

Business, Armed Conflict, and Protection of the Environment: What Avenues for Corporate Accountability?

Marie Davoise*

Table of Contents

A.	Introduction – Corporate Wrongs and the ‘Geographies of Injustice’ ...	153
B.	Doctrinal Difficulties in Applying International Law to Corporations..	159
C.	Business, Armed Conflict, and the Environment: A Venn Diagram	162
D.	State Responsibility, Transnational Law and the Draft BHR Treaty	168
E.	International Criminal Law and Argor-Heraeus	172
I.	Prosecuting Legal Entities for International Crimes.....	174
1.	No Current Prospects of Prosecutions at the ICC.....	175
2.	Jurisdiction of Domestic Courts Over International Crimes Committed by Businesses.....	177
II.	Universal/Extraterritorial Jurisdiction.....	178
III.	Challenges.....	181
F.	Transnational Tort Litigation and Vedanta.....	184
I.	Global Trend Towards Parent Company Liability	186
1.	Parent Company Liability in the United Kingdom.....	188
2.	Parent Company Liability in Canada	190
3.	Parent Company Liability in the Netherlands	191
4.	Alien Tort Statute in the United States.....	192

* Marie Davoise (LL.M., King’s College London) is an English-qualified solicitor specializing in international criminal law and business and human rights, with experience in private practice, at the International Criminal Court and at the UN International Residual Mechanism for Criminal Tribunals. The views and opinions expressed in this article are those of the author.

This contribution is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 Germany License and protected by German Intellectual Property Law (UrhG).

II. (Public) Knowledge is Power: Impact of Public Materials and Mandatory Reporting	194
III. Challenges.....	198
G. Conclusion.....	199

Abstract

In July 2019, the International Law Commission (ILC) provisionally adopted, on first reading, a series of draft principles on the protection of the environment in relation to armed conflict (the Draft Principles). The role of businesses in armed conflict is addressed in Draft Principle 10 and Draft Principle 11. The latter, in particular, requires States to implement appropriate measures to ensure that corporations operating in or from their territories can be held accountable for environmental harm in the context of armed conflict.

The inclusion of those two Draft Principles reflects increasingly vocal calls for corporate accountability, which has been the focus of the growing field of Business and Human Rights (BHR), an umbrella term encompassing a variety of legal regimes from tort law to criminal law.

This contribution will look at the link between businesses, the environment, and armed conflict. Using the newly adopted Draft Principle 11 as a starting point, it explores three major liability regimes through which businesses could be held accountable for damage to the environment in armed conflict: State responsibility, international criminal law, and transnational tort litigation.

Using case studies, the article discusses some of the challenges associated with each of those regimes, before concluding that the cross-fertilization phenomenon observed in this article (between public/private law, domestic/international level, and across various jurisdictions) is making BHR an increasingly salient discipline and useful tool in the fight against impunity for corporate environmental harm in armed conflict.

A. Introduction – Corporate Wrongs and the ‘Geographies of Injustice’

The dual role of the environment as both a driver and a casualty of armed conflicts around the globe has garnered increasing attention in recent years.¹ In 2013, the International Law Commission (ILC) decided to include the topic *Protection of the Environment in Relation to Armed Conflicts* in its program of work.² Six years later, the Drafting Committee of the ILC presented the Draft Principles it had provisionally adopted on the topic to the ILC in June 2019,³ which the Commission provisionally adopted on first reading at its seventy-first session a month later. The Draft Principles apply to the three temporal phases of armed conflict (before, during, and after conflict)⁴ and cover broad ground, from the designation of protected zones to the management of toxic and hazardous remnants of war.

Recognizing the increased willingness to address the role of businesses in armed conflict, which I describe in more detail later, the Draft Principles include two provisions that are directly relevant to corporations. First, Draft Principle 10 recommends that States take appropriate measures to ensure that corporations operating in or from their territories exercise due diligence with respect to protection of the environment in areas of armed conflict or in post-conflict environments. Second, Draft Principle 11 addresses situations in which harm has been caused to the environment by corporations and invites States to take appropriate measures, legislative or otherwise, to ensure that companies can be held liable for having caused such harm.

The inclusion of Draft Principles 10 and 11 makes sense in the context of an international legal sphere increasingly concerned with the impact of businesses,

¹ See for example International Committee of the Red Cross, ‘Environment and International Humanitarian Law’ (2010) available at www.icrc.org/en/doc/war-and-law/conduct-hostilities/environment-warfare/overview-environment-and-warfare.htm (last visited 26 May 2020). See also Resolution No. 15 of the United Nations Environment Assembly of the United Nations Environment Programme, *Protection of the Environment in Areas Affected by Armed Conflict*, UN Doc UNEP/EA.2/Res.15, 4 August 2016.

² GA Res. 68/112, UN Doc A/RES/68/112, 18 December 2013.

³ ILC, *Protection of the Environment in Relation to Armed Conflicts: Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading*, UN Doc A/CN.4/L.937, 6 June 2019.

⁴ Although it should be noted that not all Draft Principles are applicable during all phases; see Draft Principle 1 and Commentary thereto in International Law Commission, *Report of the International Law Commission to the Seventy-First session (29 April - 7 June and 8 July - 9 August 2019)*, UN Doc A/74/10, 216, 20 August 2019.

particularly multinational corporations, on both humans and the environment. Indeed, by operating in “[...] spatially concentrated clusters often referred to as transnational production chains [...]”,⁵ such corporations simultaneously transcend and exercise unprecedented influence over national economies.⁶ This creates a dissonance between the globalization of capital and the spatiality of the law, and, in particular, the spatiality of adjudication. By focusing on traditional links between business activities and domestic territory, domestic legal regimes become out of step with a global economy made of transnational supply chains, cross-border trade, and movements of both goods and people.⁷ Where the economy goes, and the law fails to follow, an accountability breach is created, opening a space into which many corporations rush. The dissonance creates what Baxi refers to as the “geographies of injustice”⁸ peculiar to conflict adjudication. The resulting negative effect is compounded by the privatization of State functions,⁹ leading to an erosion of “[...] the substance of public authority that States wield over their territory – including their capacity to protect human rights [...]”.¹⁰

This territoriality of jurisdiction is, of course, a consequence of the sovereignty granted to States under international law.¹¹ It is based on the Westphalian and post-Westphalian concept of the territorial nation-State, under which a State’s territory is traditionally regarded as the basic unit for

⁵ P. Macklem, ‘Corporate Accountability Under International Law: The Misguided Quest for Universal Jurisdiction’, 7 *International Law FORUM du droit international* (2005), 281.

⁶ For example, Kearney notes that the power of transnational corporations vis-à-vis the State has “[...] climbed markedly over the past sixty years [...]”, with 69 of the world’s 100 largest economies now belonging to corporations rather than States; see D. Kearney, ‘Transforming Adversary to Ally: Mobilizing Corporate Power for Land Rights’, 27 *Journal of Transnational Law & Policy* (2017-2018), 100-101.

⁷ Report of the United Nations High Commissioner for Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse*, UN Doc A/HRC/32/19, 10 May 2016, para. 5.

⁸ U. Baxi, ‘Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law’, 23 *Indiana Journal of Global Legal Studies* (2016).

⁹ For a discussion of the global trend towards privatization, see A. Reinisch, ‘The Changing International Framework for Dealing with Non-State Actors’, in P. Alston (ed.), *Non-State Actors and Human Rights* (2005), 75.

¹⁰ D. Augenstein, ‘Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy’, 18 *Human Rights Law Review* (2018), 594.

¹¹ E. Young, ‘Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation after Kiobel’, 64 *Duke Law Journal* (2015) 6, 1031.

jurisdiction.¹² Thus, the barriers to cross-border litigation involving multinational companies are simply “[...] an expression of the delimitation of jurisdiction in public international law that protects the sovereign authority States wield over their territory and the people therein [...]”¹³

As a result of this sovereign status, the State is usually considered to be the only subject under international law. Under this view, companies, as non-State actors, are not considered responsible for their internationally wrongful acts, including violations of international human rights norms.¹⁴ In addition, classical international human rights law typically rested on the assumption that the perpetrator and victims would be located in the same territory, that there was a “[...] geographical overlap between the rights-owner and the rights-bearer [...]”¹⁵ As a result, international law appears to be an imperfect tool to address violations where a business (e.g. a multinational company headquartered in Europe) and the victim of its operations (e.g. local communities suffering environmental harm in a conflict zone) are located on two separate territories, often subject to different legal regimes.¹⁶ This is addressed in section *B. Doctrinal Difficulties in Applying International Law to Corporations*.

For my purposes, it is also important to understand the link between the three components of Draft Principles 10 and 11, which are at the intersection of a Venn diagram made up of three circles: corporations, environmental harm, and armed conflict. Section *C. Business, Armed Conflict and the Environment: A Venn Diagram* will examine the interplay between those three circles in more detail.

Having established the doctrinal difficulties of imposing direct international law obligations on businesses, and having explained precisely why the link between business, armed conflict, and the environment calls for some sort of corporate liability, the question is then: how? This contribution explores three potential avenues to address corporate environmental harm in armed conflict: the law of State responsibility through a binding treaty, the domestic

¹² Reinisch, ‘The Changing International Framework for Dealing with Non-State Actors’, *supra* note 9.

¹³ Augenstein, ‘Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy’, *supra* note 10, 598.

¹⁴ C.L. Sriram, O. Martin-Ortega & J. Herma, *War, Conflict and Human Rights: Theory and Practice*, 3rd ed. (2018), 83.

¹⁵ Augenstein, ‘Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy’, *supra* note 10, 596.

¹⁶ Macklem, ‘Corporate Accountability Under International Law: The Misguided Quest for Universal Jurisdiction’, *supra* note 5, 282-283.

application of international criminal law, and transnational tort litigation before national courts.

Indeed, the law of State responsibility could be one way to hold businesses indirectly accountable. BHR is a booming discipline, growing out of the recognition that corporations have a responsibility to respect human rights and should be held accountable for adverse human rights impacts linked to their commercial operations. It is characterized by the wide spectrum of instruments it encompasses, from soft law *initiatives* to (admittedly less frequent) legally binding instruments.¹⁷ A milestone in the development of BHR has been the adoption of the United Nations (UN) Guiding Principles on Business and Human Rights (the “UN Guiding Principles”)¹⁸ in 2011, which developed a framework based on three pillars: the State duty to protect human rights, the corporate responsibility to respect human rights, and access to remedy for victims of business-related abuses. Although not legally binding, the UN Guiding Principles are nevertheless considered “[...] a key reference for responsible business conduct by all stakeholder groups including business, civil society, and governments.”¹⁹ Soft law instruments, however, have often revealed the limit of their impact.²⁰ To address such shortcomings, an intergovernmental working group was established within the UN framework in June 2014, with the task of drafting a binding treaty on human rights and business (“Draft BHR Treaty”). As we will see below, this UN-backed binding treaty is currently being negotiated, albeit not without difficulty. Corporate accountability for human rights and environmental abuses²¹ is a central component of BHR. The current

¹⁷ E. Groulx Diggs, M. Regan & B. Parance, ‘Business and Human Rights as a Galaxy of Norms’, 50 *Georgetown Journal of International Law* (2019) 2, 309.

¹⁸ 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*, UN Doc. A/HRC/17/31, 21 March 2011.

¹⁹ A. Graf & A. Iff, ‘Respecting Human Rights in Conflict Regions: How to Avoid the Conflict Spiral’, 2 *Business and Human Rights Journal* (2017), 111.

²⁰ For a discussion of the flaws associated with purely voluntary approaches and soft law instruments, see D. Bilchitz, ‘The Necessity for a Business and Human Rights Treaty’, 1 *Business and Human Rights Journal* (2016), 203-228.

²¹ Throughout this paper, the term *human rights* will be used broadly to cover legal claims anchored in a variety of disciplines, from criminal law to tort law. The reason for this is twofold. First, such disciplines have at times been found to contain strong human rights elements, and in fact they form an integral part of *business and human rights* as a discipline. Second, it remains common for environmental concerns to be pursued through the lens of human rights law. While there are valid concerns about an overly anthropocentric view

draft contains provisions relevant to protection of the environment and legal liability of corporations. If enacted, the treaty could offer an avenue for addressing corporate environmental harm in armed conflict through what Harold Koh calls *transnational law*,²² or international law that is then transplanted at the domestic level. This avenue is discussed in more detail at section *D. State Responsibility, Transnational Law, and the Draft BHR Treaty*.

The fight for corporate accountability is unfolding both at the international and domestic levels. National court systems provide an effective battleground for those seeking to use strategic litigation to hold companies to account, fueled by an apparent judicial willingness to consider what can broadly be defined as *human rights cases* against corporations.²³ As national judges increasingly look to comparative as well as international jurisprudence for guidance, cross-fertilization occurs both vertically (international/national) and horizontally (across domestic jurisdictions).²⁴ Domestic avenues for redress and accountability offer a crucial tool to address environmental harm caused by corporations in armed conflict. This article offers two main routes through which environmental harm caused by corporations could be addressed. Section *E. International Criminal Law and Argor-Heraeus* describes the public law route, which consists of a combination of criminal law and the increasing use of extra-territorial (and, in some cases, universal) jurisdiction. Section *F. Transnational Tort Litigation and Vedanta* discusses the private law route, i.e. the use of transnational tort litigation by

of environmental protection, the human rights framework, as understood in this broad sense, remains a useful conceptual tool for our purposes. See T. Stephens, *International Courts and Environmental Protection* (2009), 54. See also J. Auz Vaca, 'The Environmental Law Dimensions of an International Binding Treaty on Business and Human Rights', 15 *Brazilian Journal of International Law* (2018), 158.

²² H. Koh, 'Why Transnational Law Matters', 24 *Penn State International Law Review* (2005-2006), 745.

²³ Open Society Justice Initiative, *Strategic Litigation Impacts: Insights from Global Experience* (2018), 39: "Not only are more cases being brought, but litigation is expanding into new fields, from anti-corruption to international criminal justice, from the right to land to a sustainable environment, from access to citizenship to the rights of persons with intellectual disabilities. It is being pursued, not only in domestic fora, but transnationally through participation in other national court systems, on the assumption that, as national judges increasingly look to comparative as well as international jurisprudence for guidance, strategic litigation in one place may affect norm development elsewhere."

