

Through the Looking Glass: Corporate Actors and Environmental Harm Beyond the ILC

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Abstract

Corporate activities take place in a variety of social contexts, including in countries affected by armed conflict. Whether corporations are physically present in these regions or merely do business with partners from conflict zones, there is an increased risk that their activities contribute to egregious human rights abuses or serious environmental harm. This is especially so for corporations active in or relying on the extractives sector. It is against this background that the ILC included two principles addressing corporate responsibility for environmental harm in its Draft Principles on the protection of the environment in relation to armed conflict. Both principles explicitly call on the home States of these corporations to give effect to their complementary role in regulating and enforcing corporate social responsibility. Draft Principle 10 addresses the responsibility of home States to regulate multinational corporations under the heading of “corporate due diligence”, while Draft Principle 11 addresses the responsibility of home States to hold multinational corporations liable for environmental damage caused in conflict zones. The current contribution engages with the potential normative foundations underpinning extraterritorial responsibilities for the home States of multinational corporations with respect to the prevention and remediation of environmental harm in conflict zones, focusing on international humanitarian law and international human rights law. It concludes that the Draft Principles are certainly indicative of the direction in which the law is evolving, but that no firm obligations beyond treaty law can be discerned as of yet. It was therefore a wise decision to phrase the respective Draft Principles as recommendations instead of obligations. At the same time, there are sufficient indications to conclude that it seems a matter of time before it is accepted that States have distinct obligations under customary international law for which their responsibility may be engaged. It is argued that the ILC Draft Principles provide an important impetus to these developments, not in the least because they provide a reference to States regarding the state-of-the-art and guidance for future action.

A. Introduction

On July 8th, 2019, the International Law Commission (ILC) provisionally adopted, upon first reading, a set of 28 Draft Principles on protection of the environment in relation to armed conflict, thereby concluding six years of study conducted by ILC Special Rapporteurs Marie Jacobsson and Marja Lehto on this topic. The Draft Principles have the potential to make an important contribution to strengthening mechanisms for environmental protection in conflict and post-conflict settings. This is certainly true for the Draft Principles that are the focus of the current contribution, namely Draft Principles 10 and 11 relating to environmental harm caused by corporate actors. The inclusion of these Draft Principles is highly significant, not in the least because of the involvement of corporations in the illicit exploitation of natural resources financing armed conflicts, which is a prevalent cause of environmental harm in contemporary armed conflicts.

Draft Principle 10 addresses the responsibility of home States to regulate *their* multinational corporations under the heading of “corporate due diligence”. It encourages States to “[...] take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health [...]” in conflict and post-conflict situations.¹ The Draft Principle covers two different scenarios. The first concerns supply chain responsibility, which is explicitly addressed in the second sentence of the principle, stipulating that the measures that States should take “[...] include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner [...]”.² The Draft Principle thereby formulates a recommendation for States to ensure that the corporations domiciled in their territory obtain their raw materials in an environmentally sustainable manner. The second scenario concerns environmental harm caused by corporations operating within the territory of conflict and post-conflict States. The Draft Principle encourages home States to take appropriate measures to ensure that their corporations take measures to avoid environmental harm when operating in conflict or post-conflict States.

Draft Principle 11 complements Draft Principle 10 by addressing the responsibility of home States to hold *their* multinational corporations liable for

¹ *Report of the International Law Commission to the Seventy-First Session*, UN Doc A/74/10, 20 August 2019, 212.

² *Ibid.*

environmental damage caused in conflict zones. It encourages States to “[...] take appropriate legislative and other measures aimed at ensuring that corporations [...] operating in or from their territories can be held liable for harm caused by them to the environment, including in relation to human health [...]” in conflict and post-conflict situations.³ The Draft Principle is restricted to harm *caused by* the activities of the respective corporation itself; liability is not foreseen for harm to which the corporation *contributed* or that is *linked to* a corporation’s activities, e.g. caused by business partners. This is an important restriction compared to related initiatives aimed at enhancing home State’s engagement with corporate social responsibility, most notably the United Nations (UN) Guiding Principles on Business and Human Rights.⁴ However, the Draft Principle does extend to activities undertaken by a corporation’s subsidiaries acting under its *de facto* control. More specifically, States are encouraged to pierce the corporate veil by “[...] ensuring that a corporation or other business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its *de facto* control [...]”.⁵ This is an important contribution, as attempts by victims to hold corporations accountable for harm caused by their subsidiaries have often failed because of difficulties in establishing the connections between the subsidiary and its parent.⁶ Lastly, the Draft Principle determines that “[t]o this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm”.⁷

³ Ibid.

⁴ See the commentary to Principle 7 addressing the responsibility of home States for corporations operating in conflict zones, which encourages States to explore liability for corporations that “[...] commit or contribute to gross human rights abuses” in conflict-affected areas (emphasis added). See also more generally Principle 3, which encourages States, as part of their duty to protect, to “[e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights [...]”. This responsibility to respect is defined in Principle 13 as “[a]void causing or contributing to adverse human rights impacts through their own activities, [...]” as well as to “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships [...]”. Human Rights Council, Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 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, 11 (Annex).

⁵ *Report of the International Law Commission to the Seventy-First Session*, *supra* note 1.

⁶ A. Y. Vastardis & R. Chambers, ‘Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?’, 67 *International and Comparative Law Quarterly* (2018) 2, 389.

⁷ *Report of the International Law Commission to the Seventy-First Session*, *supra* note 1, 211.

Notwithstanding the fact that the Draft Principles are phrased as recommendations, they generated considerable debate within the ILC, both in the Drafting Committee and in Plenary.⁸ A principal concern that was expressed relates to the explicit reference made by both Draft Principles to human health. Some members requested the deletion of this reference as they considered human health to fall outside the remit of the study, while others were of the view that the protection of the environment and human health were intrinsically linked and that the reference should therefore be retained.⁹ This concern exposes the much more fundamental issue regarding the appropriateness of the integrative approach taken by the Draft Principles with respect to international environmental and human rights law.¹⁰

Other concerns that were raised relate to the normative foundations of the extraterritorial application of Draft Principles 10 and 11. Both Draft Principles call on the home States of multinational corporations to exercise extraterritorial jurisdiction with respect to environmental harm caused by corporate actors in conflict and post-conflict zones. Draft Principle 10 calls on States to take measures to prevent their corporations from contributing to environmental harm abroad, whether through their own activities or through those of their business partners. Draft Principle 11 furthermore calls on States to provide appropriate remedies for environmental harm caused by their corporations abroad. Two issues were raised in this respect. The first pertains to the nature and scope of home States' responsibility to exercise extraterritorial jurisdiction. The original proposal by the Special Rapporteur called on States to "[...] take necessary legislative and other measures to ensure that corporations [...] exercise due diligence [...]" on the one hand and that they can be held liable on the other.¹¹ The Drafting Committee however decided to alter the formulation in order to provide States more flexibility "[...] when deciding which measures should be taken in this context at the national level [...]".¹² For this purpose,

⁸ See e.g. ILC, 'Protection of the Environment in Relation to Armed Conflicts, Statement of the Chair of the Drafting Committee' (2019), available at https://legal.un.org/ilc/documentation/english/statements/2019_dc_chairman_statement_peac.pdf (last visited 25 February 2020), 7-12.

⁹ *Ibid.*

¹⁰ *Report of the International Law Commission to the Seventy-First Session*, *supra* note 1, 242.

¹¹ *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, UN Doc A/CN.4/728, 27 March 2019, 23, 49-50, paras 50, 104.

¹² See ILC, 'Protection of the Environment in Relation to Armed Conflicts, Statement of the Chair of the Drafting Committee', *supra* note 8, 8.

necessary was replaced by *appropriate* and *to ensure* was replaced by the more aspirational *aimed to ensure*.¹³ The second issue concerns the implications of the exercise of extraterritorial jurisdiction by home States for the sovereignty of host States, especially in light of the recommendation to home States to pierce the corporate veil. In the plenary discussion, some members cautioned against the excessive exercise of extraterritorial jurisdiction by home States to the detriment of the sovereignty of the host State.¹⁴

In light of the concerns raised in the debates, the current contribution raises the following question: to what extent does current international law establish extraterritorial obligations for the home States of multinational corporations with respect to the prevention and remediation of environmental harm in conflict zones, and how do these obligations relate to the sovereignty of the host States? In order to assess this, this paper will engage with the normative foundations underpinning the Draft Principles. For this purpose, section B will first clarify the connections between corporate activities and various forms of environmental harm in conflict zones. The purpose of this inquiry is to facilitate understanding of the types of corporate activities potentially within the remit of the responsibility of home States. Subsequently, section C will examine the international legal obligations underlying the recommendations contained in Draft Principles 10 and 11. Section D will complement this analysis with an inquiry into the current state-of-the-art in international law with respect to the exercise of extraterritorial jurisdiction by home States. Section E will extend the inquiry to State practice. It will explore how States have interpreted their due diligence obligations and the manner in which States have given effect to them in their domestic legislation. Finally, section F evaluates the potential contribution of the Draft Principles for the development of international law on State responsibility.

