations as being *indirectly* imposed on corporations.[29] However, aside from the fact that several international instruments *specifically*[30] address corporate conduct, the very conclusion that an obligation is direct or indirect depends on how one interprets the relevant source.[31] What some see as indirect obligations may appear to others as direct obligations. Corporations possess an international stature that does not equate them to other international actors or conflate all corporations in the same (legal) reality.[32] Such an approach aligns with ICJ's Advisory Opinion in the *Reparation for Injuries* case, whereby the court suggested that the international capacity may differ from one entity to another.[33] In their current development stage, corporations are not only passive addressees of

27 Permanent Court of International Justice, *Jurisdiction of the Court of Danzig*, 1928, Series B, No. 15. See also,Joe Verhoven, "La notion d'applicabilité directe du droit international", *Revue Belge de Droit International*, No. 2, 1980, p. 245.

28 ICJ, *Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, *ICJ Reports 1970*, p. 35. See also ICJ, *Ahmadou Sadio Diallo (Guinea v. DRC)*, *ICJ Reports 2010*, p. 104.

29 See, for instance, J. G. Ruggie, above note 22, pp. 320–321; Carlos M. Vazquez, "Direct vs Indirect Obligations of Corporations under International Law", *Columbia Journal of Transnational Law*, Vol. 43, No. 3, 2005, p. 927.

30 Nicolas Bueno, Anil Yilmaz Vastardis and Isidore Ngueuleu Djeuga, "Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses", *Journal of World Investment and Trade*, Vol. 24, No. 2, 2023, p. 189. See also Andrès Felipe Lopez Latorre, "In Defence of Direct Obligations for Businesses under International Human Rights Law", *Business and Human Rights Journal*, Vol. 5, No. 1, 2020.

31 Markos Karavias, *Corporate Obligations under International Law*, Oxford University Press, 2013, p. 13; Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility", *Yale Law Journal*, Vol. 111, No. 3, 2001, p. 448; Julio A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", *Collected Courses of the Hague Academy of International Law*, Vol. 179, 1983, p. 161.

32 H. Slim, above note 3, p. 912.

33 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ Reports 1949*, p. 178 ("the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights").

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international rules that protect them but also actively participate in dispute settlement mechanisms and shape international law rules to their advantage.[34] The international duties imposed on them echo such rights and privileges.[35]

Lastly, whether international law imposes obligations upon corporations can be deduced from international responsibility mechanisms intended for such corporations. This implies that international obligations not only stem from international rules addressing corporate conduct but are also ascertained by the legal consequence attached to the violations of these obligations – i.e., responsibility. The existence of civil or criminal responsibility is evidence of correlative obligations.[36] In order words, the fact that corporations can incur international responsibility – be it through investment arbitration, human rights, international criminal responsibility, or in a field such as the law of the sea – is the most tangible indication that they are international duties bearers. Even though such responsibility has mainly been addressed before domestic courts, this does not take away its international character, for the existence of responsibility must not be confused with the mode of implementing it. What matters is that such responsibility is enforced by applying rules existing in or deriving from international law.[37]

Legal basis of BEOAC under IHL

It has been shown above that there is no conceptual hindrance to the existence of international obligations for corporations. Here we argue that, from an IHL perspective, the conceptual basis of these obligations is even easier to demonstrate. Firstly, while other international law regimes, such as human rights, have been traditionally (mis)understood as only applicable to States, IHL was extracted from such State-centric logic at a very early stage. True, most IHL norms were designed for states and contemplated IACs.[38] However, since the early moments of their formation, and with the practical necessity of considering "conflicts not of an international character", IHL rules rapidly expanded their *rationae personae* application to non-State actors irrespective of their legal status.

34 Julian Arato, "Corporations as Lawmakers", *Harvard International Law Journal*, Vol. 56, No. 2, 2015; Vaughan Lowe, "Corporations as International Law Actors and Law-Makers", *Italian Yearbook of International Law*, Vol. 14, 2004, p. 23. On the "human rights" of corporations, see Marius Umberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford University Press, Oxford, 2006; M. Karavias, above note 31, p. 161.

35 On the necessary duality between rights and duties from a theoretical perspective, see Michel Virally, *La pensée juridique*, re-ed., LGDJ, Paris, 1998, pp. 63–78. By analogy, on the idea that power entails responsibility, see Frederic Mégret and Florian F. Hoffmann, "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities", *Human Rights Quarterly*, Vol. 25, No. 2, 2003, p. 321.

36 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart, London, 2008, p. 87.

37 M. Karavias, above note 31, p. 15.

38 Marco Sassòli, *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 204; Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, Geneva, 2019, p. 53.

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Moreover, IHL applies to individuals with no proven link to the armed forces of a government or an armed group.[39] This indicates *a fortiori* that nothing bars a non-State entity such as a corporation from becoming a duty bearer under IHL.

However, the yardstick for the applicability of IHL rules to non-State actors rests on their "taking part" in the conflict. This generally covers "being a party" to an armed conflict,[40] but except for situations where business entities such as PMCs are engaged in hostilities, it is hard to contend that a private corporation constitutes a party to a conflict. The question therefore arises as to what the ultimate criterion for applicability is. According to Kolb and Hyde, what matters is the "substantive ability of an entity or a person to participate in an armed conflict by making acts of war".[41] In our view, it is not inaccurate to contend that the criterion ought to be interpreted not formally and, at any rate, with some flexibility.[42] In practice, the fact that IHL imposes obligations on individuals with no direct ties to parties to a conflict corroborates such a loose approach. The litmus test, therefore, is the material link between the conduct in issue and the context of the conflict. In its *Kunarac* appeals judgment, the International Criminal Tribunal for the former Yugoslavia (ICTY) adopted a broader perspective of this relationship, referring to the "environment" in which an act is committed. In that sense, an act that is "shaped" by or "closely related" to an armed conflict is covered by IHL rules.[43] This is enough to encompass actors in conflict areas, including corporations. Hence, the ICRC has considered that IHL

> does not just bind States, organised armed groups and soldiers – it binds all actors whose activities are closely linked to an armed conflict. Consequently … a business enterprise carrying out activities that are closely linked to an armed conflict must also respect applicable rules of international humanitarian law. Moreover, whether a business enterprise operates in a context of ongoing armed conflict or whether its operations, established in a peaceful setting, are caught up by the outbreak of an armed conflict does not affect its obligation to respect international humanitarian law.[44]

As is apparent, the ability of a private corporation to bear obligations under IHL is robustly grounded. As IHL duty bearers, corporations may even pose less conceptual difficulty than armed non-State actors. It is a well-known fact that the applicability of IHL to armed groups has often proved controversial based on

39 See, for instance, International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, paras 444–445.

40 Institute of International Law, Resolution on "The Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties", 1999: "All parties to armed conflicts in which non-State entities are parties, irrespective of their legal status, … have the obligation to respect international humanitarian law."

41 R. Kolb and R. Hyde, above note 36, p. 86.

42 M. Sassòli, above note 38, p. 198.

43 ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23, Judgment, 12 June 2002, para. 58.

44 See ICRC, *Business and International Humanitarian Law: an Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law*, Geneva, 2006, p. 13 (acknowledging, however, that "determining which activities are closely linked to an armed conflict is not always easy").

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legitimacy considerations by States. States consider that such applicability would pertain to recognition.[45] This legitimacy concern surrounding armed groups is arguably absent regarding business entities, as their legitimacy as social actors is generally not an issue. Similarly, it is often argued that IHL does not apply to "abstract" organizations but to individuals who engage in hostilities.[46] Such a conception could exclude a corporation – an abstract juridical person – from the scope of application of IHL. However, this argument does not stand up to scrutiny. First, it is incorrect to contend that IHL does not apply to abstract entities, for it applies to States, which are arguably the most sophisticated *abstract* political organizations. Second, the fact that IHL applies to "organizations" was already acknowledged in the Nuremberg trials, where some organizations were labelled "criminal".[47] Third, the applicability of IHL to individuals cannot trump its applicability to the States or non-State organizations to whom those individuals belong. In this way, the idea that business entities, as such, are different from the individuals composing them is not disputable. This has legal implications in different branches of law applicable to companies.[48] In this context, the applicability of IHL to the corporation does not prevent its applicability to individual staff members or directors. Such applicability to the "abstract business entity" is even critical regarding responsibility and reparation.[49]

As will be explained more clearly later in the article, the overall conceptual justification of BEOAC rests on an ontological consideration relating to the actual nature of the rules protecting the environment during armed conflicts. The legal value that these rules aim to protect is the environment. Given the fragile context created by an armed conflict, although relatively limited, IHL rules on protecting the environment stem from considering that armed conflict may adversely affect the environment, especially when the parties utilize certain means of war. In their spirit, these rules aim at protecting the environment as part of human life. Hence, the environment is considered a civilian object.[50] These protective rules oblige any actor intervening in a conflict context, regardless of status. For instance, there is no logical reason why pollution or pillage would be prohibited for armed groups or governmental forces but allowed for corporations operating in conflict

45 See Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971, Document V, *Protection of Victims of Non-International Armed Conflicts*, submitted by the ICRC, Geneva, January 1971, p. 52.

