WAR ZONES AND GREY ZONES
– DOES LEGAL LIABILITY OF COMPANIES EXIST UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT?
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1. Introduction

International law as a system is founded on the principle of state sovereignty, manifested in the international law of armed conflict through the notion of state monopoly of the use of force. The international law of armed conflict constitutes an attempt to civilise warfare by creating rules of conduct and by distinguishing legitimate from unlawful combatants and combatants from non-combatants.

While the international law of armed conflict is a state-based order, non-state actors abound in present-day conflicts. A majority of today's armed conflicts involve non-state parties. States outsource significant

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2 Despite common article 3 and the 2nd Additional Protocol to the Geneva Conventions, which provide certain binding standards to combatants of rebel movements and guerrillas in internal conflicts, states remain the pillars of and retain the main responsibility under the international law of armed conflict.
parts of their military operations to private bodies to an extent not seen since before the emergence of the Westphalian modern nation-state system. There are already reports of the involvement of such private firms in violations of international law. Companies increasingly operate in conflict areas and thereby risk becoming involved in violations of the international law of armed conflict. Provided that the detainees are subject to violations of the international law of armed conflict; can for instance suppliers to the US Military at Guantanamo Bay be held liable for such violations? Or, are there any circumstances under which oil companies can be held liable for atrocities committed by those contracted for site protection? The inconsistency between the state-based order of international law and the realities of current conflicts puts the international law of armed conflict under pressure and poses relevant but difficult legal problems.

This article will enquire into corporate responsibility under the inter-

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3 For instance, between 1994 and 2002, the US Defence Department made more than 3,000 agreements with private entities to an estimated total contractual value of $300 billion. See Singer pp. 15 and 40.


5 This gives rise to interesting problems regarding the notion of complicity under international criminal law, which however fall outside the scope of this article.

6 Similarly, are constructing companies covering up mass graves in Rwanda after the Tutsi genocide liable under international law? See Clapham p. 148. In the so-called Zyklon B case before the British Military Court, the owner of the firm that supplied gas to the gas chambers in German concentration camps was sentenced for accessory to murder. The decisive subjective element in the court’s decision was that the firm had supplied gas despite knowledge about the actual use of the gas by the purchaser. I.L.R. 49 pp. 250–253.

7 This is what happened in Doe v Unocal, where the Appeals Court found for the Plaintiffs under the US Alien Tort Claims Act on the basis that Unocal, with knowledge of the use of forced labour by the military in their performance under a Joint Venture had utilised and benefited from the military’s practise. Doe v. Unocal 2002, p. 9. The case is further discussed in section 4.2.

8 Private actors conducting all aspects of military operations – from general support to strategy planning and actual combat – can obscure the line between protected civilians and unlawful combatants. This also raises the question of renewed relevance of the mercenary concept, which was generally considered obsolete when the International Convention against Mercenary was adopted in 1989. Finally, private contractors often perform similar operations regardless of whether they are conducted during an armed conflict or not. This can contribute to the blurring of the limits between the international law of armed conflict and other areas of international law, especially human rights law. These are all questions that fall outside the scope of this article.
national law of armed conflict. Its specific purpose is to establish whether companies have been conferred legal personality under this part of international law. I will argue that while companies have not yet attained such status under the international law of armed conflict, the ongoing normative processes to this effect should be welcomed in view of the increasing corporate involvement in modern armed conflicts.

Given companies’ current lack of subjectivity under the international law of armed conflict, my further enquiries into their present legal status show that companies de lege lata are not entirely immune from responsibility if involved in breaches of this part of international law. In principle, the US Alien Tort Claims Act (ATCA) provides American Federal Courts with universal jurisdiction over companies for violations of international law. This is important, among other things because the central position of the United States makes it likely that American judgements will yield international influence. American Courts have a wide normative freedom, and they will not hesitate to implement their apprehension of what is applicable law. As a consequence, American court practise on corporate liability under ATCA might tell us something about the material application of the international law of armed conflict on companies. A few states, among them Norway, have introduced corporate criminal responsibility for violations of the international law of armed conflict in their domestic criminal laws. This demonstrates that these states accept corporate criminal responsibility per se.

«Companies», particularly in the form of limited liability companies, is a Western, incomprehensive term for all forms of commercial entities involved in violations committed in armed conflicts. For instance, many states operate behind various legal constructions that do not fit with the corporate concept but whose activities sometimes give rise to concern.9 Consequently, transnational companies10 are not necessarily the worst perpetrators, although they typically operate from open jurisdictions and thereby become subject to much debate. What is stated in

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9 Examples can be found in the list of companies allegedly involved in unlawful activities in the Democratic Republic of Congo prepared by the UN Panel of Experts, cited in the Executive Summary of the report Companies, conflict and the Democratic Republic of Congo prepared by OECD and RAID in March, 2004.

10 There does not exist a common legal definition of transnational companies, see Henkin et al, p. 346. See also the OECD Guidelines article 1.3.
the following is equally applicable to this wide spectrum of private legal persons. The consequences of violation may vary accordingly, but it falls outside the scope of this article to make such distinctions.

2. The doctrine and practise of legal personality

Companies’ mere involvement in situations of armed conflict does not automatically give them legal personality, or competence to possess rights and duties directly under the international law of armed conflict. States as makers of international law possess full discretion to assign and remove legal personality in relation to any entity with respect to any norm of international law. They are also free to determine that a particular norm shall apply materially different to different subjects. In this sense, legal personality is a relative concept.

In any discussion on international legal personality, it is important to recall the fundamental basis for international law: states are its principal subjects and international law as a normative system was designed to regulate the relationship between them. States also make international law and have the primary responsibility to enforce it. If a violation of international law is established, states have the primary duty to hold the perpetrators accountable. The jurisdiction of the International Criminal Court (ICC) or any other international forum is only secondary and complementary to that of national courts. It follows hereof that states would be obliged to ensure compliance, even if companies would prove to have legal personality under the international law of armed conflict.

11 Interesting questions arise with respect to the limits of state responsibility for state owned companies. These fall outside the scope of this article. For instance, are there any circumstances under which the Norwegian state can be held responsible for investments made by the Norwegian Petroleum Fund in companies involved in international crimes?

12 Shaw p. 175. There is a line of thought that the definition of international legal personality must also include some form of international enforcement or complaint mechanisms with respect to the rights and obligations ascribed to the entity in question, see Brownlie p. 58. However, Lauterpacht provides an excellent explanation of why «there is a clear distinction between procedural capacity and a quality of a subject of law», see Lauterpacht p. 54. See also pp. 8, 27, 48, and 61.

13 The International Court of Justice (ICJ) has explained this in the Reparation for Injuries case p. 178, in which the Court attributed international personality to the United Nations: «The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.»

