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# DIFFERENTIATING THE CORPORATION: ACCOUNTABILITY AND INTERNATIONAL HUMANITARIAN LAW

*David Hughes\**

## I. INTRODUCTION

Imagine the following scenario: A mid-sized South American state retains the services of a private military contractor (“PMC”) to aid in its decade-long fight against a transnational narco-trafficking organization. A routine reconnaissance mission is disrupted by members of a small Hoxhaist-liberation group. Mistaking the PMC for the local military, the rebels fire a rocket-propelled grenade towards the convoy. Responding, the contractors pursue. Drawn away from their intended route, the PMC comes under further attack. They radio for assistance. Members of the PMC, 35-miles away, board a UH-60 Black Hawk helicopter that was recently procured from a private aviation leasing company headquartered in Glendale, Arizona. Support arrives, but the rebels have dispersed throughout a rural village. The helicopter circles. Someone in the village, obscured in the shadows between two buildings, fires upwards. A member of the PMC locates the individual and from a side-mounted machine gun returns a volley of bullets. The target is killed alongside three civilians who had sought refuge within a nearby building.

Two weeks later and 300 miles away, representatives of an Antwerp based agricultural conglomerate arrive in the Capital to facilitate the expansion of a palm oil plantation. Government officials from the Office of Business Development believe that the now heavily regulated Asian market, where much of the world’s palm oil production originates, no longer meets international demand. A ten-year plan, approved by Parliament, expands the industry and positions the state to become the largest global exporter of palm oil in the region. The Belgian corporation holds a thirty-five percent stake in the operations and will support efforts to expand production facilities. The desired growth, however, requires expansive deforestation in a region of the country that is the site of a low-intensity armed conflict between

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the military and a large indigenous population that have long sought autonomous self-rule. Resistance by a coalition of environmentalists, human rights groups, and armed fighters from the indigenous community is anticipated. The Belgian delegation and representatives from the Office of Business Development reach an informal agreement. The Government will ensure that the agribusiness receives unimpeded access to the required land and will guarantee that any militant activities are instantly suppressed.

In 1970, Milton Friedman pronounced that the sole social responsibility of business is to increase profit.<sup>1</sup> In the above hypothetical, several entities act dutifully. The PMC that assumes a kinetic role, the company that repurposes and leases decommissioned military vehicles, and the transnational corporation that seeks to expand within a profitable market all prioritize earnings. Each demonstrates little regard towards, or awareness of, the host state's constituents' interests. International law balances the desire to provide investor protection with efforts to safeguard against corporate complicity in egregious human rights violations and international crimes.<sup>2</sup> But do the above activities raise *particular* concerns that are derived from international humanitarian law ("IHL")?

IHL—the body of international law that endeavors to limit the effects of warfare, protect individuals not participating in hostilities, and designate how force is used—applies in all instances of armed conflict.<sup>3</sup> Accountability for violations of IHL is traditionally attributed to states and to individuals.<sup>4</sup> The contributions of corporate actors also come within the auspices of IHL. Despite the proliferation of legal initiatives and literature addressing the human rights obligations of businesses, IHL's applicability to corporate

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1. See Milton Friedman, *The Social Responsibility of Business is to Increase Its Profit*, N.Y. TIMES MAG. (June 13, 1970), <https://www.nytimes.com/1970/09/13/archives/friedman-doctrine-the-social-responsibility-of-business-is-to.html>.

2. See generally Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERK. J. INT'L L. 45 (2002). See also Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

3. See generally YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (3d ed., 2010); see also MARCO SASSÒLI, *INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE* (2019); EMILY CRAWFORD & ALISON PERT, *INTERNATIONAL HUMANITARIAN LAW* (2015).

4. 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL 2: PRACTICE 3507–12, 3606–10 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (detailing rules 149 and 151 within the ICRC's customary International Humanitarian Law ("IHL") study which assess responsibility for violation of IHL by states and individuals respectively); see also DALE STEPHENS, *ACCOUNTABILITY OF THE LAW OF ARMED CONFLICT AND THE QUESTION OF THE EFFICACY OF INTERNATIONAL CRIMINAL LAW IN AMELIORATING VIOLENCE IN ARMED CONFLICT*, IN *ACCOUNTABILITY FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW: ESSAYS IN HONOUR OF TIM MCCORMACK* 177, 179, 188 fn. 52, 197 (Jadranka Petrovic ed., 2017); Gentian Zyberi, *Enforcement of International Humanitarian Law*, in *INTERNATIONAL HUMAN RIGHTS INSTITUTIONS, TRIBUNALS, AND COURTS* 390–91, 395 (Gerd Oberleitner, ed., 2018).

entities that operate within conflict zones has received minimal attention.<sup>5</sup> The emphasis on human rights considerations is essential. However, it is neither proportionate to the frequency with which corporations operate within conflict zones nor does it reflect, perhaps, the “more certain foundation” upon which norms derived from IHL directly bind the operations of corporations or their officials.<sup>6</sup>

But how are these operations assessed and regulated? In the described scenario surely the culpability of the PMC differs from that of the aviation leasing firm which, in turn, differs from the agribusiness. How does international law treat these disparate forms of corporate conduct when the implicated behavior occurs within a conflict zone? And how do the occurrent accountability challenges differ from those similar limitations commonly associated with state responsibility?

This article considers the particularities that affect how accountability is imposed for corporate behavior that implicates IHL. I ask: Do existing accountability frameworks—the amalgamation of the primary rules that international law imposes upon corporate actors and the secondary rules that determine and implement the consequences of a primary breach—adequately regulate corporations whose behavior implicates international humanitarian law? I suggest that despite the prevalence of familiar impediments and enforcement challenges, accountability is further compromised by two features distinctive to corporations. The applicable legal framework inadequately conceptualizes both the form of corporations and the operational nature of corporate activity. These features differentiate the corporation from the state. Collectively, they present particular regulatory questions; questions that remain under-conceptualized by the patchwork of legal regimes initially designed to ensure accountability for the conduct of states and their representatives and that are now applied to a variety of non-state actors.

The significance of these questions is clear. Corporations wield enormous power. Accelerated by the era of globalization, their supply chains stretch across the world and they exert vast influence over both domestic and international politics.<sup>7</sup> A recent list of the one hundred largest revenue-generating entities contains twenty-nine states and seventy-one corporations.<sup>8</sup> Notwithstanding the ability of these organizations to generate wealth,

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5. Simon Chesterman, *Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones*, 11 CHI. J. INT'L L. 321, 324–25 (2011) (suggesting that the current emphasis results from the prominence and dynamism of human rights and the relative conservatism of IHL as a discipline).

6. *Id.*

7. See Simon Chesterman, *Oil and Water: Regulating the Behavior of Multinational Corporations Through Law*, 36 N.Y.U. J. INT'L L. & POL. 307, 307-308 (2004).

8. Milan Babic, Eelke Heemskerk & Jan Fichtner, *Who is More Powerful – States or Corporations?*, CONVERSATION (July 10, 2018), <https://theconversation.com/who-is-more-powerful-states-or-corporations-99616>.

drive employment, innovation, and economic growth, corporations also possess the capacity to cause significant harm.

This is particularly acute during instances of armed conflict.<sup>9</sup> Following the Second World War, the United States asserted that the culpability of German industrialists equaled that of the state.<sup>10</sup> As William Schabas reminds, many IHL violations would not occur but for the contributions of arms dealers, diamond traders, bankers, and financiers.<sup>11</sup> By fueling the war effort in Western Europe, with the extraction of wealth from the world's most vulnerable landscapes, and through the supply of personnel and weaponry to employ force under the cloak of privatization, business entities are immersed in the conduct and continuance of conflict. But how does the nature of the corporation pose specific challenges to a regulatory framework that developed in reaction to state conduct? How is corporate activity evolving to affect IHL in previously unforeseen ways? And how do we most efficaciously conceptualize a relationship between the corporation and IHL that both reaffirms old questions and presents new regulatory challenges?

This article has three purposes. First, within section II, I describe the doctrinal methods through which accountability for corporate conduct implicating IHL may be pursued. The section tells of the emergence of a piecemeal framework. Under this framework accountability for corporate conduct is achieved indirectly, through secondary rules imposed by separate doctrinal forms.<sup>12</sup> International criminal law ("ICL"), international human rights law ("IHL"), and domestic legislation and courts each provide a potential means of securing accountability for violations of IHL. These bodies of law all extend to the actions of corporations. But these legal fields—collectively, the attempt to regulate corporate conduct—are hampered in specific ways when they extend beyond the state and to the corporation. Corporations have gained international legal status through a succession of developments. Advancements in corporate responsibility, however, have resulted in a mismatch between the primary rules that purport to govern business conduct, the secondary rules through which regulatory efforts are implemented, and the nature of and the manner in which corporate entities operate within conflict zones.

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9. U.N. Human Rights Council ["HRC"], *Business and Human Rights in Conflict-Affected Regions: Challenges and Options Towards State Responses* ¶ 5, U.N. Doc. A/HRC/17/32 (May 27, 2011) (featuring John Ruggie stating that the most egregious rights violations occur in conflict environments where legal regimes cannot be expected to function as intended).

10. See Answer of the United States Prosecution to the Motion on Behalf of the Defendant Gustav Krupp von Bohlen, *United States v. Krupp* (The Krupp Case), 9 T.W.C. 1 (Nov. 12, 1945).

11. William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 INT. REV. RED CROSS 439, 441 (2001).

12. See Ratner, *supra* note 2, at 481 (clarifying the distinction between the existence of a responsibility imposed by international law and the various means through which this responsibility may be implemented).

This results in accountability gaps. This article's second purpose is to identify features that contribute to these gaps. Section III describes how despite the capacity of the relevant doctrinal forms to impose accountability in *particular* scenarios, the development of the primary and secondary rules regulating corporate conduct exhibit structural limitations. Limitations in the legal frameworks governing the conduct of hostilities are familiar. The extent to which these have allowed states to operate with impunity is well-documented and the subject of ongoing reform.<sup>13</sup> The gradual development of a regulatory framework, intended to treat corporate activity occurring within conflict zones and affecting IHL, however, exhibits particular vulnerabilities that are the subject of this article. This section describes: (i) structural challenges that complicate the transference of state-based frameworks to corporations and (ii) how the resulting accountability processes have failed to adequately consider, and are thus adversely affected by, particular features of the corporate form.

This article's final purpose is to offer a more complete understanding of divergent business operations that often occur beyond the conceptual boundaries of the relevant legal frameworks. Accordingly, section IV considers the nature of corporate operations. Through a series of case studies, I consider how varied forms of corporate behavior elude treatment and affect IHL. Often, the implicated conduct is unanticipated by existing legal frameworks. New technologies and corporate innovation present novel challenges. Efforts to ensure accountability for corporate behavior must begin by more fully conceptualizing the ways that corporate conduct can affect IHL-based norms. This section presents three broad categorizations of corporate activity that implicate IHL: as a direct violator, as a facilitator, or as an incidental contributor.

Corporate activities, occurring within a conflict zone and implicating IHL, exhibit a range of moral and legal culpabilities. The ability of the existing frameworks to treat these forms of corporate conduct decreases as the proximity between the corporation and the violation widens. However, the distance between conduct and consequence does not lessen the extent that norms derived from IHL are affected by these varied, emerging, forms of corporate behavior. Collectively, as corporations continue to gain legal status, the prospect of ensuring accountability dwindles when the applied frameworks fail to fully envision both the nature of a corporation and the extent of its activities. Part five concludes.

To narrow the existing accountability gaps, we must begin by aligning conceptualizations of corporate conduct and a more accurate conception of the corporate form with an encompassing notion of accountability that exceeds the confines of the existing doctrinal prescriptions. Whether limited

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13. See EMANUELA-CHIARA GILLARD, PROMOTING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW 2–5 (Oct. 2016), <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-10-05-promoting-compliance-ihl-gillard.pdf>.

by a lack of identifiable law or an inability to enforce existing law, regulatory efforts must better reflect the contours of the debates they seek to affect. Rarely does the corporation pull the trigger, dig the mass grave, or promote the elimination of a group. History shows they are more likely to finance the purchase of the gun, manufacture the shovel, or idle while the propaganda resonates. Yet paradigms are shifting. Corporations are engaging in new activities, affecting international humanitarian law in unforeseen ways. While international law has moved from its state-centric origins, assessments of corporate conduct remain bound by the confines of the various doctrinal forms, those primary and secondary rules, through which accountability is pursued.

## II. INDIRECT ACCOUNTABILITY FOR CORPORATE VIOLATIONS OF IHL

International law imposes rights and duties upon corporations. Notwithstanding the intricacies of debates regarding legal subjecthood or personality, various fields of international law increasingly and incrementally extend to corporations.<sup>14</sup> IHL binds all actors whose activities are closely linked to armed conflict.<sup>15</sup> States and organized armed groups do bear the greatest responsibility for implementing IHL, but a business entity whose activities are closely linked to an armed conflict is required to respect relevant legal precepts.<sup>16</sup> Commentators diverge on whether these obligations extend to legal or natural persons. Assuming a more conservative stance, Emanuela-Chiara Gillard suggests that businesses are not, *per se*, bound by IHL.<sup>17</sup> Instead, Gillard opines that while businesses are not formally bound, individual staff are required to comply with IHL. This is because IHL applies to organized armed groups and thus individuals. Gillard concludes that, by analogy, the well-established principle of individual responsibility extends to both those

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14. See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 70–71 (1986) (directly recognizing that corporations are subjects of international law); José E. Alvarez, *Are Corporations “Subjects” of International Law?*, 9 SANTA CLARA J. INT’L L. 1, 3 (2001) (noting that the extension of personhood to corporations carries unintended risks); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 78–79 (2006) (arguing in favor of recognizing the limited legal personality of corporations).

15. INT’L COMM. RED CROSS [“ICRC”], BUSINESS AND INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION TO THE RIGHTS AND OBLIGATIONS OF BUSINESS ENTERPRISES UNDER INTERNATIONAL HUMANITARIAN LAW 14 (2006), <https://www.icrc.org/en/publication/0882-business-and-international-humanitarian-law-introduction-rights-and-obligations> [hereinafter ICRC BUSINESS AND IHL].

16. *Id.*

17. See Emanuela-Chiara Gillard, *The Position with Regard to International Humanitarian Law*, 100 AM. SOC’Y INT’L L. PROC. 129, 130–31 (suggesting also that states may impose IHL-based obligations on businesses through domestic mechanisms meaning that while businesses would not be bound at the international level, IHL can inform domestic obligations that are extended to businesses).

present within an armed conflict—members of armed groups; civilians; aid workers; in-country business staff—and to those not physically present but whose activities may violate IHL.<sup>18</sup>

The International Committee of the Red Cross (“ICRC”) presents a more expansive position. IHL, they contend, grants protections to business personnel (provided they do not partake in hostilities) and to the assets and capital investments of the business enterprise.<sup>19</sup> Equally, IHL imposes obligations on business staff and on the business itself that exposes both the natural and legal person to the risk of criminal or civil liability.<sup>20</sup>

Accountability for conduct implicating IHL is, however, realized indirectly. In response to violations by both states and corporations, accountability is implemented through a separate doctrinal form: international criminal law; international human rights law; and through domestic legislation and courts. Here, I employ the notion of accountability broadly. It is used in its fullest sense—as both imposing obligations that inform assessments of culpability and prescribing consequences for breaches of those standards.<sup>21</sup> Consequences may be legal (e.g., judicial remedy) or non-legal (e.g., reputational costs; moral opprobrium). They may also be individual (criminal) or collective (civil).<sup>22</sup> This article, however, limits its scope to forms of legal accountability. This should not be read as under-appreciating the potential of non-legal redress. Such means of pursuing accountability are of particular relevance to corporations but will only be touched on throughout the article. The decision to narrow considerations is instead intended to maintain focus on the development and limited scope of the formal legal frameworks.

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18. *Id.* at 131.

19. See ICRC BUSINESS AND IHL, *supra* note 15, at 7; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(3), June 8, 1977, 1125 U.N.T.S. 3 (stating that “civilians shall enjoy protection against the dangers arising from military operations unless and for such time as they take a direct part in hostilities.” Protections alter should the corporation become a direct participant or unlawful combatant) (hereinafter First Additional Protocol).

20. ICRC BUSINESS AND IHL, *supra* note 15, at 7.

21. See Jutta Brunnée, *International Legal Accountability Through the Lens of the Law of State Responsibility*, 36 NETH. Y.B. INT’L. L. 3, 6 (2005) (describing international legal accountability as “the legal justification of an international actor’s performance vis-à-vis others, the assessment or judgment of that performance against international legal standards, and the possible imposition of consequences if the actor fails to live up to applicable legal standards”) (emphasis omitted); see also André Nollkaemper, *Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives*, in MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE: PERSPECTIVES FROM SCIENCE, SOCIOLOGY AND THE LAW 179, 182 (Gerd Winter, ed., 2010) (discussing the use of “responsibility” to describe obligations).

22. See STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 3 (3d ed., 2009).



Under these frameworks, whether accountability is assessed against legal or natural persons varies amongst and remains a contested legal question.<sup>23</sup> An encompassing notion of accountability that extends beyond the individual to the business entity is desirable and likely constitutes a general principle of law.<sup>24</sup> Yet, the contours of this debate do not affect present considerations and thus need not be settled here. Instead, the following sections consider how these frameworks have evolved to regulate corporate conduct.

#### A. *International Criminal Law*

Lord Holt, in an unnamed decision from 1701, declared that “a corporation is not indictable, but the particular members of it are.”<sup>25</sup> The maxim *societas delinquere non potest* portends the once commonplace view that corporations lack the requisite *mens rea* to commit a crime.<sup>26</sup> This informed the Nuremberg Tribunal and the emerging tenet of individual responsibility. In the *Goering* case, the Tribunal claimed that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>27</sup> The Nuremberg Charter extended the Tribunal’s jurisdiction to the representatives of groups and organizations implicated in the war effort.<sup>28</sup> In the *I.G. Farben* case, the U.S. Military Tribunal held that “it can no longer be questioned that the criminal sanctions of international law are applicable to private individuals.”<sup>29</sup> In three formative cases, leading German industrialists were prosecuted for the commission of crimes against peace, war crimes, and for crimes against humanity.<sup>30</sup>

The extension of international criminal liability to corporations edged forward. Diplomatic discussions, during the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda (“ICTY/ICTR”) and at the Rome Conference, produced a familiar admixture. States

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23. See DESISLAVA EMANOUILOVA STOITCHKOVA, TOWARDS CORPORATE LIABILITY IN INTERNATIONAL CRIMINAL LAW 95 (2010).

24. See Ratner, *supra* note 2, at 461 (providing a strong normative account of why corporate liability should extend beyond individual responsibility).

25. Anonymous Case No. 935 (1701), 88 Eng. Rep. 1518, 1518 (KB).

26. See Thomas J. Bernard, *The Historical Development of Corporate Criminal Liability*, 22 CRIMINOLOGY 3, 8 (1984); see also WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 211 (5<sup>th</sup> ed. 2017).

27. France et al. v. Goering et al., 22 I.M.T. 203, 447 (1946) (hereinafter *Goering Case*).

28. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Charter, art. 9, *opened for signature* Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter *IMT Statute*].

