

INTERNATIONAL LAW ASSOCIATION

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NON STATE ACTORS

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3rd report prepared by the co-rapporteurs, Cedric Ryngaert and Jean d'Aspremont

At the Sofia Conference, Dr Ryngaert presented the Second Report at the Open Working Session, and it was well received. At the Closed Session, attending Committee members discussed the work remaining on NSA responsibilities, including empirical findings and theoretical considerations. The Committee decided to address these in a third report for presentation at the ILA conference in Washington, D.C. in April 2014. At their meeting with Christine Chinkin and Marcel Brus (present and incoming Director of Studies of the ILA), Professor Chinkin informed Professor Math Noortmann (Chairman of the Committee) and Dr Ryngaert that she would propose an extension of the mandate for another four years, and this was granted. This was intended to enable the Committee to draft a final report and a substantial resolution for the 2016 ILA Conference in Durban.

At the 2012 ILA Executive Council meeting Jean d'Aspremont was appointed and welcomed as Co-Rapporteur of the Committee.

The Committee held its next meeting on theoretical and empirical issues relating to the responsibilities of NSAs at the Institute for Transborder Studies at Kwantlen Polytechnic University in Vancouver, Canada on June 28-29th, 2013. In preparation for that meeting members were requested to submit papers relating to international responsibilities of NSAs. The aim was to address issues concerning NSA primary international obligations under international law, secondary rules of responsibility of NSAs (e.g., attribution, shared responsibility), monitoring of NSA compliance with international law and private regulatory initiatives, NSA involvement in international compliance-monitoring mechanisms, private complaints mechanisms or privileges and immunities

of NSAs. Contributions were also solicited from interested ILA members outside the Committee, specifically from the American, Belgian, Dutch and Canadian Branches.

The Committee held another meeting in Utrecht on December 13th, 2013, on the side of a conference on Shared Responsibility of Organized Non-State Actors. The co-rapporteurs sought feedback on the draft report they had circulated. Their choice of an actor-based approach was approved as well as that of the actors the report would focus on. Members insisted on maintaining a general introduction on the various methodological choices available to the Committee. The rapporteurs also invited those members who had not yet contributed to the report to provide input.

I. Introductory remarks on the methodological choices made by the Committee

This introduction provides an overview of the approach adopted in this report, and recalls the substance of the discussion that took place in preparation of this report as well as the implications thereof. In particular, this introduction outlines the various methodological options that were available to the committee (1) and the orientation that was finally chosen for this report (2), the difficulties inherent in alternative approaches as well as those pertaining to the elaboration of general principles beyond the framework of international responsibility *stricto sensu* (3). It ends with a few remarks on the divergences in the conceptual framework (4).

1. Methodological options available to the Committee:

Previous reports of the Committee all followed a similar methodological pattern. Whilst being dominantly descriptive of the existing state of the law, they occasionally identify areas of development where the positive rules may be perceived as insufficiently developed. Previous reports were rarely prescriptive in that they fell short of putting forward new (primary or secondary) rules or innovative concepts or paradigms. This report adopts the same methodological pattern by being primarily descriptive and occasionally shedding light on areas of development.

Albeit perpetuating the descriptive approach adopted in previous reports, the Committee, for its third report, still had to weight (and choose from) a variety of descriptive model. Indeed, description necessarily involves both evaluation as well as choice of a framework on the basis of which the described data is constructed.¹ It is well known that there is no such thing as a preconceived and objective descriptive framework.² In the case of the determination of primary obligations of non-state actors as well as that of the consequences of breaches thereof, description is traditionally carried out, in mainstream literature, on the basis of a specific source theory (see above 1.3). The descriptive framework necessary in this respect also hinges on other choices that more directly pertain to the presentation of the data. In this respect, it seems that the Committee can choose between three different approaches.

The Committee could choose for a holistic cross-cutting rule-based approach whereby it would describe of the general rules binding all non-state actors and/or general rules of responsibility applying to all non-state actors. According to this first approach, the report would seek to identify general obligations applicable to all non-state actors and/or consequences of a breach which would apply in all cases irrespective of the actor concerned or the regime at stake. The Committee could alternatively choose for a regime-based approach whereby it would describe the obligations of non-state actors and/or consequences of breaches thereof for each regime taken in isolation of the other. According to this second approach, the report would review a carefully selected number of regimes in the framework of which non-state actors could potentially be held bound by certain obligations and/or by virtue of which they could possibly incur specific consequences for breach of an obligation. Finally, the Committee could choose for an actor-based approach whereby it would describe of the obligations of non-state actors and/or consequences of breaches thereof for each non-state actor taken in isolation of another. According to this third approach, the report would look at the obligations of a few non-state actors, each of them taken individually. Likewise, in the context of responsibility, this approach would mean that consequences of breach of primary obligations are examined for some carefully selected non-state actors, each taken individually.

¹ J Dickson, *Evaluation and Legal Theory*, (Hart Publishing, 2001).

² A MacIntyre, *Whose Justice? Which Rationality* (London: Duckworth, 1988), 333. See also the remarks of S Singh, *International Law as a Technical Discipline: Critical Perspectives on the Narrative Structure of a Theory*, in Appendix 2 of J. d'Aspremont, *Formalism and the Sources of International Law* (Oxford: OUP, 2013), 236-261.