²⁴ A double-edged process with potentially negative consequences, see for example C. McCrudden, 'Transnational Culture Wars', 13 *International Journal of Constitutional Law* (2015), 434, describing increasing frequency of litigation on religious issues in European courts conducted by United States (US) faith-based Non-Governmental Organizations (NGOs).

private parties such as affected individuals and communities. Importantly, when a violation of criminal law attracts civil liability, “[...] wrongdoing becomes addressed by diffuse layers of law [...]”,²⁵ allowing accountability to become available in multiple fora and cross-fertilization to occur between the private and public law spheres.

This contribution will conclude by arguing that the Draft Principles, the Draft BHR Treaty, international criminal law, and transnational tort litigation all contribute to what Dworkin calls *salience*, a theory of the creation of international law according to which:

“If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole.”²⁶

In this regard, the Draft Principles do not just add a star to what has been called the BHR *galaxy of norms*,²⁷ but also consolidate and participate in the elevation to salience of an international norm against corporate environmental harm in armed conflict.

²⁵ M. Drumbl, ‘Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation and Development’, *International Center for Transitional Justice* (2009), 23.

²⁶ D. B. Dennison, ‘Taking Salience Seriously: the Viability of Ronald Dworkin’s Theory of Salience in the Context of Extra-Territorial Corporate Accountability’, 1 *Glocalism: Journal of Culture, Politics and Innovation* (2015), 8. See also O. Martin-Ortega, ‘Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?’, 32 *Netherlands Quarterly of Human Rights* (2014) 1, 44, 72: “In the attempt to regulate business activities and working methods that impact negatively on human rights, a corporate responsibility to respect human rights is emerging. This is not a legal responsibility in international law, but rather a social expectation that is slowly finding its way into mandatory regulatory frameworks”.

²⁷ A *galaxy* made of various layers of standards and expectations ranging from classic enforceable *hard law* to voluntary principles generated by private parties, multi-stakeholder initiatives, and international organizations. See Groulx Diggs, Regan & Parance, ‘Business and Human Rights as a Galaxy of Norms’, *supra* note 17.

B. Doctrinal Difficulties in Applying International Law to Corporations

The response to environmental harm by multinational businesses in armed conflict will likely require a mix of international and domestic legislation. Two elements of this equation are, by definition, unbound by borders: the environment and multinational corporations. Yet, at the same time, damage occurs and is treated in localized ways, first because the majority of armed conflicts in the world is now non-international armed conflicts²⁸ and, second, because domestic courts are likely to be the most experienced and best prepared to handle cases against corporate actors.²⁹

There are many differences between jurisdictions in terms of legal structures, cultures, traditions, resources, and stages of development, all of which have implications for the issues at hand.³⁰ In that regard, an international liability standard could have an important unifying power.³¹ However, any such international standard of liability would encounter doctrinal difficulties due to the uncertain status of non-State actors, including corporations, in international law. Indeed, the classical view remains that “[...] except through and by the force of treaty, corporations in general do not owe international legal obligations to respect human rights”, with international treaties generally imposing direct international legal obligations only on States.³² Alston calls it the *not-a-cat* syndrome, in which international law status is still defined by reference to the State: you’re either a cat (a State), or you’re not-a-cat (non-State actors, including businesses).³³

²⁸ See D. Pearlstein, ‘Armed Conflict at the Threshold’, 58 *Virginia Journal of International Law* (2019) 2, 371: “The post-Cold War period has seen wars involving non-state actors (non-international armed conflicts, or NIACs) eclipse wars between states as the primary source of armed conflict in the world”.

²⁹ K. Magraw, ‘Universally Liable? Corporate Complicity Liability Under the Principle of Universal Jurisdiction’, 18 *Minnesota Journal of International Law* (2009) 2, 495.

³⁰ Report of the UN High Commissioner for Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance*, UN Doc A/HRC/32/19/Add. 1, 12 May 2016, para. 3.

³¹ V. Grosswald Curran, ‘Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations’, 17 *Chicago Journal of International Law* (2016) 2, 415 [Grosswald Curran, ‘Harmonizing Parent Company Liability’].

³² Macklem, ‘Corporate Accountability Under International Law: The Misguided Quest for Universal Jurisdiction’, *supra* note 5, 281.

³³ P. Alston, ‘The “Not-a-Cat” Syndrome’, in P. Alston (ed.), *Non-State Actors and Human Rights* (2005), 5.

There are, however, at least two reasons why the difficulties associated with a classical, State-centric view of international legal obligations should not be overstated.

First, the classical view is actually undergoing radical changes, and it can now be “[...] credibly asserted that a contemporary reading of human rights instruments shows that non-State actors are also addressees of human rights norms.”³⁴ After the Tokyo and Nuremberg war crimes trials “[...] pierced the veil of State sovereignty and dispelled the myth that international law is for states only”,³⁵ non-State actors began looming ever larger on the horizons of international and human rights law.³⁶ A more nuanced view of legal personality is emerging which departs from a purely State-centric approach.³⁷ States arguably have a *vicarious* or *subsidiary* duty to protect human rights by regulating the behavior of private (non-State) actors, a finding which “[...] now belongs to the *acquis* of international human rights law.”³⁸ Fulfillment of this duty could take the form of States strengthening the legal framework on corporations and human rights, for example by establishing parent company or group liability regimes.³⁹ Regional human rights institutions have espoused this idea of States’ vicarious liability for non-State actors in their case law.⁴⁰ As we will see, this idea of indirectly imposing obligations on non-State actors (in our case, businesses) through State responsibility is central to the upcoming Draft BHR Treaty. The move towards a people-centered approach to international law will only be accelerated by the continuing rise of corporations on the global scene and a better recognition and understanding of environmental rights.⁴¹ Talk of recognition of corporate international legal personality tends to cause anxiety among those

³⁴ Reinisch, ‘The Changing International Framework for Dealing with Non-State Actors’, *supra* note 9, 72.

³⁵ H. Koh, ‘Transnational Public Law Litigation’, 100 *Yale Law Journal* (1991), 2358.

³⁶ Alston, ‘The “Not-a-Cat” Syndrome’, *supra* note 33, 5.

³⁷ Reinisch, ‘The Changing International Framework for Dealing with Non-State Actors’, *supra* note 9, 78.

³⁸ O. De Schutter, ‘Towards a New Treaty on Business and Human Rights’, 1 *Business and Human Rights Journal* (2015) 41, 44 [De Schutter, Towards a New BHR Treaty].

³⁹ Committee on Economic, Social and Cultural Rights, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc E/C.12/2011/1, 12 July 2011, 44 [CESCR, July 2011 Statement].

⁴⁰ Reinisch, ‘The Changing International Framework for Dealing with Non-State Actors’, *supra* note 9, 80.

⁴¹ M. Sornarajah, ‘State Responsibility for Harms by Corporate Nationals Abroad’, in C. Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 496.

who seek to decrease, not increase, the legitimacy of corporate participation on the world stage,⁴² but this ignores the fact that legal personality may be limited and does not imply the full set of rights and duties of States, making fears about granting *corporate rights* irrelevant.⁴³

Secondly, in the end, determinations of international personhood do not matter. For example, the concept of international legal personality has sometimes been held “[...] as a shield against the proposition that international criminal law duties can, and do, legitimately and meaningfully extend beyond natural persons”⁴⁴ – but ultimately, the legal personality debate plays no real argumentative role in clarifying the obligations, rights, and capacities of corporations. Noting the circularity of the argument (proving legal personality of corporations in order to impose obligations, and doing so by arguing that companies have international obligations), Reinisch wearily commented that “[t]ruly, the suspicion that the whole matter of international legal personality forms a vast intellectual prison [...] is sometimes hard to suppress.”⁴⁵

The question of the legal personality of businesses under international law is far from settled and continues to generate debate, including in the context of business and human rights.⁴⁶ The extent of its practical impact on corporate

⁴² J. Kyriakakis, ‘International Legal Personality, Collective Entities, and International Crimes’, in N. Gal-Or, C. Ryngaert & M. Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (2015), 93.

⁴³ *Ibid.*, 94.

⁴⁴ *Ibid.*, 101.

⁴⁵ Reinisch, ‘The Changing International Framework for Dealing with Non-State Actors’, *supra* note 9, 72. See also N. Gal-Or, M. Noortman & C. Ryngaert, ‘Introduction; Responsibilities of the Non-State Actor in Armed Conflict and the Market Place’, in N. Gal-Or, C. Ryngaert & M. Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (2015), 3: “Forcing [non-State actors such as corporations] into the so-called pigeon-hole of legal personality or international subjectivity by measuring it against the State has remained an unsuccessful intellectual exercise. The discourse on the rights of the NSA has been attempting to avoid this conundrum by referring to NSA’s rights as established via participation, not as of inherent subjectivity. Our study follows this strategy of circumvention by focusing on obligations and responsibility as arising from NSA’s *participation* in, and – possibly adverse – impact on, international affairs. It thus continues to plow in this yet barren field in public international law.”

⁴⁶ For examples of the discussion surrounding the legal personality of businesses in the BHR context, see C. Holt, S. Stanton & D. Simons, ‘The Zero Draft Legally Binding Instrument on Business and Human Rights: Small Steps Along the Irresistible Path to Corporate Accountability’ (2018), available at <https://www.business-humanrights.org/>

accountability, however, remains to be seen, particularly in the context of increasingly blurred boundaries between the international and domestic legal spheres.⁴⁷

C. Business, Armed Conflict, and the Environment: A Venn Diagram

Contemporary conflicts are increasingly characterized by the involvement of private actors such as corporations.⁴⁸ Similarly, the connection between conflict and the exploitation of natural resources for commercial gain is well documented⁴⁹. Academic literature has often explored the link between i) businesses and armed conflict, ii) armed conflict and environmental harm, and iii) environmental harm and businesses.

Yet surprisingly little has been written on the three-dimensional interaction of all three components (business, armed conflict, environmental harm), at the intersection of which Draft Principles 10 and 11 can be found. The section below explores the links between those components through the prism of four paradigmatic examples of that Venn diagram between business, armed conflict, and environmental harm.

The first example is that of *land grabs*, or land acquisitions that are undertaken without the evicted party's consent or that otherwise violate their human rights.⁵⁰ Land grabs involve the forcible displacement of communities,

en/the-zero-draft-legally-binding-instrument-on-business-and-human-rights-small-steps-along-the-irresistible-path-to-corporate-accountability (last visited 26 May 2020), and N. Bernaz, 'The Draft UN Treaty on Business and Human Rights: The Triumph of Realism Over Idealism' (2018), available at <https://www.business-humanrights.org/en/the-draft-un-treaty-on-business-and-human-rights-the-triumph-of-realism-over-idealism> (last visited 26 May 2020).

⁴⁷ A.-M. Slaughter & W. Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)', 47 *Harvard International Law Journal* (2006) 2, 327, 350.

⁴⁸ Sriram, Martin-Ortega & Herma, *War, Conflict and Human Rights: Theory and Practice*, *supra* note 14, 80.

⁴⁹ R. Mares, 'Corporate and State Responsibilities in Conflict-Affected Areas', 83 *Nordic Journal of International Law* (2014), 294. The strong correlation between dependence on natural resources and increased risk of conflict is a facet of the *resource curse*, as discussed in e.g. War on Want, 'Fanning the Flames: The Role of British Mining Companies in Conflict and the Violation of Human Rights' (2007), available at <http://curtisresearch.org/wp-content/uploads/Fanning-the-Flames.pdf> (last visited 26 May 2020).

⁵⁰ Following the widely used definition in the Tirana Declaration issued by the International Land Coalition in 2011.

violating a wide spectrum of human rights, including the right to food and water, and also often lead to severe environmental degradation.⁵¹ Land grabs, and corporate grabs in particular, are on the rise globally.⁵² For example, in recent years, Southeast Asia has witnessed a surge in corporate-driven land deals that can often be distinguished by their international nature, far-reaching size, and involvement of transnational corporations. Such deals include agricultural investments (e.g. for rubber and palm oil) as well as large-scale projects driven by extractive industries.⁵³ Land grabs can take such proportions that they arguably amount to international crimes – a position taken by international lawyers who, in 2014, asked the Prosecutor of the ICC to investigate massive land-grabbing and associated crimes, including environmental crimes, committed in Cambodia.⁵⁴

Land-grabbing often acts as a driver of armed conflict and instability, as noted in a 2016-2017 Rights and Resources Initiative Report.⁵⁵ In Colombia, for example, land grabs, insecure rights, and unequal land distribution exacerbated the 50-year civil war, which relied on seized lands as a key funding source.⁵⁶ In Liberia, conflict over land and resources was identified as a root cause of the civil war that ended in 2003.⁵⁷ In Mali, tenure insecurity and weak natural resource management have been recognized as significant factors of conflict that needed to be addressed to ensure lasting peace and stability.⁵⁸ Environmental war crimes, property crimes, and expropriation are inextricably intertwined with conflict, feeding off each other in a cycle wherein atrocities inflicting damage on the environment can, unless remediated as part of post-conflict transition, simply

⁵¹ Friends of the Earth Europe, 'Land & Land-Grabbing', available at <http://www.foeeurope.org/land-grabbing> (last visited 26 May 2020).

⁵² Kearney, 'Transforming Adversary to Ally: Mobilizing Corporate Power for Land Rights', *supra* note 6, 100.

⁵³ Y. Kanosue, 'When Land is Taken Away: States' Obligations under International Human Rights Law Concerning Large-Scale Projects Impacting Local Communities', 15 *Human Rights Law Review* (2015) 4, 643, 645.

⁵⁴ J. Crawford, 'Could Cambodia be Test for New ICC Move on Land Grabs?', JusticeInfo.net (2016) available at <https://www.justiceinfo.net/en/tribunals/icc/29554-could-cambodia-be-test-for-new-icc-move-on-land-grabs.html> (last visited 26 May 2020).

⁵⁵ Rights and Resources Initiative, 'From Risk and Conflict to Peace and Prosperity: The Urgency of Securing Community Land Rights in a Turbulent World', *Annual Review 2016-2017* (2017), 25.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, 26.