B. Exploring Extraterritorial Environmental Harm: Linkages Between Corporate Activities and Environmental Harm in Conflict Zones

The purpose of this section is to establish what types of activities generating environmental harm potentially fall within the remit of home State's

¹³ *Ibid.*

¹⁴ See e.g., *Provisional Summary Record of the 3465th Meeting of the International Law Commission to the Seventy-First Session (First Part)*, UN Doc A/CN.4/SR.3465, 24 June 2019, 13.

responsibility under the draft articles. The ILC study takes as a starting-point that armed conflict situations are generally characterized by weak institutional oversight, either because domestic institutions have collapsed or because parts of the territory of the conflict-affected State have fallen into the hands of armed groups.¹⁵ Furthermore, even after hostilities have been terminated, it often takes a long time to rebuild the rule of law in conflict-affected States.¹⁶ This creates a complex operational environment for corporations. Given the volatility of the situation and the lack of regulatory oversight, there is an increased risk that corporations intentionally or unintentionally contribute to human rights abuses and/or inflict harm on the environment. There is an abundance of cases to illustrate this problem. One such example concerns the massive pollution caused by oil operations in the Niger Delta, more specifically in Ogoniland. Even though oil production in this region ceased in the early 1990s as a consequence of internal strife, the facilities were never dismantled. Moreover, pipelines transporting oil produced in other parts of Nigeria still passed through the region. As the situation had become too volatile, these pipelines were no longer maintained. This in turn presented opportunities for armed groups operating in Ogoniland to sabotage the oil pipelines. An environmental impact assessment conducted by the UN Environment Programme (UNEP) in 2011 concluded that “[...] the control, maintenance and decommissioning of oilfield infrastructure in Ogoniland are inadequate”.¹⁷ The UNEP team further concluded that the contamination of Ogoniland and nearby areas was widespread, affecting soil, groundwater, and surface water as well as fauna and flora, and constituted a danger to public health.¹⁸

Apart from situations in which the corporation’s regular operations may have contributed to environmental harm in conflict zones, a prevalent problem in armed conflict situations concerns the illegal exploitation of natural resources as a means of financing the armed conflict.¹⁹ In Africa, approximately 75% of civil wars since the 1990s “[...] have been partially funded by revenues from natural

¹⁵ *Report of the International Law Commission to the Seventy-First Session, supra* note 1, 245.

¹⁶ *Ibid.*

¹⁷ UNEP, ‘*Environmental Assessment of Ogoniland*’ (2011), 12, available at https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf (last visited 21 February 2020).

¹⁸ *Ibid.*, 9-12.

¹⁹ The term *illegal* is employed here in a general manner, following the terminology used in the ILC study. For a critical appraisal of this term, see D. A. Dam-de Jong, ‘Between Paradox and Panacea: Legalizing Exploitation of Natural Resources by Armed Groups in the Fight Against Conflict Resources’ (2019), available at <https://armedgroups-international.org/2019/06/18/between-paradox-and-panacea-legalizing-exploitation->

resources”.²⁰ This is detrimental to the development of the States concerned, as revenues from public goods are being used to fund armed conflict,²¹ but it also constitutes a major cause of environmental harm. For example, the armed conflict in Cambodia during the 1980s was largely financed by proceeds from timber. The extensive logging by all the parties to the armed conflict significantly diminished the country’s forest cover.²² Likewise, minerals and gold have been the primary source of revenue for armed groups operating in the east of the Democratic Republic of the Congo (DRC) for the past twenty years. A UN Panel of Experts concluded as early as 2002 that highly organized and systematic exploitation activities within and around UNESCO World Heritage Sites in the DRC posed a significant threat to the integrity of those sites.²³ These practices do not immediately end after the armed conflict is over. Sometimes the conclusion of peace even creates an institutional vacuum which benefits transnational criminal groups. This is, for instance, currently taking place in Colombia. An assessment by the UN Office on Drugs and Crime (UNODC) of gold production in Colombia revealed that large-scale illegal gold production, including in nature reserves, has had serious impacts on fragile ecosystems.²⁴

Corporations can be involved in these practices in a myriad of ways, depending on their position in the supply chain. A distinction has been made between corporations operating upstream and downstream in the supply chain.²⁵ Upstream corporations are all those involved in preparing raw natural resources

of-natural-resources-by-armed-groups-in-the-fight-against-conflict-resources/ (last visited 21 February 2020).

²⁰ UNSC, *8372nd Meeting, Maintenance of International Peace and Security: Root Causes of Conflict — the Role of Natural Resources*, UN Doc S/PV.8372, 16 October 2018, 2.

²¹ K. Ballentine & H. Nitzschke (eds), *Profiting from Peace: Managing the Resource Dimensions of Civil War* (2005).

²² For more details on the links between logging and the armed conflict in Cambodia, see P. Le Billon & S. Springer, ‘Between War and Peace: Violence and Accommodation in the Cambodian Logging Sector’, in W. de Jong, D. Donovan & K. Abe (eds), *Extreme Conflict and Tropical Forests* (2007), 17.

²³ UNSC, *Interim Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, UN Doc S/2002/565, 22 May 2002, 10 (Enclosure, paras 50-53).

²⁴ See UN Office on Drugs and Crime, ‘Alluvial Gold Exploitation: Evidences From Remote Sensing 2016’ (2018), 41-67, available at https://www.unodc.org/documents/publications/Evoa_2016_in_1.pdf (last visited 21 February 2020).

²⁵ This distinction between upstream and downstream corporations is based on industry standards, as incorporated in the Organisation for Economic Co-operation and Development Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, discussed in section E.

for further processing. This category includes corporations that actually exploit natural resources, but also corporations selling equipment necessary for the exploitation of natural resources, those that transport the natural resources from the mine to trading houses and/or smelters/refiners, as well as *middle-men* that purchase the natural resources before they are further processed and, lastly, smelters and refiners. Finally, downstream corporations are all those involved in transforming processed natural resources into end products. These include suppliers of semi-finished products as well as consumer brands.

The most obvious form of corporate involvement in the illegal exploitation of natural resources is through direct involvement in the exploitation. Corporations may actively attempt to benefit from the opportunities presented by armed conflict. The logging industry in Liberia provides a relevant example. During the 1989-1996 civil war, several timber companies accepted logging concessions granted by the rebel group National Patriotic Front of Liberia (NPFL).²⁶ When Charles Taylor, the leader of the NPFL, became president in 1997, some of the same timber companies furthermore helped Taylor to siphon logging revenues away for the purpose of funding the activities of rebel groups operating in Sierra Leone.²⁷ Involvement in the illegal exploitation of natural resources may also occur, for instance, when corporations operate otherwise perfectly legal concessions in conflict zones. In light of the long production cycles and high costs associated with the exploitation of natural resources, especially extractives, corporations active in this sector rarely relocate their

²⁶ The Panel of Experts established by the UNSC to, *inter alia*, investigate links between the exploitation of natural resources and other forms of economic activity in Liberia, and the fueling of conflict in Sierra Leone and neighboring countries noted in its 2001 Report that “[d]uring the 1989– 1996 civil war, timber provided Charles Taylor and his NPFL rebels their main independent source of revenue”. UNSC, *Report of the Panel of Experts Pursuant to Resolution 1343 (2001), Paragraph 19, Concerning Liberia*, UN Doc S/2001/1015, 26 October 2001, 70 (Annex, Enclosure, para. 322).

²⁷ The Panel of Experts pointed to the role of specific logging companies, the most important being the Oriental Timber Company (OTC), chaired by the Dutch Businessman Guus van Kouwenhoven, who was convicted by a Dutch court of appeal in 2017 for his role in supplying weapons to the Taylor government in contravention of the weapons embargo imposed against Liberia by the UNSC. The Panel’s 2001 report furthermore indicates that Van Kouwenhoven “[...] managed logging operations for [Taylor] through rebel-controlled Buchanan in the early 1990s”. By the time Taylor had become president, concessions held by the OTC represented 42 per cent of Liberia’s total productive forests. See *ibid.* 72 (Annex, Enclosure, para. 333).

activities when conflict breaks out.²⁸ This also implies that they are vulnerable to pressure exerted by the parties to the armed conflict, including extortion by armed groups through the imposition of illegal taxes. In other instances, armed groups have simply taken control of mines within existing concessions.²⁹

More often however, corporations' involvement in the illegal exploitation of natural resources is indirect, for instance, because they purchase natural resources from armed groups or corporations associated with them. Reports by various UN Panels of Experts provide detailed accounts of smuggling networks and the involvement of corporations in third countries in concealing the origin of the natural resources involved.³⁰ Processing corporations furthermore have a key role to perform in preventing illegally exploited natural resources from moving further down the supply chain, as it is impossible to verify the origin of natural resources beyond the point where the raw materials are worked. Allegations have been made towards several corporations of turning a blind eye to the origin of natural resources processed by them. One example concerns a case brought to the Swiss prosecutor in 2013 with respect to the gold refiner Argor Heraeus. This corporation had been accused of involvement in concealing the origin of three tonnes of illegal gold procured from the African Great Lakes region in the early 2000s. The case was ultimately dismissed because of lack of evidence regarding criminal intent.³¹

Overall, home States' responsibility with respect to corporate activities in or related to conflict and post-conflict zones may be engaged in two ways.

²⁸ W. Rosenau *et al.*, 'Corporations and Counterinsurgency' (2009), 3, available at https://www.rand.org/pubs/occasional_papers/OP259.html (last visited 25 February 2020).

²⁹ See e.g., UNSC, *Final Report of the Group of Experts on the Democratic Republic of the Congo*, UN Doc S/2009/603, 23 November 2009, 38 (Enclosure, para. 158), in which the Group notes that a corporation has complained that one of the armed groups operating in Kivu has taken control of gold mining areas within the corporation's concession and refuses to withdraw.

³⁰ See for example, UNSC, *Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA*, UN Doc S/2000/203, 10 March 2000, 30-31 (Annex I, Enclosure, paras 87-93), which revealed the relative ease with which diamonds exploited by the Angolan rebel movement UNITA could enter the legal diamond market. See also the reports by the Group of Experts on the DR Congo, which meticulously trace the smuggling of minerals and gold from the mines to overseas markets, eg the gold market in Dubai. UNSC, *Final Report of the Group of Experts on the Democratic Republic of the Congo*, UN Doc S/2019/469, 7 June 2019, 30-38 (Enclosure, paras 147-191).

³¹ Schweizerische Bundesanwaltschaft, *Dismissal of Proceedings Against Argor-Heraeus*, Case number SV.13-MUA, Bern, 10 March 2015. See J.G. Stewart, 'The Argor Heraeus Decision on Corporate Pillage of Gold', available at <http://jamesgstewart.com/the-argor-heraeus-decision-on-corporate-pillage-of-gold/> (last visited 25 February 2020).