2. The choice for an actor-based approach and scope of the present report

Following the meeting of the Committee in Vancouver, Canada, on 28 June 2013 and the discussion on the initial observations formulated by the co-rapporteurs, it was decided to follow a segmented actor-based approach for which input would be sought from members of the committee. Input was accordingly provided by the following members: Noemi Gal-Or, Robin Hansen, Barbara Woodward, Hirokazu Miyano, Manuel Almeida de Ribeiro, Veronika Bilkova, Pauline Collins, Luke Moffett, Aris Constantinides, Math Noortmann and Barabara Woodward.

According to the segmented actor-based approach agreed upon, the report would attempt to describe possible obligations of non-state actors and, if applicable, the consequences of breaches thereof for each non-state actor taken in isolation of another. For this report, two categories of non-state actors, deemed particularly relevant and for which there seems to be relatively widespread practice and theory, were selected: armed opposition groups, and corporations. This draft report constitutes a consolidation of the input provided from members in connection with these categories.

It must be also noted that the above-mentioned choice involves a choice for a two-step differentiated approach: the report first examines primary obligations before moving to the consequences of a breach thereof. Accordingly, the two aspects are kept clearly distinguished and studied one after the other.

3. Difficulties inherent in a more holistic approach based on the current concept of international responsibility

The chosen methodology leaves open the question whether the Committee should attempt to identify (or make proposals for the progressive development of) some cross-cutting and overarching principles governing both the primary obligations of all NSAs and the effects of breaches thereof. The preliminary discussion in Vancouver on the matter indicated some reservations as to the feasibility of such an overarching and holistic study as far as international responsibility *stricto sensu* is concerned. Even a more modest regime-based approach³, that is description and discussion of the (current or desired) obligations of non-state actors and/or the (current or desired) consequences of breaches thereof for each regime taken in isolation of the other, has seemed an unachievable enterprise.

The foregoing does certainly not mean that an overarching and holistic approach cannot be taken if one espouses a less formal concept of responsibility, and especially if one seeks to propose (the progressive development of) general principles of liability and moves away from the idea that the violation of a primary obligation is a constitutive element of the wrongfulness that generates responsibility.⁴

Whilst it seems that, in the current state of practice and theory, the elaboration of such a unitary model for all NSAs seems, both descriptively and normatively, unfeasible, there may be some room for the (progressive) development of general principles. It must be emphasized here, however, that the Rapporteurs have not ventured tackling this task at this stage. It will be for the Committee to determine whether it is willing to undertake that mission. This will mean taking into account the practicability of such an exercise to gather sufficient findings to

³ According to this approach, the report would review a carefully selected number of regimes in the framework of which non-state actors could potentially be held bound by certain obligations and/or by virtue of which they could possibly incur specific consequences for breach of an obligation.

⁴ It should be recalled here that violation has been made the central generating factor of responsibility. It strips responsibility of any subjective notion, such as fault, *culpa*, abuse, recklessness, or *dolus* (see D Anzilotti, *Teoria generale della responsabilità dello Stato nel dritto internazionale* (Florence, F Lumachi, 1902), 89 and *Corso di diritto internazionale* (4th ed., Padua, CEDAM, 1955), vol. I, 425). Such elements constitute, in other systems of responsibility the standard for assessing the wrongfulness of the conduct, but have not been elevated to the standard of conduct to determine the operation of responsibility See e.g. Article 4:102 of the Principles of European Tort Law. See also article 1382 of the French Civil Code. At best, they have been externalized and outsourced to primary norms (e.g., due diligence) in the sense that they can constitute the standard of conduct to determine the wrongfulness of conduct only as long as it is made so by a primary norm (see ICJ, *Corfu Channel Case. Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, No. 17, ITLOS, 1 February 2011, para. 131). Such an objectification of responsibility is said to “provide a better basis for maintaining good standards in international relations and for effectively upholding the principle of reparation” (see Brownlie, *Principles of Public International Law* (6th ed., 2003). This is also what realizes the unity of the regime of responsibility (see P Weil, *General Course on Public International Law*, 334).

⁴ ICJ, *Corfu Channel Case. Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, No. 17, ITLOS, 1 February 2011, para. 131.

enable the realization of general conclusions and the likelihood that the outcome may obtain authority within the international law academy.

4. Caveat: conceptual pluralism of the actor-based account provided in the report

It should not be surprising that Committee member inputs reflect some variations as to the conceptual framework relied on to determine the primary obligations of NSAs as well as the effects of the breach thereof. In that sense it must be made clear that there is not always an exactly identical common conceptual framework in connection with the origin of the obligations and the concept of responsibility the members rely on. Such conceptual and paradigmatic variations are inevitable even if the input received from the members is dominantly descriptive.⁵

⁵ It is a truism that description is not neutral and necessarily involves both evaluation as well as choice of a framework on the basis of which the described data is constructed. See e.g. J Dickson, *Evaluation and Legal Theory*, (Hart Publishing, 2001). It is well known that there is no such thing as a preconceived and objective descriptive framework. See e.g. A MacIntyre, *Whose Justice? Which Rationality* (London: Duckworth, 1988), 333. See also the remarks of S Singh, *International Law as a Technical Discipline: Critical Perspectives on the Narrative Structure of a Theory*, in Appendix 2 of J d'Aspremont, *Formalism and the Sources of International Law* (Oxford: OUP, 2013), 236-261.