⁵⁸ *Ibid.*, 26.

reactivate competition over resources and reignite fighting.⁵⁹ With the centrality of land to livelihoods and poverty reduction in post-war torn areas, land grabs regularly attract disputes and controversy in post-conflict regions,⁶⁰ leading to a volatile environment in which large-scale land acquisitions can spark political instability.⁶¹

Another example of intersection consists of commercial activities leading to human displacement outside the context of land grabbing. Such was the case in South Sudan, where commercial exploitation of oil resources was found to be a major driver behind the Sudanese government's *scorched earth* policy that displaced thousands of people.⁶² The ecological impact of conflict-related human displacement was recognized by the ILC itself in Draft Principle 8, which addresses the potential environmental strain caused by massive displacement of civilian populations. Such was the case in the Democratic Republic of Congo, for example, where thousands of internally displaced refugees, the vast majority of which lived with host communities or in rudimentary shelters in makeshift camps, led to large-scale environmental degradation (e.g. deforestation to meet energy and housing needs, wildlife poaching, charcoal trade as a way to earn money, exponential unplanned urbanization leading to waste management issues).⁶³

A third illustration of the intersection between business, armed conflict, and the environment can be found in the rights of indigenous people, whose "[...] special relationship [with] their environment [...]"⁶⁴ is explicitly recognized in Draft Principle 5. Indigenous communities are often violently deprived of their rights in the context of commercial activities, such as mining.⁶⁵ Failure to

⁵⁹ Drumbl, 'Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation and Development', *supra* note 25, 5.

⁶⁰ S. Mabikke, 'Escalating Land Grabbing in Post-Conflict Regions of Northern Uganda', Conference paper presented at the International Conference on Global Land Grabbing (2011), ii.

⁶¹ E. Gorman, 'When the Poor Have Nothing Left to Eat: The United States' Obligation to Regulate American Investment in the African Land Grab', 75 *Ohio State Law Journal* (2014) 1, 199, 204.

⁶² HR Council, *Report of the Commission on Human Rights in South Sudan*, UN Doc A/HRC/40/69, 21 February 2019.

⁶³ UN Environment Programme, *The Democratic Republic of the Congo: Post-Conflict Environmental Assessment Synthesis for Policy Makers* (2011), 26.

⁶⁴ *Report of the International Law Commission to the Seventy-First session*, UN Doc A/74/10, 20 August 2019, 225.

⁶⁵ A. Gedicks, 'Transnational Mining Corporations, the Environment, and Indigenous Communities', 22 *Brown Journal of World Affairs* (2015) 1, 129.

respect the rights of local communities can snowball into violent confrontations and even in some instances undermine national stability, as was the case in 2016 in Ethiopia, where the government's decision to clear forestland for an investment project led to civil and political unrest so severe that a country-wide state of emergency was declared.⁶⁶ Conversely, armed conflict may also have the effect of increasing existing vulnerabilities to environmental harm or creating new types of environmental harm on indigenous territories, thereby affecting the survival and well-being of the peoples connected to it.

A fourth example of corporate links to environmental harm in the context of armed conflict is the war crime of pillaging. Draft Principle 18 restates the prohibition of pillage and its applicability to natural resources. Indeed, illegal exploitation of natural resources is a driving force for many armed conflicts and, in particular, non-international armed conflict in recent decades.⁶⁷ Pillage often causes major environmental strain on affected areas.⁶⁸ One emblematic example of this link between natural resources and violence is the Democratic Republic of Congo, where natural resources are widely acknowledged to have played a key role in the country's complex cycle of conflict.⁶⁹ The commentary is "[...] unanimous that the real reason for the protracted armed conflict that has been going on in that country since 1993 is the exploitation of the country's

⁶⁶ F. Horne, 'Anger Boiling Over Ethiopia: Declaration of State of Emergency Risks Further Abuses', Human Rights Watch (2016), available at <https://www.hrw.org/news/2016/10/11/anger-boiling-over-ethiopia> (last visited 26 May 2020).

⁶⁷ According to the UN Environment Programme, 40 per cent of internal armed conflicts over the past 60 years were related to natural resources, and since 1990 at least 18 armed conflicts have been fuelled directly by natural resources. See UN Environment Programme, *Renewable Resources and Conflict: Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflicts* (2012), 14.

⁶⁸ See for example United Nations, UN Environment Programme, *The Democratic Republic of the Congo: Post-Conflict Environmental Assessment Synthesis for Policy Makers* (2011), 26-28; UN Security Council *Report of the Panel of Experts Pursuant to Paragraph 25 of Security Council Resolution 1478 (2003) Concerning Liberia*, UN Doc S/2003/937, 2003, para. 14; UN Environment Programme-INTERPOL, *The Rise of Environmental Crime – A Growing Threat to Natural Resources Peace, Development and Security* (2016), 69. See also A. Lopez, 'Criminal Liability for Environmental Damage Occurring in Times of Non-International Armed Conflict: Rights and Remedies', 18 *Fordham Environmental Law Review* (2007) 2, 231.

⁶⁹ UN Environment Programme, *The Democratic Republic of the Congo: Post-Conflict Environmental Assessment Synthesis for Policy Makers* (2011), 24; UN Security Council, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, UN Doc S/2002/1146, 16 October 2002.

mineral resources [...]”,⁷⁰ with many companies, especially Canadian and American corporations, entering into mineral exploitation deals with both the rebels and Kabila’s government. The volatile environment of resource-rich States creates opportunities for corporations to engage in resource theft, plunder, and other forms of illegal natural resource exploitation, which often brings further instability to conflict-riddled countries.⁷¹ Some of the most emblematic cases of corporate unaccountability have appeared in unstable and violence-ridden zones,⁷² due in part to the role of natural resources in initiating, escalating, and sustaining armed conflict.⁷³

Perhaps unsurprisingly, measures aimed at addressing the role of businesses in conflict have tended to be *siloed* and consider only two of the three components at the same time: business and environmental harm, environmental harm and armed conflict, or business and armed conflict. The latter has given rise to a wide array of corporate social responsibility initiatives aimed at safeguarding human rights in conflict-affected areas, from the 2000 Voluntary Principles for Security and Human Rights to the 2011 Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas produced by the Organization for Economic Co-operation and Development (OECD).⁷⁴ Conflict sensitive business practices, which have been on the rise since 2005,⁷⁵ are increasingly integrated into human rights due diligence.

The BHR world is cognizant of the need for specific regulation of businesses operating in conflict-affected areas, and UN Guiding Principle 7 explicitly acknowledges that some of the worst human rights abuses involving business occur in armed conflict situations “[...] where the human rights regime cannot be expected to function as intended [...]”. The commentary to UN

⁷⁰ P. Okowa, ‘Natural Resources in Situations of Armed Conflict: Is There a Coherent Framework for Protection?’, 9 *International Community Law Review* (2007) 3, 237, 239.

⁷¹ J. Tsabora, ‘Illicit Natural Resource Exploitation by Private Corporate Interests in Africa’s Maritime Zones during Armed Conflict’, 54 *National Resources Journal* (2014) 1, 181, 190.

⁷² Mares, ‘Corporate and State Responsibilities in Conflict-Affected Areas’, *supra* note 49, cites the example of Talisman in Sudan, Shell and other oil companies operation in a militarized Niger delta, and Freeport McMoran mining activities in Indonesia’s West Papua while an emergency was taking place.

⁷³ S. Wisner, ‘Criminalizing Corporate Actors for Exploitation of Natural Resources in Armed Conflict’, 16 *Journal of International Criminal Justice* (2018) 5, 964.

⁷⁴ Mares, ‘Corporate and State Responsibilities in Conflict-Affected Areas’, *supra* note 49, 295.

⁷⁵ Graf & Iff, ‘Respecting Human Rights in Conflict Regions: How to Avoid the Conflict Spiral’, *supra* note 19.

Guiding Principle 7 suggests a range of actions that both States and businesses can take to address such heightened risks, including for States to explore “[...] civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses [...]”.

The specific challenges and responses to business and human rights in conflict-affected regions were also addressed in a report to the Human Rights Council in 2011 titled “Business and human rights in conflict-affected regions: challenges and options towards State responses”.⁷⁶ It contains a list of recommendations for States to regulate business impacts in conflict-affected regions throughout the conflict cycle, including the suggestion that States “[...] should explore civil, administrative or criminal liability [...]” for businesses committing or contributing to gross human rights abuses.

This is echoed in the commentary to UN Guiding Principle 23:

“Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.”

The link between armed conflict and corporate accountability has two components, both mirrored in the Draft Principles.

First, there is a growing recognition that multinationals wanting to operate in such volatile environments will need to conduct an enhanced due diligence process to identify risks of gross human rights abuse. Businesses will also be expected to act on the information uncovered through this enhanced due diligence process, which in extreme cases could “[...] result in dramatic

⁷⁶ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises John Ruggie, *Business and Human Rights in Conflict-Affected Regions: Challenges and Options Towards State Responses*, UN Doc A/HRC/17/32, 27 May 2011.

decisions of choosing to not conduct business in conflict zones [...]” at all.⁷⁷ This is reflected in Draft Principle 10 on corporate due diligence.

Second, it highlights the need for better access to remedy for harm occurring in so-called “high-risk host countries” (defined broadly by Skinner as countries that have a weak, ineffective, or corrupt judicial system)⁷⁸ which includes the majority of countries where international or non-international armed conflict is unfolding. This is addressed in Draft Principle 11 on corporate liability.

D. State Responsibility, Transnational Law and the Draft BHR Treaty

Beyond such voluntary initiatives and soft law requirements, such as those enshrined in the UN Guiding Principles, could the law of State responsibility help address corporate environmental harm in armed conflict?

Faced with the *geographies of injustice* conundrum discussed above, some international treaty bodies have certainly advocated a progressive approach to extraterritorial human rights protection,⁷⁹ calling on home States to take steps to facilitate greater access to State-based judicial mechanisms by those adversely affected by foreign business-related human rights impacts of business enterprises domiciled in the respective home States.

For example, a 2011 statement issued by the UN Committee on Economic, Social, and Cultural Rights (CESCR) issued a statement (the “CESCR July 2011 Statement”) inviting States “[...] to take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction.”⁸⁰ In 2017, the CESCR published a general comment⁸¹ relating specifically to economic, social, and cultural rights in the context of business

⁷⁷ Mares, ‘Corporate and State Responsibilities in Conflict-Affected Areas’, *supra* note 49, 303.

⁷⁸ G. Skinner, ‘Parent Company Accountability: Ensuring Justice for Human Rights Violations’, International Corporate Accountability Roundtable (2015), 10, available at <https://justice-project.org/wp-content/uploads/2017/07/pcap-report-2015.pdf> (last visited 26 May 2020).

⁷⁹ Augenstein, ‘Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy’, *supra* note 10, 610.

⁸⁰ CESCR, July 2011 Statement, *supra* note 39, para. 5.

⁸¹ CESCR, *General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc E/C.12/GC/24, 10 August 2017.

activities, in which it again exhorts States to “[...] take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory)”. Such calls have also been made in specific contexts such as children’s rights, as seen in a 2013 general comment by the UN Committee on the Rights of the Child⁸² encouraging States to provide mechanisms, both judicial and non-judicial, to provide remedy “[...] for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned.”

Such exhortations to adopt a broad view of extraterritorial obligations are not limited to the human rights sphere. For example, Article 5(3) of the new Dutch model bilateral investment treaty requires contracting States to “[...] take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy [...]”.

Perhaps most emblematic of the international community’s willingness to consider extraterritorial protection of human rights is the Draft BHR Treaty currently under negotiation. The genesis of this draft treaty can be found in a September 2013 statement to the Human Rights Council,⁸³ which called for a legally binding international instrument on business and human rights. An intergovernmental working group was established within the UN framework in June 2014, with the task of drafting a binding treaty on human rights and business. A first draft (the *Zero Draft*) was published on 16 July 2018.⁸⁴

The drafting and negotiation process, which is still ongoing, has been bumpy so far, with divided opinions and reluctant engagement from some States and regional organizations. There has been considerable pushback from the European Union (EU), for example, which some say is at best a “[...] lack of

⁸² UN Committee on the Rights of the Child, *General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children’s Rights*, UN Doc CRC/C/GC/16, para. 44.

⁸³ Republic of Ecuador, Statement on behalf of a Group of Countries at the 24th Session of the Human Rights Council (2013), available at <https://www.business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf> (last visited 26 May 2020).

⁸⁴ ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’, Zero Draft, 16 July 2018, available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> (last visited 26 May 2020).

substantive EU engagement [...]” in the process,⁸⁵ and at worst a decision to drop out of it altogether,⁸⁶ and which the EU defended on the basis of a need to “[...] balance human rights concerns with legitimate economic interests.”⁸⁷

A second, revised draft was published on 16 July 2019.⁸⁸ Intergovernmental negotiations continued during the 5th session of the working group on 14 to 18 October 2019, during which the EU noted its (and others’) continuing dissatisfaction with the draft instrument, as well as the fact that it would reserve its position until granted a formal negotiation mandate.⁸⁹

Although an in-depth analysis of the current Draft Treaty is outside the scope of this contribution, three features are worth noting. The first feature concerns the scope of the Draft Treaty. Article 6 contains the standard of legal liability, which would require States to have a “[...] comprehensive and adequate [...]” system of legal liability in place for corporate violations of human rights. This would include legal liability for a company who failed to prevent harm caused by another natural or legal person in the context of business activities, regardless of where the activity takes place. This seems like a broad provision, but two conditions are attached to that liability: the company must have had a contractual relationship with that person, and the company must “[...] sufficiently control [...]” or supervise the relevant activity that caused the harm, or should have foreseen the risk of abuse. This could considerably narrow the scope of the provision in practice, where supply chains can consist of numerous layers not

⁸⁵ Fédération internationale des droits de l’homme, ‘Citizens Demand the EU Stops Stalling on a Treaty to Ensure that Businesses Respect Human Rights’ (18 July 2019), available at <https://www.fidh.org/en/international-advocacy/european-union/citizens-demand-the-eu-stops-stalling-on-a-treaty-to-ensure-that> (last visited 26 May 2020).

⁸⁶ Friends of the Earth Europe, ‘Leak: EU to Back out of UN Treaty on Business and Human Rights’ (13 March 2019), available at <http://www.foeeurope.org/leak-eu-un-treaty-human-rights-130319> (last visited 26 May 2020).

⁸⁷ European Parliament Research Service, ‘Briefing: Towards a Binding International Treaty on Business and Human Rights’ (2018), available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI\(2018\)620229_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf) (last visited 26 May 2020).

⁸⁸ ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’, Revised Draft, 16 July 2019, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (last visited 26 May 2020).