29. United States v. Carl Krauch et al., (I.G. Farben Case), 8 T.W.C. 1081, 1136 (1948).

30. *Id.*; See also United States v. Flick (The Flick Case), 6 T.W.C. 1202 (1997); United States v. Krupp (The Krupp Case), 9 T.W.C. 1, 1–2 (1997).

resisted formalizing corporate criminal responsibility but signaled a desire to apply ICL to particular actions by legal persons.<sup>31</sup> When the French delegation proposed that the Statute of the International Criminal Court (“ICC”) include a modest provision assessing corporate liability, the initiative garnered notable support. Ultimately, a congruence of practical limitations and domestic differences precluded delegates from agreeing to an appropriate formulation.<sup>32</sup>

The post-war ICL tribunals have all held corporate officials liable for atrocity crimes.<sup>33</sup> The trials of the German industrialists signified the international community’s intent to look beyond the state structure.<sup>34</sup> Article 25(1) of the Rome Statute is read to extend the Court’s jurisdiction to non-state actors but only imposes responsibility on natural persons.<sup>35</sup> The Office of the Prosecutor has repeatedly indicated willingness to investigate corporate officials.<sup>36</sup> And the ICTR, in the *Media Case*, convicted three employees of *Radio Télévision des Mille Collines* of genocide.<sup>37</sup>

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31. See U.N. Secretary-General., Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 51, U.N. Doc. S/25704 (May 3, 1993) (in which delegates briefly considered extending International Criminal Law (“ICL”) to the conduct of criminal persons during discussions to establish the International Criminal Tribunal for the Former Yugoslavia (“ICTY”). Although the Secretary General stated that this was desirable, the initiative was rejected in favor of concentrating the Tribunal’s jurisdiction on the actions of natural persons). See also 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 CONTEMPORARY CHALLENGES TO THE LAWS OF WAR: ESSAYS IN HONOUR OF PROFESSOR PETER ROWE 285, 290 (Caroline Harvey, James Summers & Nigel D. White eds., 2014).

32. See JAMES GOBERT & MAURICE PUNCH, RETHINKING CORPORATE CRIME 165 (2003); JERNEJ LETNAR ERNI, HUMAN RIGHTS LAW AND BUSINESS: CORPORATE RESPONSIBILITY FOR FUNDAMENTAL HUMAN RIGHTS 145 (2010) (noting that the French proposal would have limited liability to private corporations in which corporate liability could be linked to the individual criminal responsibility of one of the corporation’s leading members).

33. Julia Graff, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo*, 11 HUM. RTS. BRIEF 23, 23 (2004).

34. See United States v. Carl Krauch et al., (I.G. Farben Case), 8 T.W.C. 1081, 1136 (1948); see also *Krupp*, 9 T.W.C. 1; United Kingdom v. Tesch (The Zyklon B Case), Case No. 9, 1 L.R.T.W.C. 93 (1946).

35. See Rome Statute of the International Criminal Court art. 25(1), July 17, 1998, 2187 U.N.T.S. 90; see also Caroline Kaeb, *The Shifting Sands of Corporate Liability Under International Criminal Law*, 49 GEO. WASH. INT’L L. REV. 351, 374–75 (2016).

36. See Batesmith, *supra* note 31, at 292 (citing the Prosecutor’s general intent to look at the involvement of corporate officials); see also Press Release, International Criminal Court, Prosecutor Receives Referral of Situation in Democratic Republic of Congo, U.N. Press Release L/3067 (Apr. 19, 2004) (indicating willingness to investigate the role of private actors in the extractive industry that were accused of facilitating conflict in the Ituri Province of the Democratic Republic of Congo); Prosecutor v. Ruto, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 22 (Jan. 23, 2012) (in which Joshua Sang, a broadcaster at a radio station, was indicted as an in-

David Scheffer, the U.S. Ambassador-at-Large for War Crimes Issues who led the American delegation at the Rome Conference, has detailed “an increasing acceptance of corporate criminal liability in the almost two decades since the Rome Treaty was completed.”<sup>38</sup> The Malabo Protocol will, if adopted, extend the jurisdiction of the proposed African Criminal Court to legal persons that are accused of committing an array of war crimes.<sup>39</sup> The Appeals Panel of the Special Tribunal for Lebanon (“STL”) held that the Court may proceed against a media company that had been accused of contempt.<sup>40</sup> In a comprehensive judgement, the STL interrogated the historical record. It held that the *Goering* pronouncement—that crimes were committed by natural persons—was merely obiter.<sup>41</sup> U.N. resolutions were consulted. Domestic legislation from forty-four countries was surveyed.<sup>42</sup> Read collectively, the Appeals Panel contended that corporate criminal liability was “on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.”<sup>43</sup>

This status is further evidenced in several international treaties. The Apartheid Convention extends criminal liability to both institutions and individuals.<sup>44</sup> The illegal movement of hazardous waste is labelled an offence when committed by either legal or natural persons under the Basel Convention.<sup>45</sup> The Organization for Economic Cooperation and Development’s (“OECD”) Anti-Bribery Convention obliges states to impose criminal liability

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direct co-perpetrator of crimes against humanity for his role on the post-election violence in Kenya).

37. Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeals Judgment, ¶¶ 1096, 1113–14 (Nov. 28, 2007); see also Kaeb, *supra* note 35 at 375–76.

38. Brief of Ambassador David J. Scheffer, Northwestern University Pritzker School of Law, as Amicus Curiae in Support of the Petitioners at 6, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (No. 16-499) [hereinafter Scheffer Brief].

39. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights art. 46I, adopted June 27, 2014, [https://au.int/sites/default/files/treaties/36398-treaty-0045\\_\\_protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36398-treaty-0045__protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf).

40. See Prosecutor v. New TV S.A.L., Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings (Oct. 2, 2014).

41. *Id.* ¶ 64.

42. Manuel J. Ventura, *The Prosecution of Corporations Before a Hybrid International Criminal Tribunal: The New TV and Akhbar Beirut Contempt Jurisdiction Decisions of the Special Tribunal for Lebanon*, 1 AFR. J. INT’L CRIM. JUST. 71, 75–76 (2016).

43. *New TV S.A.L.*, Case No. STL-14-05/PT/AP/AR126.1 ¶ 67.

44. International Convention on the Suppression and Punishment of the Crime of Apartheid art. 1(2), adopted Nov. 30, 1973, 1015 U.N.T.S. 243 (entered into force July 18, 1976).

45. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 2(14), opened for signature Mar. 22, 1989, 1673 U.N.T.S. 51.

ity on legal persons that attempt to induce public officials.<sup>46</sup> In the Convention on Action Against Trafficking, the Council of Europe requires parties to ensure that corporations are made criminally liable for violations of the treaty's provisions.<sup>47</sup> And the U.N.'s Convention Against Transnational Organized Crime defines a series of international offences that are applied to both natural and legal persons.<sup>48</sup>

The criminalization of particular forms of corporate behavior—trafficking, environmental derogation, and corruption—offer a foundation from which liability for IHL violations logically extends. Accordingly, Andrew Clapham suggests that there are “no theoretical barriers to subjecting corporate war crimes to the developed international criminal legal order designed to tackle violations of international humanitarian law and international human rights law.”<sup>49</sup> Existing legal mechanisms have begun to do this work. The International Law Commission's (“ILC”) Draft Articles on Crimes Against Humanity require that “each state shall take measures, where appropriate, to establish the liability of legal persons. . . .”<sup>50</sup> Remedies for corporate involvement in the most egregious breaches of IHL are provided in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>51</sup> Accountability is provided through reparations where a person, legal person, or other entity is found liable for a gross violation of IHL.<sup>52</sup>

### B. *International Human Rights Law*

The Universal Declaration of Human Rights (“UDHR”), in its preamble, extends the common standards contained within its text to “individuals

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46. Organization for Economic Cooperation and Development [“OECD”] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 2, *opened for signature* Dec. 17, 1997, 2802 U.N.T.S. 225.

47. Council of Europe, Convention on Action Against Trafficking in Human Beings art. 22, *opened for signature* Feb. 1, 2008, C.E.T.S. No. 197, 2569 U.N.T.S. 33.

48. United Nations Convention Against Transnational Organized Crime arts. 5–6, *opened for signature* Nov. 15, 2000, 2225 U.N.T.S. 209.

49. Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 139, 178 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

50. Int'l Law Comm'n, Crimes Against Humanity: Texts and Titles of the Draft Preamble, the Draft Articles and the Draft Annex Provisionally Adopted by the Drafting Committee on First Reading, U.N. Doc. A/CN.4/L.892, art. 6 ¶ 7 (May 26, 2017).

51. See G.A. Res. 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ 3(c) (Mar. 21, 2006).

52. *Id.* ¶ 15.

and every organ of society.”<sup>53</sup> This prompted Louis Henkin’s oft-cited contention that this encompassing formulation “excluded no one, no company, no market, no cyberspace.”<sup>54</sup> Yet, at least formally, the major human rights instruments that built upon the UDHR did not recognize legal persons as either the bearers or subjects of rights.<sup>55</sup>

Evolution was gradual. Well-publicized events in the 1970s—the involvement of foreign corporations in Central and South American *coups*; corporate officials that bribed states to receive lucrative military contracts—encouraged efforts to regulate corporate conduct through international legal mechanisms.<sup>56</sup> The United Nations, following the establishment of the Centre for Transnational Corporations, and the OECD both produced non-binding, draft codes of corporate behavior.<sup>57</sup> Initially, however, human rights considerations were indirect. The OECD guidelines, for example, desired creation of a “level playing field” for companies operating in territories where opportunities to accrue advantage through unregulated business practices are widespread.<sup>58</sup> This prompted criticisms that the OECD had privileged investor rights above public interests.<sup>59</sup> Early U.N. initiatives, built around an ambitious redistributive agenda that began in the Global

53. G.A. Res. 217 (III) A, Universal Declaration of Human Rights pmb. ¶ 10 (Dec. 10, 1948) [hereinafter UDHR].

54. Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT’L L. 17, 25 (1999); see also Stephens, *supra* note 2, at 77.

55. See International Covenant on Civil and Political Rights pmb., Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights pmb., Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; see also Silvia Steininger & Jochen von Bernstorff, *Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate “Human” Rights in International Law*, 25 MPIL RESEARCH PAPER SERIES 1, 5–6 (2018).

56. See Ratner, *supra* note 2, at 457 (noting that early impetus was derived from the role that United Fruit Company and International Telephone and Telegraph played in efforts to destabilize governments in Guatemala and Chile); see CLAPHAM, *supra* note 14, at 201 (also citing events in Chile as well as Lockheed’s payment of bribes to Japanese officials as motivating the OECD’s efforts to address corporate conduct); James Salzman, *Labour Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Co-operation and Development*, 21 MICH. J. INT’L L. 769, 788 (2000).

57. See Econ. and Soc. Council, Rep. on the Special Session of the Comm. on Trans’at’l Corps. Supp. No. 7, U.N. Doc. E/1983/17/Rev.1, annex II (1983); OECD, Declaration on International Investment and Multinational Enterprises, OECD/LEGAL/0144, annex 1 (1976), reprinted in THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 57 (1994); see also Ratner, *supra* note 2, at 457.

58. See CLAPHAM, *supra* note 14, at 204; see also OECD, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 31 (2011) (The Revised Guidelines (2001) would, however, include direct reference to human rights considerations).

59. John Ruggie & Tamaryn Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges 2* (Harv. Kennedy Sch., Working Paper No. 15-045, 2015).

South, failed to garner consensus and became mired in Cold War bipolarity.<sup>60</sup>

In 1977, the International Labour Organization (“ILO”) adopted the Tripartite Declaration of Principles.<sup>61</sup> Unlike other soft law initiatives that preceded it, the ILO Declaration was perceived as reflecting an appropriate balance between governmental, industry, and workers’ interests.<sup>62</sup> It explicitly held that all parties “should respect the *Universal Declaration of Human Rights* and the corresponding International Covenants adopted by the General Assembly of the United Nations.”<sup>63</sup> Through its subsequent amendments, the ILO Declaration promoted labor rights, as articulated in various human rights instruments, and extended (soft) legal duties to corporations.<sup>64</sup>

An array of voluntary declarations followed. As private initiatives, through international organizations, and at the behest of various states, these instruments offered broad affirmations of human rights principles.<sup>65</sup> Momentum built. At the World Economic Forum in 1999, Kofi Annan announced the U.N. Global Compact.<sup>66</sup> This non-binding initiative compels businesses to support and respect the protection of internationally proclaimed human rights and avoid complicity in human rights abuses.<sup>67</sup>

60. See Economic and Social Council Res. 1913 (LVII) (Dec. 5 1974); see also Seymour J. Rubin, *Developments in the Law and Institutions of International Economic Relations: Reflections Concerning the United Nations Commission on Transnational Corporations*, 70 AM. J. INT’L L. 73; John Gerrard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 819 (2007); Branislav Gosovic & John Gerard Ruggie, *On the Creation of a New International Economic Order: Issue Linkage and the Seventh Special Session of the UN General Assembly*, 30 INT’L ORG. 309 (1976).

61. Declaration Adopted by the Governing Body of the International Labour Office at Its 204th Session (Nov. 1977), reprinted in Official Bulletin, at 49–56, Vol. LXI, Series A (1978) [hereinafter ILO Declaration].

62. See Ratner, *supra* note 2, at 486.

63. ILO Declaration, *supra* note 61, ¶ 8.

64. Ratner, *supra* note 2, at 487.

65. Alongside the state-initiated codes drafted by the U.N., OECD, and International Labor Organization (“ILO”), a series of other initiatives were formalized between the 1970s and 1990s. See e.g., *Sullivan Principles for U.S. Corporations Operating in South Africa*, 24 INT’L L. MAT. 1496, 1496–99 (1985); *The MacBride Principles*, by Father Sean McManus, President, Irish National Causus, December 1997, U. MINN. HUM. RTS. LIBR., <http://hrlibrary.umn.edu/links/macbride.html> (last visited Oct. 17, 2020); Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, 1998 O.J. (C 104) 180; Bureau of National Affairs, Inc., *Voluntary “Model Business Principles” Issued by the Clinton Administration* (May 26, 1995), Daily Rep. For Executives. For a detailed account of such initiatives, see Jorge F. Perez-Lopez, *Promoting International Respect for Worker Rights through Business Code of Conduct*, 17 FORDHAM INT’L L. J. 1 (1993); see also Stephens, *supra* note 2, at 79–80.

66. U.N. Secretary General, Kofi Annan’s Address to World Economic Forum in Davos (Feb. 1, 1999), <https://www.un.org/sg/en/content/sg/speeches/1999-02-01/kofi-annans-address-world-economic-forum-davos>.

67. U.N. Global Compact, The Ten Principles of the U.N. Global Compact, princs. 1–2, <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

Concurrently, the U.N. Sub-Commission on Human Rights began drafting the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.<sup>68</sup> Proponents of the Norms viewed self-regulation as ineffectual and, potentially, as harmful.<sup>69</sup> The draft Norms read like a treaty.<sup>70</sup> They contained twenty-three articles detailing an array of human rights obligations—civil and political, social and economic, consumer protection, and environmental—pertinent to business entities.<sup>71</sup> The Norms, more comprehensive than preceding initiatives, were positioned as a binding legal document. Ultimately, the Norms failed to garner sufficient state and corporate support and were not adopted by the Human Rights Commission.<sup>72</sup>

Their influence is, nevertheless, enduring. Unlike many of the preceding rights-based initiatives, the Norms explicitly consider business entities that operate within conflict zones. The draft's preamble acknowledges that business enterprises are obligated to respect norms contained within a plethora of international agreements including the Geneva Conventions.<sup>73</sup> Corporations may not engage in or benefit from atrocity crimes.<sup>74</sup> IHL informs numerous articles that address the security of persons, forced labor, worker's rights, and child protection.<sup>75</sup> These references address the contexts that prompted many of the early legal initiatives that sought to regulate the human rights implications of business practice. Rarely, however, did these inclusions explicitly recognize the potential of legal persons to benefit from or perpetuate conflict.

The international community continued to pursue accountability initiatives that would address the relationship between business entities and human rights. After the Secretary General appointed John Ruggie as Special Representative on the issue of Human Rights and Transnational Corporations, the U.N. Guiding Principles on Business and Human Rights ("UNGP") were formulated with a strong intergovernmental mandate. Prin-

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68. See Ioan Maxim (Rapporteur), *Rep. of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Fiftieth Session*, Res. 1998/8, U.N. Doc. E/CN.4/1999/4-E/CN.4/Sub.2/1998/45 (Sept. 30, 1998).

69. See *id.*; see also S. Prakash Sethi & Donald H. Schepers, *United Nations Global Compact: The Promise-Performance Gap*, 122 J. BUS. ETHICS 193, 206–07 (2014).

70. Ruggie, *supra* note 60, at 820.

71. See U.N. Comm'n on Hum. Rts., *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *U.N. Norms*].

72. See U.N. Comm'n on Hum. Rts., *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Dec/2004/116 (Apr. 22, 2004); see also Ruggie, *supra* note 60, at 821.

73. See *U.N. Norms*, *supra* note 71, pmb1.

74. *Id.* art. 3.

75. *Id.* arts. 3, 5–7 (each article notes the relevancy of IHL in relation to specific provisions that address security and worker's rights).

principle 7 recognizes that the risk of human rights abuses is heightened within conflict-affected areas and calls upon states to ensure that businesses do not contribute to such abuses.<sup>76</sup> The commentary to Principle 12 holds that business operations within an armed conflict “should respect the standards of international humanitarian law.”<sup>77</sup>

Questions remain regarding how, and the extent to which, IHRL-derived duties can be transposed to further ensure corporate accountability.<sup>78</sup> Accountability initiatives, like the in-progress Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, are increasingly mindful of the challenges posed by armed conflict to the business and human rights relationship.<sup>79</sup> Civil society initiatives complement intergovernmental efforts to redress harmful business activities.<sup>80</sup> And the UNGP’s operationalization process has increased attention on the challenges of conducting business in conflict-affected areas.<sup>81</sup>

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76. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, princ. 7, U.N. Doc. A/HRC/8/5 (Aug. 7, 2008) [hereinafter U.N. *Guiding Principles*].

77. See Off. of the U.N. High Comm’r for Hum. Rts. (OHCHR), *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04, at 13–14 (2011), [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf).

78. See Ratner, *supra* note 2, at 492–97.

79. See e.g., U.N. Hum. Rts. Council, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (July 16, 2018), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> (in which the revised draft treaty builds upon the appeals to IHL contained within the UNGP).

80. See e.g., OECD, *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (2006), <https://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf>; *Voluntary Principles on Security and Human Rights*, <https://www.voluntaryprinciples.org/the-principles/> (last visited Sept. 27, 2020); *The Kimberley Process*, <https://www.kimberleyprocess.com> (last visited Sept. 27, 2020); U.N. GLOBAL COMPACT, *GUIDANCE ON RESPONSIBLE BUSINESS IN CONFLICT-AFFECTED AND HIGH-RISK AREAS* (2010), [https://www.unglobalcompact.org/docs/issues\\_doc/Peace\\_and\\_Business/Guidance\\_RB.pdf](https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf); YADAIRA ORSINI & ROPER CLELAND, *HUMAN RIGHTS DUE DILIGENCE IN CONFLICT-AFFECTED SETTINGS* (2018), [https://www.international-alert.org/sites/default/files/Economy\\_Human%20RightsDueDiligenceGuidance\\_EN\\_2018.pdf](https://www.international-alert.org/sites/default/files/Economy_Human%20RightsDueDiligenceGuidance_EN_2018.pdf); SHIFT, *HUMAN RIGHTS DUE DILIGENCE IN HIGH RISK CIRCUMSTANCES* (2015), <https://shiftproject.org/resource/human-rights-due-diligence-in-high-risk-circumstances>.

81. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Business and Human Rights in Conflict-Affected Regions: Challenges and Options Towards State Responses*, U.N. Doc. A/HR/17/32 (May 27, 2011) [hereinafter Special Representative Report 2011].