14 Higgins p. 39.

15 This is reflected in article 1 of the ICC Statute.
Despite the primary role of states, nothing in international law prevents it from having other subjects. Indeed, though some scholars remain reluctant to the idea, it is already established that non-state entities can have international legal personality. Most important is the attribution of international legal personality to natural persons. The principle of liability of natural persons under the international law of armed conflict is mainly reflected in the Charter of the International Military Tribunal and the provisions dealing with grave breaches in the Geneva Conventions and Additional Protocol I. More generally, it is confirmed in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda as well as the ICC.

Individual responsibility under the international law of armed conflict applies to every person committing a violation. This implies that corporate executives, board members and other employees engaging in criminal acts, privately or on behalf of their companies, are already subject to criminal liability under international law.

It is difficult to identify international legal persons and the norms of international law applicable to them. The mere fact that many international law instruments refer to non-state entities does not necessarily make them subjects thereof. For instance; the material provisions contained in the Geneva Conventions set out rules of conduct for persons in combat. Yet these persons are not subjects under the Geneva Conventions. Common article 1 makes clear that it is the «state parties» that are obliged to ensure respect for the norms set out therein. One very important exception hereto is the grave breaches for which individual liability incur. Individual liability for certain other violations of the Geneva Conventions has developed through custom, which makes customary law the basis for individual liability in these instances, not the Geneva

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16 Lauterpacht, especially p. 4.
17 The ICJ established already in 1949 that international law have other subjects than states, see the Reparation for Injuries case p. 174. The case is discussed in Lauterpacht, especially pp. 23 and 29. See Higgins p. 39 and Friedmann pp. 74 and 83.
18 For an exposé of the development of individual responsibility for war crimes and crimes against humanity, see Greppi. See also Cassese pp. 37 ff.
20 Green p. 286.
21 Grave breaches are defined in articles 50–51, 49–50, 129–130 and 146–147 of the respective Geneva Conventions. The definition is extended in article 85(3) of Additional Protocol 1. See also Shaw p. 235.
Conventions as treaties. Human rights instruments illustrate this point even better. On the face they confer rights to individuals, whereas they in fact impose obligations on state parties to ensure that individuals within their jurisdiction enjoy these rights. This has been interpreted to include an obligation on states to ensure corporate compliance of human rights norms. But companies participating in human rights violations would be responsible under domestic, not international law.

International legal personality takes many forms and is manifested in different sources of international law. The tension between the foundations of traditional international law of armed conflict and current developments largely makes the question of identifying new legal personalities one of ascertaining the intention and practise of States. This is the course that will be pursued in the next section.

3. Are companies subjects under the international law of armed conflict?

3.1 Introduction

In the search for evidence of companies’ subjectification under the international law of armed conflict, treaties establishing international criminal tribunals and the decisions made by such tribunals, other treaty law and the practise of the UN Security Council are particularly relevant places to look. Since the range of voluntary efforts at regulation is a significant feature of the relationship between companies and international law, the last sub-section of this chapter is devoted hereto.

22 Shaw pp. 594–595, Meron p. 4. The exact definition of every particular conduct that may give rise to international criminal liability and the legal basis therefore (either treaty law or customary law) is extremely complicated and falls outside the purpose of this essay, even though it further complicates the identification of those subject to liability. Equally difficult problems arise of delimitations towards international criminal law. 

23 Compare, for instance the wording of articles 6(1) and 2(1) of the International Covenant on Civil and Political Rights (1966).

24 The Inter-American Court of Human Rights has established that «the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention», The Velasquez Rodriguez Case, section 176.


26 Lauterpacht p. 38.
3.2 Treaties establishing international tribunals with jurisdiction over war crimes

3.2.1 The legal settlement following the Second World War

One of the reactions by the international community to the atrocities committed by Nazi Germany during the Second World War was to create the Nuremberg International Military Tribunal (IMT). The IMT Charter establishes, among other things, individual criminal liability for violations of the international law of armed conflict. The Control Council Law No. 10 provides the basis for prosecuting persons of lower rank than those tried by the IMT, however likewise guilty of international crimes.\(^\text{27}\)

The so-called Industrial cases, tried by the American Military Tribunal (the Tribunal) under Control Council Law No. 10, illustrate how the Nuremberg military courts treated the relationship between corporate conduct and criminal responsibility.\(^\text{28}\) In the first case, Carl Krauch and some colleagues of his were sentenced for criminal participation by the firm I.G. Farben in plunder of private and public property, exploitation and spoliation in territories occupied by Germany.\(^\text{29}\) Five of them were also found guilty of accessory in the German slave labour programme connected to the firm’s plant at the Auschwitz concentration camp.\(^\text{30}\) In the second and third cases, the Tribunal also sentenced Friedrich Flick and his companions, as well as Alfried Krupp von Bohlen and some of his executives, on similar charges.\(^\text{31}\)

The Tribunal clearly recognised the companies’ prominent role in the


\(^{29}\) The Farben Case p. 1.

\(^{30}\) The Farben Case p. 309.

\(^{31}\) The Flick Case, as for charges of plunder of public and private property, spoliation and other offences against property in territories occupied by Germany, see p. 852, as for charges of enslavement and deportation to slave labour of civilians and the use of prisoners of war in war operations, see p. 681. The Krupp Case, as for charges of plunder and spoliation activities in by Germany occupied territories, see pp. 1352–1353, 1358–1359 and 1361, as for charges of participation in the slave labour programme, see pp. 1448–1449.
commission of the crimes. It also appreciated the difficulties in making individuals fully accountable for acts committed through legal persons not subject to international responsibility. In the Farben case, the Tribunal pointed at problems related to pulverization of responsibility for policy making as well as collection of evidence. It nevertheless would be misleading to conclude that by their reasoning, the Tribunal indirectly attributed criminal responsibility to the firms involved. The Tribunal was indeed aware that it lacked jurisdiction over legal entities and consequently not in a position to try the companies as such. There is a clear difference between the ability to carry out an act that fulfils the objective requisite of a particular crime and being amenable to criminal liability. Instead, the Tribunal made it clear that it treated the firms as instruments through which the perpetrators committed their crimes.

In trying these men, the Tribunal remained loyal to the fundamental principle of modern criminal law that no one shall be convicted for crimes that cannot be ascribed to him personally. The principle prohibits collective punishment, i.e. holding persons criminally responsible for the conduct of others. Additionally, objective criminal liability is prohibited: the crime must have been committed with some form of mental involvement, at least some level of negligence. The principle is reflected in the IMT Charter article 6 and the Control Council Law No. 10 article II, but in applying it to the Industrial cases, the Tribunal referred to its principal place in Anglo-American criminal law theory.