⁸⁹ See compilation of statements made at the HR Council, ‘Fifth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’, available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx> (last visited 26 May 2020).

necessarily linked by contractual relationships.⁹⁰ Adjudicative jurisdiction for human rights violations amounting to crimes has also been narrowed, as the new draft contains no trace of the previous Article 10(11) in the Zero Draft, which required States to implement “[...] appropriate provisions for universal jurisdiction [...]” over such crimes. As we will see below, universal jurisdiction is a controversial topic, which may explain its removal from the recent draft. Although explicit references to universal jurisdiction are gone, the new Article 6(7) now contains a list of crimes for which States must ensure some sort of liability of corporations. This includes the core international crimes of war crimes, crimes against humanity and genocide as defined by the Rome Statute. If enacted, this provision would be significant in that it would align domestic laws with international criminal law – a welcome unification, but one which might however prove politically unpalatable for those States who are not party to the Rome Statute.

A second noteworthy feature is the contrast between Article 10(8) of the Zero Draft, which required States to provide for corporate criminal liability for human rights abuses amounting to criminal offences, and the first few words of Article 6(7), under which States are asked to provide liability for the listed crimes “[...] subject to their domestic law [...]”. Under the new Draft, States can also choose to provide criminal but also civil or administrative liability of legal persons for such crimes.

Finally, the current Draft is relevant to our discussion in that it addresses both the question of human rights impact of business activities in conflict situations, as well as the specific question of impact on the environment. Article 14 of the current draft requires special attention to be paid in the case of business activities in conflict-affected areas. Article 5(3)(e) requires enhanced human rights due diligence when conducting business activities in conflict areas or occupied territories, while Article 5(3)(a) and (c) provide for mandatory environmental impact assessment and public reporting on environmental standards.

Despite the opposition and controversy surrounding it, the Draft BHR Treaty is therefore a significant step forward in the pursuit of corporate accountability, including for environmental harm in armed conflict. Regulating corporate behavior through an international instrument binding on States

⁹⁰ T. Manandhar & P. Thielborger, ‘Bending the Knee or Extending the Hand to Industrial Nations? A Comment on the New Draft Treaty on Business and Human Rights’, *EJIL:Talk!* (23 August 2019), available at <https://www.ejiltalk.org/bending-the-knee-or-extending-the-hand-to-industrial-nations-a-comment-on-the-new-draft-treaty-on-business-and-human-rights/> (last visited 26 May 2020).

would also constitute an example of *transnational law* allowing bypassing of the debate on corporate personality in public international law. It is, however, still at the negotiating stage. The next two sections therefore look at existing regimes and mechanisms already in place to address such violations.

E. International Criminal Law and Argor-Heraeus

In 2013, Argor-Heraeus, one of the largest gold refineries in the world, became the subject of a domestic criminal investigation in Switzerland for pillaging Congolese natural resources. According to the criminal complaint filed with the Swiss Federal Prosecutor's Office by Non-Governmental Organization (NGO) TRIAL, in 2004-2005 the company bought approximately three tons of gold ore illegally mined in the wartorn region of Ituri by Congolese militia *Front des Nationalistes Intégrationnistes* (FNI), then shipped through intermediaries in Uganda and the Jersey Islands.⁹¹ Gold proceeds were then used to fund the ongoing war.⁹²

According to the complaint, Argor-Heraeus knew, or at least should have known, that the raw material it was acquiring was the proceeds of pillage, which is a war crime. This claim was based on evidence such as reports from the UN Group of Experts, NGO and media reports showing that the extent of pillaging in the Democratic Republic of Congo was a well-known fact in Switzerland at the time, and on data from the Ugandan ministry of mines and from other official sources indicating that Ugandan production represented only a small proportion of its gold exports.

In 2015, in a widely criticized decision, the Swiss Federal Prosecutor's Office dismissed the complaint for lack of evidence.⁹³ The decision found that

⁹¹ D. Muhlemann & S. Mbiyavanga, 'Natural Resources and Money Laundering: Commodity and Precious Metals Deals From the Perspective of Swiss Money Laundering Law' (2018), available at <https://www.oecd.org/corruption/integrity-forum/academic-papers/Muhlemann-Mbiyavanga.pdf> (last visited 26 May 2020); J. Stewart, 'Corporate War Crimes Begin', *Opinio Juris* (2013) available at <http://opiniojuris.org/2013/11/14/corporate-war-crimes-begin/> (last visited 26 May 2020).

⁹² Human Rights Watch, 'The Curse of Gold' (2005), available at <https://www.hrw.org/report/2005/06/01/curse-gold> (last visited 26 May 2020); UN SC, *Report of the Group of experts submitted pursuant to resolution 1616 (2005)*, UN Doc. S/2006/53, 23 December 2005, marginal note 8.

⁹³ Decision to dismiss proceedings dated 10 March 2015, translation made available by the Open Society Justice Initiative at <https://www.dropbox.com/s/xsgeuz7ihnvpubi/Argor%20Decision%20-%20Formal%20English%20Translation.pdf?dl=0> (last visited 26 May 2020) [Decision to dismiss proceedings dated 10 March 2015].

there was a non-international conflict raging in the gold mining areas of Ituri, with widespread illegal mining of gold. It also found that Argor-Heraeus had “objectively” aided and abetted the militia in the commission of war crimes in Ituri, by refining the gold and adding to its value and thereby incentivizing the militia to continue its pillaging.⁹⁴ The Prosecutor, however, found the knowledge element to be lacking as there was “[...] no evidence that the accused [knew] of the intention of the FNI [...]”.⁹⁵ Argor-Heraeus trusted its intermediary when it told them that the gold came from legal sources in Uganda, and the Prosecutor found no evidence that the Swiss company knew about various public reports revealing the origin of the pillaged gold.

The Argor-Heraeus case study is at the intersection of corporate accountability and armed conflict. Although not strictly about environmental damage, it does concern a company’s potential complicity in a war crime that is often related to environmental harm. It also raises two wider issues relevant for the general debate on corporate accountability.

First, it raises the question of a company being prosecuted for war crimes before the only permanent international court created for that purpose, the ICC. As we will see in section *E.I. Prosecuting Legal Entities for International Crimes*, the absence of corporate criminal liability before the ICC makes the international prosecution of legal entities difficult, but a number of domestic regimes allow for the prosecution of companies for international crimes in national courts.

Second, although eventually dismissed, the Argor-Heraeus investigation arguably signals that, “[...] in the absence of prosecution of corporate entities by international courts, domestic courts are increasingly willing to act.”⁹⁶ Given the increasing role of transnational corporations in war crimes abroad, however, accountability would have to entail some sort of extraterritoriality mechanism, the most controversial version of which is universal jurisdiction. Section *E.II. Universal/Extraterritorial Jurisdiction* looks at the tools used by domestic courts to allow proceedings in situations where neither the territorial jurisdiction of the State nor the *classic* bases for extraterritorial jurisdiction are engaged, and at the expansion of domestic courts’ jurisdiction through universal or extraterritorial jurisdiction.

⁹⁴ *Ibid.*, 11.

⁹⁵ *Ibid.*

⁹⁶ O. Radics & C. Bruch, ‘Pillage, Conflict Resources and Jus Post Bellum’, in C. Stahn, J. Iverson & J. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (2017), 160, 162.

The application of international criminal law to corporations before domestic courts could, if combined with extraterritorial jurisdiction, provide efficient avenues to address certain forms of corporate environmental harm (those constituting international crimes) occurring in armed conflict. Such a combination is not without its challenges, however, as we will see in Section *E.III. Challenges*.

I. Prosecuting Legal Entities for International Crimes

International criminal law addresses particularly grave abuses, such as war crimes, crimes against humanity, and genocide. There is a well-established history of prosecuting individuals before international tribunals and military courts for their role in international crimes committed in the context of business activities,⁹⁷ from the *1946 Zyklon B case*⁹⁸ to the *Media Case* before the International Criminal Tribunal for Rwanda⁹⁹.

Criminal liability of legal entities, on the other hand, is far more controversial, despite frequent arguments that there are specific advantages to holding legal persons criminally responsible, especially in the context of natural resource exploitation.¹⁰⁰ It has been argued that focusing on the company itself can in some cases maximize the possibility for reparations, “[...] since in case of a conviction, assets of the company itself could be forfeited [...]”.¹⁰¹ Corporate criminal liability may also offer a better response in cases where a particular corporate culture has encouraged the commission of abuses, making it hard to isolate individualized contributions.¹⁰²

As we have seen, doctrinal difficulties arise from the theory of subjectivity under which non-State actors (in this case, corporations) do not have legal personality under international law. Further complicating matters are philosophical objections to corporate criminal liability, on the basis that “[...] legal entities cannot be deemed to act independently and hence are not

⁹⁷ *Ibid.*, 160.

⁹⁸ *Case No. 9, The Zyklon B Case: Trial of Bruno Tesch and Two Others*, British Military Court, March 1946.

⁹⁹ *Prosecutor v. Nahimana et al*, Judgment, ICTR-99-52-A, 28 November 2007.

¹⁰⁰ Radics & Bruch, ‘Pillage, Conflict Resources and Jus Post Bellum’, *supra* note 96, 162.

¹⁰¹ *Ibid.*

¹⁰² C. Ryngaert, ‘Accountability for Corporate Human Rights Abuses: Lessons From the Possible Exercise of Dutch National Criminal Jurisdiction Over Multinational Corporations’, 29 *Criminal Law Forum* (2018) 1, 4.

blameworthy [...]”¹⁰³ A more pragmatic obstacle is the fact that the only global permanent criminal court, the ICC, does not currently have jurisdiction over businesses as such.¹⁰⁴

1. No Current Prospects of Prosecutions at the ICC

While the concept of criminal corporate liability was discussed during the negotiation of the Rome Statute, States ultimately opted to exclude corporations from the jurisdiction of the ICC at the Rome Conference in 1998.¹⁰⁵ The lack of jurisdiction over corporate entities limits the usefulness of the ICC in relation to corporate crimes such as environmental harm, which is often carried out by groups acting for a profit motive.¹⁰⁶ Former ICC Prosecutor Moreno Ocampo previously stated that companies complicit in human rights violations could be investigated by the Office of the Prosecutor (“OTP”), possibly with a view to indicting corporate executives.¹⁰⁷ In its 2016 Policy Paper on Case Selection, the OTP also stated that it would give particular consideration to “[...] crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land [...]”¹⁰⁸ The Policy Paper raised expectations among those

¹⁰³ Alexandra Garcia, ‘Corporate Liability for International Crimes: A Matter of Legal Policy Since Nuremberg’, 24 *Tulane Journal of International & Comparative Law* (2015) 1, 127. Corporate criminal liability is the subject of considerable doctrinal debate. For an excellent critique of all sides of the debate, see James G. Stewart, ‘A Pragmatic Critique of Corporate Criminal Theory’, 16 *New Criminal Law Review* (2013) 261.

¹⁰⁴ *Rome Statute of the International Criminal Court*, 17 July 1988, UN Doc. A/CONF.183/9, Article 25(1).

¹⁰⁵ See discussions on this in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, A/CONF.183/13 (Vol. II), 133-136.

¹⁰⁶ M. Gillett, ‘Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict’, in C. Stahn, J. Iverson & J. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (2017), 224.

¹⁰⁷ M. Shinn, ‘The 2005 Business & Human Rights Seminar Report: Exploring Responsibility and Complicity, 8 December 2005, London’ (2005), available at <http://www.scu.edu.tw/hrp/Teng/TengText3.pdf> (last visited 26 May 2020): “The ICC cannot investigate corruption, or other crimes not connected with its statute. However, some companies have been known to support groups who kill to gain control of a gold mine, for example, knowing that this could be a crime (knowledge is a required condition for prosecution). The ICC could prosecute under these circumstances”.

¹⁰⁸ Office of the Prosecutor of the International Criminal Court, ‘Policy Paper on Case Selection and Prioritisation’ (15 September 2016), para. 41.

campaigning for increased scrutiny of the human rights impacts of business activity, by bringing welcome focus to crimes committed with the complicity of the private sector, such as land grabs or exploitation of resources.¹⁰⁹

In the absence of trials against businesspeople, however, concerns were voiced regarding the ICC's readiness to act against corporate complicity in international crimes.¹¹⁰ Nevertheless, current ICC Prosecutor Bensouda recently confirmed that prosecution of international crimes committed in the context of business activities was high on her Office's agenda. In an oral statement given to the 2019 International Congress of Penal Law,¹¹¹ Bensouda noted that, although the ICC had so far focused on traditional cases involving government and military leaders, it could also under certain circumstances exercise jurisdiction over individuals committing or contributing to international crimes through business activities. Although the Rome Statute is anthropocentric and aims to protect human life, Bensouda added that:

“[...] business activities can directly impact human life. In some cases, the degree of the impact of business activities on human life may be sufficiently serious for those activities to reach the threshold of constituting Rome Statute crimes. As an example, certain organized industrial activities can cause serious injuries to physical health, or they may force people to leave their land [which could] potentially amount to crimes against humanity.”

¹⁰⁹ For a discussion of the significance and limitations of the Policy Paper, see N. Bernaz, 'An Analysis of the ICC Office of the Prosecutor's Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights', 15 *Journal of International Criminal Justice* (2017) 3, 527.

¹¹⁰ C. Ryngaert & H. Struyven, 'Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law', in C. Ryngaert & M. Noortmann (eds), *Human Security and International Law* (2014), 118. It should be noted that charges of complicity in crimes against humanity were brought against businessman Joshua Arap Sang before the ICC and confirmed in 2012. In facts similar to the "Media" case in Rwanda, Sang was charged by virtue of his influence as a prominent radio broadcaster who used his radio show to fan the flames of violence during mass crimes in post-election 2007-2008 in Kenya. The case, however, was terminated in 2016 for lack of evidence – see *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr (Trial Chamber V(A)), 5 April 2016.

¹¹¹ Statement of ICC Prosecutor Fatou Bensouda, International Congress of Penal Law (2019, available at https://www.dropbox.com/s/gmma9oambjpg0wd/ICC_Prosecutor_Fatou_Bensouda_statement_AIDP_Congress_Rome.mp4?dl=0 (last visited 26 May 2020).

She also noted that crimes punished under the Rome Statute often overlapped with other types of crimes, such as land grabbing and the destruction of the environment, which in turn often fuel social conflicts and the commission of crimes punished under the Rome Statute.