II. Overview of Obligations and Responsibility of Armed Opposition Groups, Corporations and Non-Governmental Organizations

The following accounts are based on the input provided by the members of the Committee mentioned in the introduction. Section 1 addresses armed opposition groups (AOGs), Section 2 corporations, and Section 3 non-governmental organizations (NGOs).

For the sake of this report, **armed opposition groups** are defined as collective entities that use organized military force, have an authority responsible for their acts, have the means of respecting and ensuring at least the rules international humanitarian law.⁶ Moreover, they are generally engaged in protected armed violence with the Government of a State, or with another AOG,⁷ typically in the context of a(n) (international or non-international armed) conflict.

Corporations are defined as legal entities that are separate from their owners (shareholders), which thus enjoy limited liability under domestic law (i.e., they are not liable for the debts of the corporation). Their aim is to make a profit. Corporations are incorporated in a domestic jurisdiction, although some corporations have international operations, and control production and service plants outside their home State. Such corporations are typically denoted as transnational corporations, if these plants are incorporated into a unified corporation strategy.⁸ Sometimes corporations are joined together for purposes of carrying out international activities, in which case the term ‘multinational corporation’ is used.⁹

Non-governmental organizations (NGOs, sometimes also denoted as ‘civil society’ organizations) are associations, foundations or other private institutions which have a non-profit making or aim of international utility and are established by an instrument governed by domestic law.¹⁰ Some NGOs or international NGOs carry on their activities with effect in more than one State.¹¹ NGOs are normally independent from States, although they may be (partly) funded through government resources. Typically, they pursue public interest goals in the humanitarian, human rights, or environmental fields.

1. Armed Opposition Groups

Discussions concerning the obligations and responsibility of armed opposition groups (AOGs) play out at two levels: (a) whether AOGs are bound by primary rules of international law, in particular (given their activities in conflict areas) international humanitarian law and international human rights law, and on what grounds; (b) whether, provided AOGs are indeed bound by such rules, how their responsibility can be conceptualized and operationalized by virtue of secondary rules.

a. *The obligations of armed opposition groups (primary rules of international law)*

According to mainstream understanding¹², AOGs are said to bear obligations under primary rules of international humanitarian law.¹³ According to this approach, they are, at minimum, bound by Common Article 3 to the four 1949 Geneva Conventions, by various rules of the conventional Hague law as well as by various customary rules of international humanitarian law.¹⁴ All these rules supposedly apply “whenever there is [...]

⁶ *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, judgment of 2 September 1998, para.619.

⁷ *Prosecutor v. Tadić*, Case No. IT-94-I, ICTY Appeals Chamber, Decision in the Defence Motion for Interlocutory Appeal on jurisdiction of 2 October 1995, para. 70.

⁸ L Wildhaber, *Some Aspects of the Transnational Corporation in International Law*, 27, Netherlands International Law Review 80, (1980).

⁹ D Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83, Harvard Law Review, (1969-70), 740 (defining a multinational enterprise as ‘a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy’).

¹⁰ Article 1(a) and (b) of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, Strasbourg, 1986, ETS No. 124.

¹¹ *Id.*, Article 1(c).

¹² For an alternative approach see however C Ryngaert, *Non-state actors in international humanitarian law*, in J d’Aspremont (ed), *Participants in the International Legal System* (Routledge, 2011), 284-294; See also J d’Aspremont and J de Hemptinne (eds), *Droit international humanitaire* (Pedone, 2012), esp. 95-118.

¹³ See, e.g., *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of 31 May 2004, para. 22 – ‘[I]t is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties.’ See also Rule 139 in J Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law*, ICRC and Cambridge UP, 2005 & 2009.

¹⁴ They may be bound by customary international law where they are organised and the conflict rises to sufficient intensity to be considered an armed conflict. See *Prosecutor v Dusko Tadić*, Case No. IT-94-1, Trial Chamber Judgement, 7 July

protracted armed violence between governmental authorities and organised armed groups or between such groups within a State¹⁵. AOGs are furthermore said to be subject to the extensive legal regime of 1977 Additional Protocol II to the Geneva Conventions, which however only applies when AOGs exercise some territorial control. Interestingly, while there is agreement among states and in mainstream literature that AOGs are bound by international humanitarian law, the opinions as to why it is so, and what the legal basis of their status under international humanitarian law is, vary considerably.¹⁶ Some scholars subscribe to the doctrine of legislative jurisdiction which asserts that international humanitarian law rules “become binding on the armed group via the implementation or transformation of international rules into national legislation or by the direct applicability of self-executing international rules¹⁷”. This doctrine, though largely adhered to, is often subject to criticism faulting it for misinterpreting the relationship between national and international law.¹⁸ An alternative approach finds AOGs to be bound by international humanitarian law rules via their individual members who are individually bound to respect these rules. Finally, some scholars consider that AOGs dispose of functional legal subjectivity, the international community (i.e. states) having conferred upon them certain rights and duties under international humanitarian law – either by agreement or custom or owing to the binding nature of treaties upon third parties. The institution of conferring rights and duties upon other subjects without their consent is, once again, however, controversial.¹⁹