In reflecting upon the requisite of personal guilt of individuals, the
Tribunal drew upon IMT’s interpretation of the IMT Charter articles 9 and 10.\textsuperscript{39} These articles authorise IMT to declare groups or organisations criminal for the purpose of imposing individual criminal liability upon its members.\textsuperscript{40} Their inclusion derived from a United States proposal as a way of holding persons accountable against whom there was insufficient evidence to prove any other crime;\textsuperscript{41} thus a similar line of thought that lies behind contemporary corporate criminalisation in national legislation.

IMT interpreted the said articles restrictively and did not confer accountability to individuals merely on the basis of membership in organisations it had defined as criminal; criminal responsibility required personal knowledge of, or incriminating connection to, criminal acts conducted in the name of the organisation.\textsuperscript{42} This is how IMT explained its standpoint:

«One of the most important [legal principles] … is that criminal guilt is personal, and that mass punishments should be avoided. … the tribunal should make such declaration of criminality [of an organisation or group] so far as possible in a manner to ensure that innocent persons will not be punished»\textsuperscript{43}

Similarly, the Tribunal could not accept individual responsibility on the basis of particular corporate dispositions alone. It either required proof of personal participation in a criminal act or of personal authorisation or approval of a particular conduct within the corporate organisation with knowledge of its criminal character.\textsuperscript{44} This dilemma manifests one advantage of corporate criminal liability: it can be imposed when it is impossible to sentence all individuals involved.

It is evident that IMT and the Tribunal sought to ascertain \textit{individual} accountability for criminal acts committed in the name of legal persons,

\begin{footnotes}
\item[39] The provisions are reflected in article II(d) of Control Council Law No. 10, which criminalises membership in organisations or groups «declared criminal by the International Military Tribunals».
\item[40] \textit{Clapham} p. 165 wrongly assumes that these provisions provide a basis for imposing criminal liability on the organisation as such.
\item[41] \textit{Cassese} p. 137.
\item[42] \textit{Cassese} p. 138.
\item[43] Stated in the judgement against Göring and others, cited in \textit{McDonald and Szwak-Goldman} p. 8.
\item[44] \textit{The Farben Case} p. 1163.
\end{footnotes}
organisations or companies, a matter entirely different from criminalising the entities themselves. The legal project behind the post-war legal settlement was to tear apart the protection against individual criminal liability that states had provided in the past. Hence the focus was on individuals; not on legal persons. This is what IMT explains in this well-known citation:

«Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international laws. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced»

It can also explain why the Tribunal took pains to emphasise that corporate organisations could not serve as shields against individual responsibility and why legal persons were excluded from the jurisdiction of the military courts. Lastly, it is assumable that the question of extending criminal responsibility to companies was less relevant in the 1940-ies than it is today. It would seem easier to allocate liability on individuals in corporate structures characterised by family-run businesses with few owners in superior positions than in today’s complicated corporate structures.

In conclusion, one cannot rely on the Industrial cases to compose corporate responsibility under the contemporary international law of armed conflict. They do tell us, however, something about the threshold for holding individuals accountable for corporate conduct under current international law.

3.2.2 The International Criminal Court (ICC)

The adoption of the Rome Statute for the ICC in 1998 and the establishment of the Court in 2002 represent a major accomplishment by the community of states and a significant step in the development of international law. It creates an international forum for bringing perpetrators of war crimes and other atrocities to justice. It is not, however, a court authorised to try companies. Article 25 of the Rome Statute is clear: the ICC has jurisdiction over natural persons only.

45 Trial of the Major War Criminals p. 466.
46 The Farben Case p. 1163.
47 This is also described by Clapham p. 152.
Whether to include legal persons in the ICC’s judicial sphere, as proposed by France among others, was subject to at times heated debates throughout the treaty negotiations. Several states negotiating the ICC Statute deemed corporate criminal liability a fundamentally alien concept.48 Moreover, serious and «ultimately overwhelming problems of evidence» were discussed.49 It was also widely perceived that punishing legal persons would require particular penalties, in turn giving rise to special challenges such as subsequent forfeiture procedures on the national level.50

Referring to the application of the principle that no one shall be sentenced without personal guilt in the Nuremberg trials, many delegates who were against corporate liability argued that introducing corporate criminal liability would eventually impose collective guilt on employees.51 This is, however, a misguided interpretation, both of the principle as such and the way IMT used it. For IMT, it was not a matter of conferring criminal responsibility to legal persons. IMT was concerned with standards for sentencing natural persons for crimes committed by other individuals through the use of a legal person of whom he or she was a member or employee.52 A wholly different matter is whether legal persons can fulfil the mental elements required for imposing criminal liability on natural persons, another controversial issue in criminal legal theory.53

The state parties also had difficulties agreeing on a common application of the principle of piercing the corporate veil, i.e. making separate

49 Ambos p. 478.
50 Fife pp. 993–994. Ratner p. 481 makes the valid point that the question of responsibility should not be blurred with the question of its implementation.
51 Thanks to Rolf Einar Fife, Director General of the Legal Department, the Norwegian Royal Ministry of Foreign Affairs and Head of the Norwegian Delegation to the United Nations Diplomatic Conference (during which he was Chairman of Plenipotentiaries) for providing me with this example. This concern reflects domestic debates relating to the same theme; see also how Ratner interprets article 9 of the IMT Charter in Ratner and Abrams p. 16. As far as Norwegian Criminal Law is concerned, see i.a. Matningsdal, Rieber-Mohn and Andenes p. 278, and Matningsdal and Bratholm pp. 390–391.
52 For an argument along the same lines as the ICC delegates, see Clapham p. 175. See also The ICC Statute article 25(3)(d).
53 For instance, Norwegian criminal law only permits corporate criminal liability for negligence crimes when the actual perpetrator is unknown. See the text relating to footnotes 113–117.
legal entities within a company group jointly responsible for the liability incurred on one. 54 Few companies carry out their business under one single roof. Companies engaged in cross-border business commonly establish separate legal entities in different jurisdictions. This division is perfectly legitimate for reasons of protecting company assets from risks involved with particular projects. But potential claimants are interested in joint liability because it increases the chances of compensation. Domestic laws differ greatly in how the balance between these inherently opposing interests is struck.

Against this background, it is not surprising that criminal responsibility for legal persons was left out in the end. 55 In result, to the extent corporations are involved in crimes under the ICC Statute, the ICC has the option to prosecute Board members, executives and other employees engaged in such criminal acts. Notably, in his very first case the ICC Prosecutor focuses on corporate involvement, in particular arms trade and natural resource extraction businesses which provide the belligerents in the Democratic Republic of Congo (DRC) with constant funding. Some persons involved in these businesses may in principle be liable for aiding and abetting those committing crimes under the ICC’s jurisdiction. In his press release subsequent to the initiation of the DRC investigations, the Prosecutor emphasised that putting an end to such business will be necessary to achieve peace. 56 This is a clear example of companies’ potentially pivotal role in armed conflicts.