46 For instance, Emanuela-Chiara Gillard, "The Position with Regard to International Humanitarian Law", *Proceedings of the American Society of International Law*, Vol. 100, 2006, p. 130.

47 J. Aparac, above note 2, p. 106.

48 David Hughes, "Differentiating the Corporation: Accountability and International Humanitarian Law", *Michigan Journal of International Law*, Vol. 42, No. 1, 2021, p. 47.

49 Under international law, the idea that reparations can be asked of individuals is not new. See Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Art. 75. Under most domestic laws, this is even more trivial.

50 Most items mentioned in the "objects indispensable to the survival of the civilian population" list under article 54 of Geneva Convention IV are part of the environment. See also M. Sassòli, above note 38, pp. 569–570.

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situations. Although other rules, including those of domestic origin, may equally apply, as long as the conduct is "closely linked" to the conflict, IHL rules become relevant. These protective rules apply regardless of the type of conflict[51] – what harms the environment in IACs cannot be unharmful in NIACs. Equally, the origins – that is, the authors – of such harm do not matter. This does not mean, however, that the nature and the scope of BEOAC are identical to those of parties engaged in hostilities.[52] Furthermore, BEOAC must be adapted to the nature of businesses and their activities in an armed conflict.

Legal foundations of BEOAC in other international regimes

Although IHL rules regulate armed conflicts – and are often referred to as the *lex specialis* of armed conflict – they are not the only international regime applicable in armed conflict. In addition to IHL, BEOAC may also flow from various other sources of international legislation; henceforth, a complementary approach is critical. Moreover, the consensus that IHL rules on the protection of the environment during armed conflicts are limited warrants such an approach. Three complementary sources are discussed below.

The first source is international human rights law (IHRL). Although the relationship between IHRL and IHL has proven somewhat controversial, it is safe to state that the latter overlaps with the former in various aspects[53] and that IHRL remains applicable in armed conflicts. The question of whether private corporations bear human rights obligations has also been controversial; indeed, the question of whether corporations are duty bearers under international law has mainly gained traction in the context of human rights.

The common reference in this field is the UNGPs adopted in 2011 by the UN Human Rights Council (HRC) after background work by John Ruggie, the special representative of the UN Secretary-General on this topic. The salient conclusion of Ruggie was that private corporations have "responsibilities" to respect human rights. He opposed "responsibilities" with "duties" and considered that only States bear human rights "obligations". This position raised many criticisms,[54] and it is, in our view, antithetical to the emphasis put on access to remedy in the UNGPs. Rights holders' access to remedy cannot be recognized without a legal obligation owed to them. A legal remedy correlates to a (legal) right and a corresponding legal obligation. Some UN bodies, such as the sub-commission of the former Human Rights Commission, had long concluded the

51 ICRC Guidelines, above note 16, p. 85 (explaining that most rules apply in both types of conflicts).

52 For instance, except for PMCs or corporate security staff engaged in hostilities, the proportionality rule generally applicable to attackers and defenders in an armed conflict to avoid incidental effects on civilian objects would not be pertinent for actors that do not launch military operations.

53 M. Sassòli, above note 38, p. 422.

54 See, generally, Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge University Press, Cambridge, 2013; and, specifically within this book, David Bilchitz, "A Chasm between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles", p. 7.

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existence of human rights duties on corporations.[55] Assuming that the UNGPs reflected an "uncertain" normative situation at the time of their adoption, Ruggie considered them only as the "end of the beginning"; therefore, it is not unreasonable to contend that things have drastically evolved over the past decade and that there is more evidence that corporations are (human rights) duty bearers under international law.[56] For instance, the Special Tribunal for Lebanon found no issue affirming that "human rights standards and the positive obligations arising therein are equally applicable to legal entities".[57] At any rate, based on the reasons enumerated earlier in this section, we believe that these obligations exist as a matter of law.

Turning more specifically to corporate environmental obligations, it is worth noting that the relationship between the protection of the environment and human rights is well established.[58] Some UN human rights bodies have indicated the existence of such obligations. For instance, acknowledging that businesses can potentially interfere with human rights – with an environmental dimension – several General Comments of the HRC use a broad formulation when defining the *rationae personae* scope of human rights duties, highlighting, for instance, obligations of actors other than States parties.[59] Under the recent UN General Assembly resolution on the right to a clean, healthy and sustainable environment, business enterprises are mentioned just like other stakeholders and are called upon to ensure such rights for all.[60] In the context of the occupation in Palestine, the HRC fact-finding mission indicated, among other human rights violations, "the use of natural resources, in particular water and land, for business purposes", as well as "pollution, and the dumping of waste in or its transfer to Palestinian villages".[61] For its part, the African Commission on Human and

55 *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003 (UN 2003 Norms).

56 This evolution includes several draft treaties on TNCs, the ongoing momentum on corporate human rights and environmental due diligence in regional and domestic legislations, and critical court decisions over the last few years. See also A. F. Lopez Latorre, above note 30.

57 Special Tribunal for Lebanon, *Prosecutor v. New TV SAL and Al Khayat (Karma Mohamed Thasin)*, Case No STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 October 2014, para. 46.

58 John H. Knox, "Human Rights", in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law*, Oxford University Press, Oxford, 2021, p. 784; United Nations Environment Programme (UNEP), *Climate Change and Human Rights*, Union Publishing, Nairobi, 2015.

59 HRC, General Comment No. 36, "Article 6: Right to Life", 2019, para. 62: Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14, "The Right to the Highest Attainable Standard of Heath", 2000, paras 50–51; CESCR, General Comment No. 12, "The Right to Adequate Food", 1999, para. 20; CESCR, General Comment No. 15, "The Right to Water", 2003, para. 23. Depending on how one interprets these provisions, one could see the relevant obligations as being addressed only to States. However, requiring States to protect against interference by private actors is akin to acknowledging an obligation of the private actors themselves not to interfere with these rights.

60 UN General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment*, UN Doc. A/76/L.75, 26 July 2022.

61 HCR, *Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/22/63, 7 February 2013, para. 96. A list of business entities, including corporations whose activities directly affect the environment, was drawn up.

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Peoples' Rights (ACHPR) has indicated that "under the African Charter [on Human and People's Rights], corporate obligations towards rights holders have a clear legislative basis". The ACHPR indicates that corporations must "ensure continuously that their acts or operations are in full compliance with internationally accepted human and peoples' rights, labour and environmental standards to avoid any incident producing harm or curtailment of rights of people".[62]

Another relevant source in framing BEOAC is, naturally, international environmental law (IEL). This set of rules is essentially composed of multilateral conventions on the protection of the environment as well as customary environmental rules. They apply during both IACs and NIACs. While the legal basis for the application of IEL to State armed forces is evident in NIACs, it could be unclear on what basis these rules apply to non-State actors, especially business entities. However, the raison d'être of IEL makes its rules applicable "to all situations regardless of the type of conflict involved".[63]

While IEL rules impose obligations mainly on States, this does not mean that only States are required to protect the environment. Environmental protection is conceived of in international law as a common concern of humankind, prompting some to consider some of its rules as having a *jus cogens* character.[64] Many IEL treaties contain specific provisions addressing corporate conduct.[65] Moreover, although some of these conventions provide for exceptions during armed conflicts, they remain applicable – and some provide for even greater environmental protection regimes – in armed conflict.[66] Additionally, general principles of IEL, such as the "polluter pays" principle, are directly relevant for business entities. It is therefore not surprising that these environmental obligations for corporations have been reflected in the ILC Draft Principles.[67] Furthermore, these corporate obligations are progressively interpreted as encompassing duties related to climate change.[68]

62 ACHPR, *State Reporting Guidelines and Principles on Articles 21 and 24 relating to Extractive Industries and the Environment*, 2018, para. 68.

63 UNEP, *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law*, Nairobi, 2009, pp. 43–47.

64 Nilufer Oral, "Environmental Protection as a Peremptory Norm of General International Law: Is It Time?", in Dire Tladi, *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations*, Brill, Leiden, 2021; Pierre-Marie Dupuy, "Où en est le droit international de l'environnement à la fin du siècle?", *Revue Général de Droit International*, Vol. 101, 1997, p. 873.