First, home States have a responsibility to regulate the cross-border business transactions of corporations domiciled in their jurisdiction. Second, home States' responsibility may be engaged when corporations domiciled in their jurisdiction engage directly in the illegal exploitation of natural resources or otherwise environmentally destructive practices in conflict zones. Both forms of responsibility are contemplated in the ILC draft articles.

C. International Legal Foundations for States' Obligations to Prevent and Remediate Environmental Harm Caused by Corporations

It is not controversial to argue that States can be held responsible for their own conduct in relation to the acts of non-state actors. As will be discussed in this section, international law recognizes self-standing obligations for States to take all reasonable measures to prevent violations of international law by non-state actors within their jurisdiction or control. It is this type of obligation that is reflected in the recommendations contained in Draft Principles 10 and 11. These Draft Principles call on States to take "[...] appropriate [...] measures [...]" that are "[...] aimed at ensuring that corporations [...] exercise due diligence [...]" to prevent environmental harm (principle 10) and "[...] can be held liable [...]" for having caused environmental harm (principle 11).³² It can be derived from the discussions within the ILC that the members interpreted the phrase *aimed at ensuring* as aspirational, calling on States to make their best efforts instead of requiring particular results.³³ Such obligations of conduct, which require States to take positive action with respect to non-state actors, are referred to as *due diligence* obligations. Due diligence obligations formulate a standard of conduct that is required to discharge other, i.e. more material, obligations.³⁴ Their content therefore depends on the primary norm that is at stake, but generally they can

³² *Report of the International Law Commission to the Seventy-First Session*, *supra* note 1, 211.

³³ The original proposal by the Special Rapporteur used the terms "should ensure", which was modified into *aimed at ensuring*. This textual revision was mainly introduced because some ILC members interpreted *should ensure* as an obligation of result. See *Provisional Summary Record of the 3471st Meeting of the International Law Commission to the Seventy-First Session (First Part)*, UN Doc A/CN.4/SR.3471, 8 July 2019, 4; and ILC, 'Protection of the Environment in Relation to Armed Conflicts, Statement of the Chair of the Drafting Committee', *supra* note 8, 8.

³⁴ See J. Bonnitcha & R. McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights', 28 *European Journal of International Law* (2017) 3, 899, 900.

be seen as satisfied if it can be demonstrated that the State took all reasonable measures at its disposal, even if these were ultimately not sufficient to prevent the harm in question.³⁵

Obligations of due diligence have a longstanding tradition in international law, going back to 17th century writings by Hugo Grotius and Samuel Pufendorf.³⁶ Today, they can be found in several fields of international law, including in international humanitarian, human rights, and environmental law, which together provide the legal framework for environmental protection in situations of armed conflict. The objective of this section is to examine the international legal obligations underlying the recommendations contained in Draft Principles 10 and 11. For this purpose, section C.I will focus on international humanitarian law as the *lex specialis* for situations of armed conflict and section C.II will extend the inquiry into international human rights law and, indirectly, international environmental law.

I. International Humanitarian Law as Legal Foundation for States' Obligations to Prevent and Remediate Environmental Harm Caused by Corporations

International humanitarian law, as the *lex specialis* during armed conflict,³⁷ contains several obligations for parties to an armed conflict that are relevant for the prevention of environmental harm. However, the majority of these obligations is concerned with regulating the means and methods of warfare and is thus less suitable for the regulation of economic activities. An obligation for States to prevent environmental harm caused by corporations in conflict situations therefore cannot be solely based on international humanitarian law.

³⁵ In the context of genocide, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, 221, para. 430. For a more in-depth analysis of due diligence, its different understandings and applications, see S. Besson, *La «Due Diligence» en Droit International* (forthcoming 2020). See also International Law Association Study Group on Due Diligence in International Law, 'First Report' (2014), available at <https://www.ila-hq.org/index.php/study-groups?study-groupsID=63> (last visited 21 February 2020).

³⁶ See J. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', 36 *New York University Journal of International Law* (2004) 2 & 3, 265, 283.

³⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 240, para. 25.

Through the prohibition of pillage, international humanitarian law however does provide a solid legal basis for preventing and punishing acts of illegal exploitation of natural resources in conflict zones. The prohibition of pillage, which has been included in Draft Principle 18 of the ILC study, is part of all major IHL conventions and has also been recognized as part of customary international law.³⁸ The prohibition applies to all acts of theft in the context of an armed conflict and has been expressly applied to instances of illegal natural resource exploitation.³⁹ Moreover, it does not only apply to the belligerents themselves, but also to private persons, including corporations.⁴⁰ Corporations can therefore be held directly responsible for violating the prohibition of pillage. In light of this observation, the question can be raised whether there is a corresponding obligation for States to prevent and punish instances of pillage.

Such an obligation can be founded on identical Article 1 of the four 1949 Geneva Conventions, which formulates an obligation for States to “[...] ensure respect [...]” for the provisions contained in the Conventions.⁴¹ This obligation can be interpreted as being applicable to private actors within a State’s jurisdiction or control.⁴² This implies that States parties to the 1949 Geneva Conventions are under an obligation to prevent and punish breaches of the prohibition of pillage included in Article 33 of Geneva Convention IV, as far as reasonable and appropriate. Whether and to what extent home States that

³⁸ For a more extensive analysis of the prohibition of pillage in the context of illegal exploitation of natural resources, see L.J. van den Herik & D.A. Dam-de Jong, ‘Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation During Armed Conflict’, 22 *Criminal Law Forum*, 2nd ed. (2011) 3, 237.

³⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, 252, para. 245.

⁴⁰ See J. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (2011), 75-79.

⁴¹ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, Article 1, 75 UNTS 31, 32 [First Geneva Convention]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, Article 1, 75 UNTS 85, 86 [Second Geneva Convention]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, Article 1, 75 UNTS 135, 136 [Third Geneva Convention]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Article 1, 75 UNTS 287, 288 [Fourth Geneva Convention]; see also *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Report 1986, 14, 114, para. 220.

⁴² See M. Sassòli, ‘State Responsibility for Violations of International Law’, 84 *International Review of the Red Cross* (2002) 846, 401, 412.

are not themselves parties to the armed conflict have an obligation to ensure respect of the conventions by their nationals operating in conflict zones requires further analysis. Indications that the obligation does extend to these situations can be found in the *Wall* Advisory Opinion, in which the International Court of Justice (ICJ) stated that “[i]t follows from [Article 1] that every State party to [the] Convention[s], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with”.⁴³ The updated commentary to the first Geneva Convention likewise argues that “[...] the proper functioning of the system of protection provided by the Conventions demands that States Parties not only apply the provisions themselves, but also do everything reasonably in their power to ensure that the provisions are respected universally”.⁴⁴

Whereas the Geneva Conventions apply generally to international armed conflicts, it is important to note that the obligation to ensure respect also applies to non-international armed conflicts, in as far as it concerns the acts that are included in Article 3 of the 1949 Geneva Conventions. It could furthermore be argued that the obligation indirectly applies to Additional Protocol II, as Article 1(1) of this Protocol explicitly states that it “[...] develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 [...]”.⁴⁵ If this argument is accepted, the obligation to ensure respect for the Conventions also applies to acts of pillage committed in non-international armed conflict, as covered by Article 4(2) of Additional Protocol II.

While the obligation to ensure respect for the Geneva Conventions extends to situations of occupation as a species of international armed conflict, a more specific legal basis for due diligence obligations in the context of occupation can be found in Article 43 of the 1907 Hague Regulations. This provision determines that an occupying power “[...] shall take all the measures in his

⁴³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 199-200, para. 158. For a more detailed analysis of the obligation to ensure respect for the conventions in the context of private military and security companies, see H. Tonkin, *State Control Over Private Military and Security Companies in Armed Conflict* (2011).

⁴⁴ International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016), Article 1, para. 119.

⁴⁵ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts*, 8 June 1977, Article 1, 1125 UNTS 609, 611 [Protocol II]; see for this argument, L. Boisson de Chazournes & L. Condorelli, ‘Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests’, 82 *International Review of the Red Cross* (2000) 837, 67, 69.

power to [...] ensure, as far as possible, public order and safety [...].⁴⁶ The ICJ explicitly held that Article 43 comprises an obligation for occupying powers “[...] to secure respect for the applicable rules of international human rights law and international humanitarian law [...]”.⁴⁷ The Court held, moreover, that an occupying power’s “[...] responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory [...]”.⁴⁸ This specifically applies to acts of pillage, which are prohibited pursuant to Article 47 of the 1907 Hague Regulations. It can therefore be argued that an obligation to prevent and punish acts of pillage by corporations is incumbent on occupying States, insofar as it concerns corporations that are operating within occupied territory.

Whereas liability for the illegal exploitation of natural resources can be based directly on international humanitarian law, recourse can also be made to international criminal law. The war crime of pillage, which is included in Articles 8(2)(b)(xvi) and (e)(v) of the Rome Statute of the International Criminal Court and is referenced in Draft Principle 18 of the ILC Draft Principles on protection of the environment in relation to armed conflict, is concerned with criminal liability for individuals, thereby ruling out the possibility to try corporations directly.⁴⁹ As States parties to the Rome Statute are expected to prosecute crimes

⁴⁶ *Regulations Respecting the Laws and Customs of War on Land, Annex to Hague Convention IV*, 18 October 1907, Article 43, United States Treaty Series 539, 631, 651. For a more detailed analysis of Article 43 in the context of exploitation of natural resources, see M. Longobardo, ‘State Responsibility for International Humanitarian Law Violations by Private Actors in Occupied Territories and the Exploitation of Natural Resources’, 63 *Netherlands International Law Review* (2016) 3, 251.

⁴⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *supra* note 39, 67, para. 178.