The debate unfolding regarding humanitarian law has been witnessed, albeit to a lesser degree, when it comes to international human rights law. Again, according to the dominant narrative, it is said that AOGs may not incur obligations only under international humanitarian law, but also under international human rights law. This approach contends that, although AOGs are not parties to human rights treaties, they may possibly be bound by international human rights law where they exercise *de facto* control over part of a territory.²⁰

It is interesting to note that such an understanding of AOGs' obligations in terms of human rights is also said to be underpinned by the practice of the United Nations which has called upon armed organizations to respect human rights law, and where violations or crimes do occur such groups have an obligation similar to the state to provide reparations. More particularly, the Security Council and various other organs of the United Nations have repeatedly called upon armed organizations since the late 1990s to abide by human rights obligations, respect human rights and put an end to human rights violations.²¹ The International Court of Justice, in its Kosovo Advisory Opinion, has indicated that the Security Council could create obligations for non-state Actors.²²

1997, para. 562; *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Chamber Judgment, 27 September 2007, para. 407; and *Prosecutor v Lubanga*, Case No. ICC-01/04-01/06-2842, Judgment, 14 March 2012, para. 538. See S Vité, *Typology of armed conflicts in international humanitarian law: legal concepts and actual situations*, 873, International Review of the Red Cross, 69-94.

¹⁵ *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

¹⁶ For an overview of these doctrines, see C Ryngaert, *Non-state actors in international humanitarian law*, in J d'Aspremont (ed), *Participants in the International Legal System*, (Routledge, 2011), 284-294; See also J d'Aspremont and J de Hemptinne (eds), *Droit international humanitaire*, (Pedone, 2012), esp. 95-118.

¹⁷ M Sassoli, A Bouvier, A Quintin (eds), *How Does Law Protect in War*, Vol. I, ICRC, 3rd Edition, (Geneva, 2011), 26.

¹⁸ See A Cassese, *The Status of Rebels Under the 1977 Geneva Protocol on Non-international Armed Conflicts*, 30, International and Comparative Law Quarterly, (1981), 429.

¹⁹ For more details on various theories, see S Sivakumaran, *Binding Armed Opposition Groups*, Vol. 55, No. 2, International and Comparative Law Quarterly, (2006), 369-394.

²⁰ L Zegveld, *The Accountability of Armed Organised Groups in International Law*, Cambridge Studies in International and Comparative Law, (2002), 148; J Henckaerts and C Wiesener, “Human rights obligations of non-state armed groups: A possible contribution from customary international law?” to be published in R Kolb and G Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (forthcoming Edward Elgar Publishing, 2013). A Constantinides in HRILD 2010; J Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Actors*, 31, Columbia HRLR, (1999), 81; M Schoiswohl, *De Facto Regimes and Human Rights Obligations: The Twilight Zone of Public International Law*, 6, Austrian Review of International and European Law, (2003), 45; Y Ronen, *Human Rights Obligations of Territorial Non-State Actors*, 46, Cornell International Law Journal, (2013), 21-50.

²¹ See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, paras.600 and 603; UN Secretary - General, Report of the Secretary – General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011 paras.188 and 419; and Human Rights Council, Report of the independent international commission of inquiry on the Syrian Arab Republic, A/HRC/21/50, 16 August 2012 21 and 47. Cf Report of the United Nations Fact-Finding Mission on the Gaza Conflict, 25 September 2009, A/HRC/12/48, 401-403. See gen. for some critical comments as well as additional documentations, A Constantinides, *Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council*, 4, Human Rights and International Legal Discourse, (2010), 89-110.

²² ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion), Advisory Opinion of 22 July 2010, 2010 ICJ reports, para. 116. For some critical comments, see G

It is widely recognized that, besides all the abovementioned conceptual difficulties, the dominant contention that AOGs are bound by human rights is not without practical problems. Indeed, one particular challenge in recognizing AOGs as subjects of human rights law is that they may not have the resources or capacity to implement these obligations. Whilst this is obvious with regard to the obligation to fulfill certain human rights (e.g. they may not have the infrastructure in place to guarantee a fair trial or to conduct effective investigations of torture and extrajudicial killings), there seem to be few practical obstacles in implementing the negative obligation to respect human rights (that is, refrain from violations) and a potential positive obligation to ensure their protection in areas under their control.²³ Another challenge lies in the fact that states may often be unwilling to acknowledge that such groups can have human rights obligations as it may provide some sort of legitimacy to these organizations by attributing State-like prerogatives to them.²⁴ It is noteworthy that, despite these difficulties, experts have not wavered and continued to contend that AOGs are bound by international human rights law.