65 See, among others, International Convention on Civil Liability for Oil Pollution Damage, 1969 (many articles impose specific obligations on ship owners); United Nations Convention on the Law of Sea, 1982 (Art. 137(1)); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989 (Art. 4); Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 1991 (Arts 9, 12); African Convention on the Conservation of Nature and Natural Resources, 1968 (several articles concern the conduct of non-State actors such as corporations); Convention Relating to Civil Liability in the field of Maritime Carriage of Nuclear Material, 1971; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.

66 See, for instance, Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972; R. van Steenberghe, above note 20, p. 1128.

67 See ILC Draft Principles, above note 13, Principles 10, 11. See also UNEP, above note 63, pp. 43–47.

68 The Hague District Court, *Milieudefensie and Other NGOs v. Shell*, 2021 (in which the Court imposes on Shell some climate obligations, especially reduction of greenhouse gas emissions, based on a mixed approach combining domestic obligations with some international sources). See also Expert Group on

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Finally, another critical source of BEOAC worth mentioning is UN Security Council resolutions. Such resolutions imposing obligations on corporations and private entities can be traced back to the context of decolonization and efforts to uphold the right to self-determination.[69] However, after the Cold War's end and the Security Council's revitalization, many resolutions imposed direct obligations on non-State entities such as corporations. This happened, for instance, with resolutions concerning the situations in Sierra Leone,[70] Liberia,[71] Angola[72] and the Democratic Republic of the Congo (DRC).[73] In the latter context, the continuing role of private corporations in the environmental harms associated with the conflict was already a major concern for the Security Council in the early 2000s. At that time, for instance, the Security Council created a panel of experts to focus on the illegal exploitation of the DRC's resources. The panel placed numerous business entities on a sanction list and pointed out the "implication of foreign enterprises" in the "criminal and illicit exploitation" of the natural resources of the DRC.[74]

It is apparent from the above that the formulation of legal obligations imposable on business entities during armed conflicts is not only conceptually sound but also flows from various sources of "positive" international law. Though we have focused on these main sources for brevity, however, other sources exist. One could think, for instance, of general principles of law[75] or even voluntary commitments by corporations themselves.[76] In any event, there is a necessary combination and interactions between international, regional, domestic and transnational sources in framing corporate obligations under international law.[77]

The nature of BEOAC

This section discusses the precise nature or content of BEOAC. It argues that when involved in a conflict situation, business entities must *refrain from* causing harm to the environment. They must also proactively take measures to *prevent* the occurrence of such harm. These two dimensions will be discussed in turn.

Climate Obligations of Enterprises, *Principles on Climate Obligations of Enterprises*, Eleven International Publishing, 2018.

69 See Sâ Benjamin Traoré, *L'interprétation des résolutions du Conseil de sécurité de l'ONU*, Helbing, Basel, 2020, pp. 101, 611.

70 UNSC Res. 1171, 5 June 1998.

71 UNSC Res. 1478, 6 May 2003.

72 UNSC Res. 864, 15 September 1993.

73 Among others, UNSC Res. 1457, 24 January 2003; UNSC Res. 1952, 29 November 2010.

74 *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of DR Congo*, UN Doc. S/2003/1027, 23 October 2003, paras. 174–175.

75 Ludovica Chiussi Curzi, *General Principles for Business and Human Rights in International Law*, Brill, Leiden and Boston, MA, 2021.

76 In *Okpabi*, the UK Supreme Court recently referred to "formal binding decisions" taken "at corporate level" that could provide a source of environmental obligations on a corporation. See UK Supreme Court, *Okpabi and Others (Appellants) v. Royal Dutch Shell PLC and Another (Respondents)*, [2021] UKSC 3, 2021, paras 141–159.

77 Elise Groulx Diggs, Mitt Regan and Beatrice Parance, "Business and Human Rights as a Galaxy of Norms", *Georgetown Journal of International Law*, Vol. 50, No. 2, 2019.

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Do no harm

Business entities intervening in conflict-affected areas must preserve the environment from harmful operations. Such obligations vary depending on the nature of the corporation; for instance, the obligations of PMCs or other corporate security staff engaged in the conduct of hostilities are akin to the obligations strictly imposed by IHL – and complementary regimes – on "parties" to an armed conflict. However, as pointed out above, many corporations in conflict situations cannot be considered "parties". The obligations to respect the environmental rules applicable in armed conflicts can only be accessed based on the – potential or actual – impacts of such business activities on the environment. Being by nature a *negative* obligation,[78] in this context, "do no harm" means that corporations must undertake their activities without infringing on the environment and the environmental rights of others.[79] What this obligation implies can only appear through an *in concreto* assessment using a complementarity approach between different protective regimes. Therefore, IHL rules offer a framework of obligations, together with other rules, prompting the need for interpretive interaction between different sources. The following subsections provide further guidance on what form these obligations might take.

Exploitation of natural resources in armed conflict

It is common knowledge that most conflicts are shaped around the "exploitation" of natural resources.[80] The commercial objective of some business activities is to use natural resources; think, for instance, of extractive industries. Hence, in principle, such "exploitation" is not problematic *per se*, as long as the business entity carrying it out operates within the law's confines. However, the exploitation by businesses of natural resources during armed conflicts may pose various environmental concerns. Such concerns have been raised in emblematic situations such as the DRC[81] and Colombia,[82] to mention just two. From the perspective of IHL, corporations have general and specific obligations related to the exploitation of natural resources. Two categories of provisions serve as a starting point for ascertaining these obligations:

78 Pierre d'Argent, "Les obligations internationales", *Collected Courses of the Hague Academy of International Law*, Vol. 417, 2021, p. 124.

79 L. Chiussi Curzi, above note 75, pp. 173–179.

80 See, among others, UNEP, *Environmental Rule of Law: First Global Report*, 2019; James G. Stewart, *Corporate War Crime: Prosecuting the Pillage of Natural Resources*, Open Society Foundation, 2011; M. Davoise, above note 17.

81 See *Final Report of the Panel of Experts*, above note 74; Phoebe Okowa, "Natural Resources in Situations of Armed Conflict: Is There a Coherent Framework for Protection?", *International Community Law Review*, Vol. 9, No. 3, 2007; Laurence Juma, "The War in Congo: Transnational Conflict Networks and the Failure of Internationalism", *Gonzaga Journal of International Law*, Vol. 10, No. 2, 2006, p. 97; Asimina-Manto Papaioannou, "The Illegal Exploitation of Natural Resources in the Democratic Republic of Congo: A Case Study on Corporate Complicity in Human Rights Abuses", in O. De Schutter (ed.), above note 10.

82 Comisión para el Esclarecimieto de la Verdad, la Convivencia y la No Repetición, *Informe final*, Vol. 5: *Sufrir la guerra y rehacer la vida: Impactos, afrontamientos y resistencias*, 2022, pp. 190–224, available at: https://babel.banrepcultural.org/digital/collection/comision-col/id/394/.

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some of the IHL rules on this matter concern the "appropriation or destruction of property",[83] while others regard the issue of pillaging.[84] These rules generally have a customary international law nature applicable in both IACs and NIACs.[85] Particularly relevant for corporations, the "property" protected from destruction and seizure in this context must be understood broadly and includes "high-value commodities such as timber, gold and oil, but also parts of the natural environment such as water and fertile land".[86]

Regarding the rules applicable to the appropriation of "property", the activities of business enterprises in occupied territories provide interesting insights. The term "property" is broad and encompasses collective and public property, including several constitutive parts of the environment. The relevant rules of IHL do not prohibit all types of acquisition and destruction by an Occupying Power, as some might be allowed under strict military necessity conditions.[87] However, the Occupying Power is bound by the rule of usufruct, which means that it cannot act beyond mere administration. Acts of "disposition" are therefore prohibited.[88] For instance, in the context of Palestine, the UN General Assembly had considered that measures taken by Israel for the exploitation of natural resources of Arab territories were illegal.[89] This stems logically from the basic rule that the occupier has *authority* and not *sovereignty* over the occupied territory.[90] In that regard, considering that the Occupying Power is not allowed to "exploit" natural resources such as minerals or oil, there is an implied obligation that such exploitation must not be undertaken by foreign companies operating in collaboration or with the consent of the Occupying Power[91] – no military necessity can justify such exploitation of natural resources. Besides the IHL framework, determining business obligations in this context requires looking at other complementary regimes that prove even more precise. For instance, the principle of permanent sovereignty of people over their natural resources prohibits exploitation of those resources without the people's consent.[92] Such exploitation may also contradict other civil, social and economic rights. In

83 See Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (Hague Regulations), Art. 23(g); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 147.