Despite such ambitious statements, and despite hopes that international criminal procedures would bolster international human rights scrutiny of corporations,¹¹² the lack of corporate liability before the ICC means that prosecution of legal persons for environmental crimes committed in armed conflict is inevitably limited at the international level.

2. Jurisdiction of Domestic Courts Over International Crimes Committed by Businesses

Although the ICC might not be able to prosecute legal persons, a large number of domestic courts have jurisdiction over war crimes perpetrated by companies.¹¹³ The ICC framework still has a role to play in this respect, as countries sometimes choose to implement the Rome Statute into their domestic law without making a distinction between legal and natural persons,¹¹⁴ effectively importing international criminal law in national legal systems (some of which explicitly recognize corporate criminal liability).¹¹⁵ The UN Guiding Principles

¹¹² Reinisch, 'The Changing International Framework for Dealing with Non-State Actors', *supra* note 9, 87: "Another potential for a truly international human rights scrutiny of non-state actors may lie in the development of international criminal procedures. The example of the Nuremberg Tribunal already shows that it is not only individuals whose activities may be investigated, but also corporations."

¹¹³ J. G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (2011), 79.

¹¹⁴ O. De Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations', background paper to the seminar organized with the Office of the UN High Commissioner for Human Rights in Brussels 3-4 November 2006 (2006), 2 [De Schutter, 'Extraterritorial Jurisdiction'].

¹¹⁵ See for example, a 26 April 2016 Survey by law Firm Clifford Chance, showing corporate criminal liability in place in most EU countries, such as the UK, France, Italy, Spain, the Netherlands, Denmark and Austria, Clifford Chance, 'Corporate Criminal Liability' (2019), available at https://www.cliffordchance.com/briefings/2016/04/corporate_criminalliability.html (last visited 26 May 2020). In Germany, a draft bill is currently making its way through the legislative process, see M. Kock *et. al*, 'Germany's Corporate Sanctions Act: The Path to Corporate Criminal Liability' (2019), available at <http://www.mondaq.com/germany/x/845680/Corporate+Crime/Germanys+Corporate+Sanctions+Act+The+Path+To+Corporate+Criminal+Liability> (last visited 26 May 2020). As noted by Stahn, domestic legal systems have tended to diverge

acknowledge this extended reach of the Rome Statute through domestic jurisdictions, in particular in the Commentary to UN Guiding Principle 23, which notes “[...] the expanding web of potential corporate legal liability arising from [...] the incorporation of the provisions of the Rome Statute of the ICC in jurisdictions that provide for corporate criminal responsibility [...]”.

The international criminal law framework offers at least two advantages for holding corporate entities to account for environmental harm caused in armed conflict. First, by operating on the premise that natural persons (individuals) can have certain international obligations, international criminal law has, in a way, transcended the State-centric approach of international law.¹¹⁶ It is thus a more natural vehicle to impose international obligations on other non-State actors (including collective entities such as businesses). Second, it carries a heavy normative weight.¹¹⁷

II. Universal/Extraterritorial Jurisdiction

As explained above, a common issue with corporate crime, and especially crime committed by multinational corporations, is the discrepancy between the *nationality* of the corporation committing the act, and the territory on which the act is committed.

Although a State’s jurisdiction is classically conceived as territorial, it can also be exercised extraterritorially in certain scenarios. This includes the case in which particularly heinous crimes may be prosecuted by any State, acting in the name of the international community, where the crime meets with universal reprobation.¹¹⁸ This is commonly referred to as the *universality principle*, leading to a form of jurisdiction called *universal jurisdiction*, which applies to crimes

in their approach to corporate criminal responsibility, with common law jurisdictions generally recognising such responsibility, while continental legal traditions are more diverse. See C. Stahn, ‘Liberals vs. Romantics: Challenges of an Emerging Corporate International Criminal Law’, 50 *Case Western Reserve Journal of International Law* (2018) 1/2, 91.

¹¹⁶ Kyriakakis, ‘International Legal Personality, Collective Entities, and International Crimes’, *supra* note 42, 98. See also Vazquez arguing that extending international criminal law obligations to corporations does not imply any deep challenge to orthodox conceptions of international law, in ‘Direct vs. Indirect Obligations of Corporations under International Law’, 43 *Columbia Journal of Transnational Law* (2005) 3, 944.

¹¹⁷ M. Lawry-White, ‘Victims of Environmental Harm During Conflict’, in C. Stahn, J. Iverson & J. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (2017), 389.

¹¹⁸ De Schutter, ‘Extraterritorial Jurisdiction’, *supra* note 114, 22.

considered so harmful that “[...] the perpetrators of such crimes are deemed to be *hostes humani generis* — enemies of all humankind — who do not deserve safe haven anywhere in the world.”¹¹⁹

Unsurprisingly, given this line of reasoning, notions of universal jurisdiction have traditionally been reserved for criminal proceedings.¹²⁰ The Nuremberg Tribunals established the first modern notion of universal jurisdiction,¹²¹ while also sketching the first iteration of corporate complicity.¹²²

Some treaties require States to establish and exercise national jurisdiction in respect of offences with which the State may have no connection.¹²³ Several regional instruments and academic works also address the topic, such as the African Union Model Law on Universal Jurisdiction¹²⁴, the Cairo-Arusha Principles on Universal Jurisdiction,¹²⁵ and the 2001 Princeton Principles on Universal Jurisdiction.¹²⁶ In theory, universal jurisdiction has the potential to counter some of the negative effects of economic globalization, as it reasserts the State’s regulatory capacity (which the rise of transnational economic actors was threatening to marginalize),¹²⁷ and could therefore help combat the impunity of corporations for international crimes which they commit or in which they are complicit. Indeed, universal jurisdiction has been touted by some as “[...] the method most likely to achieve corporate observation of human rights [...]”,¹²⁸ which would make domestic courts the best forum to prosecute businesses. States themselves appear generally to agree on the legality of universal jurisdiction in

¹¹⁹ See *Report of the International Law Commission to the Seventieth Session*, UN Doc A/73/10 (2018), para. 6 (Annex A) [Jalloh Report].

¹²⁰ Magraw, ‘Universally Liable? Corporate Complicity Liability Under the Principle of Universal Jurisdiction’, *supra* note 29, 460.

¹²¹ *Ibid.*, 461.

¹²² *Ibid.*, 470.

¹²³ E.g. genocide under the 1948 Genocide Convention, the “grave breaches” (war crimes) of the 1949 Geneva Conventions and of 1977 Additional Protocol I, and torture under the 1984 Convention against Torture.

¹²⁴ Executive Council of the African Union, *Model National Law on Universal Jurisdiction over International Crimes*, Twenty-First Ordinary Session 9-13 July 2012 (2012).

¹²⁵ Africa Legal Aid, *The Cairo-Arusha Principle on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspectives*, adopted at the Follow-up Expert Meeting held at Arusha (2002).

¹²⁶ Princeton University, Program in Law and Public Affairs, *Princeton Principles on Universal Jurisdiction* (2001).

¹²⁷ De Schutter, ‘Extraterritorial Jurisdiction’, *supra* note 114, 7.

¹²⁸ Magraw, ‘Universally Liable? Corporate Complicity Liability Under the Principle of Universal Jurisdiction’, *supra* note 29, 493.

certain circumstances,¹²⁹ and on the fact that it is, in principle, a useful and important tool in combating impunity.¹³⁰

The benefits of international criminal law are compounded when combined with universal jurisdiction, especially as an increasing number of States have extraterritorial jurisdiction provisions which could apply to legal persons. Domestic systems have increasingly used concepts of universal jurisdiction to hold companies to account for international crimes through the enactment of Rome Statute-implementing legislation,¹³¹ thereby further expanding the web of liability in which corporations can potentially be caught. From a conceptual perspective, universal jurisdiction is also well suited to respond to environmental crimes. As described, the universality principle is based on the idea that some crimes are so heinous that they require a forceful response from all members of the community. This was traditionally the case for piracy, and later for terrorism, which was described by De Schutter as “[...] our modern equivalent to piracy which all States have not only an interest in combating, but an obligation to do so [...]”.¹³² Environmental harm, with its borderless and potentially catastrophic consequences on all life whether human or not, arguably fits that category too.

The United Nations Environment Programme (UNEP) is also of the view that universal jurisdiction can play a significant role in bridging gaps in the enforcement of international environmental law. Environment-related crimes include corporate crime in the forestry sector, illegal exploitation and sale of gold and minerals, illegal fishing, trafficking in hazardous waste and chemicals, and threat finance using wealth generated illegally from natural resources to support non-State armed groups and terrorism. The UNEP also underlined the negative effects of such crimes on the environment, future generations, Governments, and legal businesses.¹³³

As we see below, however, the combination of international criminal law and universal jurisdiction is not without its challenges.

¹²⁹ Although, as noted in E.III. Challenges, how far the concept extends is still the subject of considerable debates.

¹³⁰ Jalloh Report, *supra* note 119, para. 7.

¹³¹ Magraw, ‘Universally Liable? Corporate Complicity Liability Under the Principle of Universal Jurisdiction’, *supra* note 29, 475.

¹³² De Schutter, ‘Extraterritorial Jurisdiction’, *supra* note 114, 3.

¹³³ Report of the UN Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, UN Doc A/72/112, 22 June 2017, 10.

III. Challenges

When envisaging the application of international criminal law to corporations before domestic courts, four issues come to mind.

First, and perhaps most obviously, is that, under customary international law, “[...] the scope of universal jurisdiction is limited to crimes such as genocide, crimes against humanity, war crimes and torture [...]”.¹³⁴ Non-treaty based international criminal law is therefore a limited avenue for addressing other human rights violations by corporate non-State actors.¹³⁵ To the extent that it is recognized, the principle of universal jurisdiction only applies to the most severe crimes. Environmental harm would therefore need to be *repackaged* as a core international crime in order for universal jurisdiction (and international criminal law) to operate. This is not a fatal flaw, as the current international framework offers a few crimes onto which environmental harm could be *grafted*. The war crime of pillage, for example, could offer a framework for holding corporate actors responsible for the exploitation of mineral and other resources.¹³⁶

Second, universal jurisdiction provisions can sometimes trigger fears of hegemonic use, on the basis that such provisions “[...] have allowed the industrialized States to reach situations occurring on the territory of developing States [...]”.¹³⁷ At the UN, such concerns are regularly voiced, in particular, by the African Group, the Latin American and Caribbean Group, and the Non-Aligned Movement, who have expressed the view that nationals of less powerful States have been the only real targets of universal jurisdiction, while nationals of more powerful States have largely been exempt.¹³⁸ There is an undeniable potential for abuse in provisions allowing courts in the Global North to adjudicate on matters occurring in the Global South in the name of human rights. With respect to corporate accountability, however, the reverse argument might be made. Prosecution of Western corporate actors could

¹³⁴ Magraw, ‘Universally Liable? Corporate Complicity Liability Under the Principle of Universal Jurisdiction’, *supra* note 29, 460.

¹³⁵ Ryngaert & Struyven, ‘Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law’, *supra* note 110, 133.

¹³⁶ Wisner, ‘Criminalizing Corporate Actors for Exploitation of Natural Resources in Armed Conflict’, *supra* note 73, 971. See also Bernaz, ‘An Analysis of the ICC Office of the Prosecutor’s Policy Paper on Case Selection and Prioritization From the Perspective of Business and Human Rights’, *supra* note 109.

¹³⁷ De Schutter, ‘Extraterritorial Jurisdiction’, *supra* note 114, 7.

¹³⁸ Jalloh Report, *supra* note 119, para. 9.

“[...] provide the greatest deterrent against continued trafficking of conflict resources [which in turn] would also help restore faith in the international justice system, which is currently subject to intense criticism over the concern that Africans have been over represented as targets for crime [...]”.¹³⁹

Third, there are also practical and procedural problems with domestic courts using universal jurisdiction. This includes the possibility of concurrent proceedings, inconsistent outcomes stemming from varying interpretations of the Rome Statute, as well as the possibility of corruption at the domestic level which would make such domestic trials a sham.¹⁴⁰ However, the likelihood of these issues could be reduced by domestic courts through the use of various legal doctrines such as international comity, *forum non conveniens*, collateral estoppel, or *res judicata*.¹⁴¹

Fourth, broad conceptions of universal jurisdiction itself are far from being unanimously accepted. *Pure* universal jurisdiction is, and always has been, a hotly debated concept. A good illustration of this can be found in the individual opinion of International Court of Justice President Guillaume in the *Arrest Warrant* case concerning the validity of a Belgian arrest warrant for Congolese foreign minister Abdoulaye Yerodia for alleged war crimes and crimes against humanity. In an individual opinion appended to the judgment of 14 February 2002, President Guillaume states:

“International criminal law has itself undergone considerable development and constitutes today an impressive legal corpus. It recognizes in many situations the possibility, or indeed the obligation, for a State other than that on whose territory the offence

¹³⁹ Wisner, ‘Criminalizing Corporate Actors for Exploitation of Natural Resources in Armed Conflict’, *supra* note 73, 981. Although note Tsabora, ‘Illicit Natural Resource Exploitation by Private Corporate Interests in Africa’s Maritime Zones During Armed Conflict’, *supra* note 71, 190, who warns that overreliance on support from Western States is problematic in that “[...] such states are less eager to lend support and offer assistance where the transnational problems are traceable to entities domiciled in the Western states [...]”.

¹⁴⁰ Magraw, ‘Universally Liable? Corporate Complicity Liability Under the Principle of Universal Jurisdiction’, *supra* note 29, 496.

¹⁴¹ *Ibid.*, 496. It should be noted that *forum non conveniens* is not without its challenges, particularly when framed through the issue of access to remedy for human rights violations – see below.

was committed to confer jurisdiction on its courts to prosecute the authors of certain crimes where they are present on its territory. International criminal courts have been created. But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined 'international community'. Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward."¹⁴²

Years later, the debate is still ongoing, as evidenced by recent discussions taking place at the Sixth Committee of the UN General Assembly. The Committee, which is the primary forum for the consideration of legal questions in the General Assembly, took up the issue of universal jurisdiction in 2009, and in 2018 the ILC itself decided to include universal criminal jurisdiction in its long-term program¹⁴³.