Depending on the inference from the DRC and future cases involving corporate conduct, the discussion of corporate liability may re-open

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54 Again, I thank Rolf Einar Fife for this example.
55 Especially taking into account the effect it would have against the principle of complementarity. See Ambos pp. 477–478 and Saland p. 199. For those and other reasons Frulli assumed that an inclusion «would have caused major problems to the Court», Frulli p. 532. The International Law Commission anticipated already in its work on a Draft Statute of an International Criminal Court that corporate liability would prove too controversial, see Clapham pp. 171–172.
in future revisions of the ICC Statute, which can take place in 2009 at the earliest.  

While the ICC Statute itself is treaty law, it arguably constitutes the lowest common denominator of custom within international criminal law, which evidently does not include criminal liability of legal persons. On the other hand, lack of *opinio juris* with respect to corporate responsibility under international criminal law was probably not the only reason why the state parties rejected it this time. Some might have agreed with the principle as such but not its formulation in the final drafts. For others, political reasons determined their opposition. Henceforth, one must exhaust other relevant sources of international law to ascertain the current legal status of companies with respect to the international law of armed conflict.

### 3.3 Other treaty law

Some conventions, such as the UN Convention Against Corruption and the OECD Bribery Convention, impose obligations on state parties to criminalise companies involved in corruption. It has been argued that this type of treaties serve to indicate law-makers’ willingness to impose corporate liability under human rights law and the international laws of armed conflict. Some even maintain that these conventions in fact do impose such liability. Both arguments fail to recognise the significance of states as the main subjects under international law. All

57 Article 121(1) of the ICC Statute. Especially taking into consideration how close the state parties were to an agreement in 1998, see *Saland* p. 199. See also *Clapham* p. 192, anticipating a future amendment to include legal persons in article 25 of the ICC Statute.

58 The United Nations Convention Against Corruption, adopted on 31 October, 2003, see in particular article 26 concerning liability of legal persons.

59 Article 2 of the OECD Bribery Convention provides: «Each party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.»

60 *Ratner* p. 479. See also pp. 482–483.

61 *Clapham* p. 178. See also pp. 141 and 191 where it is argued that certain environmental conventions impose direct liability on companies for pollution and that it is possible through these conventions to interpret corporate liability under the international law of armed conflict. As we have seen, legal personality is not something that once conferred to an entity with respect to a particular norm extends to all other norms under the same legal system.
other subjects of international law are ultimately exceptions to this fundamental rule. As makers of international law, states are free to assign legal personality to others at any time for any rule of international law. Consequently, states must be presumed the only subjects under an international rule unless legal personality has been conferred to other entities through explicit treaty text or firmly established custom. When states are the only subjects in the international legal instruments on corruption, one must infer thereof that the law-maker consciously did not assign legal personality to other entities. The fact that these conventions give rise to corporate liability under domestic laws, by which they are implemented, is an entirely different matter.

In any case, the UN Commission of Human Rights clarified on 20 April, 2004, that while the matter is highly important, states are not yet ready to confer legal personality to companies under the international law of armed conflict. At their meeting held the same date, the Commission adopted its position on the UN Draft Norms on the Responsibilities of Transnational Corporations (the Draft Norms) prepared by the Sub-Commission on the Promotion and Protection of Human Rights.62 The wording of the Draft Norms goes far in suggesting that companies should be directly responsible under a number of international instruments including the Geneva Conventions and the ICC Statute. This proposition was a key reason why the Draft Norms were rejected by the Commission.63 Against this background, it is difficult to maintain that companies are responsible under the current international law of armed conflict. The very name of the draft document, «Draft Norms», implicate that it constituted an attempt to create new norms, not a codification of existing international law.

In this year’s session, the Commission continued their efforts to include corporations into the sphere of human rights and the international law of armed conflict from a new angle. In a resolution adopted on

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63 For this information, I am grateful to Tormod C. Endresen, Assistant Director General in the Royal Norwegian Ministry of Foreign Affairs.
15 April, 2005, the Commission requested the UN Secretary General to appoint a special representative with a mandate mainly to, during a two year period, «identify and clarify standards of corporate responsibility and accountability for transnational corporations and other businesses enterprises with regard to human rights».  

3.4 Practise of the UN Security Council involving private entities

The General Assembly has engaged itself with corporate involvement in armed conflicts on a few occasions, but the practise of the UN Security Council is more relevant in the discussion on legal liability. Article 25 of the UN Charter stipulates that resolutions passed by the Security Council under Chapter VII are legally binding to states. Since the members of the Security Council interpret, apply and develop international law in the decision-making process, resolutions by the Security Council can serve as evidence of current international law. Their relevance as normative indicators is however limited by the fact that they are passed in response to particular situations and not as general statements of law.

On two occasions, the Security Council has invoked its Chapter VII powers to establish international Ad Hoc criminal tribunals for the purpose of creating international jurisdiction over perpetrators of international crimes committed during the Yugoslav and Rwandan conflicts. The Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) merely provide jurisdiction and individual crimi-
nal responsibility over natural persons.\textsuperscript{70} In this way, they confirm the subjective delimitation towards companies under customary law reflected in the ICC Statute. The Security Council was very conscious about its wording in passing these resolutions. Since the Security Council lacks general legislative powers, it was important that the provisions providing the framework for the tribunals, including those concerning individual liability, merely reflected clearly established customary international law.\textsuperscript{71}

The Security Council increasingly requires states to take measures against legal entities. An early example is Security Council resolution 864 imposing arms embargo against the Angolan rebel group Total Independence of Angola (UNITA), not least in response to UNITA’s violations of the international law of armed conflict. The Security Council required the Sanctions Committee established by the resolution to identify any persons \textit{and entities} who may have violated the sanction regime.\textsuperscript{72} Another example is the work by the UN Panel of Experts,\textsuperscript{73} established by the Security Council to investigate illegal exploitation of natural resources in the DRC. The Panel compiled an inclusive list of domestic and foreign companies and entities allegedly involved in illegal exploitation activities.\textsuperscript{74}

Most significant for a discussion on companies as subjects under international law is, however, Security Council resolution 1373\textsuperscript{75} on the suppression of terrorism. Subject to operative paragraph 6, a Committee was established with wide discretion to monitor states’ compliance with the resolution. The Committee \textit{i.a.} has drawn up black lists of persons and legal entities accused of sponsoring terrorist activities. While the states are responsible for complying with Security Council Resolu-

\textsuperscript{70} Notably, the ICTY has stressed the same fundamental principle of international criminal law that was fundamental to the IMT; see Cassese p. 136.