84 ICRC Guidelines, above note 16, Rule 14, p. 74, paras 181–186.

85 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 52 and commentary, available at: https://ihl-databases.icrc.org/en/customary-ihl/rules.

86 ICRC Guidelines, above note 16, para. 179.

87 See Hague Regulations, above note 83, Arts 46, 52, 53, 55; GC IV, Arts 53, 55.

88 Acts of disposal can only happen under the strict military necessity condition.

89 UNGA Res. 3175, 17 December 1973.

90 Hague Regulations, above note 83, Art. 42.

91 Ka Lok Yip, "Exploiting Natural Resources in Occupied Territories – the Conjunction between Jus in Bello, Jus ad Bellum and International Human Rights Law", in A. Duval and E. Kassoti, above note 8, p. 25.

92 In that sense, see European Court of Justice, *Council of the European Union v. Front Populaire pour la Libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario)*, Case No. C-104/16 P, Judgment (Grand Chamber), 21 December 2016, para. 86.

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the context of illegal occupation, it can be argued that companies have a legal obligation not to assist in the continuance of such illegality.[93]

The IHL rules regarding pillage seem even more relevant regarding corporate obligations during armed conflicts. The term "pillage" – plunder, spoliation and looting – refers to the appropriation or obtention by an individual of public or private property without the owner's consent.[94] Pillage constitutes a war crime both in IACs and NIACs.[95] The Nuremberg Military Tribunal acknowledged the responsibility of business entities in widespread and systematized acts of dispossession and acquisition of property, in violation of the rights of the owners, during the Second World War.[96] Pillage extends to "a systemic economic exploitation of occupied territory" according to the ICTY.[97] For the ICRC, the "systematic extraction of oil stocks and the unlawful exploitation of natural resources such as gold and diamonds are war crimes".[98] In contemporary war, private enterprises serve as the primary vehicle of such systemic economic exploitation. In the *Armed Activities* case, the ICJ found that the looting, plunder and exploitation of natural resources in the DRC violated IHL, especially the prohibitions against pillage found in Article 47 of the 1907 Hague Regulations and Article 33 of Geneva Convention IV.[99] The judgment also refers to instances where Ugandan forces and high-ranking officials were involved and facilitated "illegal trafficking in natural resources by commercial entities".

Interestingly, in this case, the ICJ brings into the legal framework other international instruments, such as the African Charter on Human and People's Rights.[100] The Elements of Crimes under the Rome Statute of the International Criminal Court (ICC) indicate that for the war crime of looting to be constituted, it is enough that the perpetrator appropriated certain property intentionally and for its private or personal use without the owner's consent. The nexus requirement is that the conduct occurred in the context of and was associated with an IAC and that the perpetrator was aware of factual circumstances that established the existence of an armed conflict.[101] Although some particular types of property appropriation may not qualify as unlawful under IHL, military necessity cannot justify pillage.[102]

93 K. L. Yip, above note 91, p. 30 (but highlighting other regimes such as *jus ad bellum* and human rights law that render such exploitation illegal).
94 ICRC Guidelines, above note 16; see also ICRC Customary Law Study, above note 86, Rule 15 and commentary, p. 76.
95 Rome Statute, above note 49, Art. 8(2)(b)(XVI), 8(2)(e)(v).
96 See *United States of America v. Carl Krauch et al. (IG Farben Case)*, Military Tribunal VI, Judgment, 30 July 1948, *Law Reports of Trials of War Criminals*, Vol. 8, 1949, esp. p. 1144.
97 ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 590.
98 ICRC Guidelines, above note 16, Rule 14 and commentary, pp. 74–75, para. 86.
99 ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005, paras 237–250, esp. para. 245.
100 *Ibid.*, para 245.
101 See ICC, *Elements of Crimes*, 2003, Art. 8(2)(e)(v), p. 17, available at: www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.
102 See J. G. Stewart, above note 80, p. 20 (critiquing the alleged military necessity exception).

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Other environmental dimensions of illicit exploitation of natural resources may include certain types of corporate conduct that heavily strain the environment. By way of illustration, in *Armed Activities*, it was acknowledged by the ICJ that certain business activities, such as timber production, can lead to massive deforestation.[103]

Similarly, corporate activities such as the large-scale acquisition of land or activities with massive polluting potential and extractives operations that imply significant greenhouse gas emissions – large-scale fossil fuels extraction – might create environmental stress and vulnerabilities that fall within the prohibition against severe, widespread and long-term damage to the environment. It is true that under the customary rule reflected in Article 35 of Additional Protocol I (AP I), the threshold for this prohibition is extremely high,[104] and there is no doubt that the direct addressees are warring parties engaged in hostilities. However, the threshold is less high under other regimes, and the ILC seems to adopt such less strict criteria in the context of pillage of natural resources in its Draft Principles, referring to "illegal exploitation of natural resources that has caused severe environmental strains in the affected areas".[105]

Moreover, the principles of proportionality and precaution, as applicable to warring parties, rest on the objective of avoiding war-related severe environmental damage.[106] In many contemporary conflicts – especially in NIACs – corporations have taken advantage of the fragile conflict context, characterized by the absence of the rule of law, public institutions and regular State mechanisms, to loot natural resources systematically.[107] In other cases, they have taken advantage of this fragile context to engage in massive pollution activities.[108] IHL offers only a little ground for corporate obligations on these issues; complementarity with other regimes therefore becomes critical. Prevention and precaution are general principles of IEL that may bind companies.[109] For instance, large-scale land

103 ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 9 February 2022, paras 333–343.

104 The three criteria imposed by this provision are "widespread, long-term and severe damage to the natural environment". The cumulative character of these criteria is disputed and unreasonable when interpreted in relation to other IEL treaties. See also Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, Art. 35 commentary, para. 1457, available at: https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-35/commentary/1987?activeTab=undefined.

105 See ILC Draft Principles, above note 13, p. 149.

106 Michael Bothe, "The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict", in R. Rayfuse (ed.), above note 20, p. 100.

107 UNEP, above note 80, p. 110; J. Tsabora, above note 17.

108 For instance, the dumping by Trafigura of toxic waste in 2006 in Abidjan, Côte d'Ivoire, amidst a NIAC (see Amnesty International, *The Toxic Truth: About a Company called Trafigura, a Ship Called the Probo Koala, and the Dumping of Toxic Waste in Côte d'Ivoire*, 2012, available at: www.amnesty.org/en/documents/afr31/002/2012/en/); or a similar ongoing situation in the maritime coast of Somalia (see Ranee Khooshie Lal Panjabi, "The Pirates of Somalia: Opportunistic Predators or Environmental Prey?", *William and Mary Environmental Law and Policy Review*, Vol. 34, No. 2, 2010, p. 378).

109 Sandrine Maljean-Dubois, "Les obligations de diligence dans la pratique: La protection de l'environnement", in SFDI, *Le standard de due diligence et la responsabilité internationale, Journée d'études franco-italiennes du Man*, Pedone, Paris, 2018, pp. 145–146.

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acquisitions – often called land grabs – may violate communities' and peasants' rights to land, food, development or cultural heritage.[110] In both NIACs and IACs, the land is an "object" necessary for the civilian population's survival.[111] As pointed out by the ICRC, massive displacements or expulsions for corporate activities such as extraction can be considered "closely linked to an armed conflict" and could give rise to criminal and civil legal liabilities.[112] Moreover, environmental rules on the limitation of greenhouse gas emissions have direct effects on companies operating both in peacetime and in conflict situations. Finally, as pointed out above, the liability of private actors for pollution has long been recognized under various environmental instruments at the international and regional levels.

The prohibition of the use of certain means of war

IHL prohibits using certain types of weapons that cause grave environmental damage.[113] The question therefore arises as to what extent such an obligation could be transposed on corporations. The direct use of these prohibited means falls outside most business activities unless the business entity is directly involved in hostilities; nonetheless, corporations are often involved in manufacturing, transporting and trading these means of war.[114] It is argued that they bear legal obligations in this context due to their potential contribution to using such environmentally harmful weapons. The fact that business entities are obligated not to facilitate warring parties in utilizing certain types of weapons is not disputed under international law, but one must distinguish between the manufacture and sale of prohibited weapons, on the one hand, and the manufacture and trade of conventional arms used to commit war crimes, on the other. This picture can prove even more complex as it may involve manufacturing only a part of a prohibited weapon or manufacturing different equipment that can be made into a prohibited weapon. Be that as it may, manufacturing and selling prohibited weapons is illegal, and prohibited weapons that adversely impact the environment would fall under this category.