### C. Domestic Legislation and Courts

Accountability for violations of IHL relies upon domestic enforcement mechanisms.<sup>82</sup> The Geneva Conventions require states parties to incorporate IHL standards into domestic law.<sup>83</sup> This inclusion envisioned that national courts would assume a significant role in regulating the conduct of actors engaged in armed conflict.<sup>84</sup> Many states initially lacked the necessary legislative foundation to address IHL violations.<sup>85</sup> However, following adoption of the Rome Statute, states amended their criminal codes to include international crimes within domestic legislation.<sup>86</sup> Comprehensive legislative and jurisprudential frameworks emerged to offer and inform accountability options across numerous jurisdictions.<sup>87</sup> These developments prompted Marco Sassòli's observation that IHL had assumed new credibility and offered improved effectiveness.<sup>88</sup>

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82. Gentian Zyberi, *Enforcement of International Humanitarian Law*, in HUMAN RIGHTS INSTITUTIONS, TRIBUNALS AND COURTS 377, 381–84 (Gerd Oberleitner, ed, 2018); see also Sharon Weill, *Building Respect for IHL Through National Courts*, 96 INT. REV. RED CROSS 859, 861 (2014).

83. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art.49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S.135 [hereinafter Third Geneva Convention]; Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (each containing common provisions that impose obligations to prosecute individuals that have committed war crimes).

84. Weill, *supra* note 82, at 861.

85. See Régis Bismuth, *Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing Between International and Domestic Legal Orders*, 38 DENVER J. INT'L L. & POL'Y 203, 219 (2010).

86. See Rome Statute, *supra* note 35, arts. 1, 17; see also Ramiro García Falconí, *The Codification of Crimes Against Humanity in the Domestic Legislation of Latin American States*, 10 INT'L CRIM. L. REV. 453 (2010). See generally F. INT'L CRIM. AND HUMANITARIAN L., IMPORTING CORE INTERNATIONAL CRIMES INTO NATIONAL LAW (Morten Bergsmo, Mads Harlem & Nobuo Hayshi eds., 2d ed. 2010).

87. See Sudan Peace Act, Pub. L. No. 107-245, §§ 6, 11, 116 Stat. 1504 (2002) (finding that the Sudanese Government would use the sale of oil to facilitate military action and directing the Secretary of State to collect information on violations of IHL); see also Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, §§ 2–3, 117 Stat. 864 (2003) (acknowledging violations of international law in Burma and forbidding all trade that would support the military regime); Kyle Rex Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F. L. Rev. 167, 206–09 (2005).

88. Marco Sassòli, *The Implementation of International Humanitarian Law: Current and Inherent Challenges*, 10 Y.B INT'L HUMANITARIAN L. 45, 46 (2007).

The use of domestic mechanisms to impose IHL accountability for corporate action builds upon pre-existing regulatory frameworks.<sup>89</sup> Accountability manifests through both criminal and civil pursuits, through both purely domestic mechanisms and with the use of universal jurisdiction. Criminal accountability, implemented directly, is grounded in the identical requirement, posed in each of the four Geneva Conventions, that obliges parties to enact legislation and provide penal sanctions for violations constituting grave breaches.<sup>90</sup> A 2006 survey of various domestic legal regimes concluded that incorporation initiatives often went beyond the limits of the international legal architecture. Commonly, when imposing criminal liability, these jurisdictions did not distinguish between natural and legal persons.<sup>91</sup>

A host of prosecutions followed. Many of these actions concern individual actors—both state officials and members of non-state armed groups—that have been accused of IHL violations.<sup>92</sup> Yet, several notable instances demonstrate the willingness of domestic forums to impose accountability for business actions occurring within armed conflict. In a celebrated 2007 decision, the Dutch Court of Appeal in The Hague increased the sentence of Frans van Anraat.<sup>93</sup> Van Anraat was the principal supplier of thiodiglycol to Iraq. After Saddam Hussein's government used these supplies to manufacture mustard gas, deployed in attacks against Iran and the Kurdish population in Halabja, van Anraat was convicted of complicity in

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89. See Albin Eser & Felix Rettenmaier, *Criminality of Organizations: Lessons from Domestic Law – A Comparative Perspective*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 222, 222–223 (André Nollkaemper & Harmen van der Wilt eds., 2009).

90. See First Geneva Convention, *supra* note 83, art. 49; Second Geneva Convention, *supra* note 83, art. 50; Third Geneva Convention, *supra* note 83, art. 129; Fourth Geneva Convention, *supra* note 83, art. 146.

91. See ANITA RAMASASTRY & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT 15–16 (2006).

92. See Emina Dizdarevi, *Bosnia Indicts Serb for Crimes Against Humanity in Kljuc*, DETEKTOR (Oct. 11, 2018), <http://detektor.ba/en/bosnia-indicts-serb-for-crimes-against-humanity-in-kljuc/> (describing the 2018 indictment of Zoran Adamovic by the Bosnian State Court); Benjamin Duerr, *International Crimes: Spotlight on Germany's War Crimes Unit*, PHILIPPE KIRSCH INSTITUTE (Jan. 10, 2019), <http://www.kirschinstitute.ca/fr/international-crimes-spotlight-germanys-war-crimes-unit/> (summarizing German trials against numerous individuals accused of various war crimes and IHL violations in Syria, Rwanda, and the DRC); *DRC: Two Militiamen Found Guilty of Crimes Against Humanity*, TRIAL INT'L (Sept. 25, 2018), <https://trialinternational.org/latest-post/drc-two-militiamen-found-guilty-of-crimes-against-humanity/> (describing the first convictions by a military tribunal in the DRC against two former militia commanders that had been accused of crimes against humanity).

93. See Hof's-Gravenhage 9 mei 2007, NJ 2007, BA4676, m.nt. M.C.Z. (Public Prosecutor/ Frans Cornelis Adrianus van Anraat) (Neth.) (for an English overview, see *Public Prosecutor v. Frans Cornelis Adrianus van Anraat*, INT'L CRIMES DATABASE, <http://www.internationalcrimesdatabase.org/Case/168/Van-Anraat/> (last visited Oct. 17, 2020)).

war crimes.<sup>94</sup> In 2018, the Supreme Court of the Netherlands upheld the conviction of Guus Kouwenhoven for aiding and abetting in the commission of war crimes.<sup>95</sup> Kouwenhoven, the head of Oriental Timber Corporation and the Royal Timber Company, had trafficked arms to Liberian dictator Charles Taylor in violation of Security Council sanctions.<sup>96</sup>

A series of French cases further evidence the capacity of domestic legal bodies to impose accountability for corporate violations of IHL. In 2011, a Paris court began proceedings against Amesys, a French subsidiary of the Bull Group.<sup>97</sup> The technology company was accused of developing a surveillance network that the Gaddafi regime in Libya used to identify, detain, and torture political dissidents.<sup>98</sup> Qosmos, a French software company, is under investigation for complicity in torture by the Al-Assad regime in Syria.<sup>99</sup> And in 2018, the French multinational, Lafarge was indicted for complicity in crimes against humanity.<sup>100</sup> Significantly, the corporate entity itself was indicted.<sup>101</sup> This marked the first instance in which a legal person was implicated in the commission of a war crime.<sup>102</sup>

Despite the increasing willingness of domestic courts to pursue criminal action against corporate actors, prosecutions remain rare. Leora Bilsky convincingly argues that fixating on criminal remedies obscures the often more efficacious “specificities of civil litigation as a potential tool of corporate

94. *Id.* (noting that Van Anraat was acquitted of the charge of genocide as the prosecution were unable to determine that he was aware of the Iraqi regime’s genocidal intent); see Salil Tripathi, *Business in Armed Conflict Zones: How to Avoid Complicity and Comply with International Standards*, 50 POLITIRBUS 131, 132–33 (2010).

95. HR 18 december 2018, NJ 2018, 1394, m.nt. H.J.S.K. (The Public Prosecutor/Guus Kouwenhoven) (Neth.) (for an English overview, see <http://www.internationalcrimesdatabase.org/Case/3309/The-Public-Prosecutor-v-Guus-Kouwenhoven/>).

96. *Id.* See also, Batesmith, *supra* note 31, at 305.

97. See generally INT’L FED’N FOR HUM. RTS., THE AMESYS CASE (2015), [https://www.fidh.org/IMG/pdf/report\\_amesys\\_case\\_eng.pdf](https://www.fidh.org/IMG/pdf/report_amesys_case_eng.pdf).

98. *Id.*

99. See *Qosmos*, TRIAL INT’L (Sept. 12, 2019), <https://trialinternational.org/latest-post/qosmos/> (noting that new information was presented to the Court after the examining Magistrate decided to close the case and that the investigation is ongoing).

100. See *France: Cement Company Lafarge Indicted by Investigative Judges over its Syria Activities*, BUS. & HUM. RTS. RES. CTR. (June 28, 2018), <https://www.business-humanrights.org/en/france-cement-company-lafarge-indicted-by-investigative-judges-over-its-syria-activities>.

101. Alexandru Tofan, *The Lafarge Affair: A First Step Towards Corporate Criminal Liability for Complicity in Crimes against Humanity*, ASSER INST.: DOING BUS. RTS. BLOG (Oct. 2, 2018), <https://www.asser.nl/DoingBusinessRight/Blog/post/the-lafarge-affair-a-first-step-towards-corporate-criminal-liability-for-complicity-in-crimes-against-humanity-by-alexandru-tofan>.

102. See Liz Alderman, *Terrorism Financing Charge Upheld Against French Company Lafarge*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/business/lafarge-terrorism-syria.html>.

accountability.”<sup>103</sup> Civil avenues have long been available. An influential corporate complicity report by the International Commission of Jurists noted that “in every jurisdiction, despite differences in terminology and approach, an actor can be held liable under the law of civil remedies if through negligent or intentional conduct it causes harm to someone else.”<sup>104</sup> The relevant civil provisions extend domestic jurisdiction to corporate actors implicated in violations of international humanitarian or criminal law.<sup>105</sup>

The body of litigation produced under the Alien Tort Statute (“ATS”) in the United States merits particular attention.<sup>106</sup> The ATS provides district courts with jurisdiction for “any civil action by an alien for a tort only, committed in violation of the law of nations or by a treaty of the United States.”<sup>107</sup> Importantly, relevant ATS cases meld IHL norms and ICL standards with domestic torts.<sup>108</sup> Cases have been brought against both individuals and corporate actors.<sup>109</sup> In *Kadic v. Karadzic*, the Court held that the ATS’s jurisdiction extends to claims of war crimes and other violations of international humanitarian law.<sup>110</sup> The scope of the ATS has, however, narrowed considerably.<sup>111</sup>

Despite curtailment of the ATS in the United States, other jurisdictions increasingly offer expanding avenues to pursue redress.<sup>112</sup> The International Commission of Jurists has noted that civil accountability can “significantly influence patterns of behaviour in a society, raising expectations as to what is acceptable conduct, and preventing repeat of particular conduct, by both the actor held liable, and by other actors who operate in similar

103. LEORA BILSKY, *THE HOLOCAUST, CORPORATIONS, AND THE LAW* 33 (2017).

104. 3 INTERNATIONAL COMMISSION OF JURISTS, *CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY* 10 (2008) [hereinafter ICJ, *CORPORATE COMPLICITY REPORT*].

105. See RAMASAstry & THOMPSON, *supra* note 91, at 22–25.

106. See generally BETH STEPHENS, JUDITH CHOMSKY, JENNIFER GREEN, PAUL HOFFMAN & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* (2nd ed. 2008).

107. 28 U.S.C. § 1350 (2004); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714–15, 729 (2004); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

108. See Bismuth, *supra* note 85, at 225.

109. See Harmen van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities*, 12 CHINESE J. INT’L L. 43, 49 (2013); *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003).

110. *Kadic v. Karadzic*, 70 F.3d 232, 241–44 (2d Cir. 1995); see also Bismuth, *supra* note 85, at 222–24.

111. See *infra* Section III.C.

112. Jodie A. Kirshner, *Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT’L L. 259, 279–281 (2012) (detailing developments in the use of civil litigation within the United Kingdom, South Africa, and Europe); see *Nevsun Resources Ltd. v. Araya*, [2020] 5 S.C.R. (Can) (indicating willingness to hear civil cases alleging that corporations had violated norms of customary international law in their overseas operations).

spheres. . .”<sup>113</sup> Accountability for corporate violations has undoubtedly advanced over the past decades. Yet practice demonstrates that limitations shroud each of the ancillary methods used to extend accountability to corporations whose business activities occur within conflict zones. Both structural and implementation challenges affect each of the discussed doctrinal approaches. Collectively, these contribute to accountability gaps. The following section discusses how structural factors complicate the transference of these legal frameworks to corporations and how the resulting regulatory advancements are complicated by various features of the corporate form.

### III. IDENTIFYING ACCOUNTABILITY GAPS

Structural and operational factors inhibit the regulatory efforts that extend to corporate entities operating within conflict zones. The legal frameworks, described above, have developed through analogies. The corporation is likened to, and regulated through, the state.<sup>114</sup> The legal mechanisms, a series of primary and secondary rules, concepts, and norms that are traditionally intended to limit and regulate the ways in which militaries use force, are applied to business entities. However, the transference of existing mechanisms, initially designed through a statist gaze, do not neatly map onto the corporate form. Failures to appreciate the specificities of the corporation result in regulatory frameworks that are structurally ill-equipped to address various manifestations of business operations that implicate IHL.

Aspects of these challenges are familiar. They consist of overarching implementation and enforcement deficits with which the international lawyer is well-acquainted. Such features do not extend *exclusively* to IHL. IHL does, however, experience particular challenges that differentiate it from those other fields of international law that regulate corporate conduct. Two factors motivate this article’s narrow scope. The first is urgency. The salience of the identified accountability gaps is increased in relation to IHL. As corporations become prominent international actors imbued with state-like characteristics—what Jay Butler has recently termed semi-states—the state’s traditional monopolization of the use of force is likely to erode further as the involvement of corporations in conflict increases.<sup>115</sup>

The second challenge stems from IHL’s dependence upon domestic mechanisms. The absence of a universal judicial system means that many areas of international law are reliant upon domestic implementation, monitoring, and enforcement. Such reliance is heightened with IHL when enforcement lags and permanent international courts hear only a select few

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113. ICJ, CORPORATE COMPLICITY REPORT, *supra* note 104, at 4.

114. Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT’L L. 955, 961 (2008) (noting that both corporations and states unite individuals for common purpose and both possess the capacity for good or ill).

115. See generally Jay Butler, *Corporations as Semi-States*, 57 COLUM. J. OF TRANSNAT’L L. 221 (2019).

cases.<sup>116</sup> Efforts to ensure IHL accountability through domestic means are pursued directly or indirectly through a civilian court or the military justice system. In such instances a judicial body will decide whether an individual's actions violate IHL. They will consider whether a policy is compliant with the state's international obligations. And they will interpret the content and specificity of these obligations.<sup>117</sup> In each instance, the domestic interaction presupposes some relation to the state. It fails to consider the specificities of the corporation and how these will affect the pursuit of accountability.

Often these specificities reflect the nature of the corporation itself. Corporations assume a diversity of structures.<sup>118</sup> Despite variants, five features are common amongst all corporations. The corporate form is constructed around: (i) legal personality; (ii) limited liability; (iii) transferable shares; (iv) centralized management and a board structure; and (v) shared ownership.<sup>119</sup> All jurisdictions contain legislation that provides for the formation of organizations that exhibit these characteristics.<sup>120</sup> Yet as many commentators note, the corporation is not *merely* a legal entity. It is a significant international actor that regularly influences economic, political, and social proceedings.<sup>121</sup> This public-private dichotomy undergirds both calls for corporate regulation and the creation of regulatory challenges.<sup>122</sup>

It is here, however, that a state-derived approach impresses upon efforts to check corporate conduct.<sup>123</sup> Because the corporate entity possesses analogous powers, subsequent efforts to impose accountability recall those similar techniques, doctrines, and instruments whose erstwhile application is limited to, or derived from, the state.<sup>124</sup> The corporation is, as Fleur Johns describes, rendered state-like to neatly impose international law-based restraints.<sup>125</sup> But when regulatory efforts result in the coupling of familiar structural limitations and under-appreciated features of the corporate form,

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116. See Lawrence Hill-Cawthorne, *Joint Blog Series: Application of International Humanitarian Law by Domestic Courts*, EJIL TALK! (Sept. 15, 2015), <https://www.ejiltalk.org/application-of-international-humanitarian-law-by-domestic-courts>.

117. *Id.*; see also Zyberi, *supra* note 82, at 383.

118. Julian G. Ku, *The Limits of Corporate Rights Under International Law*, 12 CHI. J. INT'L L. 729, 753 (2012).

119. See John Armour, Henry Hansmann & Reinier Kraakman, *What is Corporate Law?* in THE ANATOMY OF CORPORATE LAW 1, 5 (Reinier Kraakman, et al., 2017); see also ALICE DE JONGE, CORPORATIONS AND INTERNATIONAL LAW 1 (2013).

120. See Armour, *supra* note 119, at 5.

121. See *Id.* at 22–25; see also Ratner, *supra* note 2, at 452–59.

122. See David Millon, *Theories of the Corporation*, 39 DUKE L. J. 201, 201–02 (1990); see also Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT. L.J. 229, 235.

123. See Fleur Johns, *Theorizing the Corporation in International Law*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 635, 641–42 (Anne Orford and Florian Hoffmann eds., 2016).

124. *Id.*

125. *Id.* at 643.

these processes contribute to the generation of accountability gaps that facilitate the corporation's ability to operate beyond the reach of the imposed legal frameworks.

#### A. *The Limited Scope of International Criminal Law*

International criminal law can provide an effective means of imposing accountability for the most egregious corporate violations of IHL. Yet despite notable successes, ICL's scope remains limited. The U.S. Military Tribunal at Nuremberg sought accountability for corporate violations.<sup>126</sup> The German industrialists were accused of dire acts. They had enabled the forcible transfer and enslavement of whole populations, aided in the procurement of weapons brandished to wage aggressive war, and supplied the chemicals and poisons deployed in the concentration camps.<sup>127</sup> Prosecutions have, since these formative trials, focused (though with important and foretelling exceptions) on natural not legal persons. Accountability is, however, limited by two factors. First, these post-Nuremberg developments limit judicial reach to all but the most egregious violators. And second, efforts to impose corporate accountability through the extension of a complicity standard that draws upon international jurisprudence, domestic legal prescriptions, and a series of mechanisms designed to address state conduct are restricted by particular features of the corporate form.

Transfixed by the most serious core crimes, Article 5 of the Rome Statute focuses the Court's jurisdiction on instances of genocide, crimes against humanity, war crimes, and aggression.<sup>128</sup> Similarly, the inclusion of grave breaches within the Geneva Conventions directs attention towards those violations that are of particular seriousness and which require the High Contracting Parties to prosecute offending entities.<sup>129</sup> Compelling policy reasons support these narrow approaches.<sup>130</sup> Several scholars, however, demonstrate that the designation of core crimes is largely artificial.<sup>131</sup> Various forms of

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126. See generally Matthew Lippman, *War Crimes Trials of German Industrialists: The 'Other Schindlers'*, 9 TEMP. INT'L. & COMP. L.J. 173 (1995).

127. See *United States v. Krauch*, Judgment, 8 T.W.C. 1081, 1136 (1948); See also *United States v. Flick* (The Flick Case), 6 T.W.C. 1202 (1997); *United States v. Krupp* (The Krupp Case), 9 T.W.C. 1 (1997).

128. Rome Statute, *supra* note 35, art. 5 (noting that the ICC's jurisdiction is limited to "the most serious crimes of concern to the international community").

129. See First Geneva Convention, *supra* note 83, art. 50; see also Second Geneva Convention, *supra* note 83, art. 51; Third Geneva Convention, *supra* note 83, art. 130; Fourth Geneva Convention, *supra* note 83, art. 147.

130. See ICC-OTP, *Policy Paper on Case Selection and Prioritisation* (Sept. 15, 2016), [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-PolicyCase-SelectionEng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-PolicyCase-SelectionEng.pdf).