\textsuperscript{71} Brownlie pp. 569–570.


\textsuperscript{73} The UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo.


\textsuperscript{75} S/RES/1373 (2001).
tion 1373, the listed companies are held directly responsible to the Security Council. This effectively means that to the extent that the Security Council applies international law in dealing with the listed companies, such companies are directly affected by it. In my view, although companies are not the subjects under Security Council resolution 1373, this is the closest international law relating to armed conflicts has come in the subjectification of companies. One should however keep in mind the very special context of the so-called war on terror in which Security Council Resolution 1373 was passed; hence its value as precedent should not be overestimated.76

The Security Council is also by other means acknowledging corporate involvement in armed conflict. In April 2004, the Security Council discussed the role of business in conflict prevention, peacekeeping and post-conflict peace-building.77 The UN Secretary General addressed this meeting, emphasising the great influence of companies in areas suffering from armed conflict.78

In summary, while the UN Security Council’s practise is not yet supporting a doctrine of corporate responsibility under the international law of armed conflict, it clearly indicates increasing attention to the role played by companies in conflict areas.

3.5 Soft law

While the lack of binding international norms for companies operating in armed conflicts remain, a number of voluntary rules exist.79 Many companies have formulated internal guidelines based on international codes of conduct developed in collaboration between the private sector, states and international organisations.

Besides the ILO Tripartite Declaration of Principles Concerning

76 Security Council 1373 was adopted 28 September 2001, only 17 days after the 9/11 attacks against the United States.


79 Muchlinski notes that they can become legally binding, either as part of contractual obligations or in the form of domestic legislation, see Muchlinski p. 37.
Multinational Enterprises and Social Policy, many regard the OECD Guidelines for Multinational Enterprises as the central international normative framework for corporate behaviour. None of these are however directly concerned with the international law of armed conflict. This is equally the case with the UN Global Compact initiative. More relevant for our purpose are the Voluntary Principles on Security and Human Rights, elaborated by the US State Department in collaboration with the Foreign and Commonwealth Office of the United Kingdom, a number of companies and NGOs. These guidelines aim at preventing private and public security forces from violating i.a. the international law of armed conflict while providing security to extraction companies. The very name reveals that the Voluntary Principles are non-binding and mainly serve as an instrument for dialogue between stakeholders.

The number and non-binding nature of existing codes of conduct and other initiatives reflect the international legal status of companies operating in areas of armed conflict. They indicate reluctance of states to assign legal personality to companies under the international law of

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82 The OECD Guidelines were used as benchmark for corporate behaviour by the UN Panel of Experts in their assessment of illegal exploitation activities in DRC. They also served as basis for the discussion in the Security Council in April 2004. Illegal exploitation of natural resources in the Democratic Republic of Congo: Public statement by CIME, available at http://www.oecd.org/documents/6/0,2340,en_2649_34889_27217789_1_1_1_37439,00.html (last visited on 20 July, 2004). The report «Unanswered questions – companies, conflict and the Democratic Republic of Congo», by RAID, March, 2004, is an assessment of the work of the UN Panel of Experts against the OECD Guidelines.
85 Norway and the Netherlands have later joined. ExxonMobile, Chevron, Statoil and Hydro are among the participating companies. Amnesty International and Human Rights Watch are NGO partners. I am again grateful to Tormod C. Endresen, Assistant Director General in the Royal Norwegian Ministry of Foreign Affairs, for this information.
armed conflict. At the same time, they seemingly serve as evidence of a need for regulation and a level of recognition of that need on the side of companies as well as governments. While expressions of commitment from companies voluntarily adhering to regulation are important, the focus on voluntary initiatives can also express an interest in preventing binding regulation. In the meantime, voluntary codes of conduct are not ineffective in influencing corporate conduct in armed conflicts. They create expectations of legitimate corporate behaviour and provide a measurement tool for NGOs. The risk of public condemnation may matter as much as litigation risks, making compliance with international standards good business.

4. National application of relevance to the development of international law

4.1 Introduction

While it was established in the previous chapter that companies are not yet subjects under the international law of armed conflict, this chapter will discuss two ways in which companies can incur liability for violations on the basis of national laws.

While international law assumably would establish criminal responsibility, the US Alien Tort Claims Act (ATCA) in principle provides universal jurisdiction to US Federal Courts over civil tort claims against corporate violators of international law, including certain aspects of the international law of armed conflict. Despite fundamental differences between civil and criminal responsibility of companies, ATCA case law is relevant to our discussion because it may indicate the material content of the international law of armed conflict as it would potentially be applicable to companies. The fact that other states have no obligation to enforce judgements within their territory rendered on the basis of ATCA may limit their effect. Given the dominant role of the United States, ATCA jurisprudence is nevertheless likely to have a norm-setting

86 The voluntary codes of conduct have for instance been criticised for adapting too much to companies’ requests, see Jochnick p. 68.
effect internationally. In addition, the shaming factor and bad publicity of law suits may also influence corporate conduct.

Under a limited number of national laws, companies can incur criminal liability for violations of the international law of armed conflict. Presumably, this is merely the consequence of a legally technical solution by which a provision establishes corporate criminal responsibility for all penal provisions in a criminal act. One should therefore be cautious in taking this as evidence of opinio juris with respect to corporate criminal liability under the international law of armed conflict. It can nevertheless indicate states’ attitude to corporate criminal liability as a matter of principle, which they can bring into future processes of international law-making.

4.2 Civil Liability under the American Tort Claims Act (ATCA)

Initially enacted in 1789, ATCA provides:

«The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.» 88

In Kadic v. Karadžić of October, 1995, it was established that «private individuals» are subject to jurisdiction under ATCA and thus may incur liability for certain violations of international law. 89 Following this case was a flood of actions alleging violations by companies of various norms of international law. 90

In Doe v. Unocal, 91 for instance, the Court applied the principle of individual liability set out in the Kadic case on the defendant company without further reasoning. The case was brought against the Californian Unocal Corp. by a number of Burmese villagers seeking liability for i.a.