⁴⁸ *Ibid.*, 67, para. 179.

⁴⁹ See for example L. J. van den Herik, ‘Corporations as Future Subject of the International Criminal Court: an Exploration of the Counterarguments and Consequences’, in L.J. van den Herik & C. Stahn (eds), *Future Perspectives on International Criminal Justice* (2010), 350; N. Farrell, ‘Attributing Criminal Liability to Corporate Actors: Some Lessons From the International Tribunals’, 8 *Journal of International Criminal Justice* (2010) 3, 873; H. van der Wilt, ‘Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities’, 12 *Chinese Journal of International Law* (2013) 1, 43; P. Ambach, ‘International Criminal Responsibility of Transnational Corporate Actors Doing Business in Zones of Armed Conflict’, in F. Baetens (ed.), *Investment Law Within International Law: Integrationist Perspectives* (2013), 51; J. Kyriakakis, ‘Corporations Before International Criminal Courts: Implications for the International Criminal Justice Project’, 30 *Leiden Journal of International Law* (2017) 1, 221.

committed by their nationals,⁵⁰ home States of corporations have criminal jurisdiction over the natural persons within the corporation responsible for taking the decisions if these persons have the nationality of the home State.⁵¹ Moreover, corporations can be prosecuted directly if the domestic law of the home State accepts criminal responsibility for legal persons.⁵²

In terms of criminal liability, reference should also be made to two important regional instruments which have been developed in recent years. The first concerns the 2006 Lusaka Protocol Against the Illegal Exploitation of Natural Resources, adopted by the International Conference on the Great Lakes Region, an international organization composed of States in the African Great Lakes region.⁵³ This Protocol provides for the domestic criminalization of acts of illegal exploitation of natural resources.⁵⁴ More recently, the 2014 Malabo Protocol, adopted by the African Union, mirrors the relevant provisions of the Lusaka Protocol to establish the crime of illegal exploitation of natural resources, falling under the jurisdiction of the African Court of Justice and Human Rights.⁵⁵

International humanitarian law therefore provides a viable legal basis for the home State's obligation to prevent the illegal exploitation of natural resources by corporations domiciled in its territory, while both international humanitarian and criminal law have an important role to play in ensuring liability for such

⁵⁰ *Rome Statute of the International Criminal Court*, 17 July 1998, Articles 12 & 17, 2187 UNTS 90, 99, 100.

⁵¹ Nevertheless, there are a number of hurdles to take in the context of prosecuting illegal exploitation of natural resources. See Ambach, *supra* note 49; D. A. Dam-de Jong, 'Ignorantia Facti Excusat? The Viability of Due Diligence as a Model to Establish International Criminal Accountability for Corporate Actors Purchasing Natural Resources From Conflict Zones', in L. Enneking *et al.* (), *Accountability, International Business Operations, and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains* (2019), 126.

⁵² For an analysis of the potential for domestic criminal courts to hold corporations accountable, see C. van den 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, 1.

⁵³ International Conference on the Great Lakes Region, 'Protocol Against the Illegal Exploitation of Natural Resources', (2006), available at https://ungreatlakes.unmissions.org/sites/default/files/icglr_protocol_against_the_illegal_exploitation_of_natural_resourcess.pdf (last visited 24 February 2020).

⁵⁴ *Ibid.*, see notably Articles 12 and 13.a

⁵⁵ African Union, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 15 May 2014, Article 28 L BIs, EX.CL/846(XXV), Annex 5, 29.

acts. Nevertheless, these fields of international law are less suitable for addressing other forms of environmental harm caused by corporate actors. We should therefore consider how and to what extent other fields of international law may provide a complementary legal basis.

II. International Human Rights Law as Legal Foundation for States' Obligations to Prevent and Remediate Environmental Harm Caused by Corporations

In her second report, Special Rapporteur Marja Lehto referred extensively to international human rights law as legal foundation for Draft Principles 10 and 11.⁵⁶ She furthermore argued that human rights obligations may provide a basis for State responsibility for environmental harm in conflict scenarios because such harm may violate various human rights.⁵⁷ This argument builds upon recent developments within the context of international human rights law: more specifically, the recognition that the protection of human rights and the environment are intertwined.⁵⁸ Special Rapporteur John Knox, who was appointed by the Human Rights Council in 2012 as an independent expert to map the relationship between human rights and the environment, played an important role in clarifying the connections between the two fields. His 2013 report demonstrated that all major global and regional human rights bodies have identified “[...] rights whose enjoyment is infringed or threatened by environmental harm”.⁵⁹ Indeed, developments in international and regional systems evidence that a greening of human rights has occurred.⁶⁰

At the international level, the right to a healthy environment has been recognized as inherent to the enjoyment of other human rights.⁶¹ For example,

⁵⁶ *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, supra note 11, 32-49, paras 67-103.*

⁵⁷ *Ibid.*, 51, para. 108.

⁵⁸ J. Van de Venis, ‘A Human Right to a Clean and Healthy Environment: Dream or Reality in Europe?’, *Environmental Law Network International Review* (2011) 1, 27.

⁵⁹ Human Rights Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John Knox*, UN Doc A/HRC/25/53, 30 December 2013, 6, para. 17.

⁶⁰ A. Boyle, ‘Human Rights and the Environment’, in B. Boer (ed.), *Environmental Law Dimensions of Human Rights* (2015), 203; E. Grant, ‘International Human Rights Courts and Environmental Human Rights: Re-imagining Adjudicative Paradigms’, 6 *Journal of Human Rights and the Environment* (2015) 2, 156, 158.

⁶¹ D. Shelton, ‘Human Rights and the Environment: What Specific Environmental Rights Have Been Recognised’ 35 *Denver Journal of International Law & Policy* (2006) 1, 129,

the Committee on Economic, Social and Cultural Rights (CESCR) stated that a “[...] right to health [...]”⁶² includes a healthy environment as an “[...] underlying determinant [...]” of health.⁶³ The Human Rights Committee (HR Committee) has furthermore maintained that all human rights treaty bodies acknowledge a link between the realization of human rights and the environment.⁶⁴ In its recent General Comment 36 on the right to life, the Committee went as far as to recognize that States’ duty to protect life implies that they should “[...] take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity”.⁶⁵ Environmental degradation was thus acknowledged as a serious threat to the right to life.⁶⁶ The HR Committee applied this concept in the case *Portillo Cáceres v. Paraguay*, where it held that the right to life may be violated if States fail to take such appropriate measures in relation to environmental pollution.⁶⁷ A similar trend can be discerned among regional human rights bodies. In the African and Inter-American system substantive rights to a satisfactory and healthy environment have been recognized,⁶⁸ whereas in the European system it was determined that environmental degradation or damage may violate the enjoyment of other human rights.⁶⁹

129.

⁶² *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Article 12, 993 UNTS 3, 8.

⁶³ CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the ICESCR)*, UN Doc E/C.12/2000/4, 11 August 2000, 2, para. 4.

⁶⁴ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, UN Doc A/HRC/10/61, 15 January 2009, 7, para. 18.

⁶⁵ HR Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, UN Doc CCPR/C/GC/36, 30 October 2018, 6, para. 26.

⁶⁶ *Ibid.*, 13, para. 62.

⁶⁷ HR Committee, *Portillo Cáceres v. Paraguay*, Communication No.2751/2016, UN Doc CCPR/C/126/D/2751/2016, 9 August 2019, 13-14, para. 7.3.

⁶⁸ For the Inter-American system, see *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 17 November 1988, Article 11, OAS Treaty Series No. 69 [Protocol of San Salvador]. For the African system, see *African Charter on Human and Peoples’ Rights*, 27 June 1981, Article 24, 1520 UNTS 217, 250.

⁶⁹ These include Articles 2, 6, 8, 10 and 13 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221. Relevant case law of the European Court for Human Rights includes *Dubetska and Others v. Ukraine*, ECtHR Application No. 30499/03, Judgement of 10 February 2011, 18-19, para.

Based on these developments, the Framework Principles on Human Rights and the Environment require States to “[...] respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment”.⁷⁰ The commentary to the Framework Principles clarifies that States should “[...] refrain from violating human rights through causing or allowing environmental harm [and] protect against harmful environmental interference from other sources, including business enterprises [...]”.⁷¹

When it comes to determining States’ human rights obligations in the context of economic activities, the UN Guiding Principles on Business and Human Rights, developed by Special Rapporteur John Ruggie and endorsed by the Human Rights Council in 2011, are the first point of reference.⁷² Although these principles do not themselves formulate binding obligations for States, they are considered to be based on existing obligations for States under international human rights law.⁷³ The principles assert that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises”.⁷⁴ For this purpose, they are required to “[...] tak[e] appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”.⁷⁵ Furthermore, a draft treaty on business and human rights is currently being negotiated under the auspices of the Human Rights Council.⁷⁶ The preamble to this draft treaty clearly stipulates that “[...] States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise

105; *López-Ostra v. Spain*, ECtHR Application No. 16798/90, Judgement of 9 December 1994, 15, para. 51; *Guerra and Others v. Italy*, ECtHR 116/1996/735/932, Judgement of 19 February 1998, 17, para. 60.

⁷⁰ Human Rights Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/37/59, 24 January 2018, 7 (Annex, Framework Principle 2).

⁷¹ *Ibid.*, 7-8 (Annex, para. 5).

⁷² *Human Rights Council, Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, supra note 4*, 6-27 (Annex). The guidelines were endorsed by the Human Rights Council through HRC Res. 17/4, UN Doc A/HRC/17/4, 6 July 2011.

⁷³ *Ibid.*, 6 (Annex, General Principles).

⁷⁴ *Ibid.*, 6 (Annex, Principle 1).