131. See Christine Schwöbel-Patel, *The Core Crimes of International Criminal Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 768 (Kevin Jon Heller, et al. eds., forthcoming); see also Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM. INT'L L.J. 1400 (2009).

corporate behavior that do not constitute core crimes or amount to grave breaches but nevertheless implicate IHL remain under-conceptualized by the existing ICL mechanisms.

Accountability gaps form in the space between the commission of a core crime and the familiar conduct of a modern corporation. John Ruggie tells that “few legitimate firms may ever directly commit acts that amount to international crimes. . . [T]here is a greater risk of their facing allegations of complicity in such crimes.”<sup>132</sup> Criminal tribunals have prosecuted corporate actors as accomplices in the commission of war crimes.<sup>133</sup> ICL deems such facilitatory acts as aiding and abetting.<sup>134</sup> Yet it is but for the rare or egregious instances that corporate complicity receives prosecutorial attention.<sup>135</sup> And international law has not yet provided a coherent doctrine of complicity that can be seamlessly applied amongst its many sub-fields.<sup>136</sup>

In *Khulumani v. Barclays*, Judge Katzmann described complicity as the preferred doctrinal means of ensuring that “private actors who substantially assist state actors [to] violate international law and do so for the purpose of facilitating the unlawful activity [are] held accountable for their actions.”<sup>137</sup> The requisite complicity standard is adapted from legal sources that either treat state conduct or inadequately acknowledge the particularities of corporate actors.<sup>138</sup>

132. U.N. Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 30, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007) [hereinafter HRC, *Standards of Responsibility*].

133. See, e.g., *United Kingdom v. Tesch* (The Zyklon B Case), Case No. 9, 1 L.R.T.W.C. 93 (1946); see also Schabas, *supra* note 11, at 442.

134. See *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgement, ¶ 195 (May 21, 1999) (defining aiding as giving assistance to someone while abetting involves facilitating the commission of an act by being sympathetic thereto). See also Schabas, *supra* note 11, at 442.

135. See ICC-OTP, *Paper on Some Policy Issues Before the Office of the Prosecutor*, at 6–7 (2003), [https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905\\_policy\\_paper.pdf](https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf) (declaring that the OPT should focus resources on those who bear the greatest responsibility). For exceptions see ICC Press Release, *supra* note 36 (regarding the examination of atrocity crimes in the DRC); see also Luis Moreno-Ocampo, Prosecutor, ICC, Report at the Second Assembly of State Parties to the Rome Statute of the International Criminal Court (Sept. 8, 2003) (acknowledging the influence of mineral extraction on the conflict in the Ituri Province and expressing willingness to investigate private actors facilitating the conflict); Kaeb, *supra* note 35, at 375.

136. See Butler, *supra* note 115, at 278–89.

137. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 281 (2d Cir. 2007).

138. See John G. Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including The Right To Development: Clarifying the Concepts of Sphere of Influence and Complicity*, ¶¶ 33–48, U.N. Doc. A/HRC/8/16 (May 15, 2008) [hereinafter UNHRC, *Clarifying the Concepts*]; DE JONGE, *supra* note 119, at 152, 155 (extending the Draft Articles to transnational corporations); see also Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 16, in Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001) (holding that a state can be deemed responsible for aiding and



William Schabas distills the three elements necessary to establish the international criminal complicity of secondary actors.<sup>139</sup> Accountability for corporate behavior implicating IHL first requires that an atrocity crime has been committed by another actor.<sup>140</sup> In *Prosecutor v. Jelesic*, the ICTY held that considerations of whether the defendant aided and abetted the commission of genocide obliges the Trial Chamber to deduce if the constituting action occurred.<sup>141</sup> The second element requires that the corporate actor has committed a material act that contributes to the perpetration of a crime. The contours of this requirement, Schabas notes, are unsettled.<sup>142</sup>

Proponents of a low threshold have advocated that even marginal acts of assistance constitute complicity.<sup>143</sup> More influential direction, however, comes from the ICTY. Imposing a stringent standard, in *Prosecutor v. Tadic*, the Trial Chamber held that an act of complicity must be “direct and substantial.”<sup>144</sup> This follows the standard assumed by the International Law Commission.<sup>145</sup> In its Draft Code of Crimes Against the Peace and the Security of Mankind, the ILC instructs that individual criminal responsibility extends to an actor that “knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime. . . .”<sup>146</sup> The complicit act, to satisfy the third element, must exhibit the intent and knowledge of the legal or natural person that facilitates the underlying action.<sup>147</sup> The ICTY requires that a complicit actor must knowingly decide to participate in the “planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime.”<sup>148</sup>

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abetting in the commission of an international wrongful act by another state) [hereinafter ARSIWA].

139. See Schabas, *supra* note 11, at 446–49; See also Oona A. Hathaway, et al., *Aiding and Abetting in International Criminal Law*, 104 CORNELL L. REV. 1593, 1613–17 (2019).

140. See Schabas, *supra* note 11, at 447.

141. *Prosecutor v. Jelesic*, Case No. IT-95-10-T, Trial Judgement, ¶ 87 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999); see *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 530 (Sept. 2, 1998) (establishing that complicity is not contingent on demonstrating the guilt of the principal actor); see also Schabas, *supra* note 11, at 447.

142. See Schabas, *supra* note 11, at 447.

143. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Judgment, ¶ 671 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (seeking to impose liability for participation in a crime that would include contributing “in any manner whatsoever regardless of one’s specific role in the commission of the offending act”).

144. *Id.* ¶ 691; see also Schabas, *supra* note 11, at 447.

145. See also Schabas, *supra* note 11, at 447.

146. Int’l Law Comm’n, *Rep. of the International Law Commission on the Work of its Forty-Eighth Session*, U.N. Doc. A/51/10, at 18 (1996) [hereinafter ILC, *Crimes Against Peace and Security*].

147. Schabas, *supra* note 11, at 448.

148. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Judgment, ¶ 674 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

Both states and corporations act through individuals. Mechanisms like the Articles on the Responsibility of States for Internationally Wrongful Acts (“ARSIWA”) determine when individual conduct is attributable to the state.<sup>149</sup> Parallels between the state and the corporation are useful points of departure but are ultimately incomplete.<sup>150</sup> Early appeals to ICL were, and albeit to a lesser extent remain, limited by the principle *societas delinquere non potest*.<sup>151</sup> Assessments of accountability can target either the individual representative or the corporate entity. Traditionally, and most commonly, assessments begin by identifying relevant individuals before determining whether the private actor is subject to criminal sanctions for actions implicating international law. These efforts to ensure accountability are, however, limited by features of the corporate form.

Delegated management, under a board structure, is required to ensure the efficient operation of an entity whose ownership is constantly changing.<sup>152</sup> The corporate form provides governance structures that delegate decision-making between a board of directors and operational managers. This imposes a legal separation between common business decisions and the ratification of these decisions.<sup>153</sup> Intended to check the value of the firm’s business conduct, such delegation complicates assessments of whether a corporate official knowingly made a direct and substantial contribution to the commission of a core crime. Corporate law imposes liability for wrongful acts committed by individuals operating in their formal capacity.<sup>154</sup> The corporate veil is firm but not impenetrable.<sup>155</sup> However, assessments of individual responsibility may elude accountability through the nature of collective decision-making. A corporate harm, an unquestioned set of facts, may occur but attribution is avoided if an individual, possessing the requisite *actus reus* and *mens rea*, is not identified.<sup>156</sup> Complex management structures, the role and operations of subsidiaries, and the bifurcated nature of decision-making between the board and management create degrees of separation.

Drawing upon organizational theory, Meir Dan-Cohen identifies discontinuity between individual and collective preferences. Dan-Cohen describes how a corporate action—for present purposes, one that facilitates commission of a core crime—is the product of “widely dispersed informa-

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149. See JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY 91–92 (2002).

150. See DE JONGE, *supra* note 119, at 78–79.

151. See generally Thomas Weigend, *Societas Delinquere non Potest? A German Perspective*, 6 J. INT’L. CRIM. JUST. 927 (2008).

152. Armour, *supra* note 119, at 11–12.

153. *Id.* at 12.

154. See generally CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY (2d ed. 2001).

155. See generally John H. Matheson, *Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil*, 7 BERKELEY BUS. L.J. 1 (2010).

156. Slye, *supra* note 114, at 962.

tional sources and diffused individual interests and attitudes, all mediated by structures, processes, and chance in ways that defy translating or tracing the organizational decision into its individual sources.<sup>157</sup> Accountability gaps occur when assessment of the corporate official's involvement is derailed by an inability to disentangle the individual's contribution from the organizational nature of the corporation's decision-making structure.

In the rare (or future) instance when international criminal liability is pursued against a corporate entity, similar challenges are accentuated.<sup>158</sup> The various ICL tribunals offer differing evidentiary accounts of the *mens rea* requirement.<sup>159</sup> Article 30 of the Rome Statute holds that criminal liability is contingent upon both knowledge and intent.<sup>160</sup> This creates a threshold, complicated by the corporate form, that may become unattainable when applied to complicit conduct.<sup>161</sup> Satisfaction of this standard will, again, require that individual impetuses are parsed from collective structures.<sup>162</sup> Describing the paradoxical task of assessing corporate *mens rea*, Vikramaditya Khanna tells of how corporate structures may partition information, separating those that act from those that possess the requisite information about the act's implications.<sup>163</sup> International legal developments that limit their remit to only the most egregious acts—that inadequately conceptualize either the contributory nature of corporate behavior or the particular features of the corporate form—curtail the instances in which accountability for corporate conduct implicating IHL may be pursued.

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157. MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 34 (1986).

158. See Nadia Bernaz, *Corporate Criminal Liability Under International Law: The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon*, 13 J. INT'L CRIM. JUST. 313, 320 (noting the rarity of corporate liability in international tribunals); See also *Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111, 120 (2d. Cir. 2010) (remarking that international law has never extended the scope of liability to corporations).

159. See Michael J. Kelley, *Prosecuting Corporations for Genocide Under International Law*, 6 HARV. L. & POL'Y REV. 339, 360 (2012).

160. Rome Statute, *supra* note 35, art. 30 (basing intent on meaningful engagement and the purposeful cause of a consequence and holding that knowledge means awareness of a circumstance or the occurrence of a consequence).

161. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 322 (S.D.N.Y. 2003) (extending a purpose and knowledge-based standard to a corporate actor accused of violating international law); see also Roger Alford, *Second Circuit Adopts Purpose Test for ATS Corporate Liability*, OPINIO JURIS (Oct. 2, 2009), <http://opiniojuris.org/2009/10/02/second-circuit-adopts-purpose-test-for-ats-corporate-liability/>; Kelley, *supra* note 159, at 354 (both demonstrating the difficulty of satisfying this standard in relations to corporate complicity).

162. V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 369–370 (detailing how a single actor standard, common in domestic legal systems, applies *respondeat superior* to attribute the actions and *mens rea* of an offending agent to the corporate entity).

163. *Id.* at 380–81.

### B. *The Narrow Ambit of International Human Rights Law*

Such a narrow scope is not limited to ICL. International human rights law provides the most comprehensive international legal framework dedicated to the regulation of business entities. This framework acknowledges the particular challenges posed by conflict to human rights. Yet the development of the UNGP and other IHRL-based initiatives afford IHL auxiliary status within the dedicated mechanisms. The primary rules contained within the human rights framework fail to adequately conceptualize common manifestations of corporate conduct within conflict zones and remain vulnerable to features of the corporate form. First, accountability is eluded within spaces where the regulatory reach and primary rules imposed through IHRL fail to recognize or treat the particular IHL implications of corporate conduct. Avoidance is furthered by an under-articulated conception of complicity that neglects conduct implicating IHL. And second, the principles of limited liability and corporate separation have been extended to insulate corporations from accountability. These features of the corporate form compromise the development and efficacy of regulatory frameworks.<sup>164</sup>

Human rights law is often presented as the most effective means of advancing corporate responsibility. Preferred to criminal or civil pursuits, Michael Addo suggests that the pervasiveness of human rights law, its treatment of, and applicability to, an array of corporate activities, positions IHRL as an efficacious means of advancing collective objectives.<sup>165</sup> However, the UNGP make limited reference to IHL.<sup>166</sup> Its follow-up reports provide minimal elucidation about the content or applicability of specific IHL norms and how these influence business operations within conflict areas.<sup>167</sup> Many of the prominent civil society initiatives that consider the perils of conducting business within high-risk environments offer prescriptions found only in IHRL.<sup>168</sup> This narrow scope creates broad spaces in which forms of

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164. See Peter T. Muchlinski, *Corporations in International Law*, ¶ 4, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2014).

165. Michael K. Addo, *Human Rights and Transnational Corporations—An Introduction*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 3, 23–24 (Michael K. Addo ed., 1999).

166. See U.N. *Guiding Principles*, *supra* note 76, princs. 7, 12.

167. See Special Representative Report 2011, *supra* note 81; see also John G. Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Business and Human Rights in Conflict Affected Regions: The Roles of States* (2009), <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-conflict-project-note-Oct-2009.pdf> [hereinafter Special Representative Report 2009].

168. See, e.g., YADAIRA ORSINI & ROPER CLELAND, HUMAN RIGHTS DUE DILIGENCE IN CONFLICT-AFFECTED SETTINGS 11 (International Alert 2018) (acknowledging the occurrence of IHL violations in conflict affected areas and stating in a footnote that “whether [these] conditions trigger specific and different considerations under [IHL] is an important but separate consideration that requires targeted legal and expert advice); see also Shift, *supra* note 80, at 2.

corporate conduct escape the regulatory attention of IHRL-based frameworks. The Special Representative's report on Business and Human Rights in Conflict-Affected Areas does not directly reference IHL.<sup>169</sup> Instead, the report encourages states to warn businesses that armed conflict raises the likelihood of human rights abuses and to convey their expectations, through legislation and regulation, regarding business conduct within such environments.<sup>170</sup>

Inclusion of IHL is often limited to a reference. Its relevancy is noted but rarely articulated. Collectively, the various instruments say little about how IHL and IHRL norms interact. Do these interactions affect business operations within conflict zones? Potential norm conflicts, frequent occurrences documented within the well-trodden debates regarding the parallel application of these legal fields, go unremarked.<sup>171</sup> This consideration is particularly pertinent within situations of occupation. Numerous courts and treaty bodies have acknowledged IHRL and IHL's dual application upon the imposition of foreign control.<sup>172</sup> The ICJ has recognized that within an occupation, instances occur in which particular rights are exclusively matters of IHL, other rights will be the exclusive matter of IHRL, and others will be relevant to both fields of law.<sup>173</sup> Accountability gaps occur when business conduct, ostensibly compliant with the requirements imposed through human rights law, infringes upon IHL-based norms that are undertheorized by the prominent IHRL-based frameworks.<sup>174</sup>

Such conduct is often indirect. IHRL offers a broad conception of complicity.<sup>175</sup> As this is, however, derived from ICL and domestic law, it shares similar limitations to those identified above.<sup>176</sup> The UNGP determines that complicity arises when a "business enterprise contributes to, or is seen as

169. Special Representative Report 2009, *supra* note 167.

170. *Id.* at 1.

171. See e.g., Marko Milanovic, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 95 (Orna Ben-Naftali ed., 2011) (providing an overview of the relationship between IHL and IHRL).

172. See Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INT'L REV. RED CROSS 501 (2008) (providing a comprehensive review of the dual application of IHRL and IHL in situations of armed conflict).

173. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9).

174. See discussion *infra* Section IV.C.

175. See John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Clarifying the Concepts of Sphere of Influence and Complicity*, ¶ 30, U.N. Doc. A/HRC/8/16 (May 15, 2008) [hereinafter *HRC Clarifying Complicity*].

176. *Id.* ¶¶ 28, 33 (noting the origins of the complicity standard); see also DE JONGE, *supra* note 119, at 79 (describing the challenges of imposing a complicity standard on corporate actors through a human rights framework).

contributing to, adverse human rights impacts caused by other parties.”<sup>177</sup> Complicity is linked to the due diligence process and the corporate responsibility to respect human rights includes avoiding complicity.<sup>178</sup> The UNGP does, however, move beyond ICL to recognize a parallel, non-legal, conception of complicity.<sup>179</sup> The Global Compact further elucidates an IHRL-based complicity standard. Principle Two explains that businesses should ensure that they are not complicit in human rights abuses.<sup>180</sup> It acknowledges that complicity may be *direct, beneficial, or silent*.<sup>181</sup>

Despite these references, an IHRL-derived notion of complicity remains undefined. John Ruggie notes that several conceptions of complicity—designations that describe common forms of corporate conduct—are more likely to be the source of social opprobrium than the cause of legal liability.<sup>182</sup> Ruggie’s clarification report holds that “given the variations in definitions of complicity within different legal contexts, it is not possible to specify exacting tests for what constitutes complicity even within the legal sphere.”<sup>183</sup> Considerations of international humanitarian law are largely neglected by resulting IHRL complicity assessments.<sup>184</sup> During this process, a corporate actor may perform comprehensive due diligence to consider whether its operations indirectly affect the human rights of others but fail to consider how that same conduct influences specific IHL-based norms.

Such a scenario envisions a corporate official that operates in good faith but is not structurally enticed to perform a more robust evaluation. The less inclined actor may, however, purposefully appeal to features of the corporate form to blunt international law’s regulatory reach. The principle of limited liability serves as a contracting tool to tie a creditor’s claims to assets that are owned by the firm. Limited liability protects shareholders by capping their risk at, in most instances, the amount of their financial outlay.<sup>185</sup> The principle, initially designed, protects against *contractual* claims so as to facilitate diversification and passive investment.<sup>186</sup> This allows risk-averse

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177. See *U.N. Guiding Principles*, *supra* note 76, at 18.

178. *Id.*; see also *HRC Clarifying Complicity*, *supra* note 175, ¶¶ 4, 26.

179. *U.N. Guiding Principles*, *supra* note 76, at 18; see also *HRC Clarifying Complicity*, *supra* note 175, ¶ 27.

180. *U.N. Global Compact*, *supra* note 67, princ. 2.

181. *Id.*, at commentary to princ. 2.

182. See *HRC Clarifying Complicity*, *supra* note 175, ¶ 70; see also DE JONGE, *supra* note 119, at 155.

183. *HRC Clarifying Complicity*, *supra* note 175, ¶ 33.

184. *But see* ARSIWA, *supra* note 138, art. 16 (which provides a more robust account of aiding and assisting).

185. *Armour et. al.*, *supra* note 119, at 9.

186. *Id.* (noting that the compelling reasons for limited liability do not necessarily extend beyond the contractual context).

investors to provide capital to uncertain ventures.<sup>187</sup> Yet as early as the eighteenth century, economists expressed skepticism.<sup>188</sup> Adam Smith claimed that limiting liability would diminish responsibility.<sup>189</sup> The limited liability principle developed, as it was applied to corporate investors, to encourage what Marie-Laure Djelic and Joel Bothello term “de-responsibilization.”<sup>190</sup> This contributes to the desirability and construction of business environments in which risk-taking is maximized and obligation is reduced.<sup>191</sup>

Such environments adversely affect how international legal initiatives develop and how accountability mechanisms are implemented. Expansion of the limited liability principle to insulate parent companies demonstrates how prioritization of asset protection compromises accountability.<sup>192</sup> Parent companies are rarely deemed accountable for the actions of subsidiaries.<sup>193</sup> The corporate veil may be pierced if the parent directly controls and uses the subsidiary to perform a wrongful act.<sup>194</sup> This, however, is difficult to demonstrate.<sup>195</sup> In many jurisdictions, the presumption remains that the parent does not incur tortious liability for the acts of subsidiaries in all but the rarest instances.<sup>196</sup>

Subsidiaries, used strategically, become ephemeral. They can be formed to undertake a singular transaction and distant the parent’s business interest from legal consequences or negative connotations.<sup>197</sup> By externalizing risk, through subsidiaries and corporate separation, accountability is dimin-

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187. See Marie-Laure Djelic & Joel Bothello, *Limited Liability and Its Moral Hazard Implications: The Systemic Inscription of Instability in Contemporary Capital*, 42 THEORY & SOC’Y 589, 606–07 (2013).