Despite agreement on at least *a narrow form* of universal jurisdiction, and despite widespread application of (variations of) it throughout State practice, it is clear that no wide-ranging unified theory of universal jurisdiction has emerged in customary international law. Perhaps a more palatable version of the universality principle could be found in more narrow concepts of extraterritorial jurisdiction,¹⁴⁴ in which at least some sort of link must be found with the State in which proceedings are taking place (e.g. the perpetrator and/or the victim are located on the State's territory). Indeed, although the universality principle is not based on a particular connection between the crime and the State seeking to

¹⁴² Separate opinion of President Guillaume, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3, 44, para. 15.

¹⁴³ See Jalloh Report, *supra* note 119.

¹⁴⁴ Note that some consider universal jurisdiction to be exclusive of extraterritorial jurisdiction (see e.g. Jalloh Report, *supra* note 119, para. 16), while others consider universal jurisdiction to be a version (albeit an extreme one) of extraterritorial jurisdiction. See for example International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction* (2009), 14: "Unlike *the other forms* of extraterritorial jurisdiction listed above, the universality principle is not based on a particular connection between the case and the state exercising jurisdiction." (emphasis added). See also De Schutter, 'Extraterritorial Jurisdiction', *supra* note 114, 15.

exercise jurisdiction, in practice, many States attach conditions to the exercise of universal jurisdiction that require a connection.¹⁴⁵

F. Transnational Tort Litigation and Vedanta

Not all environmental harms caused by businesses in armed conflict will reach the threshold of international crimes. Instead, some instances might be better addressed using private law. In this respect, one way by which to address corporate environmental harm is the recent expansion of the tortious concept of duty of care.¹⁴⁶

For this discussion, the English case of *Vedanta v Lungowe*¹⁴⁷ is used as a case study. In 2015, a group of 1,826 Zambian citizens living in the Chingola District in northern Zambia brought a claim before the English high court against two legal entities: Vedanta Resources PLC (“Vedanta”), the parent company of a multinational group listed on the London Stock Exchange and employing some 82,000 people worldwide, and Konkola Copper Mines PLC (“KCM”), a public company incorporated in Zambia and a subsidiary of Vedanta, who has ultimate control over it. KCM is the owner of the Nchanga Copper Mine, a mining site containing processing plants, an underground mine, and the second largest open cast mine in the world.¹⁴⁸

The claimants were “[...] very poor members of rural farming communities [...]”¹⁴⁹ whose only source of drinkable water and irrigation for their crops came from watercourses which they claimed had been damaged by repeated discharges of toxic matter from the Nchanga Copper Mine, from 2005. The claims were pleaded in common law negligence and breach of statutory duty of care. While the claim against KCM was based on its direct operation of the mine, the claim against parent company Vedanta was said to arise by reason of the “[...] very high level of control and direction that the first defendant exercised at all material

¹⁴⁵ International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction*, *supra* note 144, 151.

¹⁴⁶ “Duty of care” is a Common Law concept under which a non-contractual legal obligation arises which, if breached, can give rise to the tort of negligence.

¹⁴⁷ *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* [2019] UKSC 20 [*Vedanta Decision*].

¹⁴⁸ N.N., ‘The Nchanga Mine’, available at <http://kcm.co.zm/our-operations/mining/nchanga-mine/> (last visited 26 May 2020).

¹⁴⁹ *Vedanta Decision*, *supra* note 147, para. 1.

times over the mining operations of the second defendant and its compliance with applicable health, safety and environmental standards [...]”¹⁵⁰

The United Kingdom Supreme Court had to determine whether the courts of England and Wales had jurisdiction against both the parent company and the subsidiary. The claimants relied on EU law, and in particular what is commonly known as the Brussels Regulation Recast¹⁵¹ to establish jurisdiction over Vedanta as an *anchor defendant* for the purposes of attracting the English courts’ jurisdiction over the claim against KCM. This would allow the claimants to conduct proceedings in England rather than in Zambia, where the villagers said it would have been virtually impossible for them to obtain justice given the unavailability of legal aid, the lack of conditional fee arrangements, and an inadequate legal infrastructure to handle such a case. The defendants, on the other hand, claimed this was an abuse of European law.

On 10 April 2019, the Supreme Court handed its judgment, in which it found that there had been no abuse of EU law and that the claimants had presented a real triable issue – allowing the case to proceed to trial.¹⁵² While the Court recognized that it would be an abuse of EU rules to allow claimants to sue an English-domiciled *anchor* defendant solely to pursue a claim against a foreign co-defendant (who, in this scenario, is the only real target of the claim), it nevertheless found that this exception to jurisdiction should be applied strictly. While establishing jurisdiction of the English courts over subsidiary KCM was identified as a key factor in the claimant’s decision to litigate in England, the Court found that they also had a *bona fide* claim, disclosing a “[...] real triable issue [...]” and a desire to obtain judgment against parent company Vedanta rather than merely against its subsidiary KCM.

One of the critical factors in determining whether or not there was a “triable issue” was whether Vedanta sufficiently intervened in the management of the mine owned by its subsidiary to have incurred, *itself* (rather than by vicarious liability), a common law duty of care to the claimants. Vedanta tried to argue that a finding of duty of care owed by Vedanta “[...] would involve a novel

¹⁵⁰ *Ibid.*, para. 3.

¹⁵¹ EP Regulation of 12 December 2012, OJ 2012 L 351.

¹⁵² Note that this appeal dealt solely with the issue of jurisdiction, i.e. the ability of the English courts to hear the claims brought by the claimants against Vedanta and KCM. It made no determination with regard to liability of Vedanta or KCM, which will be dealt with later at a substantive hearing. As of May 2020, the proceedings were ongoing in the Queen’s Bench Division, see procedural history detailed in *Lungowe and others v. Vedanta Resources PLC and another company* [2020] EWHC 749.

and controversial extension of the boundaries of the tort of negligence [...]”, an argument by which the Court was left unconvinced.

A noteworthy feature of *Vedanta* is how it engaged the parent company’s direct liability, rather than relying on arguments about *piercing the corporate veil*, a concept originally meant to encourage risk-taking and innovation,¹⁵³ which has had the unfortunate impact of limiting ways for victims of the conduct of a subsidiary company to seek reparation by filing a claim against the parent company in the home State of the latter.¹⁵⁴ *Vedanta* highlights several issues which are relevant to the discussion of corporate accountability for environmental harm. First, it forms part of a wider global jurisprudential trend¹⁵⁵ in which courts in various jurisdictions have been increasingly willing to allow claims to be pursued against parent companies for the actions of their subsidiaries (section *F.I. Global Trend Towards Parent Company Liability*). Second, it highlights the need to fully engage with other, non-judicial aspects of BHR, including mandatory reporting and human rights due diligence (section *F.II. (Public) Knowledge is Power: Impact of Public Materials and Mandatory Reporting*). Finally, the challenges associated with private claims for corporate accountability will be examined in section *F.III. Challenges*.

I. Global Trend Towards Parent Company Liability

Private law claims are brought by individuals or communities who have been directly or indirectly affected by the actions of the company. Depending on the legal system, claims can be based on a statutory provision, general principles of law, legal precedent or some other basis (e.g. custom).¹⁵⁶ Private claims have their place in the accountability toolkit, as “[...] unlike a criminal prosecution, a

¹⁵³ A. Yilmaz Vastardis & R. Chambers, ‘Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?’, 67 *International & Comparative Law Quarterly* (2018) 2, 394.

¹⁵⁴ De Schutter, ‘Towards a New BHR Treaty’, *supra* note 38, 48.

¹⁵⁵ G. Holly, ‘Access to Remedy Under the UNGPs: Vedanta and the Expansion of Parent Company Liability’, *EJIL: Talk!* (31 October 2017), available at <https://www.ejiltalk.org/if-the-pleading-represents-the-actuality-vedanta-access-to-remedy-and-the-prospect-of-a-duty-of-care-owed-by-a-parent-company-to-those-affected-by-acts-of-subsidiaries/> (last visited 26 May 2020).

¹⁵⁶ Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance*, UN Doc. A/HRC/32/19/Add. 1, 12 May 2016, 13.

civil action based on a human rights tort makes it possible for a victim to receive compensation from his or her abuser [...].¹⁵⁷

Private international law, which determines the competence of domestic courts to hear disputes involving a foreign element,¹⁵⁸ is also lagging behind globalization as it often requires a territorial nexus for the exercise of jurisdiction – and in doing so, is “[...] based on a map of the world which is clearly out of touch with the global political economy [...]”.¹⁵⁹ This poses the same problems as with criminal sanctions: in a borderless market, where harm often occurs through companies that are either directly foreign or shell companies for foreign companies, how can civil claims bridge the accountability gap? The answer can be found in an emerging trend of transnational tort litigation, in which a number of cases before national courts have considered the issue of parent company liability.

Comparative law shows an increased willingness on the part of courts to recognize the potential existence of a duty of parent companies to exercise reasonable care in monitoring and controlling their subsidiaries in relation to human rights and environmental protection.¹⁶⁰ In some circumstances, a duty of care is found to exist which place a subsidiary’s actions within the jurisdictional ambit of the courts of the State in which the parent company is incorporated. In terms of applicable law, cases like these are often framed through the concept of negligence. While the specific elements of negligence vary among regimes and jurisdiction, a formulation common to many jurisdictions is: (a) the existence of a duty of care towards affected persons; and (b) the breach of the applicable standard of care, which (c) resulted in harm or injury (i.e. causation). In addition, the existence of a duty of care (as well as the relevant standard of care) will often depend on whether the harm was, or should have been, foreseeable to the defendant.¹⁶¹

¹⁵⁷ A. McConville, ‘Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction’s Relationship to *Ex Juris Service*, *Forum Non Conveniens* and the Presumption of Territoriality’, in C. Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 157.

¹⁵⁸ Augenstein, ‘Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Rights to a Remedy’, *supra* note 10, 596.

¹⁵⁹ H. Muir-Watt, ‘Private International Law Beyond the Schism’, 2 *Transnational Legal Theory* (2011) 3, 385.

¹⁶⁰ Holly, ‘Access to Remedy Under the UNGPs: Vedanta and the Expansion of Parent Company Liability’, *supra* note 155.

¹⁶¹ Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, *supra* note 156.

This section moves to look at the use and impact of tortious liability in a range of domestic jurisdictions which have been identified as particularly active for environmental claims against corporations¹⁶²: the United Kingdom, Canada, the Netherlands, and the United States (US).

1. Parent Company Liability in the United Kingdom

The United Kingdom has been a fertile ground for addressing corporate harm caused overseas. This trend has been budding for the past two decades, arguably starting with the 1997 House of Lords case of *Connelly v RTZ Corporation*,¹⁶³ and reaching a high point with the 2012 Court of Appeal ruling in *Chandler v Cape*.¹⁶⁴ In the latter decision, the Court held that, under certain circumstances, a parent company could owe a legal duty of care to employees of its subsidiaries.

Vedanta and other recent cases¹⁶⁵ have addressed the question of whether parent corporations owe a duty of care to affected communities due to the level of control it exercised over its subsidiary. The *Okpabi* case recently clarified some aspects of this issue.¹⁶⁶ In that case, Nigerian communities brought claims against the parent company of oil conglomerate Shell and its Nigerian subsidiary Shell Petroleum Development Company for years of systematic and ongoing pollution

¹⁶² See for example Allen & Overy LLP, 'Environmental and Social Issues Bring Litigation Risks Home to Multinationals', Corporate Disputes Magazine, July-September 2019 Issue, available at <https://www.corporatedisputesmagazine.com/environmental-and-social-issues-bring-litigation-risks-home-to-multinationals> (last visited 26 May 2020). Although unrelated to environmental harm, another notable (albeit ultimately unsuccessful) case of parent company liability in Europe includes the KiK case in Germany, in which a lawsuit was brought by four Pakistani plaintiffs affected by a fire in a factory belonging to a supplier of German fashion retailer KiK in Pakistan, which killed 258 people. The claim sought to establish KiK's joint responsibility for fire safety deficiencies, but was thrown out because of statutory limitations – see press release by the European Center for Constitutional and Human Rights, 'German Court Dismisses Pakistani's Complaint Against KiK: KiK Evades its Legal Responsibility' (10 January 2019), available at <https://176903.seu2.cleverreach.com/m/11183014/0-c9e83767087bd1f118b3ace17b2ef8fb> (last visited 26 May 2020).

¹⁶³ *Connelly v RTZ Corporation PLC* [1997] UKHL 30, [1998] AC 854.

¹⁶⁴ *Chandler v Cape plc* [2012] EWCA Civ 525.

¹⁶⁵ Although unrelated to environmental harm, the Unilever case (*AAA & Ors. v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532) is also worth noting in that respect.

¹⁶⁶ *Okpabi & Ors. v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2018] EWCA Civ 191 [*Okpabi* Decision].

caused by Shell's operations. The High Court held in 2017 that Royal Shell was merely a holding company which did not exercise any control over its "wholly autonomous" Nigerian subsidiary. On appeal, the Court of Appeal found that mandatory corporate policies and standards could not, on their own, meet the *arguable case* threshold¹⁶⁷. Claimants needed to demonstrate "[...] an arguable case that [the parent] controlled [the subsidiary's] operations or that it had direct responsibility for practices or failures which are the subject of the claim [...]"¹⁶⁸. The Court of Appeal clarified that it was not looking only for general control over policies, but for "material control" over the subsidiary's operations¹⁶⁹. The Court recognized an extensive set of mandatory group-wide policies but treated them as mere "[...] best practices which are shared across a business operating internationally [...]", rather than a means by which the company holds itself out as exercising supervision it does not in fact exert.¹⁷⁰

On 24 July 2019, however, the United Kingdom Supreme Court granted the claimants leave to appeal.¹⁷¹ Although the reasons for granting the leave to appeal in *Okpabi* are not public, it is worth noting that the *Vedanta* Supreme Court judgment, which came out only a few months prior, is likely to have had an impact on the decision. In *Vedanta*, the Supreme Court explicitly refused to "[...] seek to shoehorn all cases of the parent's liability into specific categories [...]", on the basis that "[...] there is no limit to the models of management and control which may be put in place within a multinational group of companies [...]"¹⁷². This could indicate that it wishes to retain a level of flexibility, by allowing itself to disregard legal boundaries and ownership in cases where a commercial group acts as a single commercial undertaking in management terms.

¹⁶⁷ *Okpabi* Decision, *supra* note 166, paras. 89 and 122.