89 Kadic v. Karadžić p. 239, on this point reversing Tel-Oren v. Libyan Arab Republic, et al.
91 Doe v. Unocal see the District Court’s decision 2000 and the Appeals Court decision 2002.
the use of forced labour, forced eradications and murder committed by the Burmese military as part of their contractual obligations under a Joint-Venture pipeline project between Unocal, Total S.A. and the Burmese state-owned Myanmar Gas and Oil Enterprise.\textsuperscript{92}

*Doe v. Unocal* is often seen as the case confirming corporate liability under ATCA, even if the fundamental issue of whether ATCA applies to non-state actors as well as state-actors was thoroughly discussed and settled already in the above mentioned Kadic case.\textsuperscript{93}

The question of whether companies as private legal entities are subject to liability under ATCA was never raised as a matter of principle before *The Presbyterian Church of Sudan v. Talisman Energy Inc.*\textsuperscript{94}

The defendant in the Talisman case refuted liability under ATCA, arguing that corporations are incapable of violating international law and consequently are immune from liability. Rejecting this argument, the Court, in referring to selected parts of the Nuremberg industrial cases,\textsuperscript{95} concluded that companies can be held directly liable under international law, at least for breaches of norms *jus cogens*, hereunder being capable of possessing the necessary *mens rea* to incur criminal liability under international law.\textsuperscript{96}

In my view, the Court’s reasoning is wrong for two reasons. Firstly, the Industrial cases concerned criminal liability of natural persons – a principle the Court recognised – and the Tribunal explicitly expressed that it lacked jurisdiction over legal entities. The Tribunal even took pains to emphasise that while I.G. Farben was not before the Tribunal, the company name was used in the judgement as a convenient way of describing how some of the crimes had been committed.\textsuperscript{97} Secondly,
whether legal entities can possess *mens rea* remains a highly disputed issue within domestic legal systems and *de lege lata* there is not sufficient support for such a doctrine under international law.  

The Court also noted that the Geneva Conventions and other international law instruments establishing individual criminal responsibility lack explicit reference to companies. Nonetheless, and on the basis that it would be "implausible" that international law would not have criminalised corporations violating such norms, the Court concluded that companies are responsible under the relevant norms of international law.

Lastly, the Court took note of an utterance in the "Restatement Third of foreign relations", that companies are obliged to respect a number of international human rights instruments. Why this alone is insufficient to allocate legal personality under an instrument of international law is explained in the above. The same reliable source actually recognises that multinational corporations "have not yet achieved special status in international law or in national legal systems." This must apply to all types of private legal persons.

In summary, none of the Court’s arguments are sufficient to support its conclusion that companies are liable directly under the international law of armed conflict and related areas of international law. Rather, the position of Talisman is not at all "anachronistic" but much more convergent to the situation *de lege lata* than the Court’s own *de lege ferenda* approach.

The result of the Court’s decision is nevertheless correct because companies can be held liable under ATCA for conduct contravening particular international legal norms; not as subjects of these norms

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97 *The Farben case* p.1163.
98 See the text between footnotes 114 and 118 for examples of how Norway and the United States have chosen two separate solutions.
99 *The Presbyterian Church of Sudan v. Talisman Energy Inc.* p. 317. The court, like some authors, claimed that certain environmental conventions impose direct legal responsibility of companies for pollution, and that "If corporations can be held liable for unintentional torts such as oil spills or nuclear accidents, logic would suggest that they can be held liable for intentional torts such as complicity in genocide, slave trading, or torture." I refer to my argumentation in the section "3.3 Other treaty law" for why I do not agree with this interpretation of current international law. See also *Ratner* pp. 479–482 and *Clapham* pp. 141, 178 and 191.
101 This is how the Court characterised Talisman’s allegation. See *The Presbyterian Church of Sudan v. Talisman Energy Inc.* p. 315.
themselves but as subjects to which the jurisdiction established by ATCA apply. As mentioned above and thoroughly discussed by the Court, corporate liability under ATCA is cemented by considerable Federal and Appeals Court case law. In *Sosa and United States v. Alvarez-Machain* of 29 June, 2004, the US Supreme Court confirms this. In assessing the material scope of international law applicable under ATCA, the Supreme Court noted that a particular issue is whether the same material scope applies when «the defendant is a private actor such as a corporation or an individual» or a state-actor. In its subsequent discussion, the Supreme Court referred to cases involving corporate defendants. Although legal personality of corporations under ATCA was not the issue in the *Alvarez-Machain* case, it is unlikely that the Supreme Court had treated companies analogously to natural individuals had it meant that corporate liability could not incur under ATCA.

The Supreme Court did set out stringent criteria for what norms of international law which may give rise to tort liability under ATCA, and time will show whether any violations of the international law of armed conflict will fulfil these requisites. The criteria particularly limit the scope of liability of non-state actors, although the growing number of private companies contracted by the military will increase these companies’ risk of liability as state-actors.

Another aspect of ATCA is its broad jurisdiction over both US and foreign defendants, in effect providing an international forum administered by the US Federal Courts. Very few ATCA cases have however...

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105 See *i.a. Waldmeir*. Since the Supreme Court also instructed the federal courts to give «serious weight» to the Administration's view on the impact on United States' foreign relations of the particular case, it might be that future practise under ATCA will depend much on the Administration in office. The current Administration has, for instance, submitted amicus briefs in the *Doe v. Unocal 2002, The Presbyterian Church of Sudan v. Talisman Energy Inc.*, and *Exxon-Mobile* cases, arguing that all of them potentially risk seriously impairing important foreign relations interests of the US, including the on-going war on terrorism. See also *Department of Justice Position in «Unocal» Case* pp. 703–706, as well as *Koh*, who criticises the present Administration’s involvement.
106 As an example, see footnote 2.
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reached a final decision.\textsuperscript{107} Hence, it remains to be seen whether ATCA is an effective remedy against corporations conducting business contrary to fundamental principles of international law.

4.3 Corporate criminal liability under domestic laws

We have already established that \textit{de lege lata}, states merely have a duty to ensure criminal responsibility of natural persons for certain violations of the international law of armed conflict. But the said norms do not preclude corporate criminal responsibility, thereby giving states a discretionary right to extend criminal liability for such violations to other entities than natural persons.\textsuperscript{108}

The US, the United Kingdom, France, the Netherlands and Norway are examples of states with national criminal laws that include criminal responsibility of companies. To the extent that corporate criminal responsibility has general application on all penal provisions, it covers those establishing universal jurisdiction for international crimes – including certain violations of the international law of armed conflict. National Courts have however so far hesitated to employ universal jurisdiction to individual perpetrators. Therefore, it is too early to draw any conclusions with respect to the extent and application of corporate criminal liability under national laws for international crimes.\textsuperscript{109}

The Norwegian criminal code\textsuperscript{110} article 48(a), paragraph 1, first sentence, gives the Norwegian courts a discretionary right to sentence companies. It states:

«When a penal provision has been violated by someone who has acted on behalf of an enterprise, the enterprise can be penalised.»


\textsuperscript{108} See Ratner and Abrams p. 14 for a discussion of other differences in implementation between states.

\textsuperscript{109} Clapham pp. 193–194.