188. *Id.*, at 602–03.

189. *Id.*; see generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book V, Ch. 1 (1999).

190. Djelic & Bothello, *supra* note 187, at 607.

191. See Kirshner, *supra* note 112, at 264–65 (detailing how features of limited liability can be used to shield parent corporations from liability incurred by subsidiaries).

192. See *United States v. Bestfoods*, 524 U.S. 51, 61–64 (holding that liability protection extends to the parents of subsidiaries). See generally Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769, 1772–73 (2015) (tracing this expansion to when states began allowing corporations to own the shares of other corporations in the 1880s).

193. But see Kiarie Mwaura, *Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil*, 11 J. INT’L BUS. & L. 85, 102–05 (describing the use of enterprise principles to ensure more encompassing regulatory efforts).

194. Skinner, *supra* note 192, at 1773.

195. Mwaura, *supra* note 193, at 101–02 (noting the absence of statutory rules that detail when and under what conditions the corporate veil may be pierced).

196. Skinner, *supra* note 192, at 1774; see also *IDS Life Ins. Co. v. SunAmerica Life Ins.*, 136 F.3d 537, 540 (7th Cir. 1998).

197. See Butler, *supra* note 115, at 278–79.

ished.<sup>198</sup> Harmful conduct implicating IHL is compartmentalized. A parent company can benefit enormously through the subsidiaries' undertakings. With effective corporate structuring, the parent maintains the profitable or otherwise advantageous features of the relationship but through the corporate form achieves reputational distance and reduced liability. Norms derived from IHL are twice neglected. They are minimized within the IHRL mechanisms that are most prominently applied to corporations and they are prone to circumvention by the strategically inclined actor that insulates itself from the accountability initiatives that are intended to curtail the harmful effects of businesses that operate within conflict zones.

### C. *The Varying Nature of Domestic Law and Courts*

Accountability initiatives are often pursued within domestic venues.<sup>199</sup> Due to meager enforcement prospects and through purposeful design, many fields of international law rely upon domestic institutions to implement primary legal rules and provide remedies following violations.<sup>200</sup> As alluded to above, IHL is particularly reliant upon domestic mechanisms. Whether treated through international criminal law or under the auspices of the relevant human rights mechanisms, domestic implementation assumes a cumulative role in ensuring accountability. Efforts to regulate corporate conduct have developed accordingly and also rely upon such indirect methods.<sup>201</sup> The Geneva Conventions prescribe that violations of IHL—by a state, an armed group, and as extended to corporate actors—compel domestic redress.<sup>202</sup> International criminal institutions are positioned as complementary to national jurisdictions.<sup>203</sup> And the UNGP is premised upon the protect, respect, and remedy framework.<sup>204</sup> Having precluded a *binding* corporate duty to respect individual rights, accountability initiatives made through the UNGP become contingent on domestic capabilities.<sup>205</sup>

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198. See Kirshner, *supra* note 112, at 264–65.

199. See Weill, *supra* note 82, at 860 (noting the importance of domestic courts in the enforcement of international law).

200. See UDHR, *supra* note 53, art. 8 (noting that everyone has the right to a remedy by a competent national tribunal); see also ICCPR, *supra* note 55, art. 2(3) (ensuring that everyone whose rights are violated will have access to a remedy); David Bilchitz, *Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law*, 23 IND. J. GLOBAL LEGAL STUD. 143, 156 (2016) (detailing how the right to a remedy is contingent on the strength of the domestic sphere).

201. See generally Carlos M. Vázquez, *Direct Vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927 (2005).

202. See Weill, *supra* note 82, at 861. See generally ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW (2011).

203. Rome Statute, *supra* note 35, art. 1.

204. U.N. *Guiding Principles*, *supra* note 76, at 1.

205. U.N. Hum. Rts. Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework*, 14, U.N. Doc A



Such capabilities are, however, variable. Impressive gains have been made throughout the post-Rome era.<sup>206</sup> But jurisdictional and structural restrictions create instances in which accountability for corporate behavior implicating IHL is limited. Gaps result from alterations within particular legal systems, divergences amongst various legal systems, and the tendency of courts to preference IHRL-based considerations. Furthermore, particular characteristics, explicit to the corporate form, may be employed to position a firm beyond the reach of domestically-imposed accountability initiatives.

The once comprehensive reach of the ATS has, as noted, been narrowed. Earlier U.S. jurisprudence, culminating in *Doe v. Unocal Corp.*, expanded the ATS's remit to include human rights and IHL violations by corporations and their executives.<sup>207</sup> A series of cases under the ATS demonstrated how domestic courts could bolster enforcement of human rights norms and ensure accountability for harmful corporate conduct.<sup>208</sup> But in what is now a familiar story, in *Kiobel v. Royal Dutch Petroleum*, the Supreme Court limited the Act's extraterritorial application.<sup>209</sup> Uncertainty followed. Then, in *Jesner v. Arab Bank*, the Supreme Court ruled that foreign plaintiffs were unable to bring claims against foreign corporations under the ATS.<sup>210</sup> Jurisprudential shifts curtail opportunities to pursue redress through domestic courts. The varying and then limited scope of domestic measures further contributes to existing accountability gaps within which forms of corporate behavior successfully circumvent the attention of domestic courts.

Similarly, the ability to pursue accountability through domestic venues is jurisdictionally dependent. Although the International Commission of Jurists has documented the near universal availability of civil remedies, the ability to initiate action against corporate actors accused of violating international law ranges.<sup>211</sup> Several jurisdictions took strategic guidance from the success of the pre-*Kiobel* ATS litigation. Lawyers outside of the United States followed course, availing themselves of civil remedies in pursuit of accountability for gross violations of international law by corporate ac-

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/HRC/17/31 (Mar. 21, 2011) (stating that the responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions); *see also* Bilchitz, *supra* note 200, at 156 (noting that since corporations have no direct legal obligations towards individuals, no legal remedy can be claimed against them unless the state has created obligations for corporations).

206. *See* Weill, *supra* note 82, at 873. *See generally* Valerie Oosterveld, Mike Perry & John McManus, *The Cooperation of States with the International Criminal Court*, 25 *FORDHAM INT'L L. J.* 767 (2001).

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

208. *See generally* Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 *RUTGERS L. REV.* 971 (2004).

209. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 114–25 (2013).

210. *Jesner v. Arab Bank Plc.*, 138 S. Ct. 1368 (2018).

211. *See generally* ICJ, *CORPORATE COMPLICITY REPORT*, *supra* note 104.

tors.<sup>212</sup> These initiatives, however, remain limited. Several additional factors bar individuals from successfully initiating domestic legal actions. The International Commission of Jurists notes the impediments created by power imbalances between corporations and individuals, the lack of legal aid, cost burdens, and low compensation, the restrictions posed by statutes of limitations, and the principle of *forum non conveniens*.<sup>213</sup> Collectively, such factors bar access and result in further accountability gaps in which numerous forms of corporate conduct go untreated.<sup>214</sup>

When accusations do reach a judicial body, domestic courts often limit the scope of their engagements with international humanitarian law. While this varies by jurisdiction, many national courts accentuate actions involving their own nationals and remain reluctant to review decisions concerning the use of force or which have security implications.<sup>215</sup> When actions are brought, courts commonly preference human rights-based considerations. Often, this is to the exclusion of IHL. Sharon Weill notes that courts “increasingly tend to apply international human rights law during armed conflicts.”<sup>216</sup> Courts may lack the necessary expertise to comprehensively engage with norms derived from IHL.<sup>217</sup> This poses similar challenges to those identified above. Interactions between IHRL and IHL receive minimal consideration and an exclusive human rights-based approach risks underappreciating particular forms of corporate conduct that compromise IHL norms.

It is here too—within the domestic sphere where accountability initiatives often culminate—that the corporate form makes its most sizable contribution to the creation of accountability gaps. IHL-based norms are directly imposed upon corporate actors but implementation of accountability measures, as we see, is largely reliant on domestic initiatives.<sup>218</sup> The indirect extension of international law’s regulatory reach has inadequately navigated the public-private dimensions of the corporate form. A corporate actor that wishes to elude accountability for controversial behavior may avail itself of techniques, specific to the corporation, that allow a firm to circumvent in-

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212. *Id.* at 5–6.

213. *Id.* at 43–44.

214. See Penelope Simons, *International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights*, 3 J. HUM. RTS. & ENV’T 5 (2012). See generally Ana María Mondragón, *Corporate Impunity for Human Rights Violations in the Americas: The Inter-American System of Human Rights as an Opportunity for Victims to Achieve Justice*, 57 HARV. INT’L. L. J. ONLINE 53 (2016);

215. See Weill, *supra* note 82, at 873.

216. *Id.*

217. See Yahli Shereshevsky, *H CJ 3003/18 Yesh Din – Volunteers for Human Rights V. Chief of General Staff, Israel Defense Forces (IDF)*, 113 AM. J. INT’L. L. 361, 367–68.

218. Vázquez, *supra* note 201, at 932; see also Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* 45, 47–48 (Craig Scott, ed., 2001).

ternational law's vertical application. The place of incorporation rule ensures that a corporation may select a favoured governance regime.<sup>219</sup>

Julian Arato describes how corporations augment their nationality.<sup>220</sup> At perhaps the highest level of abstraction, the elastic application of the corporate form upends the assumption that undergirds much of international law's regulatory payoff—that the corporation is solely a construct of national law.<sup>221</sup> The widely-shared belief that states are unwilling or unable to regulate corporate activity through domestic endeavors prompted the array of international initiatives described throughout this article.<sup>222</sup> Yet as international law's regulatory agenda develops, it reverts to the domestic sphere. Through indirect obligations that rely upon the state to create and enforce a regulatory framework that reflects international norms; to ensure accountability for conduct implicating those duties prescribed directly, accountability gaps widen when features of the corporate form create spaces between international initiatives to establish primary rules and the domestic actualization of secondary rules. A similar assessment holds when we consider state conduct. Here, however, the corporation may avoid formal scrutiny by unduly moving between the domestic frameworks upon which international norms rely.<sup>223</sup>

Choice of law and choice of jurisdiction principles allow the inclined corporation to avail of regulatory arbitrage.<sup>224</sup> The commonality of place of incorporation rules creates fluid business environments in which a corporate entity is enabled to strategically select the domestic regulatory regime that

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219. See Armour et. al., *supra* note 119, at 21.

220. Arato, *supra* note 122, at 275 (describing the corporation's capacity to structure investments through subsidiaries to allow it to avail itself of numerous investment treaties that the parent would otherwise be unable to access).

221. *Id.*, at 275 (citing the classical formulation in Oppenheim's International Law: "that it is usual to attribute a corporation to the state under the laws of which it has been incorporated and to which it owes its legal existence").

222. Fleur Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELB. UNIV. L. REV. 893, 896 (describing that states are either incapable or unwilling to assert control over corporate activity); see also Ku, *supra* note 118, at 736 (summarizing the widely-held belief that domestic regulation seems inadequate to regulate modern transnational corporations and that international law has become an important means of controlling corporate behavior).

223. Arato, *supra* note 122, at 283. See generally Ronald Daniels & Benjamin Alarie, *State Regulatory Competition and the Threat to Corporate Governance*, in THE ART OF THE STATE: GOVERNANCE IN A WORLD WITHOUT FRONTIERS 165 (Thomas Courchene & Donald Savoie, eds., 2003).

224. See Magnus Willeson, *What Is and What Is Not Regulatory Arbitrage? A Review and Syntheses*, in FINANCIAL MARKETS, SME FINANCING AND EMERGING ECONOMIES 71 (Giusy Chesini, Elisa Giarretta & Andrea Paltrinieri, eds., 2017) (in which regulatory arbitrage is defined as an avoidance strategy of regulation that is exercised as a result of a regulatory inconsistency).

will govern its, or its subsidiaries, operations.<sup>225</sup> Coupled with aggressive regulatory planning, the corporation may effectively minimize legal and regulatory constraints.<sup>226</sup> Although arbitrage is generally associated with tax reduction, securities disclosures, and similar regulatory costs, the principle is transferable. A corporation motivated to bypass domestically imposed international legal rules may engage an array of avoidance techniques.<sup>227</sup>

Movements to regulate corporate conduct developed upon normative assumptions about the nature of the corporation, in response to empirical realizations about the influence accrued by corporate actors, and following anecdotal accounts of corporate misdeeds. With collective force these efforts counterbalanced the classical formulation that a corporation's principal organizational purpose is to benefit its shareholders.<sup>228</sup> Antonio Cassese states that the earliest augmentations to traditional conceptions of legal subjecthood occurred in response to armed conflict.<sup>229</sup> But since Nuremberg's expansive promise, efforts to curtail corporate conduct within conflict zones have developed haphazardly. The series of patchy frameworks, described throughout this section, are increasingly difficult to reconcile with the corporate form. They have resulted in mismatches between primary rules, secondary rules, and, as will now be seen, the nature of corporate operations.

#### IV. (RE)CONCEPTUALIZING HOW CORPORATE CONDUCT IMPLICATES IHL

Friedrich Flick and his associates were indicted as individuals at the Military Tribunal in Nuremberg. The Special Tribunal for Lebanon declared that history is replete with examples where great harm has been caused by legal persons.<sup>230</sup> In the intervening years, international law's treatment of

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225. See Armour et al., *supra* note 119, at 21–22 (describing the prevalence of place of incorporation rules in the United States and Europe).

226. See generally Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227 (2010).

227. See Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 811–12 (2005) (describing the governance implications of inversion transactions); see also Clifford W. Smith, Jr. & Charles W. Smithson, *Financial Engineering: An Overview*, in THE HANDBOOK OF FINANCIAL ENGINEERING 3 (Clifford W. Smith, Jr. & Charles W. Smithson eds., 1990). See generally Michael Knoll, *The Ancient Roots of Modern Financial Innovation: The Early History of Regulatory Arbitrage*, 87 OR. L. REV. 29 (2008).

228. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (1919) (articulating the classical formulation of the view that management must operate within the sole interests of its shareholders).

229. See ANTONIO CASSESE, *INTERNATIONAL LAW* 248–249 (2001). See also Ku, *supra* note 118, at 734.

230. See *Prosecutor v. New TV S.A.L.*, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 82 (Oct. 2, 2014).

corporate conduct has proceeded along different paths.<sup>231</sup> Individualist and collectivist, criminal or civil, binding legal obligations versus voluntary undertakings, the intervening developments reflect divergent understandings of international law itself. The purpose here has not been to endorse one such vision. Instead, this article considers how this bundle of hard and soft legal techniques has been applied to corporations that operate within conflict zones. The resulting accountability initiatives each share commitment to the belief that corporations are powerful entities and that they are capable of contributing to social ills. We coalesce around the understanding that corporations require regulatory attention but diverge on the means through which greater accountability can be prescribed and implemented.

These undertakings are ongoing. The Open-Ended Intergovernmental Working Group's revised draft of the Legally Binding Instrument to Regulate the Activities of Transnational Corporations is progressing.<sup>232</sup> The Ecuadorian initiative offers the potential of a binding instrument. It provides, perhaps, the most detailed consideration of IHL to date.<sup>233</sup> Civil society organizations, however, note that the draft document inadequately treats certain particularities of the link between business and conflict and the treaty's political prospects remain uncertain.<sup>234</sup>

The process of determining how obligations attach to corporations requires a fuller conception of the varying ways that corporate conduct affects IHL. As we have observed, features of the corporate form disrupt the application of existing accountability frameworks. A more encompassing theory of international humanitarian law's application to business conduct must also recognize how the particularities of corporate conduct influence norms derived from IHL. These activities, and the motives that undergird them, range from maleficent to banal. The nature of the implicated action tells much about the need for the creation of a new, or the reiteration of an exist-

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231. Carsten Stahn, *Liberals Vs Romantics: Challenges of an Emerging Corporate International Criminal Law*, 50 CASE W. RES. J. INT'L L. 91, 102–03 (2018) (identifying two competing schools, the first based upon the traditional liberal commitment to international criminal justice and the second derived from a human rights tradition willing to hold collective entities responsible for abuses).

232. See Carlos Lopez, *The Revised Draft of a Treaty on Business and Human Rights: A Big Leap Forward*, OPINIO JURIS (Aug. 15, 2019), <http://opiniojuris.org/2019/08/15/the-revised-draft-of-a-treaty-on-business-and-human-rights-a-big-leap-forward/>.

233. See U.N. Human Rights Council, *Revised Draft of a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, OFF. HIGH COMM'R FOR HUMAN RIGHTS ["OHCHR"] (July 16, 2019), [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf).

234. See e.g. Al-Haq, *Submission to the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, OFF. HIGH COMM'R FOR HUMAN RIGHTS ["OHCHR"] (Feb. 28, 2019), [http://www.alhaq.org/cached\\_uploads/download/alhaq\\_files/images/stories/PDF/Al-Haq\\_Binding\\_Treaty\\_IGWG\\_Call\\_for\\_Comments\\_and\\_Proposals\\_28\\_February\\_2019.pdf](http://www.alhaq.org/cached_uploads/download/alhaq_files/images/stories/PDF/Al-Haq_Binding_Treaty_IGWG_Call_for_Comments_and_Proposals_28_February_2019.pdf).

ing, primary rule; reveals an implementation challenge that affects the mode of accountability through which liability can be imposed; or displays some mixture of both.

I identify three broad categorizations of corporate activity that each implicate IHL: (i) as a direct violator; (ii) as a facilitator; and (iii) as an incidental contributor.<sup>235</sup> Each categorization encompasses varying levels of legal and moral culpability and affects IHL-based considerations in non-analogous ways. Corporate activity escapes formal scrutiny when legal standards are under-articulated or enforcement is absent. To better answer the questions posed by business conduct within conflict zones, we must further align the aforementioned primary and secondary rules that regulate corporations with a more complete conceptualization of how the particularities of business activity affects norms derived from international humanitarian law. The following events are illustrative.

#### *A. The Corporation as a Direct Violator*

MALONEY: You fired this individual for handling a weapon and being intoxicated, is that right?

PRINCE: The men operate with a clear policy. If there is to be any alcohol consumed it's eight hours between any time of consumption of alcohol. . .

MALONEY: Was he fired or not?

PRINCE: Oh yes, ma'am. He was fired.

MALONEY: OK. Have any charges been brought against him in the Iraqi justice system?

PRINCE: I don't believe, in the Iraqi justice system. I do believe—I know we've referred it over to the. . .

MALONEY: Justice Department. They told us they're still looking at it nine months later. Have any charges been brought against him in the U.S. military justice system?

PRINCE: I don't know.

MALONEY: Have any charges been brought against him in the U.S. civilian justice system?

PRINCE: Well, that would be handled by the Justice Department, ma'am. I—that's for them to answer, not me.

MALONEY: Other than firing him, has there been any sanction against him by any government authority? You mentioned you

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235. I use corporate activity and corporate conduct interchangeably and broadly to describe the various operations, practices, and objectives that corporations pursue in the course of their business operations. I do not intend to limit these considerations to any particular entity and, as such, they are relevant to various forms of transnational business entities operating within conflict zones or externally influencing the conduct of hostilities either directly or indirectly.

fined people for bad behavior. Was he fined for killing the Iraqi guard?

PRINCE: Yes, he was.

MALONEY: How much was he fined?

PRINCE: Multiple thousands of dollars. I don't know the exact number; I'll have to get you that answer.

MALONEY: OK.

PRINCE: Look, I'm not going to make any apologies for what he did.