¹⁶⁸ *Ibid.*, para. 127.

¹⁶⁹ *Ibid.*, para. 122.

¹⁷⁰ *Ibid.*, paras. 121 and 129.

¹⁷¹ The leave to appeal was confirmed by the claimants' solicitors, English law firm Leigh Day, in a press release, 'Supreme Court Grants Permission to Appeal to Nigerian Communities in Their Fight Against Shell' (26 May 2020), available at <https://www.leighday.co.uk/News/2019/July-2019/Supreme-Court-grants-permission-to-appeal-to-Niger> (last visited 26 May 2020). The appeal is scheduled to be heard in June 2020.

¹⁷² *Vedanta* Decision, *supra* note 147, para. 51: "At one end, the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries. At the other extreme, the parent may carry out a thoroughgoing vertical reorganisation of the group's businesses so that they are, in management terms, carried out as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant, until the onset of insolvency, as happened within the Lehman Brothers group."

What the Supreme Court has to say in the *Okpabi* appeal will be followed closely in all corners of the legal sphere, from human rights defenders to in-house corporate counsels. Additionally, whether a parent company's stated group-wide policies can create a duty of care in scenarios where the parent does not actively enforce them is an important question that many hope the Court will clarify.

2. Parent Company Liability in Canada

In recent years, an increasing number of international plaintiffs have bought claims against Canadian parent companies for the wrongful activities of their foreign subsidiaries, particularly for their harmful mining operations. In *Choc v. Hudbay Minerals*,¹⁷³ for example, the Superior Court of Ontario allowed a claim against mining corporation Hudbay Minerals for human rights abuses committed by its subsidiary against indigenous people at the subsidiary-owned nickel mine in Guatemala. The plaintiffs alleged *inter alia* that Hudbay Minerals had been directly negligent in failing to prevent the abuse, on the basis of previous statements it had made with regards to corporate social responsibility.

In *Garcia v. Tahoe Resources*,¹⁷⁴ a claim was brought against a parent company, mining corporation Tahoe Resources, for the actions of private security personnel hired by its subsidiary operating the Escobal mine in Guatemala. The plaintiffs' claim was based *inter alia* on the significant control exercised by Tahoe over its wholly-owned subsidiary, on Tahoe's public corporate social responsibility policies and on its commitments to the Voluntary Principles on Security and Human Rights. Tahoe argued that Guatemala was the appropriate forum, but the British Columbia Court of Appeal concluded that there was a real risk of there not being a fair trial, given the alignment of interests between the powerful mining company and the Guatemalan State. On 30 July 2019, the case reached a settlement and Tahoe Resources' new owner, company Pan American Silver, published an apology acknowledging violations of human rights at the Escobal mine and vowing to increase human rights due diligence efforts.¹⁷⁵

In *Araya v. Nevsun Resources*,¹⁷⁶ a claim was brought against mining corporation Nevsun Resources in relation to a mine operated by its indirect

¹⁷³ *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414.

¹⁷⁴ *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39.

¹⁷⁵ Press release by Pan American Silver, 'Pan American Silver Announces Resolution of Garcia v. Tahoe Case' (30 July 2019), available at <https://www.prnewswire.com/news-releases/pan-american-silver-announces-resolution-of-garcia-v-tahoe-case-300893365.html> (last visited 26 May 2020).

¹⁷⁶ *Araya v. Nevsun Resources Limited*, 2017 BCCA 401.

subsidiary in Eritrea. The claimants were Eritrean refugees who had been conscripted into Eritrea's "National Service Program", which they claimed constituted a form of slavery which Nevsun facilitated indirectly.¹⁷⁷ Nevsun's application for an order declining jurisdiction was rejected based on evidence of corruption in the Eritrean legal system, and on the risk of interference by the ruling party and national military. The Court of Appeal for British Columbia endorsed the first instance judge's finding that a fair trial would be particularly difficult for the claimants

"[...] if they chose to commence legal proceedings in which they make the most unpatriotic allegations against the State and its military, and call into question the actions of a commercial enterprise which is the primary economic generator in one of the poorest countries in the world [...]"

The Court also considered the gravity of the human rights abuses alleged to have taken place. Nevsun Resources filed an appeal with the Supreme Court of Canada, which in January 2019 dismissed Nevsun's motion to stay, dismiss, or strike the claim on the basis of *forum non conveniens*. On 28 February 2020, a majority of the Supreme Court of Canada held that Canadian courts had jurisdiction over the claims, allowing the claims to proceed to the merits stage before the British Columbia courts.¹⁷⁸

3. Parent Company Liability in the Netherlands

Five interrelated claims for environmental harm have been brought before the Dutch civil courts against parent company Royal Dutch Shell and former parent company Shell Petroleum N.V., as well as Nigerian subsidiary SPDC and former subsidiary Shell Transport and Trading Company. For the first time, a Dutch multinational company is being sued in the Netherlands for environmental damage and human rights abuses allegedly caused abroad by its foreign subsidiaries. Like in *Vedanta*, the cases against the parent company were

¹⁷⁷ See also Report of the Special Rapporteur on the situation of human rights in Eritrea, *Report on the situation of human rights in Eritrea*, UN Doc A/HRC/26/45, 13 May 2014, describing the national service as an indefinite conscription, through which conscripts are rounded up and forced to spend most of their working lives in the service of the State, working under duress and in harsh conditions.

¹⁷⁸ *Nevsun Resources Limited v. Araya*, 2020 SCC 5.

filed under European law, with the Dutch companies acting as *anchors* to bring a suit against the subsidiaries.

In December 2015, the Court of Appeal at The Hague held that the Dutch parent company could be held liable for environmental damage caused by the operation by the Nigerian subsidiary of a leaky oil pipeline. In reaching that decision, it drew explicitly on English case law (notably *Chandler v Cape* and *Caparo v Dickman*). It also stated that a parent company could be liable on the basis of a culpable failure to act, whether or not it was actively involved in the subsidiary's operations.¹⁷⁹

The Netherlands is also the scene of the European instalment of the *Kiobel* litigation, in which four widows brought a claim against Shell's parent company over its alleged role in the unlawful arrest, detention and execution of their husbands following a brutal crackdown on protests by Ogoni people against Shell's environmental pollution. The case was initiated after similar proceedings were brought and dismissed in the US (see below). Unlike other cases mentioned above, however, in the Dutch *Kiobel* litigation the claimants explicitly refused to base their claims against the parent companies on the Anglo-Saxon legal concepts of piercing the corporate veil and crossing the corporate veil, shareholders' liability or tort or negligence – preferring to base their claims on fundamental rights enshrined in the African Charter on Human and Peoples Rights and the Nigerian constitution.¹⁸⁰ This refusal to invoke tort law was likely to avoid statutory limitations, and led the Dutch Court to reject Shell's invocation of the *Okpabi* Court of Appeal decision.¹⁸¹ On 1 May 2019, the District Court of The Hague issued an interim ruling in favor of the plaintiffs, in which it found that the court has jurisdiction over the case, allowing the case to proceed to trial.

4. Alien Tort Statute in the United States

No discussion of extraterritoriality and transnational tort would be complete without a mention of the 1789 Alien Tort Statute ("ATS", sometimes referred to as the Alien Tort Claims Act), and what was until recently described as the "[...] booming transnational tort litigation in the US [...]".¹⁸² The ATS is

¹⁷⁹ *Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others*, para 3.2 [*Eric Barizaa Decision*].

¹⁸⁰ *Ibid.*, para 4.8.

¹⁸¹ *Ibid.*, para. 4.28.

¹⁸² Reinisch, 'The Changing International Framework for Dealing with Non-State Actors', *supra* note 9, 88.

another way of deploying tort law in transnational cases but, unlike in other jurisdictions, it does so “[...] via international customary law [...]”.¹⁸³ The ATS allows non-US citizens to file civil lawsuits in the US federal courts for violations of the *the law of nations*, thereby converting a *jus cogens* violation (violation of human rights so grave as to be against international customary law, or “the law of nations”)¹⁸⁴ into an actionable domestic tort. In its modern incarnation, the ATS has been held to apply to private actors in relation to international crimes of genocide, war crimes, and crimes against humanity.¹⁸⁵

The ATS is a bit of an oddity. When hearing ATS claims, US courts have often turned to international *criminal* law for guidance as it refers to international law, even though the ATS itself only provides for *civil* liability.¹⁸⁶ It has also been argued that “[...] United States tort law is functionally more equivalent to civilian criminal law than to civilian tort law [...]”,¹⁸⁷ further blurring the lines between the traditional civil/criminal categorizations. On its face, the ATS allows for universal jurisdiction over civil claims, and indeed the form of extraterritorial jurisdiction it created has been seen as a “spectacular example” of “[...] the inventive use by victims of certain legislations, whose primary aim was not necessarily to establish a form of extraterritorial jurisdiction [...]”.¹⁸⁸ However, it has led to the usual criticism of extraterritorial jurisdiction, including concerns about US courts “[...] setting themselves up as universal judges of atrocities committed abroad [...]”¹⁸⁹

Its applicability, however, is now drastically reduced. The 2013 US Supreme Court decision in *Kiobel v Royal Dutch Petroleum Co* was the first nail in the coffin of ATS-based actions against foreign corporations,¹⁹⁰ as the Court formulated the jurisdictional requirement that cases should “touch and concern”

¹⁸³ C. Wells & J. Elias, ‘Catching the Conscience of the King: Corporate Players on the International Stage’, in P. Alston (ed.), *Non-State Actors and Human Rights* (2005), 152.

¹⁸⁴ V. Grosswald Curran, ‘Mass Torts and Universal Jurisdiction’, 34 *University of Pennsylvania Journal of International Law* (2013) 4, 799 [Grosswald Curran, Mass Torts].

¹⁸⁵ Wells & Elias, ‘Catching the Conscience of the King: Corporate Players on the International Stage’, *supra* note 183, 153.

¹⁸⁶ Ryngaert & Struyven, ‘Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law’, *supra* note 110, 118.

¹⁸⁷ Grosswald Curran, ‘Mass Torts’, *supra* note 184, 804.

¹⁸⁸ De Schutter, ‘Extraterritorial Jurisdiction’, *supra* note 114, 6.

¹⁸⁹ A Cassese, *International Law* (2005), 393.

¹⁹⁰ J. Paust, ‘Responsibilities of Armed Opposition Groups and Corporations for Violations of International Law and Possible Sanctions’, in N. Gal-Or, C. Ryngaert & M. Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (2015), 122.

US territory with “sufficient force” – and found that a mere corporate presence in the US fell short of this. In 2018, the US Supreme Court held in *Jesner v Arab Bank* that the ATS did not permit federal courts to recognize causes of action against foreign corporations. As a result, any hopes of the US tackling corporate complicity through the ATS¹⁹¹ have been quashed.

II. (Public) Knowledge is Power: Impact of Public Materials and Mandatory Reporting

As we have seen in the aforementioned cases, parent company liability often requires a *hook* in order to allow courts of the parent company’s jurisdiction to rule over disputes involving a subsidiary’s actions. In this regard, a particularly noteworthy paragraph in the *Vedanta* judgment considers the impact of parent companies implementing group-wide policies, and of published materials that could suggest a level of control over subsidiaries:

“53. Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.”

The Supreme Court noted that *Vedanta* had published materials

“[...] in which it asserted its responsibility for the establishment of appropriate group-wide environmental control and sustainability standards, for their implementation throughout the group by training, and for their monitoring and enforcement [...]”¹⁹²

¹⁹¹ Ryngaert & Struyven, ‘Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law’, *supra* note 110, 103.

¹⁹² *Vedanta* Decision, *supra* note 147, para. 55.

One report, entitled *Embedding Sustainability*, stressed that the oversight of all Vedanta's subsidiaries rested with the board of Vedanta itself, and made particular reference to problems with discharges into water and to the particular problems arising at the Nchanga mine.

Similarly, the Court of Appeal at The Hague, in the aforementioned Dutch case of *Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and others*, stated that a duty of care was particularly likely to exist if the defendant parent company “[...] has made the prevention of environmental damage by the activities of group companies a spearhead and is, to a certain degree, actively involved in and managing the business operations of such companies, which is not to say that without this attention and involvement a violation of the duty of care is unthinkable and that culpable negligence with regard to the said interests can never result in liability.”¹⁹³ This assertion suggests a willingness from the Dutch court to use the codes of conduct voluntarily adopted by the company as a basis for establishing its duty of care, as well as the standard of overview and monitoring expected from the parent company.¹⁹⁴

Could linking a parent company's duty of care to its creation and implementation of global human rights policies act as an incentive for group companies not to have policies at all, so as to limit potential liability? Such an argument would appear somewhat shortsighted in the current regulatory environment, in which companies are increasingly required by law to report and intervene throughout their supply chains. New legislation is regularly being adopted both at the regional and national level that imposes mandatory human rights due diligence requirements on certain categories of companies. In other words, it is getting harder and harder for companies to justify not having global human rights policies and procedures.

Under the 2016 French *Loi de vigilance*, for example, companies of a certain size are required to identify risks of negative human rights impacts throughout their supply chains (including abroad) and how they plan to address such risks.¹⁹⁵ Those who thought this was just another box-ticking exercise may have underestimated the determination of French civil society, as the first judicial action under the *Loi de vigilance* was brought in June 2019 by a group of six

¹⁹³ *Eric Barizaa* Decision, *supra* note 179, para 6.9.

¹⁹⁴ EP, Directorate-General for External Policies, ‘Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries’ (2019), 77 available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf) (last visited 03 June 2020).

¹⁹⁵ Article L. 225-102-4.-I of the French Commercial Code (*Code de commerce*).

NGOs against oil company Total for the latter's failure to address risks linked to a large-scale extractive project in Uganda, which put 50,000 at risk of forced displacement and could have a disastrous environmental impact, in its vigilance plan.¹⁹⁶ The company failed to take remedial action, leading the NGOs to apply to the courts for provisional measures.¹⁹⁷ The application was rejected in January 2020 for lack of jurisdiction, a decision which the claimant NGOs say they are considering appealing.¹⁹⁸ A similar judicial action was launched against Total around the same time, this time by fifteen local authorities and five NGOs.¹⁹⁹

Mandatory human rights due diligence and reporting requirements are likely to be an ever more present feature of States' regulatory arsenal, with multinational corporations required to identify and disclose both human rights risks and the way they plan on addressing such risks.²⁰⁰ A sign of the times, on 28 April 2020, European Commissioner for Justice Didier Reynders pledged his

¹⁹⁶ See L. Caramel, 'Devoir de Vigilance: Total Devant la Justice Française Pour les Actes de sa Filiale en Ouganda', *Le Monde* (12 December 2019), available at https://www.lemonde.fr/economie/article/2019/12/11/devoir-de-vigilance-total-devant-la-justice-pour-les-actes-de-sa-filiale-en-ouganda_6022480_3234.html (last visited 26 May 2020).