The provision has general application on all penal provisions under Norwegian criminal law, including those corresponding to violations of the international law of armed conflict that incur individual responsibility and including those establishing criminal responsibility for aiding and abetting.\footnote{The current Norwegian criminal law lacks specific provisions on international crimes. Instead, one has to apply the regular penal provisions whose material content matches that of the international crime, such as the provisions on murder, unlawful loss of liberty, taking of hostages and other forms of bodily harm. The Norwegian Military Criminal code also contains provisions relating to crimes against the international law of armed conflict. NOU 2002: 4 section 9.2.1, see Matningsdal and Bratholm p. 393.} Criminal liability can be imposed on companies regardless of whether the actual perpetrator is known or whether the crime is constructed by the collective acts of several persons although each individual’s personal involvement is insufficient to impose individual liability. As a consequence, companies may be inflicted a kind of strict liability when the objective criteria of a penal provision are fulfilled,\footnote{Although the law-maker has not intended to impose liability for mere accidents and misfortunes. Ot.prp. nr. 90 (2003–04), section 17.1, see Matningsdal and Bratholm p. 397.} but where the violation of a penal provision is constructed by way of the cumulative acts by several persons, corporate criminal responsibility is however confined to negligence crimes.\footnote{Matningsdal, Rieber-Mohn and Andenæs p. 280.} This limits the application of corporate criminal liability with respect to violations of the international law of armed conflict. The grave breaches provisions in the Geneva Conventions\footnote{Article 50 of the 1st, article 51 of the 2nd, article 130 of the 3rd and article 147 of the 4th Geneva Convention as well as article 85(3) of the 1977 1st Additional Protocol relating to the Protection of Victims of International Armed Conflicts. So does article 15 of the 1999 Second Hague Protocol for the Protection of Cultural Property in the event of Armed conflict, referred to in Cassese p. 57.} speak of wilful conduct, hence intentional crimes, but it can be argued that gross negligence is sufficient to establish criminal responsibility at least for a limited number of war crimes.\footnote{Cassese p. 58.} By contrast, most federal criminal laws in the United States, at least in principle, establish corporate criminal liability for intentional crimes also where the actual perpetrator is unknown.\footnote{Helverson p. 976. See also Koh p. 266.}

The wording «who has acted on behalf of the enterprise» comprises a
rather extensive group of persons; mainly employees, but also independent contractors and sole traders depending on the circumstances in the individual case. It is required that the enterprise has had a genuine authority to give instructions to and to control the contractor.\textsuperscript{117} In practice, this is not necessarily an uncommon situation. Companies in the extraction business hiring private or public forces to provide site security have experienced that in doing so, their contractors have used forced labour and in other ways abused the local population in violation of international law.

Companies can also be held liable for their subsidiaries’ violations if it is established that the violations are committed on behalf of the parent company, \textit{i.e.} if the parent company’s employees have given directions or otherwise participated in the violation.\textsuperscript{118}

It follows from the above that while the legislation is provided in some states, we have yet to see a case where a corporation is penalised under domestic law for violations of the international law of armed conflict. National legislation is nevertheless interesting as potential evidence of customary international law, although the examples above are insufficient to clearly establish a new customary norm.\textsuperscript{119}

5. \textit{De lege ferenda:}
towards international liability of companies

Not least the experiences from the negotiations of the ICC Statute prove how politically and technically difficult it is to regulate international corporate liability.\textsuperscript{120} One main problem is the various shapes companies and similar legal entities take, which bring to the fore very different considerations. This section nevertheless argues that it is time to review the legal situation. We have entered a period in which companies play an increasingly dominating role in areas of armed conflict. Some even argue that companies are by far the most important actors.\textsuperscript{121} A natural consequence hereof is that they are made responsible

\begin{footnotes}
\item \textsuperscript{117} Matningsdal, Rieber-Mohn and Andenæs pp. 279 and 282, Matningsdal and Bratholm p. 397.
\item \textsuperscript{118} Matningsdal, Rieber-Mohn, Andenæs p. 282.
\item \textsuperscript{119} See Lauterpacht p. 12 on domestic law as evidence of international custom.
\item \textsuperscript{120} For examples, see footnotes 49–56 and the text referring thereto.
\item \textsuperscript{121} Meron p. 2.
\end{footnotes}
under the international law of armed conflict. It was the politically and economically predominant position of states that made it natural to confer to them the main position and enforcement responsibility in international law. Today, many transnational companies have a revenue several times the domestic economy of some states. Similarly, the military capacity of large private military firms is bigger than that of many states. Moreover, one experience from the last palmy days of mercenary was that the profit-making element increases the number and gravity of conflicts, and there are indications of a similar trend today. This development alone should be given priority by law-makers.

International law has never aimed at being a comprehensive normative system regulating all aspects of international relations. Nevertheless, it has throughout its existence formed itself according to current realities. Lauterpacht pointed out the reason for this already in 1950: if international law does not adapt to fundamental developments, it risks becoming artificial and irrelevant. One distinctive characteristic of modern international law is the increasing number of legal personalities, and the international law of armed conflict has always been a front-runner in creating new international subjects. Accordingly, it would not be unnatural that it is within this part of international law that companies are conferred legal personality.

It is however relevant to ask whether adding a new subject to the international law of armed conflict is in fact a proper response to rising problems. States will retain the primary responsibility to respond to nationals violating the international law of armed conflict; natural or legal persons alike. Likewise, individuals committing violations incur personal liability, including those acting in the name of their corporation. There are nevertheless substantial reasons why the international law of

122 Jochnick p. 58.
123 Almost half of the world’s top 100 economies are corporate. See Jochnick p. 65, Singer p. 188.
124 Singer pp. 64–65, 189. For example, during the Kosovo war the average remuneration to professional soldiers assisting the KLA was $ 4,000 a month, see Singer p. 43. Blackwater personnel contracted to guard Paul Bremer during the Iraq war had a daily rate of minimum $ 600, see Helyar.
125 Shaw p. 24.
126 Lauterpacht pp. 18, 63 and 66.
Corporations operating in several jurisdictions are often organised in complex legal structures. This easily pulverises individual liability and render it more difficult to collect evidence against individual perpetrators, at least against others than the subordinate who carried out the criminal act. Sometimes the collective acts of a number of persons inside a company make up a crime, even if each individual is free from criminal liability. Without corporate criminal liability in such situations, the crime goes unpunished. Corporate responsibility moreover enables courts to impose penalties corresponding to the gravity of the crime. Furthermore, the risk of criminal liability would encourage companies to implement abuse-preventing decision-making processes. It is in response to these issues that domestic law-makers have abandoned theoretical difficulties and introduced corporate criminal liability in their domestic laws. The same arguments are equally relevant at the international level given the complex nature of the global network economy.