MALONEY: OK. But . . .

PRINCE: He clearly violated our policies.

MALONEY: All right. We all—every American believes he violated policies. If he lived in America, he would have been arrested and he would be facing criminal charges. If he was a member of the military, he would be under a court-martial. But it appears to me that Blackwater has special rules. . . .<sup>236</sup>

The exchange between Democratic Representative Carolyn Maloney and Blackwater CEO Erik Prince concerned a year-old incident.<sup>237</sup> Andrew Moonen, a Blackwater employee, left a Christmas party in Baghdad's Green Zone. Stumbling drunk, Moonen approached Raheem Khalif, a security guard for Iraq's Vice-President. Following a brief exchange, Moonen shot and killed Khalif.<sup>238</sup> Neither Moonen nor Blackwater faced criminal sanction.<sup>239</sup> The House Oversight Committee had, however, summoned Prince to Washington for a different reason. The precipitating event that invited Congressional scrutiny—the now infamous Nisour Square massacre in which seventeen Iraqi civilians were riddled with bullets and killed at a traffic circle in the once affluent neighborhood—placed Blackwater and the heretofore unfamiliar world of private military contractors within the public consciousness.<sup>240</sup> Committee members queried whether a PMC could be held accountable for its actions. Throughout the four-hour testimony, Prince

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236. House Committee on Oversight and Government Reform Holds a Hearing on Private Security Contracting in Iraq and Afghanistan, WASH. POST (Oct. 2, 2007) [https://www.washingtonpost.com/wp-srv/politics/articles/blackwater\\_hearing\\_100207.html/](https://www.washingtonpost.com/wp-srv/politics/articles/blackwater_hearing_100207.html/) [hereinafter Hearing on Private Security Contracting].

237. See Eric Schmitt, *Report Details Shooting by Drunken Blackwater Worker*, N.Y. TIMES (Oct. 2, 2007), <https://www.nytimes.com/2007/10/02/world/middleeast/02shooting.html?fta=y>.

238. See John M. Broder, *Ex-Paratrooper Is Suspect in a Blackwater Killing*, N.Y. TIMES (Oct. 4, 2007), <https://www.nytimes.com/2007/10/04/world/middleeast/04contractor.html?hp>.

239. James Risen, *Efforts to Prosecute Blackwater Are Collapsing*, N.Y. TIMES (Oct. 20, 2010), <https://www.nytimes.com/2010/10/21/world/21contractors.html>.

240. See JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY 13–18, 27 (2008).

faced a barrage of questions and accusations. But there was not a single reference to IHL or to its regulatory scope.<sup>241</sup>

We begin by acknowledging the obscene and the obvious. The spectrum of corporate conduct implicating IHL commences with a direct violation.<sup>242</sup> A corporation that directly breaches IHL assumes high moral and legal culpability. As seen earlier, IHL regulates the conduct of a PMC or other business entity whose activities are sufficiently linked to armed conflict.<sup>243</sup> Primary rules impose discernable obligations and secondary rules provide various modes of implementation should the business entity disregard relevant legal duties.<sup>244</sup> In such instances, legal frameworks appear sufficiently cognizant of the corporation's capacity to directly violate legal precepts. Gaps are not the result of unidentifiable norms but are commonly created by inadequate implementation.<sup>245</sup>

The observed mismatch between the emerging legal frameworks that impose corporate responsibility and the ways that corporations function is least severe in instances of a direct violation. New laws are not required. Instead, efforts to bridge accountability gaps and reduce regulatory deficits that follow from a direct violation are better spent on realigning the primary rules with their modes of operationalization. It is necessary to conceptualize how the nature of corporate conduct, implicating IHL, eludes accountability and how the resulting gaps differ from the familiar implementation challenges associated with state conduct. At least two factors differentiate the corporate violation and affect the manner in which accountability frameworks are transposed from the state actor and applied to the corporate entity.

First: dispersed responsibility. When a state violates IHL, a clear line runs from the existence of a duty, through the offending action, and to the mode(s) of imposing accountability for the breach (even if implementation

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241. Hearing on Private Security Contracting, *supra* note 236.

242. See HRC *Standards of Responsibility*, *supra* note 132, ¶ 30.

243. See Fourth Geneva Convention, *supra* note 83, art. 144(2) (extending the obligation to "other authorities" that assume responsibilities in respect of protected persons to be instructed as to the Conventions provisions); ARSIWA, *supra* note 138, arts. 5, 8 (extending a state act to non-state entities empowered by the state and imposing responsibility on the state for actions of individuals or groups exercising governmental authority); see also The Int'l Committee for the Red Cross [ICRC], *The Montreux Document on Private Military and Security Companies*, ref. 0996 (Sept. 17, 2008) (applying the principle of superior responsibility to the relationship between the state and PMCs). See generally Louise Doswald-Beck, *Private Military Companies under International Humanitarian Law*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 115 (Simon Chesterman & Chia Lehnhardt, eds., 2007).

244. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL 1: RULES 551– 55* (2005) (detailing the customary nature of Rule 151 regarding individual responsibility for violations of IHL).

245. U.N. *Guiding Principles*, *supra* note 76, at 8 (noting that failure to enforce existing laws that directly or indirectly regulate business respect for human rights constitutes a significant legal gap).



is inadequate). Deviations from this linearity occur when a corporation violates a primary rule. It is not immediately clear where accountability is most effectively pursued. The place of incorporation, the jurisdiction in which the violation occurred, and the home state of an implicated individual each provide potential venues.<sup>246</sup> However, the proximity between the state and the corporation influences accountability and creates a degree of separation not otherwise present.

Home states are often unable or unwilling to monitor a corporation's IHL compliance. A PMC, for example, works throughout the world and for various clients. A host state is best positioned to monitor the PMC's adherence to legal requirements but this ability decreases when the PMC works alongside foreign governments or other businesses.<sup>247</sup> A host state will be in close proximity to the violation. It is positioned to undertake investigative obligations and impose accountability but a host state may prioritize low regulatory barriers or lack enforcement capacity.<sup>248</sup> As experienced in Iraq, this lack of capacity can result from the imposition of terms by the home state that insulate the corporation and complicate the host state's ability to implement secondary rules.<sup>249</sup> Proximity is furthest removed in relation to the state of an implicated individual. A home state whose national may have violated IHL in a third-country is rarely positioned to monitor or address the geographically varied corporate undertakings of their citizens abroad.<sup>250</sup>

Second: the strategic value of the provided service. The implicated business practice is likely to avoid international legal scrutiny if the corporation provides a service deemed indispensable by the host state. When applied to a corporation, accountability mechanisms are largely reliant upon the state—the state that may derive enormous benefit from the corporation—to implement IHL-based constraints on the business whose conduct constitutes a direct violation. PMCs like Executive Outcomes and Military Professional Resources Inc. secured desired military results within protract-

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246. See Benjamin Perrin, *Promoting Compliance of Private Security and Military Companies with International Humanitarian Law*, 88 INT'L REV. RED CROSS 613, 615 (2006).

247. *Id.* at 616.

248. Carlos Ortiz, *Regulating Private Military Companies: States and the Expanding Business of Commercial Security Provision*, in GLOBAL REGULATION: MANAGING CRISES AFTER THE IMPERIAL TURN 214, 218 (Kees van der Pijl, Libby Assassi & Duncan Wigan eds., 2004).

249. See Status of the Coalition Provisional Authority Order 17 of 2004 (Iraq) (stating that Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts. . . and that Contractors shall be immune from Iraqi legal process with respect to acts preformed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto).

250. Perrin, *supra* note 246, at 618–19.

ed conflicts.<sup>251</sup> Blackwater was repeatedly praised, even by its detractors in Congress, for providing security services and protecting U.S. officials.<sup>252</sup> Efforts to further regulate Blackwater were opposed by President Bush. Administration officials sought to ensure immunity for PMCs through a renewed Status of Force agreement with Iraq.<sup>253</sup> The President pronounced that efforts to investigate Blackwater's conduct would inhibit the ability of the Presidency to protect national security.<sup>254</sup>

Beyond such hyperbole, an inevitable tension results when the actor responsible for imposing accountability is beholden to the entity whose conduct is to be scrutinized. During Erik Prince's Congressional testimony, Representative Stephen Lynch noted:

The State Department employees, you protect them every single day. . . And I am sure there is a heavy debt of gratitude on the part of the State Department for your service. And yet they are the same people who are, in our system, responsible for holding you accountable in every respect with your contract and the conduct of your employees. . . that's an impossible conflict for them to resolve.<sup>255</sup>

The modes of imposing accountability are broader than Representative Lynch suggests yet the acknowledged tension is real. Four Blackwater contractors were eventually charged following the Nisour Square massacre. Initially, their prosecution was dismissed by a Federal Court judge.<sup>256</sup> Then, facing mounting political pressure and at the behest of Vice-President Biden, the Obama Administration appealed the dismissal.<sup>257</sup> In 2014, the contractors were convicted on various charges including first-degree murder and voluntary manslaughter.<sup>258</sup> Following a succession of appeals, an additional dismissal, and a retrial, the convictions were affirmed but the sen-

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251. Simon Chesterman & Chia Lehnardt, *Introduction*, in *FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES* 1, 1 (Simon Chesterman & Chia Lehnardt, eds., 2007).

252. See Hearing on Private Security Contracting, *supra* note 236; see also SCAHILL, *supra* note 240, at 18 (citing President Bush commending Blackwater's sacrifice and service in Iraq).

253. SCAHILL, *supra* note 240, at 53.

254. See Press Release, The White House President Bush Signs H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 into Law (Jan. 28, 2008), <https://georgewbush-whitehouse.archives.gov/news/releases/2008/01/20080128-10.html>.

255. Hearing on Private Security Contracting, *supra* note 236.

256. *United States v. Slough*, CR 08-0360 RMU, 677 F.Supp.2d 112(D.D.C., Dec. 31, 2009).

257. Anthony Shadid, *Biden Says U.S. Will Appeal Blackwater Case Dismissal*, N.Y. TIMES (Jan. 23, 2010), <https://www.nytimes.com/2010/01/24/world/middleeast/24iraq.html>

258. Matt Apuzzo, *Blackwater Guards Found Guilty in 2007 Iraq Killings*, N.Y. TIMES (Oct. 22, 2014), <https://www.nytimes.com/2014/10/23/us/blackwater-verdict.html>.

tences of three of the contractors would be halved.<sup>259</sup> This modicum of justice was fleeting. Late in 2020, in the dwindling days of the Trump Administration, the President fully pardoned the four Blackwater contractors while commending their service to the country.<sup>260</sup>

Accountability frameworks are heavily dependent on the state to restrict activity that serves the state's interests. Of course, this is also true of many legal expectations imposed upon a state whose own activities violate IHL.<sup>261</sup> Here, however, we suppose that legal engagement follows from the state's desire to, *inter alia*, benefit from the principle of reciprocity and avoid or minimize reputational costs.<sup>262</sup> Firms too, especially those that are public-facing, experience reputational consequences.<sup>263</sup> These can be considerable but the concept of corporate resilience facilitates reinvention. Following the Nisour Square massacre, Blackwater rebranded. It commissioned a widely-circulated video game in which players become heroic contractors entrusted to protect aid workers in a fictional North African country besieged by warlords.<sup>264</sup> Blackwater changed its ownership and board structure, altered its name twice, and merged with another PMC.<sup>265</sup> Notwithstanding Iraq's refusal to renew Blackwater's operational license, the new iteration of the firm and its various subsidiaries continue to obtain profitable contracts from the State Department.<sup>266</sup> And, in August 2020, Erik Prince, who had left the firm before its corporate reinvention but maintained his company's trade-

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259. Sarah Grant, *Trial Preview: Third Attempt to Convict Blackwater Guard for 2007 Massacre of Iraqi Civilians*, LAWFARE (Nov. 2, 2018), <https://www.lawfareblog.com/trial-preview-third-attempt-convict-blackwater-guard-2007-massacre-iraqi-civilians>.

260. Maggie Haberman & Michael S. Schmidt, *Trump Pardons Two Russia Inquiry Figures and Blackwater Guards*, N.Y. TIMES, (Dec. 22, 2020), available at <https://www.nytimes.com/2020/12/22/us/politics/trump-pardons.html>. See also WHITE HOUSE, *Statement from the Press Secretary Regarding Executive Grants of Clemency*, (Dec. 22, 2020), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-122220/>.

261. See, e.g., ARSIWA, *supra* note 138, arts. 30–31 (requiring a responsible state to cease a wrongful act; provide guarantees of non-repetition, and make full reparations for the injury caused).

262. See generally ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008).

263. See generally Bennett Freeman, *Substance Sells: Aligning Corporate Reputation with Corporate Responsibility*, 51 PUB. RELS. Q. 12 (2006).

264. Owen Good, *Real-Life Mercenaries to Star in Blackwater, the Videogame*, WIRED (June 7, 2011), <https://www.wired.com/2011/06/real-life-mercenaries-to-star-in-blackwater-the-video-game/>.

265. Dara Lind, *Why Four Blackwater Contractors Were Just Now Convicted of Killing 17 Iraqi Civilians in 2007*, VOX (Oct. 23, 2014), <https://www.vox.com/2014/10/23/7047519/blackwater-trial-nisour-square-massacre-2007-guilty-convicted>.

266. *Id.*

mark announced in a radio interview that he was again providing security services before defiantly concluding, “Blackwater is back.”<sup>267</sup>

### B. *The Corporation as a Facilitator*

The motto of Myanmar’s Ministry of Labour, Immigration and Population is displayed on the walls of the bureaucracy’s offices in Naypyidaw: *The earth will not swallow a race to extinction but another race will.*<sup>268</sup> This visceral message—encapsulating the nation’s ethnic divisions and motivating the systemic oppression of Myanmar’s Rohingya minority—culminated in the 2017 “clearance operations.”<sup>269</sup> On August 25, in the early morning, the Arakan Rohingya Salvation Army (“ARSA”) launched a series of attacks against military installations in Northern Rakhine State. The United Nation’s Fact-Finding Mission (“FFM”) would later describe the state’s response to the attacks as “brutal and grossly disproportionate.”<sup>270</sup> The FFM report followed a familiar pattern. It provided background, set contexts, established facts, and studied events. It assessed the impact of policies that amounted to egregious violations of international law. Deep inside the 441-page report, within a section addressing the prevalence of hate speech, the report’s authors identified and assessed the responsibility of an unexpected actor—Facebook.

Facebook was adjudged to have enabled the spread of hateful rhetoric that contributed to circumstances that, for two months in 2017, saw entire segments of the Rohingya population targeted.<sup>271</sup> Forty percent of the villages in Maungdaw, Buthidaung, and Rathedaung were destroyed.<sup>272</sup> Médecins Sans Frontières estimated that as many as 9,000 were killed during the first month of violence.<sup>273</sup> 725,000 were forced to leave their homes and flee to

267. Seth Hettena, *Erik Prince’s Private Wars*, ROLLING STONE, (Oct. 25, 2020), <https://www.rollingstone.com/politics/politics-features/erik-prince-libya-blackwater-roger-stone-trump-2020-election-1077089/>.

268. Thomas Manch, *For Muslims Across Myanmar, Citizenship Rights a Legal Fiction*, JUSTICEINFO (Jan. 11, 2018), <https://www.justiceinfo.net/en/truth-commissions/36058-for-muslims-across-myanmar-citizenship-rights-a-legal-fiction.html>.

269. Stephanie Nebehay, *Brutal Myanmar Army Operation Aimed at Preventing Rohingya Return: U.N.*, REUTERS (Oct. 11, 2017), <https://www.reuters.com/article/us-myanmar-rohingya-un/brutal-myanmar-army-operation-aimed-at-preventing-rohingya-return-u-n-idUSKBN1CG10A>

270. U.N. Hum Rts. Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, ¶ 751, U.N. Doc. A/HRC/39/CRP.2 (Sept. 17, 2018) [hereinafter U.N. FFM].

271. *See id.*

272. *See id.* ¶ 959.

273. *MSF Surveys Estimate That at Least 6,700 Rohingya Were Killed During the Attacks in Myanmar*, MÉDECINS SANS FRONTIÈRES (Dec. 12, 2017), <https://www.msf.org/myanmarbangladesh-msf-surveys-estimate-least-6700-rohingya-were-killed-during-attacks-myanmar>.

Bangladesh.<sup>274</sup> The events were characterized, in a near-unanimous vote by the U.S. House of Representatives as constituting genocide.<sup>275</sup> The ongoing campaign featured a series of recurring attacks. Infantry divisions from the *Tatmadaw*, Myanmar's military, partnered with sympathetic armed groups and ethnic Rakhine civilians. They set fire to entire townships. They shot indiscriminately into homes and at masses of people. The FFM found that the operations were pre-determined. They were consistent with the vision of General Min Aung Hlaing, the Commander-in-Chief of the *Tatmadaw* who commenced the assault on Rakhine State by declaring: "The [Rohingya] problem was a long-standing one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care to solve the problem."<sup>276</sup>

The clearance operations disregarded civilian life. They sought to dispel an entire population. A series of IHL and human rights violations were documented. Movement was restricted, forced evictions common, humanitarian access was denied, and food and property were frequently confiscated. Sexual and gender-based violence became routine. The *Tatmadaw* ignored the principle of distinction. They failed to take any feasible precautions to minimize incidental harm. Myanmar's conduct was disproportionate and constituted a "textbook example of ethnic cleansing," said the High Commissioner for Human Rights.<sup>277</sup>

Ethnic conflict is almost always preceded by long campaigns of denunciation, nationalism, and dehumanization. Sporadic occurrences of ethnic violence had become periodic features of Myanmar's transition from military rule. In Shan State in 2011 and the following year in Northern Rakhine—as foreign investment followed democratic reforms and as Aung San Suu Kyi entered Parliament—violent outbreaks became harbingers of the sustained series of atrocities that culminated in the clearance operations. One event was notable. In 2014, riots in Mandalay began after rumors circulated that a Muslim café owner had raped a Buddhist employee. The accusation was false. It was manufactured to raise tensions, to sow intercommunal discord.<sup>278</sup> Such forms of incitement had occurred in the past but now the

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274. U.N. FFM, *supra* note 270, ¶ 751.

275. See Nahal Toosi, *House Calls Rohingya Crisis a Genocide, Urges Pompeo to Take a Stand*, POLITICO (Dec. 13, 2018), <https://www.politico.com/story/2018/12/13/rohingya-house-resolution-pompeo-1063111>.

276. U.N. FFM, *supra* note 270, ¶ 752.

277. *Id.*, ¶¶ 1275–1286; Zeid Ra'ad Al Hussein, *Darker and More Dangerous: High Commissioner Updates the Human Rights Council on Human Rights Issues in 40 Countries*, OFF. HIGH COMM'R FOR HUMAN RIGHTS ["OHCHR"] (Sept. 11, 2017), <https://www.ohchr.org/EN/News+Events/Pages/DisplayNews.aspx?NewsID=22041&LangID=E>.

278. See Timothy McLaughlin, *How Facebook's Rise Fueled Chaos and Confusion in Myanmar*, WIRED (June 7, 2018), <https://www.wired.com/story/how-facebooks-rise-fueled-chaos-and-confusion-in-myanmar/>; see also U.N. FFM, *supra* note 270, ¶ 744 (detailing how

reach of disinformation carried an unforetold scope as the incitement campaign against Myanmar's Rohingya minority was fostered, and then disseminated, via Facebook.