¹⁹⁷ See E. Monin, 'Projet Pétrolier en Ouganda: Le Groupe Total Assigné en Référé Pour Manquement à son Devoir de Vigilance', *France Info* (23 October 2019), available at https://www.francetvinfo.fr/monde/afrique/projet-petrolier-en-ouganda-le-groupe-total-assigne-en-refere-pour-manquement-a-son-devoir-de-vigilance_3671767.html (last visited 26 May 2020).

¹⁹⁸ See press update, 'Total Assigné en Justice Pour Manquement à son Devoir de Vigilance Climatique', *Reporterre* (30 January 2020), available at <https://reporterre.net/Total-assigne-en-justice-pour-manquement-a-son-devoir-de-vigilance-climatique> (last visited 26 May 2020).

¹⁹⁹ V. Collen, 'Réchauffement Climatique: Total Assigné en Justice par des Collectivités Locales', *Les Echos* (28 January 2020), available at <https://www.lesechos.fr/industrie-services/energie-environnement/rechauffement-climatique-total-assigne-en-justice-par-des-collectivites-locales-1166991> (last visited 26 May 2020).

²⁰⁰ At the time of writing, Germany is considering introducing legislation similar to the French *Loi de vigilance*, see, J.-M. Hauteville, 'Responsabilité Sociale: Berlin Envisage de Mettre au pas les Multinationales Allemandes', *Le Monde* (29 July 2019), available at https://www.lemonde.fr/economie/article/2019/07/29/responsabilite-sociale-berlin-envisage-de-mettre-au-pas-les-multinationales-allemandes_5494563_3234.html (last visited 26 May 2020). Berthet describes a "legislative tide" across domestic jurisdictions, with the mood shifting towards support for the adoption of legislation imposing mandatory human rights due diligence. See A. Berthet, 'Momentum Builds for Mandatory Human Rights Due Diligence', *Opinio Juris* (13 August 2019), available at <http://opiniojuris.org/2019/08/13/emerging-voices-momentum-builds-for-mandatory-human-rights-due-diligence/> (last visited 26 May 2020).

support for mandatory human rights due diligence and announced the bloc's intention to introduce legislation to that effect in 2021.²⁰¹

This trend towards increasing scrutiny is likely to lead to some level of mandatory disclosure of risks to the environment, too. EU law already requires member States to implement rules requiring large companies to disclose certain information on specific challenges they encounter such as environmental protection and respect for human rights.²⁰² More, rather than less, mandatory disclosure is to be expected. On 23 July 2019, for example, the European Commission published a communication titled "Stepping up EU Action to Protect and Restore the World's Forests", explaining that the Commission is considering improving company reporting on the impact that their activities have on deforestation and forest degradation.²⁰³ On 2 December 2019, over a hundred civil society organizations and trade unions published an open call for the establishment of a mandatory human rights and environmental due diligence framework for businesses operating in the EU.²⁰⁴ Norway, Finland, and Germany have all, in the scope of one month in late 2019, expressed a willingness to enshrine mandatory human rights reporting in law.²⁰⁵

²⁰¹ B. Fox, 'New Human Rights Laws in 2021, Promises EU Justice Chief', EurActiv (30 April 2020), available at <https://www.euractiv.com/section/global-europe/news/new-human-rights-laws-in-2021-promises-eu-justice-chief/> (last visited 26 May 2020).

²⁰² EP and Council Directive 2014/95/EU, 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15 November 2014.

²⁰³ Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 23 July 2019, COM(2019) 352 final, 14.

²⁰⁴ Joint statement signed by NGOs and trade unions, 'A Call for EU Human Rights and Environmental Due Diligence Legislation' (2 December 2019), available at http://corporatejustice.org/news/final_cso_eu_due_diligence_statement_2.12.19.pdf (last visited 26 May 2020).

²⁰⁵ For Germany, see Decision of the 32nd Party Congress of the CDU Party, 22-23 November 2019, available (in German) at https://www.cdu.de/system/tdf/media/images/leipzig2019/32._parteitag_2019_sonstige_beschluesse_2.pdf?file=1 (last visited 26 May 2020); for Norway, see Draft Bill on Transparency in Supply Chains and Due Diligence, autumn 2019, available (in Norwegian) at: <https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/195794-bfd-etikkrapport-web.pdf> (last visited 26 May 2020); and in Finland see press release by the Finnish Ministry of Foreign Affairs, 2 December 2019, available here: https://um.fi/current-affairs/-/asset_publisher/gc654PySnjTX/content/suomi-ehdottaa-eu-lle-yritykset-ja-ihmisoikeudet-toimintasuunnitelmaa (last visited 26 May 2020).

Coupled with judicial willingness to consider parent company liability, such requirements could create a particularly effective blend of judicial and non-judicial measures, with policies established through mandatory due diligence used as a *hook* allowing courts to find a duty of care owed by parent companies. Interestingly, it could also support arguments that companies such as Argor-Heraeus should have known about human rights abuses occurring down their supply chain, potentially increasing the chances of accountability through criminal liability as well.

III. Challenges

The road to corporate accountability through parent company liability is unlikely to be a smooth ride. In particular, cases such as *Vedanta* are likely to cause a resurgence of the doctrine of *forum non conveniens*,²⁰⁶ in which courts decline jurisdiction on the basis that they are not the appropriate forum for the action,²⁰⁷ traditionally a significant obstacle to access to justice.²⁰⁸ In *Vedanta*, however, the limitations of *forum non conveniens* were countered with a variation of the doctrine of *forum necessitatis* which allows domestic courts to assert jurisdiction when there is no other forum available in which the plaintiffs could pursue their claim. The Supreme Court found that, despite all the factors connecting the case to Zambia,²⁰⁹ England could be considered the proper forum to try the case if substantial justice was unavailable to the parties in Zambia.²¹⁰

Access to justice could therefore become the jurisdictional *hook* through which arguments of *forum non conveniens* could be defeated and non-EU-domiciled defendants anchored to claims against EU-domiciled anchor defendants. This could be particularly powerful when coupled with the fact

²⁰⁶ G. Holly, 'A *Non Conveniens* Revival – The Supreme Court's Approach to Jurisdiction in *Vedanta*', *Opinio Juris* (24 April 2019), available at <http://opiniojuris.org/2019/04/24/vedanta-v-lungowe-symposium-a-non-conveniens-revival-the-supreme-courts-approach-to-jurisdiction-in-vedanta> (last visited 26 May 2020).

²⁰⁷ McConville, 'Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction's Relationship to Ex Juris Service, Forum Non Conveniens and the Presumption of Territoriality', *supra* note 157, 188.

²⁰⁸ Augenstein, 'Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law', *supra* note 10, 595, n 13. See also C. Liu, 'Escaping Liability via *Forum Non Conveniens*: Conoco Phillips's Oil Spill in China', 17 *University of Pennsylvania Journal of Law and Social Change* (2014) 2, 137; and CESCR July 2011 Statement, *supra* note 39, para. 43.

²⁰⁹ Listed at *Vedanta* Decision, *supra* note 147, para 85.

²¹⁰ *Vedanta* Decision, *supra* note 147, para. 87.

that “[...] in Europe, *forum necessitatis* jurisdiction has been considered to flow from member States’ human rights obligations to ensure access to justice under Article 6 of the European Convention of Human Rights [...]”.²¹¹ This line of argument was explicitly encouraged by the UN Committee on Economic, Social, and Cultural Rights in a 2011 statement: “[T]he extent to which an effective remedy is available and realistic in the alternative jurisdiction should be an overriding consideration in judicial decisions relying on *forum non conveniens* considerations.”²¹²

Although the law seems to be making great strides in the area of parent company liability, it has been noted that cases like *Vedanta* or the Shell litigation in the Netherlands “[...] are rather exceptional and far from suggesting any systematic concern of European private international law with the extraterritorial protection of human rights against corporate-related violations [...]”.²¹³ In addition, States might also be reluctant to accept expansive extraterritorial jurisdiction in civil matters, something which was noted during negotiations of Draft Principle 11 and which led to a change of wording, with the original phraseology proposed in the report (“necessary [...] measures to ensure”) replaced by wording which signifies lesser normative value (“appropriate [...] measures aimed at ensuring”).²¹⁴

G. Conclusion

It is often pointed out that few domestic cases of corporate complicity, whether criminal or civil, have been successful to date. This could be the result of a variety of factors, including the lack of an available forum, lack of resources, and prosecutorial strategies that fail to prioritize these types of cases. As courts “[...] strain to apply analytical frameworks ill-adapted to the contemporary mobility and deterritorialization of capital and products [...]”,²¹⁵ multinational

²¹¹ Augenstein, ‘Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law’, *supra* note 10, 597. See also *Nait-Liman v Switzerland*, ECtHR Application No. 51357/07, Judgment of 15 March 2018, for a comparative law analysis of European jurisdictions.

²¹² CESCR July 2011 Statement, *supra* note 39, para. 44.

²¹³ Augenstein, ‘Threats Posed to Human Security by non-State Corporate Actors: The Answer of International Criminal Law’, *supra* note 10, 598.

²¹⁴ V. Jakjmovska & E. Amani, ‘Protecting the Environment in Non-International Armed Conflicts: Are We There Yet?’, *EJIL: Talk!* (16 July 2019), available at <https://www.ejiltalk.org/protecting-the-environment-in-non-international-armed-conflicts-are-we-there-yet/> (last visited 26 May 2020).

²¹⁵ Grosswald Curran, ‘Harmonizing Parent Company Liability’, *supra* note 31, 414.

corporations involved in environmental harm and human rights abuses abroad continue to operate in a general climate of legal impunity. Domestic law remedies the world over have been found to be “[...] patchy, unpredictable, often ineffective and fragile [...]”,²¹⁶ with challenges exacerbated in cross-border cases.

The tide, however, could soon be turning. While the Draft Principles are non-binding, they represent a chance to galvanize discussions of protection of the environment in armed conflict when negotiating binding instruments such as the future BHR treaty. The legal conversation is increasingly concerned with both corporate accountability and the protection of the environment. In July 2019, in direct response to the publication of the Draft Principles, a group of scientists published an open letter in the journal *Nature*,²¹⁷ calling for a Fifth Geneva Convention that would make environmental damage a war crime. The intersection between business, armed conflict, and the environment is also the subject of discussion in the BHR community, as evidenced by the topics discussed at the UN annual Forum on BHR held in November 2019,²¹⁸ which included topics such as corporate crimes in conflict situations, environmental protection, and extraterritorial regulation. Similarly, the push for the inclusion of ecocide as an international crime under the Rome Statute is gaining exponential momentum,²¹⁹ further exposing the link between businesses, environmental harm, and situations of armed conflict. Norms enshrined at the treaty level

²¹⁶ UN Secretary-General, *Human Rights and Transnational Corporations and Other Business Enterprises: Notes by the Secretary-General*, UN Doc A/71/291 (4 August 2016), 23.

²¹⁷ S. M. Durant & J. C. Brito, ‘Stop Military Conflicts From Trashing Environment’, 478 *Nature* (2019) 571.

²¹⁸ UN Forum on Business and Human Rights, Concept Note, ‘Time to act: Governments as Catalysts for Business Respect for Human Rights’, available at <https://www.ohchr.org/Documents/Issues/Business/ForumSession8/ConceptNote.pdf> (last visited 26 May 2020).

²¹⁹ See, in the scope of a couple of months, ‘Imagine Jair Bolsonaro Standing Trial for Ecocide at The Hague’, *The New York Times* (21 September 2019), available at <https://www.nytimes.com/2019/09/21/sunday-review/bolsonaro-amazon-fire.html> (last visited 26 May 2020); A. Kwadrans, ‘The ICC: A Potential Avenue for Accountability for Ecocide?’, *IntLawGrrls* (2 December 2019), available at <https://ilg2.org/2019/12/02/icc-assembly-of-states-parties-symposium-the-icc-a-potential-avenue-for-accountability-for-ecocide/> (last visited 26 May 2020); J. Mehta, ‘Ecocide as an Atrocity Crimes – An Idea Whose Time is Overdue’, *JusticeInfo.Net* (2 December 2019), available at <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/43104-ecocide-atrocity-crime-idea-time-overdue.html> (last visited 26 May 2020). For a discussion of the structural limitations that could hamper the usefulness of including ecocide as a crime under the Rome Statute, see Drumbl, ‘Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation and Development’, *supra* note 25, 10.

trickle down into domestic law, leading to further cross-fertilization between the two levels.

Concepts of extraterritorial jurisdiction and liability (both civil and criminal) for harm caused directly or indirectly by multinational corporations are also gaining ground. Universal jurisdiction and extraterritorial corporate accountability have both been identified in legal literature²²⁰ as ideal conduits for the theory of *salience* mentioned in our introduction. Environmental concerns in particular are central to Dworkin's notion salience, as the global environment movement continues to gain traction and pro-environmental objectives are becoming "widely held norms".²²¹ In this context, salience would also increase accountability for corporate wrongs, as businesses will be increasingly unable to "[...] hide behind the consent of States that have self-interested reasons not to subject their corporations with restrictions that the majority of people and states consider necessary [...]".²²²

Similarly, international criminal law standards will likely permeate an increasing number of legal systems (both domestic and supranational), businesses are likely to be increasingly found to owe a duty of care to victims of corporate abuse throughout the world, and the due diligence requirement will increasingly go from soft law to hard normative standards. Such developments will make BHR law increasingly salient, leading to "[...] a further advancement in the protection of human rights from adverse corporate impact [and] a reduction in corporation contribution to social and armed conflict [...]".²²³

²²⁰ Dennison, 'Taking Salience Seriously: the Viability of Ronald Dworkin's Theory of Salience in the Context of Extra-Territorial Corporate Accountability', *supra* note 26, 8.

²²¹ *Ibid.*, 18.

²²² *Ibid.*, 21.

²²³ Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last', *supra* note 26, 74.