There will always be a number of states unable or unwilling to undertake the responsibility under the international law of armed conflict to punish their own perpetrators. Additionally, both private military firms and multinational exploration companies have their largest business growth in failing states where financial and material resources can easily be turned into political influence against law-suits. Several excesses even enjoy state support. In fact, the difficulty in separating state and corporate behaviour is one reason for the reluctance of some states to introducing international corporate responsibility. If companies could incur liability directly under the international law of armed conflict, this would create universal jurisdiction for other states to prosecute corporate perpetrators, not least the home states of companies acting abroad. Existing experience indicates insufficiency in the ex-

128 With respect to private military firms, see Singer p. 40.
129 Matningsdal, Rieber-Mohn and Andenæs p. 277, Clapham p. 147.
130 With respect to Norwegian law, see Matningsdal, Rieber-Mohn and Andenæs p. 277.
131 Singer p. 38.
132 Jochnick p. 60.
133 Clapham p. 191.
isting legal framework. It was expected that the report of the UN Panel of Experts listing companies for misconduct in DRC would trigger states to take action against the listed companies, but these expectations were never met.\footnote{The Executive Summary of the Report «Companies, conflict and the Democratic Republic of Congo» prepared by OECD and RAID in March, 2004, p. ii.}

In the long term, the interests of large private military firms and other major companies risk coming into conflict with those of their domestic states, if for example their economic interests go against the foreign policy of their home states. In the future this may complicate the doctrine of state responsibility.\footnote{Singer pp. 191–192 describes several potential scenarios.}

One potentially negative effect of criminal corporate responsibility is a reduced burden of liability on both states and individuals. This becomes particularly problematic where the actual perpetrator is a state, only acting through a private legal entity. With a higher rate of turnover among corporate executives than government leaders, there is a risk that imposed penalties have less impact on companies than governments. Some courts may be more reluctant to sentence individuals than penalising abstract legal entities. Therefore, it is important that corporate responsibility remains secondary and complementary to state and individual liability in conformity with states’ primary responsibility to enforce international law and the relationship between individual and company in domestic criminal systems.

Even if companies cannot yet be defined as subjects under the international law of armed conflict, there are certain indicators of a normative process that will lead us into a new epoch of international law governing armed conflicts.\footnote{Jochnick p. 60 points out that international law has contemplated legal personality for non-state actors for a long time.} The growing practise of the Security Council with respect to legal entities is particularly worth noticing. The work of the UN Commission on Human Rights and the voluntary codes of conduct are other examples. We shall however not expect great developments within the very near future. The fact that it took 50 years to conclude the ICC Statute, thereby codifying existing law and not creating new law, well illustrates how slow these processes can be.
One feature of this area of international law is the active role companies take in encouraging regulation. Leading companies accept that they are not immune from responsibility for the way they treat people and the natural environment affected by their operations. Frustrated with a situation where it does not pay off to behave, several companies seek and expect binding regulation, especially those already strongly committed to pursue their business in accordance with acceptable standards. Regulation would deprive the less committed companies of the competitive advantage attained by disregarding high standards and the threat of litigation will eventually affect their behaviour. Clear legal frameworks furthermore promote business. Hopefully in this case, market-driven processes will move faster than the political.

6. Conclusion

One of the most significant trends in contemporary armed conflicts is the declining role of modern nation-states, correlating to an increasing participation of private actors. This brings to the fore some fundamental challenges to the international law of armed conflict; a legal framework aimed at regulating warfare but developed on the notion of state monopoly of the use of force.

This article has focused on the question of corporate liability under the international law of armed conflict as one way of bringing this part of international law in conformity with new realities. Its main task has been to analyse relevant sources of international law for the purpose of

137 Muchlinski p. 37.

138 Arild Oma Steine, Head of Government Relations and Natalja Altmark, Head of Corporate Social Responsibility in Statoil’s division for Country Analysis and Social Responsibility, in interview with the author at the Statoil headquarters, Stavanger, on 12 August, 2004. This goes for the extraction industry as well as the private military industry: «In fact, this is probably the one industry in the world whose market leaders are begging for more regulation. Says ArmorGroup’s chief operating officer, Christopher Beece: «Our Company has had a 40-page code of ethics and a 15-page code of conduct for over 15 years; we set high standards for ourselves. But when others go around hanging out of white SUV’s waving guns at people, this business needs to be regulated,» see Helyar.

ascertaining whether companies have incurred legal personality under the international law of armed conflict.

For several reasons discussed above, this may be desirable. The conclusion is nevertheless that companies de lege lata are not responsible under the international law of armed conflict. One reason is prevailing technical and political obstacles, although several normative processes are emerging at different levels. The UN Commission on Human Rights has initiated political discussions. Recent practise of the UN Security Council, especially with respect to the effects of the black listing of companies allegedly supporting terrorists, may prove to be a nascent indication of developing customary norms. In the meantime, the emerging case law under ATCA may become an important contributor to the development of corporate liability under international law; not least because it will help define the material scope of corporate liability. What this all adds up to, is a normative grey zone, from which we may emerge sooner than we expect if sufficiently striking cases arise, forcing the international law of armed conflict forward.

Bibliography

Books and Articles
Antonio Cassese, International Criminal Law, Oxford 2003

«Department of Justice Position in «Unocal» Case, Contemporary Practice of the United States Relating to International Law», American Journal of International Law, Vol. 97, No. 3 (Jul., 2003), 703–706 (case review – author unknown)


John Helyar, «Fortunes of War», Features 26 July 2004 (LEXIS)


Rosalyn Higgins, Problems and Process. International Law and How We Use It, Oxford 1994


Harold Hongjiu Koh, «Separating Myth from Reality about Corporate Respon-
sibility Litigation», *Journal of International Economic Law* 7(2), 2004 pp. 263–274
P. Waldmeir, «Court Limits Use of US Law by Foreigners», *Financial Times*, 29 June 2004
War zones and grey zones

Case Law

The International Military Tribunals

The Krauch case, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volumes VII and VIII, 1952 (Referred to as the Farben Case),
The Flick case, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volume VI,
The Krupp case, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volume IX,
Trial of the Major War Criminals before the International Military Tribunal, Volume 22, Nuremberg, 1948,
Tesch and Others (Zyklon B case), Hamburg, British Military Court, reported in I.L.R. 49 p. 250–253.

International Court of Justice

Reparation for Injuries suffered in the service of the United Nations Case, Advisory Opinion, ICJ Reports 1949, p. 178

The Inter-American Court of Human Rights


The United States Alien Tort Claims Act

Doe v. Unocal 2000 (the District Court decision), 110 F.Supp.2d 1294 (C.D. Cal. 2000),
Doe v. Unocal 2002 (the Appeals Court decision), WL 31063976 (9th Circ. (Cal.))
Kadic v. Karadžić, 70 F.3d 232 (2nd Cir. (NY)
The Presbyterian Church of Sudan v. Talisman Energy Inc., 244 F.Supp.2d 289
Sosa and United States v. Alvarez-Machain, 2004 U.S. Lexis 4763