Eventually, mention must be made of the possible obligations of AOGs which could arise in connection to the peace agreements signed between a government on the one hand and one or more AOGs on the other.²⁵ The fact that such peace agreements do not fit within the traditional category of treaty has led a majority of observers to contend that they are not international legal agreements, let alone treaties, and do not therefore produce legal obligations under international law. Some courts have accepted this view.²⁶ This conclusion has however been criticized²⁷ and is also contradicted by the case law of the ICTY,²⁸ as well as the Report of the Darfur Commission of Inquiry.²⁹ This report is not the place to delve into this debate or solve it. It suffices here to say that such a practice, although not in itself constitutive of any new source of international obligations for AOGs, demonstrates a significant “internationalization” of such an agreement. For instance, the United Nations as well as regional organizations, most notably the African Union, have played a very active role in the negotiation and drafting of such agreements; their representatives are frequently present during or witnessing their signature (or sometimes even signatories), and have frequently been involved in their verification and monitoring. Significantly, the Security Council has spoken of *international obligations* of the parties to the conflict in Darfur.³⁰ The Security Council has in some cases also requested neighboring or all states to either support/promote or refrain from jeopardizing the implementation of peace agreements. Furthermore, the Security Council has established numerous UN missions to assist in verifying and implementing peace agreements in all stages of the peace process. Despite being similarly insufficient in making such peace agreements a source of obligations of the signatory AOGs, the practice pertaining to their enforcement is worthy of mention. In its famous resolution 864 (1993), the Security Council decided under Chapter VII to impose an arms and oil embargo against UNITA for constantly breaking the cease-fire and for not implementing or not participating constructively in the implementation of the ‘Acordos de Paz’.³¹ Subsequent resolutions confirmed

Hernandez, *Non-State Actors from the perspective of the International Court of Justice* in J d’Aspremont, *Participants in the International Legal System*, (Routledge, 2011), 140-164.

²³ L Zegveld n.20, 149.

²⁴ Instead states prefer to regulate the actions of such groups through the exercise of domestic or international criminal law, which reinforces the illegitimacy of AOGs and their legal status as criminal organisations. L Zegveld *ibid*, 162.

²⁵ Sometimes they are also signed by international organizations and are often witnessed and/or guaranteed by other States and/or international organizations.

²⁶ In *Prosecutor v. Kallon and Kamara*, Case No. SCSL-04-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, paras. 45-50. The Special Court of Sierra Leone held that the Lomé Agreement between the Government of Sierra Leone and the RUF was not a treaty because it was signed by the government and an armed group. This ruling was followed by the Supreme Court of the Philippines in *The Province of Cotabato v. The Government of the Republic of the Philippines, et al.*, Judgment of 14 October 2008, PHSC 1111[2008].

²⁷ A Cassese, *The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty*, 2, *Journal of International Criminal Justice*, (2004), 1134-35.

²⁸ *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment of 30 November 2006, para. 119; *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Judgment, 3 March 2000, para. 172. Treated a 1992 agreement between representatives of the President of the Republic of Bosnia-Herzegovina, the President of the Serbian Democratic Party, the President of the Party of Democratic Action, and the President of the Croatian Democratic Community as binding on the parties.

²⁹ U.N. Doc. S/2005/60, 1 February 2005, para. 174. “the SLM/A and the JEM possess under customary international law the power to enter into binding international agreements” and had entered into various internationally binding Agreements with the Government of Sudan.

³⁰ S/RES/1769 (2007), 31 July 2007, para. 22; S/RES/1828, 31 July 2008, para. 26: “Demands that the parties to the conflict in Darfur fulfil their *international obligations* and their commitments *under relevant agreements*, this resolution and other relevant Council resolutions”. (emphasis added)

³¹ Res. 864 (1993), paras. 17-19.

that practice.³² All-in-all, the practice pertaining to peace agreements signed by AOGs, despite a significant element of internationalization, remains too inconclusive to conclude that they constitute a new source of obligations for these groups.

b. The responsibility of armed opposition groups (secondary rules of international law)

In contrast with the consensus that seems to exist with respect to international (primary) obligations of AOGs, no agreement exists among scholars, judges and experts as to whether there are secondary rules of international law establishing the responsibility of AOGs for violations of international humanitarian law (or another regime of accountability). The lack of consensus in this matter has been so far compensated by placing emphasis on mechanisms of *indirect* responsibility of AOGs. *Indirect responsibility* of AOGs arises in connection with activities that would constitute an international wrongful act if committed or omitted by subjects other than AOGs, albeit somehow linked to them. The ambit of such subjects typically encompasses states, international organizations, and individuals.

States and *international organizations* may be held responsible for acts committed by AOGs, if such acts constitute a breach of international humanitarian law and are attributable to states (international organizations).³³ Whereas the first condition could be met relatively frequently in current non-international armed conflicts, with AOGs engaging in various atrocities, the second one may pose serious problems due to the strict nature of the rules on attribution under current international law. Acts of AOGs are attributable to states or international organizations only where the AOG is either empowered by the law of that state or international organization to exercise elements of governmental authority; is acting on the instructions of, or under the direction control of, that state when carrying out the conduct (test of the effective control); or, if the state or international organization acknowledges and adopts the acts of the AOG as its own.³⁴ Since AOGs usually fight against states or seek to keep confidential the link to states, the rules of attribution are met rather infrequently.³⁵ The mechanism of indirect responsibility of states or international organizations is therefore of limited use.