⁷⁵ *Ibid.*

⁷⁶ Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc A/HRC/RES/29/9, 14 July 2014.

under their jurisdiction or control, and ensure respect for and implementation of international human rights law [...]”⁷⁷

It is relevant to note that these instruments understand States’ obligation to regulate corporate activities as falling under their obligation to protect human rights. The remainder of this section will explore the nature and contents of the obligation to protect in the context of economic activities. As a starting point for determining the nature of the obligation to protect, it can be observed that States generally have three levels of obligations under the human rights framework.⁷⁸ These are the obligations to respect, protect, and fulfil human rights.⁷⁹ Whereas the obligation *to respect* is a negative obligation,⁸⁰ the obligations *to protect* and *to fulfil* are positive obligations, which require States to adopt “[...] reasonable and appropriate measures [...]”⁸¹ to realize human rights and prevent abuses of human rights by non-state actors.⁸² The duty to protect entails an obligation for States to exercise due diligence to prevent, investigate,⁸³ punish, or redress

⁷⁷ Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights, ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Revised Draft’ (2019), 2, 8th preambular paragraph, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (last visited 24 February 2020).

⁷⁸ *First Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, UN Doc A/CN.4/720, 30 April 2018, 37-38, para. 71.

⁷⁹ D. Shelton & A. Gould, ‘Positive and Negative Obligations’, in D. Shelton (ed.), *Oxford Handbook of International Human Rights Law* (2013), 562.

⁸⁰ HR Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, 4, para. 10. See also: S. Joseph & M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd ed. (2013), 40.

⁸¹ HR Committee, *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, UN Doc CCPR/C/39/D/195/1985, 12 July 1990, 47-48, para. 5.5.

⁸² HR Committee, *Pestaño v. Philippines*, Communication No. 1619/2007, UN Doc CCPR/C/98/D/1619/2007, 11 May 2010, 10, para. 7.2; HR Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, *supra* note 80, 3-4, para. 8; Shelton, ‘Human Rights and the Environment: What Specific Environmental Rights Have Been Recognised’, *supra* note 61, 130.

⁸³ HR Committee, *Pestaño v. Philippines*, *supra* note 82, 10, para. 7.2.

harm to human rights caused by non-state actors.⁸⁴ States will be violating their positive obligations if they fail to take reasonable and appropriate measures.⁸⁵

The content of due diligence obligations owed by States under international human rights law with regards to the environment are arguably informed by international environmental law. The merger of States' obligations was envisaged by the HR Committee in General Comment No. 36, wherein the Committee determined that States parties to the International Covenant on Civil and Political Rights should interpret the right to life in light of their duties under international environmental law.⁸⁶ More specifically, the HR Committee determined that "[i]mplementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, *inter alia*, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors".⁸⁷ This implies, according to the Committee, that there is a soft obligation for States to *inter alia* "[...] ensure sustainable use of natural resources, develop and implement substantive environmental standards [and] conduct environmental impact assessments [...]".⁸⁸ The Inter-American Court took an identical approach and required that the content and the scope of the right to life must be interpreted through international environmental law.⁸⁹ Because States have due diligence obligations under human rights law to respect and ensure the right to life and environmental law obligations to, for example, prevent transboundary harm,

⁸⁴ Human Rights Council, *Report of the Special Representative of the Secretary-General on Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum, State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: an Overview of Treaty Body Commentaries*, 13 February 2007, UN Doc A/HRC/4/35/Add.1, 9 (Annex, para. 7).

⁸⁵ HR Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, *supra* note 80, 3-4, para. 8; Bonnitcha & McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights', *supra* note 34, 904.

⁸⁶ HR Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, *supra* note 65, 13, para.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* It should be noted that conducting environmental impact assessments is in fact a hard obligation under international law in particular circumstances. See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, 82-84, paras 203-205; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, 665, 706-707, paras 104-105.

⁸⁹ *Environment and Human Rights*, Advisory Opinion of 15 November 2017, IACtHR Series A, No. 23, 48, para. 116.

they must take measures to protect the environment against (transboundary) harm caused by corporations and other private actors.⁹⁰

In order to fulfil their obligations under human rights law to protect the environment, States must adopt policies and legislation to effectively require non-state actors, including corporations, to comply with their environmental standards.⁹¹ The CESCR has interpreted this obligation as entailing “[...] a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence [...]”.⁹² This is also reflected in Draft Principle 10 of the ILC study, which specifically refers to corporate due diligence. The core of States’ obligation to protect the environment from harm caused by corporations therefore hinges on the content of this concept, which has been authoritatively defined by the UN Guiding Principles on Business and Human Rights.⁹³ Corporate due diligence figures prominently in the UN Guiding Principles as a means to address negative human rights impacts by corporations.⁹⁴ Whereas it is first and foremost presented as a means for States to discharge their obligation under international law to *protect* human rights, the principles also recognize a distinct responsibility for corporations to *respect* human rights. The due diligence requirements for corporations are directly connected to this soft duty to respect human rights and are presented as a means for corporations to identify, prevent, mitigate, and account for adverse human rights impacts ensuing from their operations.⁹⁵

⁹⁰ HR Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, *supra* note 65, 13, para. 62.

⁹¹ Human Rights Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, *supra* note 70, 15 (Annex, Framework Principle 12 and commentary, para. 34).

⁹² 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, 5, para. 16.

⁹³ Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 4.

⁹⁴ It should be noted that corporate due diligence is an important component of the principles, but that the framework itself is more complex. See J. Ruggie & J. Sherman III, ‘The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights: A Reply to Bonnitcha & McCorquodale’, 28 *European Journal of International Law* 3, 923.

⁹⁵ *Ibid.*, 923-924.

More specifically, Principle 15(b) of the UN Guiding Principles formulates a recommendation for corporations to have in place a “[...] human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts on human rights [...]”.⁹⁶ Other principles in the UN Guiding Principles further develop the responsibility to prevent, mitigate, account for, and remedy adverse human rights impacts. Particularly relevant with respect to due diligence, Principle 17 sets out the process of human rights due diligence in the corporate context. This process is referred to as “on-going” and therefore should be regarded as a continuous exercise throughout business operations; it includes “[...] assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed”.⁹⁷ The process is furthermore flexible, as its complexity depends on “[...] the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations”.⁹⁸ Most importantly, the process does not apply only to the corporation’s own activities but also to its business relationships.⁹⁹ It therefore includes a responsibility for corporate actors to assess their human rights impacts through their suppliers and other business partners.

Corporate due diligence therefore entails first and foremost an obligation to conduct human rights impact assessments, both with respect to a corporation’s own activities and with respect to its business partners, and to ensure that adequate policies are in place to respond to these impacts. As a consequence of the greening of human rights, these human rights impact assessments also extend to environmental harm. Requiring corporations to conduct due diligence can therefore be an effective way for States to give effect to their obligation to protect human rights in the context of business and human rights. Furthermore, inclusion of corporate due diligence in domestic legislation ensures that this becomes a mandatory practice for corporations.

⁹⁶ Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 4, 15 (Annex, Principle 15).

⁹⁷ *Ibid.*, 16 (Annex, Principle 17).

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* See also *ibid.*, 17-20 (Annex, Principles 18 to 22).

D. Extraterritorial Application of States' Due Diligence Obligations

The acknowledgment that States' due diligence obligations to ensure respect for international humanitarian law, on the one hand, and to protect against human rights abuses, on the other, extend to the activities of their corporations does not automatically entail an obligation for States to regulate the activities of those same corporations abroad. After all, States' obligations are usually confined to their jurisdiction. However, a trend can be recognized that States' due diligence obligations under international humanitarian law and human rights law may apply extraterritorially, specifically with respect to corporate activities.

For international humanitarian law, this ensues from the recognition that all States parties to the Geneva Conventions have an obligation to ensure respect by their nationals of the provisions of the Conventions, regardless of whether the relevant State is involved in the armed conflict. The 2016 International Committee of the Red Cross (ICRC) Commentary refers in this respect to *erga omnes partes* obligations.¹⁰⁰ This section will not further consider international humanitarian law, as the question of extraterritoriality in this field of international law seems less problematic than for international human rights law, especially because international criminal law provides a separate mechanism for the prosecution of war crimes.

For international human rights law, it is relevant to note that both the UN Guiding Principles on Business and Human Rights and the Draft Treaty on Business and Human Rights include relevant provisions. The UN Guiding Principles include a recommendation for States to set out an expectation that corporations domiciled in their territory or under their jurisdiction respect human rights throughout their operations and they call on States to take appropriate steps to ensure the effectiveness of domestic judicial mechanisms with respect to business-related human rights abuses.¹⁰¹ The Draft Treaty furthermore formulates an obligation for States to ensure that their domestic legislation requires corporations to respect environmental rights¹⁰² and to prevent

¹⁰⁰ International Committee of the Red Cross, *supra* note 44, Article 1, para. 119.

¹⁰¹ Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *supra* note 4, 7, 23 (Annex, Principles 2, 26).

¹⁰² Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights, *supra* note 77, 3-4,

their abuse whilst conducting transnational and national business activities.¹⁰³ Additionally, this treaty is proposing that States ensure that their domestic law provides for a “[...] system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character”.¹⁰⁴

The provision of remedies by the home State is especially important in situations in which the host State is not in a position to ensure that private actors operating in their territory respect human rights, as is a common scenario in situations of armed conflict or the immediate aftermath. In recognition of this, Principle 7 of the UN Guiding Principles on Business and Human Rights determines that home States should help ensure that corporations are not involved with human rights abuses in conflict-affected areas.¹⁰⁵ At the same time, it is undeniable that the exercise of jurisdiction by the home State may infringe on host State sovereignty in these circumstances,¹⁰⁶ as was referenced in the discussions in the ILC regarding the Draft Principles. It is therefore of the utmost importance to carefully determine whether and in which circumstances home States have such extraterritorial obligations and how these relate to the sovereignty of the host State.