However, a fair controversy exists around selling conventional arms to end-users who use them to commit international crimes, including environmental ones.

110 Michael Richards, *Social and Environmental Impacts of Agricultural Large-Scale Land Acquisitions in Africa – with a Focus on West and Central Africa*, Rights and Resources Initiative, 2013, available at: https://landmatrix.org/media/uploads/doc_5797.pdf.

111 See, for instance, Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 14; AP I, Art. 54.

112 ICRC, above note 44, p. 24; ILC Draft Principles, above note 13, Principle 8 (referring to States and all relevant actors); African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 2009 (Kampala Convention), Art. X (referring to displacements caused by projects carried out by public or private actors).

113 ICRC Guidelines, above note 16, p. 85.

114 UN Working Group on Business and Human Rights, *Responsible Business Conduct in the Arms Sector: Ensuring Business Practice in Line with the UN Guiding Principles on Business and Human Rights*, information note, available at: www.ohchr.org/sites/default/files/2022-08/BHR-Arms-sector-info-note.pdf.

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The Nuremberg legacy on this issue is ambiguous,[115] but despite such ambiguities, the principle that business entities could be held liable for their business operations that serve the commission of a crime was not at issue at Nuremberg. The US Military Tribunal suggested that the obligation not to assist in the commission of war crimes was nothing "but an application of general concepts of criminal law", implying that furnishing the lethal weapon for the commission of a crime is in itself criminal.[116] Perhaps more complex was the evidence of intention (*mens rea*); departing from previous cases, later cases before Nuremberg tribunals considered that the manufacture and sale of conventional weapons were not criminal *per se*. Still, one legitimate concern is whether producing and selling a conventional weapon whose use can only lead to dramatic environmental consequences is lawful.[117]

Many IHL treaties prohibit certain weapons that are harmful to the environment. While a few of them only proscribe using such weapons, the scope of application of many others is large enough to include activities such as manufacturing and sale. In our view, this speaks directly to business entities involved in such production and selling activities. A good illustration is the 1972 Biological Weapons Convention, which prohibits, without exception, "the development, production, stockpiling or any other possession of microbial agents, toxins and weapons, as well as equipment or means of delivery designed to use these agents or toxins for hostile purposes or in armed conflict".[118] IHL conventions on landmines provide another example: the 1997 Ottawa Convention prohibits any activity prohibited by the Convention undertaken by individuals.[119] Although the role of States is critical in this context, such prohibitions can only be regarded as being applicable to any entity. Even regarding more conventional arms, concerns can be raised about trading certain arms when there is a particular risk that they will assist in perpetuating environment-related war crimes.[120] In some situations, such prohibitions on the sale or transfer of arms by private individuals or entities were recalled and imposed by the UN Security Council.[121]

115 Grietje Baars, "Capitalism's Victor's Justice? The Hidden Stories Behind the Prosecution of Industrialists Post-WWII", in Kevin Jon Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials*, Oxford University Press, Oxford, 2013.

116 *United States of America v. Alstötter et al. (Justice Trial)*, *Law Reports of Trials of War Criminals*, Vol. 6, 1948, p. 62.

117 The contested position of the ICJ in its Nuclear Weapons Advisory Opinion (ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*) would probably not corroborate this interpretation concerning, at least, the use of nuclear weapons in armed conflicts. However, the 2017 Treaty on the Prohibition of Nuclear Weapons considered in its preamble that "any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular, the principles and rules of international humanitarian law".

118 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972 (Biological Weapons Convention), Art. IV.

119 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 1997 (Ottawa Convention), Art. 9.

120 Arms Trade Treaty, 3013 UNTS 269, 2 April 2013 (entered into force 24 December 2014), Art. 7(1)(b)(i).

121 For instance, UNSC Res. 1493, 28 July 2003.

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Due diligence

Corporate due diligence is undoubtedly the most impactful outcome of the UNGPs. It was designed as a critical tool for corporations to discharge their human rights "responsibilities". Accordingly, business enterprises should have policies and processes that include a human rights due diligence process aimed at identifying, preventing, mitigating and accounting for how they address their impacts on human rights.[122] The meaning and scope of corporate due diligence in the UNGPs has raised some controversies;[123] however, there is a general agreement that due diligence consists of a four-steps process namely (1) identifying and assessing actual and potential human rights impact, (2) integrating and acting upon these findings, (3) tracking the effectiveness of actions taken, and (4) communicating how impacts are addressed. The UNGPs do not expressly mention environmental due diligence, but there is no doubt that the concept encompasses environmental concerns.[124] Due diligence is of an integral nature which must cover all types of risks anticipatively.

Moreover, due diligence is an ongoing process throughout the life cycle of a project or business activity. Regardless of its normative status under the UNGPs, corporate due diligence has recently gained "momentum", especially in European regional and domestic legislations, with a strong emphasis on its "mandatory" character.[125] Although this development may suggest the opposite, it is submitted that corporate due diligence is already mandatory under (international) law. It is so simply because, as a standard of conduct, due diligence is expected from any legal operator in any legal system.[126] The Security Council has often stressed the existence of due diligence obligations in some situations.[127] According to the ILC,[128] States must ensure that business enterprises

> exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area affected by an armed conflict. Such measures include those aimed at ensuring that natural resources are purchased or otherwise obtained in an environmentally sustainable manner.

122 See UNGPs, above note 11, Principles 15–21.
123 Jonathan Bonnitcha and Robert McCorquodale, "The Concept of Due Diligence in the UN Guiding Principles on Business and Human Rights", *European Journal of International Law*, Vol. 28, No. 3, 2017, p. 899.
124 Surya Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?", *Leiden Journal of International Law*, Vol. 36, No. 2, 2023, p. 16.
125 *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, February 2022, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF. Many countries, especially in Europe, have adopted or are in the process of adopting general or limited corporate due diligence legislations.
126 L. Chiussi Curzi, above note 75, p. 240. (arguing that due diligence is a general principle of law that applies directly to corporations).
127 UNSC Res. 1952, 29 November 2010, in the context of the DRC.
128 ILC Draft Principles, above note 13, Principle 10.

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Conflict situations imply some level of "heightened risks" of human rights violations and environmental harm. It has been therefore contended that due diligence in peacetime is arguably not similar to what it should be in an armed conflict, and that corporate entities are called upon to undertake a stricter version of due diligence in armed conflicts.[129] According to the UN Working Group on TNCs, because the risk of gross human rights abuses is heightened in conflict-affected areas, action by States and due diligence by businesses should be heightened accordingly.[130] The 2021 Draft Treaty on TNCs also refers to "enhanced human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas".[131] The ICRC further acknowledges this position in indicating that business entities must observe "extreme caution" and, therefore, that "heightened managerial care" concerning environmental issues is required from business enterprises operating in conflict zones.[132] This distinction undoubtedly has some merit as it alerts business entities to the difficulties associated with operating in high-risk situations. In our view, however, such a distinction has no added value from a conceptual point of view. In its legal character, due diligence always involves the idea of contextuality and proportionality (or, in other terms, scaling up): the higher the risk, the more careful and complex the due diligence process. It is no surprise that the ILC did not embrace this peacetime/wartime dichotomy.

Be that as it may, determining the critical parameters of environmental due diligence by corporations in conflict-affected zones may raise several questions – some of which lack clear-cut answers, as the concept of due diligence is complex,[133] and its confines are even more uncertain when applied to environmental issues.[134] Such difficulties turn due diligence into a highly context-dependent concept that is disobedient to grand generalizations, as suggested by the ICJ.[135] The following considerations, in our view, deserve specific attention in evaluating the parameters of due diligence. First, as an obligation, due diligence

129 M. Tignino, above note 13; Mark van Dorp, *Fragile! Handle with Care: Multinationals and Conflict*, Centre for Research on Multinational Corporations, November 2016, available at: www.academia.edu/35484302/Fragile_Handle_with_Care_Multinationals_and_Conflict_Lessons_from_SOMOs_Multinational_Corporations_in_Conflict_Affected_Areas_programme; Swisspeace, *Enhanced Human Rights Due Diligence in Conflict Affected and High-Risk Areas*, 2016, available at: www.connectingbusiness.org/system/files/2018-11/Enhanced-Human-Rights-Due-Diligence-in-Conflict-Affected-and-High-Risk-Areas.pdf.

130 Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business Human Rights and Conflict-Affected Regions: Towards Heightened Action*, 2020, para. 14.

131 *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Third Revised Draft*, 17 August 2021 (Draft Treaty on TNCs), Art. 6(g).