As far as *individuals* are concerned, they are held responsible under international (criminal) law only for their own conduct whether in an official or private capacity. Individuals belonging to AOGs may primarily incur criminal responsibility for serious breaches of international humanitarian law.³⁶ Violations of international humanitarian law may also entail individual *civil* responsibility under domestic law, e.g., under the U.S. Alien Tort Claims Act³⁷. While most violations of international humanitarian law committed by AOGs would very likely be punishable under the mechanism of indirect responsibility of individuals, this mechanism does not make it possible to target *the group itself*, however.

It is noteworthy that the shortcomings of the aforementioned mechanisms of indirect responsibility – i.e. responsibility of states/international organizations and individual (criminal) responsibility – in terms of accountability have emboldened voices calling for the establishment of *direct responsibility* of AOGs for

³² In Resolution 1127, the Security Council decided under Chapter VII to impose a travel ban on senior officials of UNITA and of adult members of their immediate families; the immediate and complete closure of all UNITA offices in other states; and a prohibition of flights from and to UNITA-controlled territory (S/RES/1127 (1997), 28 August 1997, para. 4) for failing to implement its obligations under the Lusaka Protocol (para. 7). The Secretary-General was again requested to report on UNITA's compliance with these obligations (para. 8) and the Security Council expressed its readiness to consider the imposition of additional measures, such as trade and financial restrictions, if UNITA did not fully comply with its obligations under the Lusaka Protocol and all relevant Security Council resolutions (para. 9). In Resolution 1173, the Council decided under Chapter VII to impose the freezing of funds and financial resources of UNITA as an organization as well as its senior officials and adult members of their immediate families (S/RES/1173 (1998), 12 June 1998, para. 11.)

³³ See Article 2 of the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DARS) and Article 4 of the 2011 Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (DARIO).

³⁴ See Articles 5, 8 and 11 of DARS and Article 9 of DARIO.

³⁵ DARS also confirms the responsibility of states for the conduct of an insurrectional movement which either becomes the new government of the state or establishes a new state (Article 10).

³⁶ Holding individuals responsible may not simply be a right but even a duty of States. See, Customary International Humanitarian Law: Reducing the Human Cost of Armed Conflict", ICRC, <http://www.icrc.org/eng/resources/documents/interview/customary-law-interview-090810.htm>, retrieved 10 October 2013, and J Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law*, ICRC and Cambridge UP, 2005 & 2009. If states are unwilling or unable to proceed with the prosecution, individuals may be held liable before international institutions, especially the International Criminal Court. See, Article 8, Rome Statute of the International Criminal Court of 17 July 1998, A/CONF.183/9, United Nations Treaty Series, Vol. 2187, No. 38544. For more on the co-existence of international responsibility of the state and the individual for infringements of international humanitarian law, see E Socha, *International Responsibility of Individual for Breaches of Humanitarian Law*, 26, Polish Yearbook of International Law, (2002–2003), 67–84.

³⁷ 28 U.S.C. § 1350.

violations of international humanitarian law committed by them. Whilst still very much a question of progressive development of international law, such an option must be briefly mentioned here.

For long, this option was considered as immaterial as it was maintained that “the movement either wins and then its international responsibility is absorbed into that of a state, or is defeated and then its international responsibility can hardly yield any results since the movement ceases its existence”.³⁸ The long duration of many non-international armed conflicts and the ability of many AOGs to survive the end of armed conflicts have however proved this assumption largely incorrect. An increasing number of scholars have therefore argued that AOGs need to be held responsible under international law for violations of what should be recognized as their collective (group) primary obligations or, even, that AOG responsibility is already well established under international humanitarian law.³⁹ The former opinion benefits from indirect support by the UN International Law Commission (ILC), which speaks about “a [...] possibility [...] that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces”.⁴⁰ Further confirmation may be found in UN Security Council resolutions calling for the responsibility of specific AOGs engaged in non-international armed conflicts.⁴¹

During the drafting of the Rome Statute of the International Criminal Court, the criminalization of AOGs was discussed, on the basis of attribution of the individual member’s conduct to the group, but such a position sat uneasy with some delegates, who felt that AOG criminalization could prevent movements struggling for self-determination from achieving their goal.⁴² Prosecution of individuals, as opposed to the organization to which they belong, is, however, only a blunt tool in changing the behaviour of a group in deterring its members from committing further crimes or violations.⁴³ Conceiving collective organizational responsibility of AOGs is an important recognition that international crimes are not committed by individuals alone, but through collective, organized acts facilitated and supported by a myriad of individuals, and collectively pursued as part of the political ideology of the group which the members voluntarily agree to. Because members of an AOG are presumed to have expressed approval of the organization’s actions and benefitted from membership of the group, they should be held collectively responsible, via the AOG itself, for the acts of the group and the ‘cost’ of reparation. If a responsibility regime for AOGs were someday to emerge, the rules of attribution could provide that violations committed by AOG members are attributed to AOGs on the basis of the organ/agency doctrine, since armed opposition groups must operate under a responsible command anyway in order for a conflict to rise to the level of an armed conflict for the purpose of the application of IHL.⁴⁴ That being said, the hurdles rendering AOGs responsible for violations of international law are abound, such as the absence of an adequate

³⁸ E David, *Principes de droit des conflits armés*, Troisième édition, (Bruxelles: Bruylant, 2002), 643.