This question is closely connected to the meaning given to the concept of *jurisdiction*, as the recognition of extraterritorial obligations for States implies that the notion of jurisdiction is extended.¹⁰⁷ Generally, the obligations included in human rights treaties are exclusively owed to those within the State’s jurisdiction. Therefore, if an act occurs against someone outside the State’s jurisdiction, the *threshold criterion* is not met.¹⁰⁸ The aim of determining *jurisdiction* under human rights law is “[...] primarily about delineating as appropriately as possible

Article 1(2).

¹⁰³ *Ibid.*, 7-8, Article 5.

¹⁰⁴ *Ibid.*, 8-9, Article 6.

¹⁰⁵ Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 4, 10-11 (Annex, Principle 7).

¹⁰⁶ R. Chambers, ‘An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct: Jurisdictional Dilemma Raised/ Created by the Use of the Extraterritorial Techniques’, 14 *Utrecht Law Review* (2018) 2, 22, 26.

¹⁰⁷ K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (2013), 16.

¹⁰⁸ M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011), 19-20.

the pool of persons to which a State ought to secure human rights”.¹⁰⁹ Therefore, arguably those affected by a State’s actions or omissions should be included in this pool.

This section will discuss that a trend has emerged which recommends that home States should regulate corporate activities which originate on their territory and have consequences beyond their territory, especially when this concerns corporate activities in conflict zones. Firstly, this section will analyze the developments related to transboundary harm, i.e. harm that originates in the home State and causes damage to persons or the environment in the host State. Secondly, these developments will be transplanted to situations of extraterritorial damage, i.e. situations in which the harm originates in the host State but was influenced by persons in the home State.

I. Transboundary Harm

Victims in other States may be affected by transboundary harm or extraterritorial damage. Transboundary harm occurs when harm originates in a particular State and then causes damage to persons or the environment in another State.¹¹⁰ Such damage is prohibited by the principle of *sic utere tuo ut alienum non laedas*, also known as the no-harm principle,¹¹¹ which provides that States have the responsibility to ensure that conduct within their jurisdiction does not result in environmental harm outside their territory.¹¹² In the *Trail Smelter* award, an arbitral tribunal found that “[...] no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein [...]”.¹¹³

This general obligation contained in the no-harm principle was read into the human rights framework by the Inter-American Court in its 2017

¹⁰⁹ M. Den Heijer & R. Lawson, ‘Extraterritorial Human Rights and the Concept of Jurisdiction’, in M. Langford *et al.* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (2013), 163.

¹¹⁰ See definition in: ILC, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, *Yearbook of the International Law Commission* (2006), Vol. II, Part Two, 64, Principle 2(e).

¹¹¹ R. Percival, ‘Liability for Environmental Harm and Emerging Global Environmental Law’, *25 Maryland Journal of International Law* (2010) 1, 37, 39.

¹¹² Report of the United Nations Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment, UN Doc A/CONF.48/14/Rev.1, 5-16 June 1972, 5, Principle 21.

¹¹³ *Trail Smelter Case (United States v. Canada)*, Awards of Arbitral Tribunal, 11 March 1941, 3 Reports of International Arbitral Awards, 1905, 1965.

Environment and Human Rights Advisory Opinion.¹¹⁴ This Opinion reflects a far-reaching approach in the trend of recognizing due diligence obligations for transboundary harm. It determined that States must adopt all necessary measures to avoid activities within their State from impacting the enjoyment of people's human rights outside their territory.¹¹⁵ The *jurisdiction* of States is extended when transboundary harm has occurred "[...] if there is a causal connection between the incident that took place on its territory and the violation of the human rights of persons outside its territory".¹¹⁶ If harmful conduct originates on a State's territory, the State would have had control over the harmful activities and, therefore, that State may be exercising jurisdiction over victims of the transboundary harm. The Inter-American Court established that there is a legal presumption that the State of origin has jurisdiction over those whose rights have been violated by transboundary harm.¹¹⁷

Likewise, the HR Committee, in its General Comment 36 on the right to life, recognized that States have an obligation to "[...] take appropriate legislative and other measures to ensure that all activities [...] having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction, are consistent with article 6 [...]".¹¹⁸

Although the standard set by the HR Committee (direct and reasonably foreseeable impact) is arguably more stringent than that proposed by the Inter-American Court (causal connection between the violation and the infringement of human rights),¹¹⁹ both human rights bodies recognize in a general vein that States have an obligation to adopt legislation which ensures that corporations respect human rights and prevent their abuse during their (transboundary) business activities.¹²⁰ If States fail to adopt legislation requiring corporations to prevent transboundary harm from violating rights, States may be responsible for

¹¹⁴ *Environment and Human Rights*, *supra* note 89.

¹¹⁵ *Ibid.*, Official Summary, 3, para. g.

¹¹⁶ *Ibid.*, 43-44, paras 101-103.

¹¹⁷ C. Campbell-Duruflé & S.A. Atapattu, 'The Inter-American Court's *Environment and Human Rights* Advisory Opinion: Implications for International Climate Law', 8 *Climate Law* (2018), 321, 333.

¹¹⁸ HR Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, *supra* note 65, 5, para. 22.

¹¹⁹ Arguably, the existence of a causal connection does not necessarily imply a direct connection between an act and a violation.

¹²⁰ See the proposed obligations in the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights, *supra* note 77, 7-8, Article 5.

human rights violations caused to individuals beyond their territory and outside their effective control.¹²¹

II. Extraterritorial Environmental Damage

The CESCR established that States are required “[...] to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction [...]”.¹²² Therefore, the understanding of jurisdiction discussed above should arguably be extended to include situations where a parent company has adopted an environmentally harmful policy that was subsequently carried out by a subsidiary under its *de facto* control¹²³ and has resulted in environmental damage or exploitation in a conflict scenario. When there is a sufficiently close link of cooperation and knowledge¹²⁴ between the subsidiary and the parent company, such that the *veil* between them is recognized as artificial, the corporate veil may be pierced and the parent company may be liable for the subsidiary’s harmful conduct.¹²⁵

In scenarios of extraterritorial damage, where corporate activities were planned in a home State and consequently these activities caused environmental damage and human rights violations (in a conflict zone) abroad, the damage

¹²¹ *Environment and Human Rights*, *supra* note 89, 43-44, para. 103. Both human rights bodies furthermore adopt a foreseeability test. See D. Palombo, *Business and Human Rights: The Obligations of the European Home States* (2020), Chapter 4, II, A.

¹²² 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*, *supra* note 92, 8, para. 26. For an analysis of the comment, see T. van Ho, ‘Introductory Note to General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR)’, 58 *International Legal Materials* (2019) 4, 872.

¹²³ *Vedanta Resources PLC & Anor v. Lungowe & Others*, UK Supreme Court, [2019] UKSC 20, Judgement of 10 April 2019, 20-23, paras 55, 61. The Court assessed *de facto* control based on “[...] the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary”. *Ibid.*, 18, para. 49. See also T. Van Ho, ‘Vedanta Resources PLC and Another v. Lungowe and Others’, 114 *American Journal of International Law* 1, 110.

¹²⁴ *Wiwa v. Royal Dutch Petroleum Co.*, 96 Civ. 8386 (KMW) (S.D.N.Y. Feb. 22, 2002), 13-14. See also: *Oguru & Efang v. Shell Petroleum & Others*, Court of Appeal The Hague, 200.126.804 (zaak a) + 200.126.834 (zaak b), Judgement of 18 December 2015, para. 5.9.

¹²⁵ A. Wilson, ‘Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable Under the Alien Tort Claims Act’, in O. de Schutter (ed.), *Transnational Corporations and Human Rights* (2006), 66.

arguably originated in a State's territory.¹²⁶ States' due diligence obligations may therefore extend in these scenarios to require that corporations refrain from adopting policies domestically for subsidiaries to carry out activities abroad that will violate environmental rights in conflict zones.

In situations where corporate activities of a subsidiary occur in conflict or post-conflict zones and cause environmental harm, the question can be raised under what circumstances the home State can be considered to have obligations to provide remedies to the victims of such harm. It may be argued that, if such business activities have consequences which damage (environmental) human rights in locations where victims have no access to (effective) judicial remedies, for example because of the continued occurrence of an armed conflict, the home State's due diligence obligations may be considered to extend outside its territory.¹²⁷ These obligations should include the requirement that States provide access to effective remedies for victims of corporate human rights abuses, where such remedies are not available in the host State.¹²⁸ Additionally, to fulfil this obligation, it has been recommended that States establish domestic liability mechanisms to hold corporations liable for failing to comply with domestic legislation to prevent human rights abuses.¹²⁹

The existence of an obligation to exercise jurisdiction with respect to environmental harm caused by a corporation's subsidiary acting under its *de facto* control is, however, not generally recognized under international human rights law. Although there are movements toward interpreting jurisdiction more broadly, at this point there is insufficient evidence to conclude with certainty that the home State would be held responsible for failing to prevent extraterritorial corporate environmental harm in conflict scenarios. However, with the proposal of Draft Principle 10, the trend of extending obligations extraterritorially is further recognized and the concept is strengthened.

¹²⁶ *Environment and Human Rights*, *supra* note 89, 43-44, para. 103.

¹²⁷ *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, *supra* note 11, 35, para. 72.

¹²⁸ 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*, *supra* note 92, 5, para. 14. The CESCR emphasizes that States should pay due attention to "[t]he extent to which an effective remedy is available and realistic in the alternative jurisdiction [...]". *Ibid.*, 13, para. 44.

¹²⁹ This recommendation has been included in the principle 6 of the draft treaty on the regulation of the activities of transnational corporations and in Draft Principle 11 on the protection of the environment in relation to armed conflict.

E. State Practice Relating to Due Diligence Obligations and Liability for Corporations

The measures that States should take pursuant to Draft Principles 10 and 11 of the ILC study, and more generally pursuant to their due diligence obligations under international humanitarian law and human rights law, consist of taking legislative and other measures. This section examines the various ways in which States have given effect to their due diligence obligations in regional and domestic frameworks. Section E.1 discusses the various guidelines developed by the Organization for Economic Cooperation and Development (OECD) as part of its investment framework. This organization has played a leading role in developing corporate due diligence. Section E.2 explores relevant domestic legislation.