132 ICRC, above note 44, p. 14.

133 P. d'Argent, above note 78; Samantha Besson, *La due diligence en droit international*, Brill Nijhoff, Leiden,, 2021.

134 Jorge E. Viñuales, "Due Diligence in International Environmental Law: A Fine-Grained Cartography", in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order*, Oxford University Press, Oxford, 2020, p. 111.

135 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports 2007*, para. 430.

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does not stand alone. It is associated with an initial – a sort of parent – obligation.[136] In the present case, this obligation requires corporations not to harm human rights and the environment. Due diligence is, therefore, in its essence, an obligation not to harm a right or interest protected by law through reckless conduct. In the context of environmental protection, one of the core aspects of due diligence is that it overlaps with the principle of prevention, though the two principles are not identical.[137] While prevention is only *ex ante*, due diligence applies continuously. However, prevention is critical regarding environmental protection, as some environmental impacts might be fatally irreparable. In that sense, environmental due diligence by corporations must always prioritize prevention.

Second, although backed by a specific obligation of result – the negative obligation not to cause harm – the relevance of corporate due diligence depends on the context. Due diligence applies only where there is a serious risk of causing harm; in other words, in some situations, what is asked from the company is not to act in due diligence but to comply immediately with a "do no harm" obligation. This happens where there is a certainty that a particular conduct will inevitably cause harm. One could think of massive hazardous waste dumped in a specific area or the sale of prohibited weapons – in these situations, the obligation imposed on the duty bearer is not a due diligence obligation because there is no "risk" *per se* but rather a *certainty* that harm will be caused. It is an obligation of result expected from the duty bearer, and due diligence as an obligation of conduct does not play out in this instance. On the contrary, due diligence implies some level of remoteness vis-à-vis the risk at stake. Therefore, its operation closely depends on the company's size and the supply chain's scale. Although the UNGPs explain that due diligence applies to all companies, the closer to the violation, the less relevant due diligence becomes. Perhaps for this reason, Ruggie has admitted that "for small companies, due diligence typically will remain informal".[138]

This underlines another critical character of the due diligence obligation when applied to corporations: it requires, from the duty bearer, a certain level of control over the source of the risk. It makes due diligence essential, although complex in the supply chain. As indicated above, for instance, the sale of some weapons that are harmful to the environment may involve different business entities in the supply chain, and there is an "objective" risk of human rights and environmental abuses from third parties in the supply value chain. The difficulty, therefore, is how to delineate the scope of the due diligence obligation within the supply chain. The 2003 UN Norms on the Responsibilities of Transnational

136 See S. Besson, above note 133, pp. 211–212: "Il ne peut pas en effet s'agir d'une obligation de ne pas nuire tout court, à tous et en tout temps. Encore faut-il, en effet, pouvoir identifier les droits et intérêts qui doivent être protégés et dont l'identification permet ensuite de fonder une obligation de ne pas leur nuire par négligence." See also Awalou Ouedraogo, "La due diligence en droit international: De la règle de la neutralité au principe general", *Revue Générale de Droit*, Vol. 42, No. 2, 2012, p. 644.

137 J. E. Viñuales, above note 134, p.116.

138 John G. Ruggie, *Just Business: Multinational Corporations and Human Rights*, W. W. Norton, New York, 2013, p. 114.

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Corporations and Other Business Enterprises with Regard to Human Rights had suggested that a parent company's due diligence obligation extends throughout its "sphere of influence".[139] The UNGPs and the Draft Treaty on TNCs speak of "business relationships".[140] None of these concepts seems precise, prompting the need to define an appropriate criterion to determine the reach of the due diligence obligation in the supply chain. Neither *de jure* control nor the concept of effective control as established under the law of State responsibility for the purpose of attribution would be satisfactory: the first will be too formalistic, and the second will be inappropriate to the nature of due diligence.[141] The *de facto* control criteria adopted by the ILC seem more realistic, but one may wonder what relevant elements can establish such *de facto* control, especially when companies are generally reluctant to disclose information.[142] In situations where the risk of violation is too high, leading to impossible control over its source, strict due diligence must imply temporary suspension or disengagement.[143] This is precisely the case in some conflict situations where there is no reasonable prospect of controlling the source of the risk. Irrespective of its final judicial outcome, the *Lafarge* case is strikingly illustrative of the quasi-impossibility in some situations of continuing business without contributing to the commission of systematic violations of fundamental rules of international law.[144] It is also based on the consideration that armed trading with warring parties in some conflicts where widespread human rights violations have occurred has recently raised serious concerns.[145]

Finally, human rights and environmental due diligence imply communication, access to information by rights holders and access to remedy when damage is caused to the environment. Both the UNGPs and the Draft Treaty on TNCs provide that business corporations must communicate regularly and in an accessible manner to stakeholders, "particularly to affected or potentially affected persons, to account for how they address through their policies and measures any actual or potential human rights abuses that may arise from their activities including in their business relationships".[146] The company's communication requirement and access to information by other stakeholders in the due diligence process are essential for at least two reasons. First,

139 UN 2003 Norms, above note 55, A(1) on general obligations.
140 See HRC, above note 12, Art. 6; UNGPs, above note 11, Principle 13.
141 S. Besson, above note 133, p. 240 (explaining that effective control cannot be the criteria in the context of the due diligence control requirement).
142 See ILC Draft Principles, above note 13, Principle 11.
143 EU Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and high-Risk Areas, 2017, Art. 5(1)(b)(iii).
144 S. Cossart *et al.*, above note 6.
145 Marina Aksenova, "Corporate Complicity in International Criminal Law: Potential Responsibility of European Arms Dealers for Crimes Committed in Yemen", *Washington International Law Journal*, Vol. 30, No. 2, 2021, p. 255; Christian Schliemann and Linde Bryk, *Arms Trade and Corporate Responsibility. Liability, Litigation and Legislative Reform*, Friedrich-Ebert-Stiftung, November 2019.
146 Draft Treaty on TNCs, above note 131, Art. 6(3)(d). See also UNGPs, above note 11, Principle 21; EU Regulation (EU) 2017/821, above note 143, Art. 5(2).

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communication with relevant stakeholders is critical in assessing the potential impacts of business activities and integrating findings into decision-making. Second, in as much as due diligence is about addressing risks, the vulnerability of its beneficiaries is a core parameter of its tailoring. Such vulnerability might be assessed through communication; access to information by the beneficiaries is therefore critical in making this communication possible and meaningful. This includes specific obligations such as environmental impact assessments, an obligation of consultation[147] and consent, especially in situations where indigenous people are affected.[148] Regarding access to remedy, it is a corollary of due diligence that when the company fails to adopt the appropriate standard of conduct required, it should provide remedial measures.[149]

Existence of enforcement mechanisms as a corollary to BEOAC

It is now undisputed that business entities can negatively and substantially affect the environment in the conduct of their global activities,[150] including in the context of armed conflict.[151] It is equally well known that environmental damage in armed conflict can amount to war crimes[152] and other human rights violations.[153]

Nevertheless, holding business entities accountable for environmental harm during armed conflict presents uneasy challenges. There is too often an accountability gap. The liability of business entities as legal persons has not been included in the main treaties addressing international crimes at the national level, including the 1949 Geneva Conventions and AP I, and significant variation has occurred over the years regarding enforcement practices within international and domestic criminal courts and tribunals. Corporations' criminal liability has not featured significantly in international criminal courts and tribunals; in most cases, criminal responsibility for crimes under international law concerns individuals.

147 See, ACHPR, *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, 2001, para. 53.
148 ILC Draft Principles, above note 13, Principle 5; Draft Treaty on TNCs, above note 131, Art. 6(4)(d).
149 S. Deva, above note 124, p. 16.
150 Joanna Kyriakakis, *Corporations, Accountability and International Criminal Law: Industry and Atrocity*, Edward Elgar, Cheltenham, 2021, p. 1.
151 M. Davoise, above note 17, p. 1; O. Das, above note 20, p. 103.
152 Michael Bothe, "Criminal Responsibility for Environmental Damage in Times of Armed Conflict", in Richard J. Grunawalt, John E. King and Ronald S. McClain (eds), *Protection of the Environment during Armed Conflict*, International Law Studies Vol. 69, Naval War College, Newport, RI, 1996; Aurelie Lopez, "Criminal Liability for Environmental Damage Occurring in Times of Non-International Armed Conflict: Rights and Remedies", *Fordham Environmental Law Review*, Vol. 18, No. 2, 2007; Leebaw Bronwyn. "Scorched Earth: Environmental War Crimes and International Justice", *Perspectives on Politics*, Vol. 12, No. 4, 2014; Mete Erden, "Enforcing Conventional Humanitarian Law for Environmental Damage during Internal Armed Conflict", *Georgetown Environmental Law Review*, Vol. 29, 2017, p. 469.
153 See S. R. Ratner, above note 31; PAX, *Peace, Everyone's Business! Corporate Accountability in Transitional Justice: Lessons for Colombia*, 2017, pp. 70–72.