³⁹ See L Zegveld, *Accountability of Armed Opposition Groups in International Law*, (Cambridge: Cambridge University Press, 2002), 151; E David, n38 above, 643.

⁴⁰ *Commentaries to DARS*, 118, para. 16. The ILC however failed to specify whether this possibility has already materialised under current international humanitarian law or not.

⁴¹ See UN Docs S/RES/43 (1948), 1 April 1948, para. 2; S/RES/954 (1994), 4 November 1994, para. 7; S/RES/1316 (2000), 13 August 2000, para. 9 of the preamble.

⁴² Draft Article 23(5)(d), UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/Conf.183/C.1/WGPP/L.5/Rev.2. See L Zegveld n.20, 55-57. Contrast to the provisions under Article 9 of the Nuremberg Charter which included the criminal responsibility of such organisations.

⁴³ M Sassòli, *Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law*, 1, *International Humanitarian Legal Studies*, (2010), 10. Instead it can have the opposite effect of solidifying the group’s narrative of the conflict as the state’s use of the law to criminalise their political dissent. Joint criminal enterprise and conspiracy have been used by international criminal courts to address the collective perpetration of such crimes, but are only able to hold a handful of individuals responsible. See M A Drumbl, *Collective Responsibility and Postconflict Justice*, in T Isaacs and R Vernon (eds.) *Accountability for Collective Wrongdoing*, (CUP: 2011), 23-60.

⁴⁴ ICRC, *Customary International Humanitarian Law*, n13 above, 536, Rule 149: “Armed opposition groups must respect international humanitarian law (see Rule 139) and they must operate under a “responsible command”. It can therefore be argued that they incur responsibility for acts committed by persons forming part of such groups” (footnote omitted), citing Article 14(3) of the Draft Articles on State Responsibility, as provisionally adopted on first reading in 1996, which stated that the fact that the conduct of an organ of an insurrectional movement was not to be considered an act of State “is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law” (1996 version of the Draft Articles on State Responsibility, Article 14(3), provisionally adopted on first reading (cited in Vol. II, Ch. 42, § 57). See also the ILC Special Rapporteur, ILC, First report on State responsibility by the Special Rapporteur, Addendum (*ibid.*, § 57) (stating that “the responsibility of such movements, for example for breaches of international humanitarian law, can certainly be envisaged”). See also UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Interim Report (*ibid.*, § 53) (stating “that the Sudanese People’s Liberation Army was responsible for the killing and abduction of civilians, looting and hostage-taking of relief workers committed by local commanders from its own ranks”).

definition of such groups, the challenge of addressing those situations where they break up or are absorbed into a different or newly created group,⁴⁵ and the risk of ostracizing legitimate armed struggles.

If it were someday established that AOGs can incur direct responsibility under international law – which remains hypothetical in the present state of international law – the question of whether AOGs are under an obligation to provide *reparations* to victims of internationally wrongful acts,⁴⁶ or at least of acts that caused harm, would still arise.⁴⁷

In this respect, it is worth recalling that the ILA Committee on Reparations for Victims of Armed Conflict, has recognized that AOGs as NSAs can be held responsible to provide reparations where they commit violations of international humanitarian law.⁴⁸ Similarly, Principle 15 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International humanitarian law (UNBPG)⁴⁹ states that where ‘a person, a legal person, or *other entity* is found liable for reparation for a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim’.⁵⁰ It is indeed arguable that a rule of responsibility for reparation of any party to a conflict is necessarily ‘applicable to the whole of international humanitarian law, whether written or customary’⁵¹ – even though Article 91 Additional Protocol I to the Geneva Conventions refers only to reparations for breaches of international humanitarian law during international armed conflicts (thus applying only to States).

There is some practice of AOGs voluntarily committing themselves to provide reparations to victims. In Uganda, the Lord’s Resistance Army pledged itself to provide reparations, as part of the Juba Peace Process, and the State facilitated and provided a subsidiary role where members of the LRA were indigent.⁵² In Colombia, a series of transitional justice laws has been promulgated in which AOGs have voluntarily provided reparations to victims in order to avail of reduced sentences.⁵³ In contrast, in Northern Ireland, victims have pursued civil litigation against the Real IRA seeking a judgment to hold its members collectively responsible for compensating them for harm caused by the Omagh bombing.⁵⁴

It should be noted that reparations are desirable consequences of a finding of AOG responsibility, but arguably they are not sufficient to deter AOGs from committing wrongful acts. Reparations are responsibility consequences of private law origins, which, in international law, are particularly appropriate in horizontal relationships between States, as evidenced by the reparations regime in the ILC Articles on State Responsibility. It is doubtful whether a reparation regime for armed groups should mirror the regime for States and international organizations. Tomuschat has warned that “the consequences that the ILC articles establish for internationally wrongful acts are not generally appropriate to be applied to individuals” and that “apologies presented by an individual are no more than a gesture of courtesy and do not have the same weight as official apologies offered

⁴⁵ J K Kleffner, *The collective accountability of organized armed groups for system crimes*, in H Wilt and A Nollkaemper (eds.), *System criminality in international law*, (Cambridge University Press: 2009), 265. See *R v Z (Attorney General for Northern Ireland’s Reference)*, [UKHL] 35, [2005] 2 AC 645.