As a preliminary remark, it should be noted that the ILC Draft Principles confine their call for liability to environmental harm that is caused by corporations in conflict and post-conflict situations. It is important to note that the term *caused* implies a narrower set of circumstances for liability than one which would be based on corporations' due diligence obligations. Liability is therefore not foreseen for harm that results from activities which, in the words of the UN Guiding Principles, "[...] may be directly linked to a corporation's operations, products or services by its business relationships [...]"¹³⁰ Draft Principle 11 therefore does not provide for liability in relation to harm ensuing from a corporation's failure to conduct proper due diligence with respect to its business partners. Enforcement of due diligence requirements is more aptly covered by Draft Principle 10 and ensues from the general recommendation for States to take "[...] other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence [...]". Such other measures may include enforcement measures.

¹³⁰ See Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *supra* note 4, 16 (Annex, Principle 17(a)). See also the commentary to Draft Principle 11 of the ILC study, which states as follows: "As for the term 'cause', the Guiding Principles on Business and Human Rights, in the context of human rights due diligence, refer to adverse impacts that the business enterprise 'may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.'" See *Report of the International Law Commission to the Seventy-First Session*, *supra* note 1, 244.

I. Guidelines for Corporate Due Diligence and Liability in the OECD Framework

The OECD has developed various tools to develop corporate due diligence over the past two decades, most importantly within its guidelines for multinational enterprises, which set out an international standard for responsible business conduct,¹³¹ and related instruments within its investment framework. The concept of due diligence was first introduced in the 2000 Guidelines for Multinational Enterprises, which included a rudimentary provision on supply chain due diligence, stating that “[...] enterprises should [...] [e]ncourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines”.¹³² The 2011 revision of the OECD Guidelines significantly developed this basic due diligence requirement through the formulation of a general expectation that corporations conduct risk-based due diligence in order to avoid that their business activities cause or substantially contribute “[...] to adverse impacts on matters covered by the *Guidelines* [...]”, that they “[...] address such impacts [...]” and that they “[...] seek to prevent or mitigate an adverse impact [...] directly linked to their operations, products or services by a business relationship”.¹³³

It is important to note that the duty for corporations to avoid causing or contributing to adverse impacts through their own activities includes their activities in the supply chain. In other words, practices such as franchising, licensing or subcontracting fall under a corporation’s own activities, to which the duty to address applies.¹³⁴ It is equally important to note that this duty to address adverse impacts does not apply to independent suppliers. In this context, corporations are merely expected to use their leverage to influence the entity causing the adverse impact with the aim of preventing or mitigating that impact.¹³⁵

Matters covered by the Guidelines include both human rights and environmental impacts. The human rights due diligence draws directly on the

¹³¹ See <https://mneguidelines.oecd.org/guidelines/> (last visited 27 January 2020) for more information on the OECD Guidelines for Multinational Enterprises.

¹³² OECD, *The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, OECD Doc DAF/IME/WPG(2000)15/FINAL, 31 October 2001, 11.

¹³³ OECD, ‘2011 Update of the OECD Guidelines for Multinational Enterprises’ (2011), 20, available at <https://www.oecd.org/daf/inv/mne/48004323.pdf> (last visited 15 March 2020).

¹³⁴ *Ibid.*, 24.

¹³⁵ *Ibid.*, 24.

UN Framework on Business and Human Rights and can be considered as a means to give effect to the UN Guiding Principles.¹³⁶ The environmental due diligence, on the other hand, draws on the 1992 Rio Declaration on Environment and Development, the 1998 Aarhus Convention, as well as on corporate standard-setting instruments such as the International Organization for Standardization (ISO) Standard on Environmental Management Systems.¹³⁷ The notion *due diligence* is not specifically mentioned in the environmental chapter. Yet corporations are *inter alia* expected to collect and evaluate “[...] adequate and timely information regarding the environmental, health, and safety impacts of their activities [...]” and they are to “[a]ssess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them”.¹³⁸ As the impacts of environmental harm on human rights would also be covered by human rights due diligence, the two chapters should be read together.

The inclusion of these due diligence requirements also spurred the development of more specific guidelines within the OECD, which aim to provide corporations in designated sectors practical guidance on how to implement due diligence in their sector.¹³⁹ The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas deserves special attention.¹⁴⁰ This Guidance applies to corporations based in OECD and other adherent countries that operate in or procure minerals from volatile regions worldwide, including but not limited to conflict regions. It is therefore a particularly relevant tool to address the phenomenon of illegal exploitation of natural resources, as discussed in section B.¹⁴¹

¹³⁶ *Ibid.*, 31-34.

¹³⁷ *Ibid.*, 42-46. The full name of the Aarhus Convention is *UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters* (25 June 1998, 2161 UNTS 447).

¹³⁸ OECD, *2011 Update of the OECD Guidelines for Multinational Enterprises*, supra note 133, 42-43.

¹³⁹ See supra note 122.

¹⁴⁰ See OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd ed. (2016). For a detailed assessment of the Guidance, see Mary Footer, ‘Human Rights Due Diligence and the Responsible Supply Chain of Minerals from Conflict-Affected Areas: Towards a Normative Framework?’, in J. Letnar Čerňič & T. Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (2015), 179.

¹⁴¹ The Guidance was in fact developed in close cooperation with the UN Group of Experts on the DR Congo, established by the UN Security Council, and the International

The Guidance introduces a five-step risk-based approach to due diligence, based on the four elements of human rights due diligence as included in the UN Guiding Principles, i.e. to prevent, mitigate, to account for, and to address. These five steps consist of strengthening company management systems, identifying and assessing supply chain risks, designing and implementing strategies to respond to identified risks, conducting independent audits, and publicly disclosing supply chain due diligence and findings in annual sustainability or corporate responsibility reports. The Guidance contains detailed recommendations for upstream and downstream corporations on how they should conduct each of these five steps.

With respect to identifying and assessing supply chain risks, for instance, upstream companies are “[...] expected to clarify chain of custody and the circumstances of mineral extraction, trade, handling and export [...]”.¹⁴² They further need to evaluate those circumstances against a number of risks.¹⁴³ These include contributing to serious abuses associated with the extraction, transport or trade of minerals, such as torture or compulsory labor; direct or indirect support to non-state armed groups, including by paying them illegal taxes; abuses by public or private security forces contracted by corporations or their suppliers; and, finally, contributing to bribery, fraud or corruption.¹⁴⁴ Downstream companies, on the other hand, are expected to assess the due diligence practices of their smelters or refiners, for example by reviewing information provided by them that establishes the origin of the minerals and by carrying out joint spot checks at the smelter/refiner’s facilities.¹⁴⁵ In practice, industry association programs, such as the responsible minerals program, play a prominent role in facilitating due diligence exercise by their members.¹⁴⁶

It is important to note that the risks, on which the due diligence exercise under the Guidance is based, are much more limited than those identified under the OECD Guidelines for Multinational Enterprises. For instance, the

Conference on the Great Lakes Region, an inter-governmental organization consisting of States in the African Great Lakes region. Curbing the illegal trade from this conflict region was therefore very much on the drafters’ minds.

¹⁴² See OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, *supra* note 140, 41-42.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, 20-24.

¹⁴⁵ See OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, *supra* note 140, 42-43.

¹⁴⁶ See OECD, *Alignment Assessment of Industry Programmes With the OECD Minerals Guidance* (2018).

former Guidance does not refer at all to environmental harm. This omission is not to be regarded as excluding the applicability of this wider due diligence to corporations in the minerals sector; rather, the Guidance must be regarded as complementary to the OECD Guidelines.

The OECD further obliges every member State or adherent country to establish a National Contact Point (NCP) to assist in and monitor the implementation of the Guidelines, a feature which is also discussed by Special Rapporteur Marja Lehto in her second report.¹⁴⁷ As part of their mandate, NCPs mediate in disputes that arise in relation to the implementation of the OECD Guidelines and related instruments.¹⁴⁸ Complaints can be brought to the respective NCP by all interested parties, including worker organizations and non-governmental organizations. This procedure results either in a statement that the issues do not merit further consideration, a report outlining the agreement that the parties have reached or, lastly, a decision of non-compliance by the NCP including recommendations on how to reach compliance with the Guidelines.¹⁴⁹ Several of the disputes before OECD NCPs relate to environmental harm in conflict and post-conflict settings. Among the prime examples is a complaint brought to the British NCP by the NGO Global Witness against mineral trading company Afrimex in relation to the illegal exploitation of natural resources.¹⁵⁰ The NCP procedure can play a useful role in altering corporations' policies and can also, to a certain extent, foster accountability but it is not a legal procedure in itself.¹⁵¹ One may therefore question to what extent it can be used to hold corporations liable, as is the idea underlying Draft Principle 11.

¹⁴⁷ *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, supra note 11, 37-38.*

¹⁴⁸ OECD, *2011 Update of the OECD Guidelines for Multinational Enterprises, supra note 133, 68.*

¹⁴⁹ *Ibid.*, 72.

¹⁵⁰ See 'Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) LTD, Summary of NCP Decision' (2008), available at <http://www.oecd.org/investment/mne/43750590.pdf> (last visited 15 March 2020).

¹⁵¹ For a more thorough analysis of the function of NCPs, see K. Buhmann, 'National Contact Points under OECD's Guidelines for Multinational Enterprises: Institutional Diversity Affecting Assessments of the Delivery of Access to Remedy', in L. Enneking *et al.* (eds), *Accountability, International Business Operations, and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains* (2019), 38.

II. Corporate Due Diligence and Liability in Domestic Legislation

The UN Guiding Principles, as well as the OECD Guidelines and Guidance, provide soft norms for corporations to exercise risk-based due diligence. As international law currently does not include binding obligations for corporations, it is left to domestic States to adopt appropriate legislation to give effect to these soft norms.¹⁵² Domestic legislation is therefore of prime importance for establishing binding due diligence obligations for corporations as well as holding corporations liable for causing environmental harm, as has been recognized by the ILC Draft Principles.