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The first time corporate criminality was addressed in court was directly after the Second World War.[154] The Nuremberg Charter extended the International Military Tribunal's jurisdiction to representatives of groups and organizations involved in the war effort. Articles 9 and 10 of the Charter authorized the Tribunal to declare any group or organization as a criminal organization during the trial of an individual.[155] This could lead to the trial of other individuals for membership in the organization. Although several such organizations were designated during the Tribunal's and subsequent proceedings[156] under Control Council Law No. 10,[157] only natural persons were tried and punished.

Even though corporations were not prosecuted as legal entities *per se*, however, it has been evidenced that criminal charges against them were considered entirely permissible, even if not ultimately used.[158] The corporate and associational criminal liability concepts were seriously explored but rejected for political rather than legal reasons.[159] During the prosecutions, significant references were made to the major criminal role played by businesses, revealing an underlying implication that the corporations for which the industrialists worked had also breached IHL.[160]

Contemporary moves towards corporate accountability for atrocities refer to the Nuremberg criminal organizations doctrine. For example, early proposals to include corporations in the statutes of international criminal courts and tribunals were modelled on Articles 9 and 10 of the Nuremberg Charter. While the ICTY and the International Criminal Tribunal for Rwanda did not have criminal jurisdiction over legal persons, the diplomatic discussions during their establishment reveal that despite the States' unwillingness to formalize corporate criminal responsibility, they desired to apply international criminal law to

154 Alex Batesmith, "Corporate Criminal Responsibility for War Crimes and Other Violations of International Humanitarian Law: The Impact of the Business and Human Rights Movement", in Caroline Harvey, James Summers and Nigel D White (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe*, Cambridge University Press, Cambridge, 2014, p. 287.

155 Agreement for the Prosecution and Punishment of Major War Crimes of the European Axis, 82 UNTS 280, 8 August 1945.

156 See *IG Farben Case*, above note 96; *United States of America v. Friedrich Flick et al.*, Military Tribunal IV, *Law Reports of Trials of War Criminals*, Vol. 6, 1947; *United States of America v. Alfred Krupp et al.*, Military Tribunal IIIA, *Law Reports of Trials of War Criminals*, Vol. 9, 1948; *Commissioner v. Hermann Roechling*, Military Tribunal in the French Zone, *Law Reports of Trials of War Criminals*, Vol. 14, 1948. See also *United States of America v. Von Weizsaecker (Ministries Case)*, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. 15, 1953, pp. 621–622.

157 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, 15 vols, 1949–53, available at: www.loc.gov/item/2011525364/.

158 A. Batesmith, above note 154, p. 289.

159 Jonathan A. Bush, "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said", *Columbia Law Review*, Vol. 109, No. 5, 2009, p. 1239.

160 *Ibid.* See also Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon – an Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations", *Berkeley Journal of International Law*, Vol. 20, No. 1, 2002, p. 105; Eric Engle, "Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?", *St John's Journal of Legal Commentary*, vol. 20, 2006, pp. 291–292.

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particular actions by legal persons.[161] The Rome Conference of 1998, which would lead to the adoption of the Rome Statute of the ICC, represents the latest attempt to move international criminal law toward identifying criminal liability in legal persons. The draft statute presented at the beginning of the Rome Conference provided that the ICC would have jurisdiction over legal persons "when the crime was committed on behalf of such legal persons or by their agencies or representatives".[162] However, this possibility was removed during the last stage of the negotiations. The drafters of the Rome Statute noted that "[t]here is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute".[163] Thus, although proposals for including a provision on such responsibility were made,[164] the Statute ultimately did not contain such a provision. Only natural persons may be tried before the ICC, even though the crimes they may be convicted of include those committed "by a group of persons acting with a common purpose".[165]

Nevertheless, the lack of jurisdiction by most international criminal courts and tribunals over corporate crime does not relieve corporations of their international legal obligations. This is further affirmed by two major developments in international criminal law. Firstly, the 2014 African Union Protocol on Amendments to the Statute of the African Court of Justice and Human Rights (ACJHR), or Malabo Protocol, provides jurisdiction to the reconstituted ACJHR over legal persons for international crimes,[166] including environmental crimes.[167] According to Article 46C(1), "[f]or the purpose of this Statute the Court shall have jurisdiction over legal persons, with the exception of States". Thus, apart from jurisdiction over natural persons (Article 46B), the ACJHR will also have the power to adjudicate legal persons' responsibility. This provision on corporate liability for international crimes is the most important innovation of the Malabo Protocol, compared to the Rome Statute and other international criminal tribunals' statutes.

Secondly, compelling insights regarding the liability of legal persons for international crimes have emerged from recent developments in international criminal law. The ILC Draft Articles on Prevention and Punishment of Crimes against Humanity (ILC Draft Articles),[168] adopted on the second reading in 2019, include a provision on the liability of legal persons for crimes against humanity.

161 *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, UN Doc. S/25704, 3 May 1993, para. 51.
162 See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998: Official Records*, Vol. 3, UN Doc. A/CONF.183/13, 2002, Art. 23(5).
163 *Ibid.*, Art. 23(6) fn. 71.
164 For further details, see J. Kyriakakis, above note 150, pp. 113–122.
165 Rome Statute, above note 49, Art. 25 (3)(d).
166 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014 (not yet entered into force) (Malabo Protocol), Art. 46C.
167 *Ibid.*, Arts 28L, "Trafficking in Hazardous Wastes", and 28L*bis*, "Illicit Exploitation of Natural resources".
168 ILC, *Draft Articles on Prevention and Punishment of Crimes against Humanity*, in *Report of the International Law Commission: Seventy-First Session*, UN Doc. A/74/10, 2019 (Draft Articles), Chap. IV, paras 34–45.

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Under Draft Article 6(8), "each State shall take measures, where appropriate, to establish the liability of legal persons". Besides this, the Ljubljana–The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes (MLA Convention),[169] adopted on 26 May 2023, also includes a provision on the liability of legal persons. Article 15(1), which is built on Article 6(8) of the ILC Draft Articles, states that "[e]ach State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons". Article 15(4) of the MLA Convention further underlines that "[e]ach State Party shall, in particular, ensure that legal persons held liable … are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions".

Domestic courts can also contribute to enforcing corporations' environmental obligations. As the ILC has rightly highlighted, "criminal liability of legal persons concerning international crimes has become a feature of the national laws of many States in recent years".[170] Such liability sometimes exists concerning international crimes.[171] The acts leading to such liability are committed by natural persons who act as officials, directors, officers, or through some other position or agency of the legal person.[172] This means that business entities are, at least in theory, already subject to duties under codified domestic variants of international criminal law.[173]

Although no corporate prosecutions under domestic criminal laws have yet proceeded to any substantial consideration on the merits, some indicators demonstrate that national prosecutions may pursue such cases in the right circumstances.[174] For example, in October 2004, Congolese troops conducted violent reprisals for a minor uprising in the small town of Kilwa in the DRC, engaging in summary executions, rape, torture, pillaging and other human rights atrocities. Allegations that Anvil Mining, an Australian mining company,[175]

169 Ljubljana–The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes, 26 May 2023 (MLA Convention), available at: www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention-English-v5.pdf. The Convention will open for signatures in January 2024.

170 ILC Draft Articles, above note 168, Art. 6 commentary, para. 42.

171 *Ibid.*

172 *Ibid.*

173 Anita Ramasastry and Robert C. Thomas, "Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries", FAFO Report No. 536, 2006; Joanna Kyriakakis, "Australian Prosecutions of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code", *Journal of International Criminal Justice*, Vol. 5, No. 4, 2007, p. 809; Corry W. Wanless, "Corporate Liability for International Crimes under Canada's Crimes against Humanity and War Crimes Act", *Journal of International Criminal Justice*, Vol. 7, No. 1, 2008, p. 201; Ved P. Nanda, "Corporate Criminal Liability in the United States: Is a New Approach Warranted?", *American Journal of Comparative Law*, Vol. 58, No. 1, 2010; Simon O'Connor, "Corporations, International Crimes and National Courts: A Norwegian View", *International Review of the Red Cross*, Vol. 94, No. 887, 2012, p. 1007.