Five years earlier, less than one percent of the country's population regularly accessed the internet. Following liberalization, Facebook became ubiquitous, the importance of an online profile likened to the necessity of a home address.<sup>279</sup> In Myanmar, the social network experienced its fastest growth of any global market.<sup>280</sup> In 2017, Myanmar's 18 million users, a plurality of the country's population, received some or all of their news from the website.<sup>281</sup> Tensions between the Rohingya and segments of the Buddhist majority grew as Facebook increased its national reach and influence. While patterns of online disinformation and incitement are commonplace, their occurrence in Myanmar has been deemed distinctive.<sup>282</sup> Hateful rhetoric spread and carried salience amongst a population that had only recently embraced social networks. Facebook actively courted market share in Myanmar. Network providers incentivized the use of the social media site. In 2016, Facebook joined with Myanmar Post and Telecommunications to launch specific versions of the platform that were designed to maximize usage and reliance.<sup>283</sup>

Notwithstanding the benefits of increased communication and knowledge dissemination, the Rohingya were subjected to a centralized disinformation campaign.<sup>284</sup> The U.N. Fact-Finding Mission documented myriad postings. These reached millions of users. Often, the messages originated from state officials or influential community and religious leaders. Through Facebook posts, users were cautioned of an impending "Islamic takeover" and warned of the harm that the Muslim population posed to the Buddhist majority.<sup>285</sup> The Rohingya were the subject of dismissive screeds that echoed familiar tropes of dehumanization. The FFM cited the facilitatory effect of this hate speech and incitement.<sup>286</sup>

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"outside instigators" paid the accusers and sought to instigate violence in response to the alleged crimes).

279. See McLaughlin, *supra* note 278.

280. *Id.*

281. *Id.*; see also *Survey of Burma/Myanmar Public Opinion: March 9-April 1, 2017*, INT'L REPUBLICAN INST. 46 (2017), [https://www.iri.org/sites/default/files/8.25.2017\\_burma\\_public\\_poll.pdf](https://www.iri.org/sites/default/files/8.25.2017_burma_public_poll.pdf) (noting that 73% of those surveyed received either all, most, or some of their news from Facebook).

282. U.N. FFM, *supra* note 270, ¶ 1342.

283. *Id.* ¶ 1344 (noting that the launch of the "Free Basics" and "Facebook Flex" versions of the site were specifically designed for Myanmar and would allow users to access a stripped-down form of Facebook without incurring data charges from their network provider).

284. *Id.* ¶ 1346.

285. *Id.* ¶ 1347.

286. *Id.* ¶ 1354.

Facebook's role was noticeable. Civil society organizations warned that Facebook's investment in Myanmar was not commensurate with its efforts to regulate the use of its platform.<sup>287</sup> Facebook was accused of minimizing its enablement of harmful rhetoric and of failing to impart processes to stem the flow of information that would lead to violence.<sup>288</sup> Subsequent efforts, pledged by the firm's leadership following increasing attention and negative publicity, were widely dismissed by industry observers as insufficient.<sup>289</sup> Critics noted that Facebook had, since at least the 2014 Mandalay riots, been aware of how its platform facilitated violence in Myanmar.<sup>290</sup> Despite functioning as the nation's preeminent communicative medium, Facebook had failed to cooperate with the FFM's efforts to further diagnose the extent of the social network's contributory role.<sup>291</sup> The fact-finding report called for further research into the ways that Facebook contributed to the increase of discrimination and violence in Myanmar.<sup>292</sup> And, more recently, in early June 2020, The Gambia initiated discovery proceedings in a U.S. District Court to compel Facebook to provide data concerning various Burmese officials.<sup>293</sup> The discovery attempt is intended to support The Gambia's ICJ case, currently pending against Myanmar, for breach of the 1948 Genocide Convention.<sup>294</sup>

Business operations, contemporary models that implicate IHL, frequently diverge from the well-regulated, paradigmatic case of the military contractor. Commonly, the corporation assumes a secondary or facilitatory

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287. See *Open Letter from Six Myanmar Civil Society Organizations to Mark Zuckerberg*, (Apr. 5, 2018), <https://drive.google.com/file/d/1Rs02G96Y9w5dpX0Vf1LjWp6B9mp32VY/view> [hereinafter *Open Letter*], see also Paul Mozur, *Groups in Myanmar Fire Back at Zuckerberg*, N.Y. TIMES (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/technology/zuckerberg-facebook-myanmar.html>

288. See *Open Letter*, *supra* note 287 (noting that Facebook over-relies on third-party moderators, lacks necessary mechanisms for emergency escalation, did not engage local stakeholders, and failed to ensure transparency).

289. See, e.g., McLaughlin, *supra* note 287 (noting Mark Zuckerberg's response to questions in a Congressional hearing in which he stated that Facebook would increase its local language content reviews, remove accounts that generated hate speech, and introduce market-specific products).

290. *Id.*

291. U.N. FFM, *supra* note 270, ¶ 1354.

292. *Id.*

293. Application for Order to Take Discovery Pursuant to 28 U.S.C §1782, *The Republic of The Gambia v. Facebook, Inc.*, No. 1:20-mc-00036-JEB (D.D.C. filed June 8, 2020), <https://www.courtlistener.com/recap/gov.uscourts.dcd.218820/gov.uscourts.dcd.218820.1.1.pdf>.

294. See generally Jenny Domino, *Gambia V. Facebook: What the Discovery Request Reveals About Facebook's Content Moderation*, JUST SEC. (July 6, 2020), <https://www.justsecurity.org/71157/gambia-v-facebook-what-the-discovery-request-reveals-about-facebooks-content-moderation/>.

role.<sup>295</sup> The nature of this role, the form of corporate conduct, dictates the level of legal or moral culpability that attaches to the business entity. Examples range.<sup>296</sup> Actions deemed purposefully facilitatory may reach the level of aiding and abetting. Here, the corporation becomes an accomplice. Such occurrences are familiar and international criminal law and domestic legal mechanisms impose accountability in such instances. Gaps result from inadequate implementation, often caused by a narrowly construed notion of complicity.<sup>297</sup>

Commonly, the corporation's contribution to the facilitatory act will be less direct.<sup>298</sup> Facilitatory contributions, as defined here, include instances in which the corporation purposefully aligns or willfully neglects the relationship between business operations and the consequences of its actions. Moral culpability *may* be reduced in such instances. The corporation's conduct *may* not exhibit the purposeful intent required by the ICTY and the ILC to establish the crime of complicity under international criminal law.<sup>299</sup> But as witnessed in Myanmar, corporate activity (or inactivity) can affect IHL in unforeseen ways. In such scenarios, the corporation does not directly contribute to the implicated events. The proximate cause is further removed. Instead, the corporation may derive benefit. It neglects the harmful implications of its actions or inactions. And, increasingly through new technologies and novel business models, the corporate contribution becomes a conduit that facilitates activity that itself compromises IHL-based norms.

Once described as a drama of great complexity and intensity, understandings of complicity have broadened since the Statute of the International Military Tribunal extended responsibility to those "instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes. . ."<sup>300</sup> Today, understand-

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295. Stephen J. Kobrin, *Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights*, 19 BUS. ETHICS Q. 349, 351 (2009).

296. U.N. Global Compact, *supra* note 67, at Principle 2 (acknowledging that complicity may be direct, beneficial, or silent).

297. See Wolfgang Kaleck & Miriam Saage-Maaß, *Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges*, 8 J. INT'L CRIM. JUST. 699, 702 (2010).

298. U.N. Hum. Rts. Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuses*, ¶ 35, U.N. Doc. A/HRC/8/5/Add.2 (May 23, 2008) (finding that 41% of the incidents surveyed featured indirect human rights violations by corporations).

299. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Judgment, ¶ 674 (holding that a complicit actor must knowingly decide to participate in the planning, instigating, ordering, committing, or aiding and abetting in the commission of a crime); see also ILC, *Crimes Against Peace and Security*, *supra* note 146, art. 2(3)(d).

300. See Eighth Report on the Draft Code of Crimes Against the Peace of Mankind, ¶ 38, U.N. Doc. A/CN.4/430 (Apr. 6, 1990) (citing Special Rapporteur Doudou Thiam who notes the complexity of defining complicity); see also IMT Statute, *supra* note 28, art. 6.



ings of corporate complicity may impose ethical or legal consequences.<sup>301</sup> The nature of the requisite material act and the degree to which an actor must contribute to the commission of a crime remain open questions.<sup>302</sup> Discrepancies between knowledge and purpose-based standards delineate associated legal debates.<sup>303</sup> Whether a secondary actor that facilitates a primary violation is criminally complicit or ethically compromised is both fact-specific and is influenced by the particular regime applied to reach a determination.<sup>304</sup>

But my immediate purpose here is not prescriptive. Instead, it is to acknowledge that as the relevant accountability frameworks develop, it is necessary to forefront expansive conceptions of complicity with fuller accounts of how varying forms of corporate conduct indirectly implicate IHL norms. Corporate activity reaches further than previously foreseen, expanding the proximity between the implicated conduct and the principle harm. The influence of hate speech and false information, disseminated through social media platforms, now receives heightened attention.<sup>305</sup> Yet numerous forms of corporate activity—emanating from new sectors and manifesting in under-regulated spaces—are rapidly developing. The ways in which these developments will influence IHL remain under-conceptualized. Seven of the ten largest companies in the world are now technology firms.<sup>306</sup> Within this sector alone, rapidly evolving services, provided by the world's largest companies, present emerging challenges to the legal frameworks that govern the conduct of warfare.

In 2013, the Islamic State began using YouTube and Twitter to recruit, fundraise, and train thousands of foreign fighters.<sup>307</sup> Soon, so too were each

301. See Andrew Clapham, *Corporations and Criminal Complicity*, in HUMAN RIGHTS, CORPORATE COMPLICITY AND DISINVESTMENT 222, 223 (Gro Nystuen, et al., eds., 2011) (citing the Norwegian Council on Ethics and Government Pension Fund – Global whose guidelines promote a dualist approach to account for corporate conduct that violates international law or constitutes unethical corporate behavior not amounting to a legal violation) [hereinafter Clapham, *Criminal Complicity*].

302. Schabas, *supra* note 11, at 447.

303. Clapham, *Criminal Complicity*, *supra* note 301, at 231.

304. See *HRC Clarifying Complicity*, *supra* note 175, ¶¶ 33–62.

305. See generally Eitan Diamond, *Killing on Camera: Visual Evidence, Denial and Accountability in Armed Conflict*, 6 LONDON REV. INT'L L. 361 (2018). See also Tamar Megiddo, *Online Activism, Digital Domination, and the Rule of Trolls: Mapping and Theorizing Technological Oppression by Governments*, 58 COLUM. J. TRANSNAT'L L. 394 (2020); Björnstjern Baade, *Fake News and International Law*, 29 EUR. J. INT'L L. 1357 (2019); Evelyn Douek, *Australia's New Social Media Law Is a Mess*, LAWFARE (Apr. 10, 2019), <https://www.lawfareblog.com/australias-new-social-media-law-mess>.

306. Luca Ventura, *World's Largest Companies 2019*, GLOB. FIN. (Aug. 29, 2019), <https://www.gfmag.com/global-data/economic-data/largest-companies> (noting the ten largest companies as measured by market capitalization).

307. See Scott Gates & Sukanya Podder, *Social Media, Recruitment, Allegiance and the Islamic State*, 9 PERSP. ON TERRORISM 107 (2015).

of the numerous non-state armed groups operating in Syria.<sup>308</sup> Israel's Ministry of Foreign Affairs funded an "internet warfare squad."<sup>309</sup> During Operation Pillar of Defense in the Gaza Strip, the Israel Defense Forces ("IDF") and Hamas both employed a social media strategy to present competing narratives.<sup>310</sup> The IDF's targeting and operational decisions were influenced by social media determinations.<sup>311</sup> When the ICC indicted Mahmoud Al-Werfalli in 2017, the decision was based upon evidence found on popular video sharing sites.<sup>312</sup> The NGO Bellingcat used images and videos captured from across the internet to determine that a Russian supplied surface-to-air missile was used to down Flight MH17 in Ukraine.<sup>313</sup> And the Defense Advanced Research Projects Agency ("DARPA") publicized its ongoing research on "military memetics" which analyzes the weaponization of memes as part of information warfare and influence operations.<sup>314</sup>

Social media now affects how conflicts are initiated. It has altered the capacity and reach of non-state armed groups. It contributes to determinations of when and how force will be deployed, the manner in which legitimacy is asserted, and the enforcement and monitoring of international law. IHL provides guidance on some of these emerging questions. Ruses of war are permitted practices but IHL prohibits acts of perfidy.<sup>315</sup> As per the First Additional Protocol to the Geneva Conventions, misinformation constitutes a ruse.<sup>316</sup> The *Tallinn Manual* clarifies that transmitting false information is permissible.<sup>317</sup> This has been interpreted to include the dissemination of

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308. P.W. SINGER & EMERSON T. BROOKING, *LIKE WAR: THE WEAPONIZATION OF SOCIAL MEDIA* 9 (2018).

309. Rona Kuperboim, *Thought-Police Is Here*, YNET NEWS, (Oct. 7, 2009), <https://www.ynetnews.com/articles/0,7340,L-3744516,00.html>.

310. SINGER & BROOKING, *supra* note 308, at 194-195.

311. *Id.* at 9.

312. Emma Irving, *And So It Begins... Social Media Evidence in an ICC Arrest Warrant*, OPINIO JURIS, (Aug. 17, 2017), <http://opiniojuris.org/2017/08/17/and-so-it-begins-social-media-evidence-in-an-icc-arrest-warrant/>.

313. Bellingcat, *"A Birdie is Flying Towards You:" Identifying the Separatists Linked to the Downing of MH17*, BELLINGCAT (June 19, 2019), <https://www.bellingcat.com/news/uk-and-europe/2019/06/19/identifying-the-separatists-linked-to-the-downing-of-mh17/>.

314. SINGER & BROOKING, *supra* note 308, at 191; *see also Memes That Kill: The Future of Information Warfare*, CB INSIGHTS (May 3, 2018), <https://www.cbinsights.com/research/future-of-information-warfare/>.

315. See Hague Convention (IV) Respecting the Laws and Customs of War on Land, arts. 23(b), 24, Oct. 18, 1907, 36 Stat. 2277, 539 T.S. 631 (stating that it is forbidden "to kill or wound treacherously individuals belonging to the hostile nation or army" and "ruses of war and the employment of methods necessary for obtaining information about the enemy and the country are considered permissible").

316. First Additional Protocol, *supra* note 19, at art. 37(2).

317. TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE, Rule 61 (Michael N. Schmitt, ed., 2017).

“fake news.”<sup>318</sup> Yet, as observed in Myanmar, misleading communications can threaten peremptory norms. To determine how an evolving understanding of complicity may ensure accountability for corporate conduct that affects IHL in previously un contemplated ways we must more fully conceptualize the emerging forms of corporate behaviour—intentional and incidental—and how these encroach upon IHL’s normative purpose.

### C. *The Corporation as an Incidental Contributor*

From your computer, enter a familiar URL. Through a trusted site at the forefront of the shared economy, one scrolls through vacation rentals in Israel. Accommodation in Jerusalem and Tel Aviv has become prohibitively expensive. Move further from your preferred destination and you find more for less. Listed at \$344 per week, through Airbnb, one can book a “double room in a spacious modern flat in the center of Ariel.”<sup>319</sup> Two people may stay in the private room, fully furnished with a double bed. It features a fireplace and offers convenience. The advert tells that Ariel is suitably located with easy access to all main highways.<sup>320</sup> It is an hour on the bus to the beach or a 45-minute drive to the Old City’s holy sites. The advert, however, omits that Ariel is a large Israeli settlement located in the heart of the West Bank. It omits that the shared flat has been constructed on occupied territory and in violation of Article 49(6) of the Fourth Geneva Convention.<sup>321</sup> Instead, the advert tells guests that Ariel is not merely contiguous with, but incontrovertibly constitutes a part of, Israel.

Airbnb has become embroiled in an ongoing debate regarding the conduct of business within occupied territory.<sup>322</sup> In November 2018, Airbnb issued a press release. Responding to critics, it conceded: “when we applied our decision-making framework, we concluded that we should remove list-

318. See Unnati Ghia, *International Humanitarian Law in a Post-Truth World*, CAMBRIDGE INT’L L.J. POST (Dec. 17, 2018), <http://cilj.co.uk/2018/12/17/international-humanitarian-law-in-a-post-truth-world/>.

319. *Double Bedroom in a Welcoming Flat*, AIRBNB, [www.airbnb.ca/rooms/8470399?source\\_impression\\_id=p31569495341vAsxAkr%2Bojsuh2Sk&guests=1&adults=1&sl\\_alternate\\_dates\\_exclusion=true&check\\_in=2019-10-02&check\\_out=2019-10-09](http://www.airbnb.ca/rooms/8470399?source_impression_id=p31569495341vAsxAkr%2Bojsuh2Sk&guests=1&adults=1&sl_alternate_dates_exclusion=true&check_in=2019-10-02&check_out=2019-10-09) (last visited Sept. 29, 2020).

320. *Id.*

321. Fourth Geneva Convention, *supra* note 83, art. 49(6); see S.C. Res. 446, ¶ 3 (Mar. 22, 1979); G.A. Res. 32/20, ¶ 1 (Nov. 25, 1977) (affirming Israel’s presence within the West Bank constitutes a belligerent occupation); see also David Hughes, *Moving from Management to Termination: A Case Study of Prolonged Occupation*, 44 BROOK. J. INT’L L. 109 (2018).

322. See, e.g., Hum. Rts. Watch, *Bed and Breakfast on Stolen Land: Tourist Rental Listings in West Bank Settlements* (Nov. 20, 2018), <https://www.hrw.org/report/2018/11/20/bed-and-breakfast-stolen-land/tourist-rental-listings-west-bank-settlements>; see also *Stolen Homes Campaign*, JEWISH VOICES FOR PEACE, <https://jewishvoiceforpeace.org/stolen-homes/> (last visited Sept. 26, 2020) (a joint-campaign between American Muslims for Palestine, CODEPINK: Women for Peace, Friends of Sabeel North America, Jewish Voice for Peace, SumOfUs, and the US Palestinian Community Network).

ings in Israeli settlements in the occupied West Bank that are at the core of the dispute between Israelis and Palestinians.”<sup>323</sup> Controversy was immediate. Israel denounced the decision as “shameful” and promised legal action.<sup>324</sup> Lawyers were retained and suits were filed.<sup>325</sup> The Simon Wiesenthal Center called the delisting draconian, a move that empowered terrorists, and demanded a worldwide boycott of Airbnb.<sup>326</sup> Without hesitation, the Texas Comptroller of Public Accounts placed Airbnb on a blacklist of companies that boycott Israel.<sup>327</sup> Florida threatened retaliatory action. Governor DeSantis warned that the company would be placed on a “hit list” and Vice-President Pence promised his Administration would make it clear that the delisting “has no place in the free enterprise of the United States of America.”<sup>328</sup> In April 2019, Airbnb reversed its decision.<sup>329</sup>

Today, owners may list and users may rent properties in West Bank settlements. The legal rejoinders offered both to the initial delisting and in response to the subsequent reversal follow identifiable paths. In *Silber et al. v. Airbnb*, a group of Israeli-Americans that owned and listed West Bank properties on the website and a group that identified as prospective renters told the U.S. District Court of Delaware that the decision to remove their property violated the *Fair Housing Act*.<sup>330</sup> Their claim was settled and the

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323. *Listings in Disputed Regions*, AIRBNB (Nov. 19, 2019), <https://press.airbnb.com/listings-in-disputed-regions/>.

324. *Airbnb: Israeli Uproar as Firm Bars West Bank Settlements*, BBC NEWS (Nov. 20, 2018), <https://www.bbc.com/news/world-middle-east-46273938>.

325. See Amanda McCaffrey, *Palestinians Claim Violations by Israeli Settlers in Airbnb Case in U.S. Courts*, JUST SEC. (May 7, 2019), <https://www.justsecurity.org/63938/palestinians-claim-violations-by-israeli-settlers-in-airbnb-case-in-u-s-court/>.