The United States' Dodd-Frank Act is a good example of a domestic law establishing such obligations. Section 1502 of that document requires corporations listed on the US stock exchange to report on their exercise of due diligence regarding the source and chain of custody of minerals procured from the DRC or neighboring States.¹⁵³ The EU Conflict Minerals Regulation likewise imposes mandatory due diligence on all major public and private European corporations procuring minerals from conflict-affected States.¹⁵⁴ The Chinese Due Diligence Guidance takes a broader approach than its American and European counterparts. It requires Chinese corporations to exercise due diligence not only with respect to *conflict minerals* and related problems, but also with respect to various types of environmental harm. These include the use of chemicals and hazardous substances subject to international bans and extracting or sourcing resources from World Heritage Sites.¹⁵⁵ Unfortunately, however, the due diligence exercise under the Chinese Guidance is not legally-binding.

¹⁵² It is not likely that this situation will change on the short term, as previous attempts to develop binding obligations for corporations under international law under the umbrella of the Human Rights Commission have not come to fruition. The most recent attempt to develop international law on corporate responsibility, the draft treaty on business and human rights, does not formulate direct obligations for corporations at all. For an overview of relevant international legal developments, see J. Wouters & A.L. Chané, 'Multinational Corporations in International Law', in M. Noortmann, A. Reinisch & C. Ryngaert (eds), *Non-State Actors in International Law* (2015), 225; and E. De Brabandere & M. Hazelzet, 'Corporate Responsibility and Human Rights – Navigating Between International, Domestic and Self-regulation', in Y. Radi (ed.), *Research Handbook on Human Rights and International Investment Law* (2018), 221.

¹⁵³ *Dodd Frank Wall Street Reform and Consumer Protection Act*, 21 July 2010, Bill number H.R. 4173, Report number H. Rept. 111-517, S. Rept. 111-176.

¹⁵⁴ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017, OJ 2017 L130 60.

¹⁵⁵ China Chamber of Commerce of Metals, Minerals & Chemical Importers & Exporters, 'Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains' (2015),

Several other domestic laws introducing mandatory human rights diligence are currently underway. Most of these can be considered as legislation implementing the UN Guiding Principles. The most advanced initiatives include the French *Loi relative au devoir de vigilance* and the Swiss Popular Initiative on Responsible Business. The French law on the duty of vigilance has already entered into force and requires corporations domiciled in France and with a minimum of 5,000 employees to establish and implement a vigilance plan. This plan should include reasonable vigilance measures to identify risks and to prevent serious violations of human rights and health and safety standards as well as serious harm to the environment. The duty of vigilance applies to a corporation's own activities, those of its subsidiaries and to those of its direct business partners.¹⁵⁶ Corporations can be held responsible for not living up to their obligations pursuant to the duty of vigilance.¹⁵⁷ In this sense, the French law goes beyond the ILC Draft Principles, as it addresses not only harm that is caused by a corporation, but also harm to which it has contributed or that can be directly linked to its operations. The Swiss Popular Initiative, which is an initiative of the Swiss Coalition for Corporate Justice, aims at revising the Swiss Constitution.¹⁵⁸ It is comparable in content, but agreement has not yet been reached with respect to the degree to which corporations could be held liable for their activities abroad.¹⁵⁹ The current proposal foresees liability with

available at <http://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm> (last visited 15 March 2020), 18-21.

¹⁵⁶ The original text is as follows: “*Le plan comporte les mesures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l’environnement, résultant des activités de la société et de celles des sociétés qu’elle contrôle au sens du II de l’article L. 233-16, directement ou indirectement, ainsi que des activités des sous-traitants ou fournisseurs avec lesquels est entretenue une relation commerciale établie, lorsque ces activités sont rattachées à cette relation.*” See *LOI n° 2017-399 du 27 Mars 2017 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d’Ordre*, Journal Officiel de la République Française – No. 74 du 28 Mars 2017, Art. 1.

¹⁵⁷ *Ibid.*, Art. 2.

¹⁵⁸ The initiative has reached the minimum threshold of 100.000 signatures and therefore will be put to a vote through a national referendum, unless Parliament adopts a counter-proposal. See N. Bueno, ‘The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability’, in L. Enneking *et al.* (eds), *Accountability and International Business Operations: Providing Justice for Corporate Violations of Human Rights, Labor and Environmental Standards* (2019), 239, 245.

¹⁵⁹ See <https://www.business-humanrights.org/en/switzerland-ngo-coalition-launches-responsible-business-initiative> (last visited 15 March 2020) for a current overview of the political debate in Switzerland.

respect to harm caused by others that are under the control of the corporation. This includes, in any case, subsidiaries under the *de facto* control of the parent company, as envisaged by Draft Principle 11 of the ILC study but may also extend to other relations which are characterized by a large measure of control.¹⁶⁰

Notwithstanding the differences in their approaches, these initiatives demonstrate a clear trend towards the recognition of the need to adopt due diligence standards for corporations at the domestic level. Moreover, the majority of these standards is mandatory and can be enforced. For instance, a first case based on the new French law has been brought to the court against oil company Total for its alleged failure to elaborate and implement its vigilance plan in Uganda, where it is the main operator of a drilling project in a biodiversity rich nature reserve.¹⁶¹ These initiatives complement the range of other domestic laws providing for corporate liability that were already in place, including the US Alien Tort Statute.¹⁶²

F. Outlook

The principal aim of the two Draft Principles discussed in the current contribution is to enhance domestic implementation of corporate social responsibility. As the Special Rapporteur indicates in her report, “[...] respect for human rights is not optional for corporations”.¹⁶³ Either “[...] the relevant human rights standards are contained in domestic law that binds corporations [...]” or “[...] the responsibility to respect ‘exists over and above legal compliance’ as a (moral) expectation”.¹⁶⁴ As States play a crucial role in establishing obligations for corporations to respect, this article is set out to answer the question as to what extent current international law establishes extraterritorial obligations for the home States of multinational corporations with respect to the prevention and remediation of environmental harm in conflict zones and how these obligations relate to the sovereignty of the host States.

¹⁶⁰ See Bueno, *supra* note 158, 247-248.

¹⁶¹ See ‘Le Groupe Total Assigné en Justice Pour ses Impacts Sociaux et Environnementaux en Ouganda’, *Le Monde*, available at https://www.lemonde.fr/afrique/article/2019/10/24/le-groupe-total-assigne-en-justice-pour-ses-impacts-sociaux-et-environnementaux-en-ouganda_6016717_3212.html (last visited 15 March 2020).

¹⁶² Alien Tort Statute, 28 U.S. Code § 1350 (1948).

¹⁶³ *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts* by Marja Lehto, *supra* note 11, 33-34, para. 69.

¹⁶⁴ *Ibid.*

For this purpose, this paper first assessed potential linkages between multinational corporations and environmental harm in conflict and post-conflict settings. It concluded that home States' responsibility with respect to corporate activities in or related to conflict and post-conflict zones may be engaged in two ways. First, home States have a responsibility to regulate transborder business transactions of corporations domiciled in their jurisdiction. Second, home States' responsibility may be engaged when corporations domiciled in their jurisdiction engage directly in the illegal exploitation of natural resources or otherwise environmentally destructive practices in conflict zones. These types of responsibility were more closely assessed in the section addressing extraterritoriality, distinguishing between transboundary harm and extraterritorial environmental damage respectively.

When it comes to transboundary harm, i.e. harm that directly ensues from the practices of the corporation domiciled in the home State, both the Inter-American Court on Human Rights and the Human Rights Committee take the stance that States have an obligation to adopt legislation which ensures that corporations do not infringe on the human rights of individuals abroad. Such an obligation currently does not exist with respect to extraterritorial environmental damage, i.e. damage caused by local branches or subsidiaries operating in a conflict or post-conflict setting.

This difference may be explained from the perspective of the sovereignty of the host State. Regulating corporations when they engage in international business transactions is less likely to infringe on the sovereignty of the conflict or post-conflict State than holding corporations liable for environmental harm caused by local branches or subsidiaries in the conflict or post-conflict State. In the latter situation, these subsidiaries or local branches fall directly under the jurisdiction of the conflict or post-conflict State. For this reason, the position taken by the Draft Principles, calling on States to provide adequate and effective procedures and remedies to the extent that this is appropriate, is a good way to balance the interests. It is, in any case, of the utmost importance to provide victims with remedies, and the home State can be said to have a responsibility to provide such remedies if the host State is not in a position to do so.

Whereas the conclusion may therefore be drawn that the standards contained in the two Draft Principles to some extent reflect hard obligations, they belong for the most part to the domain of *lex ferenda*. It is, in this respect, important to distinguish between treaty and customary obligations. The aim of the ILC study is to codify existing rules of customary international law on the

one hand and to set out standards of conduct for States on the other.¹⁶⁵ Whereas Draft Principles 10 and 11 to some extent reflect treaty obligations, they cannot be said to represent customary international law.

Nevertheless, the Draft Principles are certainly indicative of the direction in which the law is evolving. It is furthermore relevant to note that these developments are not confined to the decisions and statements of human rights monitoring bodies but have also resonated in the actual practice of States. It therefore seems a matter of time before it is accepted that States have distinct obligations under customary international law for which their responsibility may be engaged. The ILC Draft Principles provide an important impetus to these developments, not in the least because they provide a reference to States regarding the state-of-the-art and a guidance for future action.

¹⁶⁵ The Special Rapporteur distinguishes between principles of a legal and of a policy nature. See International Law Commission, Seventy-First session. See *Provisional Summary Record of the 3471st Meeting of the International Law Commission to the Seventy-First Session (First Part)*, *supra* note 33, 3.