174 J. Kyriakakis, above note 150, p. 170.

175 For further, details, see Anvil Mining, *Annual Information Form for Financial Year Ended December 31, 2007*, 28 March 2008, available at: www.asx.com.au/asxpdf/20080331/pdf/318968yth6wlzj.pdf.

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provided logistical assistance for the military's actions led to calls for the company and its employees to face legal responsibility.[176] In 2005, the Australian Federal Police investigated Anvil Mining for its role in massacres over a few days in the DRC.[177] However, the investigation was soon dropped. It has been argued that this decision resulted from the fact that a deeply questionable military trial in the DRC failed to find anyone accountable.[178]

As another example, in 2015, Swiss investigators looked into the purported role of Argor-Heraeus, one of the world's leading gold refining companies, in pillaging natural resources from the DRC. It was contended that this company had refined gold allegedly looted from the DRC by individuals and companies lower down in the global supply chain.[179] This case brought to light an interesting discussion as to whether the company's critical role in enabling the gold to be sold on the international market constituted the commission of, or complicity in, pillage as a war crime.[180] Due to the lack of evidence regarding this issue, Swiss prosecutors determined that there was no case to answer.[181]

A series of French cases help demonstrate domestic legal bodies' capacity to impose accountability for corporate violations of IHL and other gross human rights violations.[182] Perhaps the most important is that of Lafarge, a French cement company.[183] In June 2018, this company, alongside some corporate executives, was indicted by French investigative judges for the role of its Syrian subsidiary in financing terrorism and complicity in crimes against humanity.[184] However, on 7 November 2019, the French Court of Appeals in Paris dropped the crimes against humanity charges against the company, maintaining only the financing of terrorism charges.[185] The Appeals Court found that Lafarge's "arrangements" with the so-called Islamic State group were merely intended to keep the plant running and did not manifest an intention on the part of Lafarge to associate itself with the crimes perpetrated.[186] This decision was appealed at the French Court of Cassation; on 7 September 2021, it brushed aside the Appeals Court and

176 For a discussion of the case, see Adam McBeth, "Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Executive Sector", *Yale Human Rights and Development Journal*, Vol. 11, No. 1, 2008, p. 127.

177 For an overview of this case, see Keren Adams, "Australian Mining Company in Prosecution Spotlight for Role in Congo Massacre", Business and Human Rights Resource Centre, 7 August 2017, available at: www.business-humanrights.org/en/latest-news/australian-mining-company-in-prosecution-spotlight-for-role-in-congo-massacre/.

178 A. McBeth, above note 176.

179 J. Kyriakakis, above note 150, p. 170.

180 *Ibid.*

181 James G. Stewart, "The Argor Heraeus Decision on Corporate Pillage of Gold", 19 October 2015, available at: http://jamesgstewart.com/the-argor-heraeus-decision-on-corporate-pillage-of-gold/.

182 See, for example, D. Hughes, above note 48, p. 64; J. Kyriakakis, above note 150, p. 171.

183 For an overview, see S. Cossart *et al.*, above note 6.

184 "France: Cement Company Lafarge Indicted by Investigative Judges over Its Syria Activities", Business and Human Rights Resource Centre, 28 June 2018, available at: www.business-humanrights.org/en/latest-news/france-cement-company-lafarge-indicted-by-investigative-judges-over-its-syria-activities/.

185 See Jelena Aparac, "Business and Armed Non-State Groups: Challenging the Landscape of Corporate (Un) accountability in Armed Conflicts", *Business and Human Rights Journal*, Vol. 5, No. 2, 2020.

186 See S. Cossart *et al.*, above note 6.

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unequivocally asserted that "it is irrelevant that the accomplice acts intending to pursue a commercial activity, a circumstance that is part of the motive and not the intentional element".[187] The Court stated that under French criminal law, motives bear no relevance in establishing (or negating) intent, thus entailing that a company cannot hide behind its business aims to escape liability.[188]

Finally, the landmark trial initiated on 5 September 2023 at the Stockholm District Court against the leaders of Lundin Oil AB[189] – a multinational company now known as Orrön Energy – for complicity in war crimes committed in the conduct of the company's business activities in Sudan[190] during the devastating civil conflict that pitted the government against armed groups in the Southern region between 1983 and 2005 further evidences the extent to which a corporation can be charged with violating IHL.

While this section concentrates on criminal enforcement mechanisms, it does not under-appreciate the potential of redress procedures for environmental harms before domestic civil courts.[191] For example, a recent report by the International Commission of Jurists on corporate complicity in international crimes pointed out that civil liability gives more latitude than criminal liability.[192] In addition, non-judicial grievance mechanisms, as contemplated under the UNGPs,[193] could be used. Administrative sanctions may also be used in specific cases – for instance, regarding the sale of prohibited weapons, administrative enforcement mechanisms can operate *ex ante* through the refusal by States to grant authorizations to companies involved in such conduct or *ex post* by withdrawing authorizations and/or applying penalties depending on the types of conduct.[194]

187 Court of Cassation, Appeal No. 19-87.367, Judgment (Criminal Chamber), 7 September 2021, available at: www.courdecassation.fr/decision/6137092ff585960512dfe635.

188 *Ibid.*, paras 66–67.

189 "The accused individuals are Swedish citizen Ian Lundin, former chairman of the company, and Swiss citizen Alexandre Schneiter, who was its former CEO. Both are charged with aiding and abetting international law violations in South Sudan in what was at the time the southern parts of Sudan, during the years 1999–2003." See "Report 1: Landmark Trial at Stockholm District Court: Allegations of Complicity in Serious International Crimes in Sudan (1999-2003) Against Two Corporate Leaders", Civil Rights Defenders, 5 September 2023, available at: https://crd.org/2023/09/05/report-1-landmark-trial-at-stockholm-district-court-allegations-of-complicity-in-serious-international-crimes-in-sudan-1997-2003-against-two-corporate-leaders/.

190 According to the prosecutor, these acts were committed with the aim of securing the company's oil operations in Sudan. *Ibid.*

191 Joachim Zekoll, Michael G. Collins and George A. Rutherglen, *Transnational Civil Litigation*, West Academic Press, Eagan, MN, 2023.

192 International Commission of Jurists, *Corporate Complicity and Legal Accountability: Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes*, Vol. 3, 2008, p. 10.

193 Under Principle 25 of the UNGPs, above note 11, a non-judicial grievance mechanism "is a formal, non-legal complaint process that can be used by individuals, workers, communities and/or civil society organisations that are being negatively affected by certain business activities and operations". See Dalia Palombo, "Guiding Principle 25: Access to Remedy – Foundational Principle", in Barnali Choudhury (ed.), *The UN Guiding Principles on Business and Human Rights: A Commentary*, Edward Elgar, Cheltenham, 2023, p. 191.

194 C. Schliemann and L. Bryk, above note 145.

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Concluding remarks

While the role of business entities in conflict situations is increasingly being underscored, there is a lack of articulation of what businesses' obligations are regarding the protection of the environment. The central objective of this contribution was to shed light on the existence and the nature of environmental duties imposed on business entities in conflict situations. The argument that private corporations bear legal obligations under international law is far from being accepted in dominant discourses in international law. Therefore, this point needed to be demonstrated from a conceptual perspective without going beyond the scope of the present contribution. In that regard, the contribution focuses on the legal sources providing for such environmental obligations.

Given that IHL is the primary regime with direct relevance in armed conflict situations, this paper has highlighted the potential and limits of its rules in addressing corporate conduct during armed conflict. However, IHL alone is not enough, particularly regarding environmental matters during armed conflict. The paper has therefore explored other sources and has demonstrated their ability to provide a complementary framework in articulating legal obligations on corporations. The assessment has been based on a systemic analysis of IHL and other branches of international law, particularly international human rights, environmental and criminal law.

After clarifying the origin of these obligations under international law, the article has discussed their nature. This has led to a twofold categorization consisting of the "do no harm" obligation on the one hand and the "due diligence" obligation on the other. While the former is a negative obligation that has solid ground in various sources of international law applicable – or transposable – to business entities, the latter is an obligation of means that is only relevant in specific circumstances but is critical not only in preventing harm but also in the continuous operation of the business. In modern business, characterized by large supply chains, due diligence is crucial in preventing or responding to environmental violations. However, this does not preclude legal responsibility or liability. As the article has demonstrated, the mere existence of these responsibility mechanisms, especially at the domestic level, corroborates that legal obligations applicable to business entities exist. The ultimate objective of this paper has been to contribute to closing what could be seen as a gap in the legal framework, as illustrated by the silence of the ILC Draft Principles and ICRC Guidelines on the issue of the current environmental obligations imposed on private companies during armed conflict.

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