326. Hugo Martin, *Airbnb Won't Operate in Israel's West Bank, Prompting Calls for a Boycott*, L.A. TIMES (Nov. 19, 2018), <https://www.latimes.com/business/la-fi-airbnb-west-bank-20181119-story.html>.

327. Marcy Oster, *Texas Blacklists Airbnb Over Israeli Settlement Boycott*, HAARETZ (Mar. 4, 2019), <https://www.haaretz.com/israel-news/texas-blacklists-airbnb-over-israeli-settlement-boycott-1.6983940>.

328. David Simley, *Florida Governor Warns Airbnb to Reverse its West Bank Policy or Face State Sanctions*, MIA. HERALD (Jan. 15, 2019), <https://www.miamiherald.com/news/politics-government/state-politics/article224556770.html>; see also Ron Kampeas, *Pence on Airbnb Settlements Ban: BDS Has 'No Place' in U.S. Market*, HAARETZ (Dec. 2, 2018), <https://www.haaretz.com/us-news/pence-on-airbnb-settlements-ban-bds-has-no-place-in-u-s-market-1.6702127>.

329. Julia Jacobs, *Airbnb Reverses Policy Banning Listings in Israeli Settlements in West Bank*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/world/middleeast/airbnb-israel-west-bank.html>.

330. Amended Complaint at 9, *Silber v. Airbnb, Inc.*, 2019 WL 3997098 (D. Del. Aug. 23, 2019) (No. 1:18-cv-01884-RGA), <https://www.justsecurity.org/wp-content/uploads/2019/04/Silber-Amended-Complaint.pdf>.

case dismissed.<sup>331</sup> Under the terms of the settlement, Airbnb reiterated that “it would not move forward with implementing the removal of listings in the West Bank from the platform.”<sup>332</sup>

When stripped of its political veneer, the described events, tell of a corporate entity whose business practice in the West Bank may be understood as mirroring its corporate conduct elsewhere. Airbnb operates in Ariel as it does in Tel Aviv, Madrid, or Tokyo. Its policy in the Palestinian territories attracts scrutiny not due to the nature of Airbnb’s general operations but because of the context within which these occur. The proximity between the corporate action and the primary harm is greater than that which constitutes facilitatory conduct. Unlike Facebook’s operations in Myanmar, which were purposely tailored to the market and are alleged to have neglected the harm caused, corporate operations are unchanged. Here, the implicated action would likely fail to meet even a low complicity threshold.<sup>333</sup> The corporation does not engage in a positive act or omission that then contributes to the implicated behavior.<sup>334</sup> In such instances, corporate conduct affecting IHL is incidental. It is a subsidiary contribution that supplements a more direct form of (likely state) conduct.

Courts have traditionally maintained that corporations are not liable, criminally or civilly, when their conduct amounts to normal business practice.<sup>335</sup> Incidental contributions occur within the scope of regular operations when corporate officials are unaware of the state’s intentions or the consequences of their actions. However, in such instances the nature of corporate operations can further the interests that the primary (state) actor wishes to impose. This may affect IHL’s normative purpose in ways that are often absent from associated deliberations.

In the Airbnb case, proponents viewed the initial removal decision as advancing corporate accountability.<sup>336</sup> Several Palestinian groups, intervening in *Silber*, argued that their inability to access the rental properties central to the initial claim amounted to discrimination and unjustly enriched the

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331. Stipulation of Dismissal at 1, *Silber v. Airbnb, Inc.*, 2019 WL 3997098 (D. Del. Aug. 23, 2019), (No. 1:18-cv-01884-RGA), <https://www.courtlist.com/recap/gov.uscourts.ded.67050/gov.uscourts.ded.67050.18.0.pdf>.

332. *Update on Listings in Disputed Regions*, AIRBNB (Apr. 9, 2019), <https://press.airbnb.com/update-listings-disputed-regions/>.

333. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 671 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (in which the Prosecutor argues in favor of a low threshold).

334. Airbnb’s subsequent decision to relist the properties may, however, alter such categorizations.

335. See *Skinner*, *supra* note 192, at 1845; see also *Texas & Pac. Ry., Co. v. Behymer*, 189 U.S. 468, 470 (1903).

336. See, e.g. *Israel: Airbnb to End Settlement Rentals*, HUM. RTS. WATCH (Nov. 20, 2018), <https://www.hrw.org/news/2018/11/20/israel-airbnb-end-settlement-rentals>.

plaintiffs.<sup>337</sup> The intervenors recalled that IHL provides the appropriate legal framework to assess the legality of the settlements but they primarily addressed the plaintiffs' ownership claims.<sup>338</sup> Airbnb's contribution was deemphasized and subsequently the intervenors' petition was dismissed after the case settled.<sup>339</sup> IHL assumed but a small role within the ongoing debate.

A human rights discourse was prioritized.<sup>340</sup> Yet despite this prevailing approach, Airbnb's West Bank policy raises crucial considerations specific to IHL. The U.N. High Commissioner for Human Rights has asserted that:

Businesses play a central role in furthering the establishment, maintenance and expansion of Israeli settlements. They are involved in constructing and financing settlement homes and supporting infrastructure, providing services to the settlements, and operating out of them. In doing so, they are contributing to Israel's confiscation of land, facilitate the transfer of its population into the Occupied Palestinian Territory, and are involved in the exploitation of Palestine's natural resources.<sup>341</sup>

The IHL implications are explicit. The settlements themselves directly violate the Fourth Geneva Convention's prohibition on the transfer of parts of an occupying power's civilian population into the territory that it occupies.<sup>342</sup> Settlements contribute to the occupation's permanence. Under IHL,

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337. See Motion to Intervene on Behalf of Putative Intervenors and Counterclaim Plaintiffs Ziad Alwan, Village of Jalud, Municipality of 'Anata, and Rada Wahbe and Memorandum of Law in Support at 1–2, *Silber v. Airbnb, Inc.*, 2019 WL 3997098 (No. 18-cv-01884-RGA) (citing an Israeli Military Order prohibiting Palestinians in the West Bank from accessing the settlements).

338. See *id.*

339. *Silber v. Airbnb, Inc.*, No. 1:18-CV-01884-RGA, 2019 WL 3997098 (D. Del. Aug. 23, 2019); see also *Silber, et al. v. Airbnb*, CTR. CONST. RTS. (Feb. 19, 2020), <https://ccrjustice.org/home/what-we-do/our-cases/silber-et-al-v-airbnb>.

340. See Amnesty Int'l, *Destination Occupation: Digital Tourism and Israel's Illegal Settlements in the Occupied Palestinian Territories* at 8, MDE 15/9490/2019 (2019), <https://www.amnesty.org/en/latest/campaigns/2019/01/destination-occupation-digital-tourism-israel-illegal-settlements/> (claiming that digital tourism companies operating in Israeli settlements violate human rights law by contributing to and profiting from the maintenance of settlements); see also *Bed and Breakfast on Stolen Land*, *supra* note 322, at 5 (in which Human Rights Watch and Kerem Navot state that online marketplaces contribute to the financial viability of settlements); Sari Bashi, *If the U.S. Government Won't Act, Airbnb Will*, FOREIGN POL'Y (Nov. 27, 2018), <https://foreignpolicy.com/2018/11/27/if-the-u-s-government-wont-act-airbnb-will-west-bank-settlements-rentals-occupation-israel-palestinians-netanyahu/> (extending similar criticisms to other occupied territories including Northern Cyprus and Western Sahara).

341. U.N. Hum. Rts. Council, *Report of the United Nations High Commissioner for Human Rights*, ¶ 42, U.N. Doc. A/HRC/37/39 (Feb. 1, 2018) [hereinafter *Report of the High Commissioner 2018*].

342. Fourth Geneva Convention, *supra* note 83, art. 49(6).

occupation is conceived as a temporary regime.<sup>343</sup> Temporality and the principle of sovereign preservation provide the normative core of the law of occupation. Their maintenance is necessary to ensure an occupation regime's legitimacy.<sup>344</sup>

Moral and legal liability is at its lowest ebb when corporate conduct affects IHL incidentally. But the absence of moral opprobrium and explicit legal prohibitions are not commensurate with the significance of such forms of conduct. This detachment—between responses and effects—results from instances when the consequences of corporate conduct are insufficiently conceptualized. Under-theorization creates broad spaces in which the implications of various forms of corporate conduct occur beyond the reach of the prominent accountability frameworks. As these frameworks develop, it is necessary to further conceptualize the various ways that particular forms of business conduct can affect IHL's foundational purpose.

It is, of course, an overstatement to imply that the settlements' viability is contingent upon whether they may be listed on a particular website. The pertinent questions, from the perspective of IHL, should, however, concern the extent to which Airbnb's business activities contribute to the settlement enterprise's prolongment, to their normalization. Do they compromise the norms central to an occupation regime? Assessment will consider how Israel, the occupying power, endeavors to generate tourism within and attract businesses to the settlements. Israel views its associated policies as a strategic means of maintaining control of both the settlements and the West Bank.<sup>345</sup>

Accordingly, ninety settlements are designated as “national priority areas.”<sup>346</sup> This enables the Government of Israel to provide financial enticements to prospective businesses—both domestic and international—as a means of encouraging economic expansion into the nominated settle-

343. As per Article 42 of the Hague Convention, “territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” See Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 42, Oct. 18, 1907, 36 Stat. 2277, 539 T.S. 631. Further, Article 6 of the Fourth Geneva Convention states that the “present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2. In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.” See Fourth Geneva Convention, *supra* note 83, art. 6.

344. See Hughes, *supra* note 321, at 156–57; see also AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION*, 3–4 (2017).

345. *Report of the High Commissioner* 2018, *supra* note 341, ¶ 43; see also U.N. Hum. Rts. Council, *Israeli settlements in the Occupied Palestinian Territory, Including East Jerusalem, and in the Occupied Syrian Golan*, ¶ 23, U.N. Doc. A/HRC/34/39 (Feb. 27-Mar. 24, 2017) [hereinafter Human Rights Council Report 2017].

346. *Report of the High Commissioner* 2018, *supra* note 341, ¶ 43; see also Chaim Levinson, *Settlement Housing Gets Third of Israeli State Funds for ‘National Priority’ Areas*, HAARETZ (Jan. 21, 2015, 5:37 PM), <https://www.haaretz.com/.premium-national-priority-area-funds-go-to-settlements-1.5363270>.

ments.<sup>347</sup> Reductions in the price of land, development and infrastructure grants, and tax incentives are used to induce business development.<sup>348</sup> Tourism is prioritized.<sup>349</sup> In 2016, Israel adopted a Resolution allocating NIS 5 million to develop the West Bank's tourism industry.<sup>350</sup> Further funds were earmarked to increase the development of tourist accommodation throughout the West Bank. Yariv Levin, Israel's Tourism Minister, announced: "After years of trying, for the first time today, the Ministry of Tourism will financially support the establishment of hotels and motels in Judea and Samaria [West Bank]. Over the past few years, we have been witnessing the development of tourism in this region, many attractions were cultivated and a need to incentivize hotels has risen."<sup>351</sup>

The geographic footprint of Israel's West Bank commercial activity now exceeds the total area of residential settlements.<sup>352</sup> A business entity that, willingly or passively, contributes to annexationist objectives furthers the policies of an occupying power to assume permanent control, implicates IHL's normative purpose. Yet these considerations are often absent from the resulting legal discourses. They remain untreated by the applicable legal frameworks. Legal mechanisms and due diligence processes increasingly reflect the extent to which corporations have become significant international actors. They better understand how corporate behavior affects social goods and can threaten individual rights. As the accountability frameworks have developed, as corporations gain legal status, failure to fully conceptualize both the nature of corporations and the extent of corporate operations within conflict areas creates these recurring instances. Through these instances, the indelible consequences of corporate conduct, its broader effects, continue to elude accountability for activities that implicate international humanitarian law.

## V. CONCLUSION

In 2007, the *Association France Palestine Solidarité* and the Palestine Liberation Organization filed a lawsuit against Veolia and Alstom. The

347. Report of the High Commissioner 2018, *supra* note 341.

348. *Id.*; see also *Occupation, Inc.: How Settlement Businesses Contribute to Israel's Violations of Palestinian Rights*, HUM. RTS. WATCH (Jan. 19, 2016), <https://www.hrw.org/report/2016/01/19/occupation-inc/how-settlement-businesses-contribute-israels-violations-palestinian>.

349. See Who Profits, *Touring Israeli Settlements: Business and Pleasure for The Economy of Occupation*, 3–4 (Sept. 2017), <https://whoprofits.org/flash-report/touring-israeli-settlements-business-and-pleasure-for-the-economy-of-occupation/>.

350. See *Government Resolution 1561: Special Assistance for the Year of 2016 to Judea and Samaria*, PRIME MINISTER'S OFF. (June 19, 2016), [https://www.gov.il/he/Departments/policies/2016\\_des1561](https://www.gov.il/he/Departments/policies/2016_des1561), cited in Who Profits, *supra* note 349, at 3.

351. Who Profits, *supra* note 349, at 3.

352. Human Rights Council Report 2017, *supra* note 341, ¶ 24.



plaintiffs argued that the French corporations violated international law when they joined a consortium to develop a light rail project in Jerusalem.<sup>353</sup> The tram's route ran through West Jerusalem but would (and now does) include a number of stops in the city's Eastern sector.<sup>354</sup> The route, the plaintiffs argued, permanently links the State of Israel with parts of the territory that it had occupied since 1967.<sup>355</sup> The Versailles Court of Appeal considered IHL's application.<sup>356</sup> It recounted the various legal mechanisms and cited the relevant articles and sub-paragraphs that apply to occupied territory.<sup>357</sup> These were narrowly construed. They were held to apply solely to states.<sup>358</sup> Accordingly, the Court found that a French corporation could not be held liable for the alleged infringement of international norms as these impose obligations that are incumbent upon the occupying power alone.<sup>359</sup>

Commentators queried the implications of the Court's decision.<sup>360</sup> The case was read as a reversion to international law's classic, state-centric, formulation. It would limit the forms of international legal accountability that can be extended to a corporation.<sup>361</sup> The decision indeed underappreciates the progression of developments that have, since Nuremberg, extended international legal liability to corporations. However, the line of critical reasoning that followed from the decision portrays too narrow a conception of

353. Jewish Telegraphic Agency, *French Court: Jerusalem Rail Does Not Violate International Law*, HAARETZ (Apr. 28, 2013), <https://www.haaretz.com/french-court-jerusalem-light-rail-project-legal-1.5240009>.

354. See Amina Nolte & Haim Yacobi, *Politics, Infrastructure and Representation: The Case of Jerusalem's Light Rail*, 43 CITIES 28, 31 (2015).

355. *Id.* at 30, 35.

356. See Cour d'appel [CA] [regional court of appeal] Versailles, 3e ch., Mar. 22, 2013, ILM 2013, 52, 1161, 1175–76 (Fr.).

357. *Id.*

358. *Id.* at 1176 (holding that “the international texts referred to are acts signed between States. The obligations or prohibitions contained therein are addressed to States”).

359. *Id.* at 1176, 1178 (supplementing its position the Court held that “The [legal] personality of transnational enterprises, however, is recognised only to a very limited extent. Their international capacity is admitted purely in the context of specific treaties which are essentially of an economic nature, and with a view to providing to these enterprises protection, within the context of their activities abroad, against the State with which they might find themselves in dispute or in specific cases of environmental liability”).

360. See Eugene Kontorovich, *Guest Post: Landmark French Ruling on West Bank Construction and International Law*, OPINIO JURIS, (May 1, 2013), <https://opiniojuris.org/2013/05/01/guest-post-landmark-french-ruling-on-west-bank-construction-and-international-law/>; Milena Sterio, *Guest Post: French Companies May Build in the West Bank – An Assessment of the Versailles Court of Appeals Case*, OPINIO JURIS, (May 8, 2013), <http://opiniojuris.org/2013/05/08/guest-post-french-companies-may-build-in-the-west-bank-an-assessment-of-the-versailles-court-of-appeals-case/>; Kevin Jon Heller, *The Difference Between Art. 49(6) of GC IV and Art. 8(2)(b)(viii) of the RS*, OPINIO JURIS, (May 1, 2013), <https://opiniojuris.org/2013/05/01/the-difference-between-art-496-of-gc-iv-and-art-82bviii-of-the-rs/>.

361. Mary Martin, *Missing the Train: International Governance Gaps and the Jerusalem Light Railway*, 4 GLOBAL AFF. 101, 103 (2018).

accountability. The symbiotic relationship between international law, corporations, and accountability advances when law's scope, purposes, and sources are understood broadly. It is only then that the range of corporate activities that impact norms enshrined in IHL in evolving and underexplored ways can be fully conceptualized.

Rosalyn Higgins identifies two notions of accountability. The first usage describes the process of determining formal guilt (i.e., demonstrating that an individual has the intention to perform an implicated act and/or the requisite mental capacity).<sup>362</sup> The second usage is preferable for current purposes. Higgins explains that a broader notion of accountability implies that there is liability for internationally wrongful behavior and that that liability must be discharged.<sup>363</sup> Understanding accountability in its broadest sense—as involving the justification of an actor's conduct, assessing that conduct against predetermined standards, and imposing consequences when the actor fails to meet those standards—allows for assessments of legal frameworks that are mindful of more than generalizable implementation and compliance challenges.<sup>364</sup>

The case studies described in section IV of this article instead tell of particularities. They describe instances in which the absence of accountability results from the misalignment between primary legal rules, the recognized forms of implementation, and the nature of both corporations and their undertaken business activities. The case of Blackwater illustrates how a direct violation by a corporation poses different accountability challenges that are exclusive to a corporation and that differ from those that are generally attributed to the non-compliant state. The case of Facebook demonstrates how emerging industries pose novel challenges that implicate IHL in previously unforeseen ways. And the case of Airbnb evidences corporate conduct that bears specific implications for IHL, for its normative purpose, that often go unconsidered when assessed through the prominent legal frameworks imposed to ensure accountability.

Corporations continue to gain international legal status. Regulatory regimes are further developing. To fully realize the prevalence and nature of accountability gaps that remain undertreated through the application of the prominent legal frameworks, it is necessary to look beyond those instances when implementation fails or when narrow readings of law exclude particular actors. Better regulation necessitates broader conceptualization. We ask: Who is accountable? To whom are they accountable? And what are the standards against which accountability is assessed and implemented?<sup>365</sup>

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362. ROSALYN HIGGINS, PROBLEMS & PROCESSES: INTERNATIONAL LAW AND HOW IT WORKS 147 (1994).

363. *Id.*

364. See Jutta Brunnée, *International Legal Accountability Through the Lens of the Law of State Responsibility*, 36 NETH. Y.B. INT'L L. 3, 4 (2005).

365. See André Nollkaemper, Jan Wouters & Nicolas Hachez, *Accountability and the Rule of Law at International Level 5–6* (2008) (unpublished manuscript) (on file with Univer-

In asking these questions we correctly assume that the norms prescribed within international humanitarian law remain vulnerable to various forms of corporate conduct. But responses to these challenges and efforts to engage with such questions of accountability must more fully reflect the particularities of the corporate form. They must more accurately account for the evolving nature of business conduct within conflict zones. The International Court of Justice, in the *Reparations Advisory Opinion*, pronounced that “the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.”<sup>366</sup> If international law is to contribute to the process of narrowing accountability gaps, if it is to provide an agreeable and accurate vocabulary for determining standards and adjudging conduct, then regulatory efforts must begin by embracing those features that differentiate the corporation from those other entities that have traditionally held international law’s attention.

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sity of Amsterdam: Amsterdam Centre for International Law) (<https://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/reports/report%20Accountability%20and%20Rule%20of%20Law.pdf>).

366. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, 178 184 (Apr. 11, 1949).