⁴⁶ Kleffner *ibid.*, 240.

⁴⁷ For the victims reparations serve the psychological function of appropriately directing blame at those who committed the atrocity against them and to relieve their guilt. See gen. B Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition*, in P de Greiff (ed.), *The Handbook of Reparations*, (OUP: 2006), 566. Reparations made by the responsible perpetrator can also help to symbolise their commitment to remedying the past and ensuring accountability for their actions. Thus responsibility for reparations distinguishes such measures from charity or humanitarian assistance by achieving some form of accountability. See C Ferstman and M Goetz, *Reparations before the International Criminal Court: The Early Jurisprudence*, in Ferstman et al, (eds.) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, (Brill: 2009), 341.

⁴⁸ Article 5(2), Reparation for Victims of Armed Conflict, Resolution, No.2, (2010). See ILA Hague Conference Report on Reparation for Victims of Armed Conflict, 12-13; and Principle 15, UNBPG; and Rule 150, ICRC, Customary IHL Study, n13 above, n.36.

⁴⁹ Adopted by the UN General Assembly 21st March 2006, (UN Doc.A/RES/60/147). See the comments by P d’Argent, *Le droit de la responsabilité internationale complété ? Examen des "Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l’homme et de violations graves du droit international humanitaire*, Annuaire Français de Droit International, (2005), 27-55.

⁵⁰ Emphasis added. Note that, pursuant to the principle of subsidiary responsibility, states also have an obligation to establish national reparation programmes and other assistance to victims in the event that ‘the parties liable for the harm suffered are unable or unwilling to meet *their obligation*.’ Principle 16. See also Principle 17 on the enforcement of domestic and foreign reparations decisions against individuals or entities liable for harm suffered.

⁵¹ F Kalshoven and L Zegveld, *Constraints on the Waging of War*, ICRC, (2001), 147.

⁵² Clauses 6.4, 8.1, and 9, Juba Peace Agreement on Accountability and Reconciliation, 29 June 2007; and Clauses 16-18, Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008.

⁵³ Article 42, La Ley de Justicia y Paz, Ley 975 de 2005 and *Gusavo Gallón y otros*, Corte Constitucional C-370/2006, 18 May 2006, para.6.2.4.4.7-6.2.4.4.13.

⁵⁴ *Breslin & Ors v Seamus McKenna & Ors* [2009] NIQB 50.

by a State".⁵⁵ Reparation could in any event appropriately consist of compensation, and to that effect an international indemnity fund that could be composed of blocked assets, may be contemplated.⁵⁶

In spite of the aforementioned calls for holding AOGs responsible for (the consequences of) their wrongful acts, it must be acknowledged that instances of AOGs actually being, as such, held *responsible* for violations of international law are largely missing and constitute very much of a textbook case. From an empirical point of view, the mechanism of direct responsibility of AOGs therefore seems to be, at the very best, a doctrine *in statu nascendi*. In addition to the lack of relevant practice, uncertainty relating to most of the parameters of such a doctrine decelerates the process of its emergence. It remains uncertain whether the direct responsibility of AOGs would be construed in analogy with the responsibility of states or rather with individual criminal responsibility, what conditions it would be founded on, whose conduct would be attributable to an AOG, or what the content of the responsibility would be. Until these issues are clarified, the contours of direct responsibility, despite conveying a sense of urgency, of AOGs is bound to remain *de lege ferenda* rather than *de lege lata*.

2. Corporations

In respect of corporations, the question of the existence of secondary rules of responsibility has hardly been discussed and emphasis of legal debates has primarily been placed on the question of whether corporations have direct obligations under primary rules of international law, in particular international human rights and international criminal law. Section (a) will show that this discussion is not yet settled. Given the prevailing uncertainty about whether corporations can commit *internationally wrongful acts* in the first place, there is little to no debate in literature nor practice concerning international responsibility-related issues such as attribution of conduct/responsibility, or reparations, in respect of such wrongful acts. With the ambition of this report being alien to a normative design of progressive development of international law⁵⁷, these issues are not addressed here.

Whereas it remains contested whether corporations are subject to international human rights/criminal law, this report recalls that in a number of technical subfields of international law, specifically in the field of environmental and energy law, as set out in Section (b), there seems to be a consensus among most experts and scholars that international conventions can impose *liability* on private operators for injurious consequences of certain economic activities, whether or not such activities are internationally wrongful. It will be made clear, however, that such private actor liability is not necessarily direct, as its implementation is mediated via State intervention.

(a) *The obligations of corporations*

Corporations are subjects of domestic law. Even when operating transnationally, they will be bound by domestic law (the law of the host State and/or home State). However, as States do not always adopt adequate domestic laws, or unevenly enforce them, the question has arisen whether corporations may be bound by *international law* (international human rights law and international criminal law in particular), regardless of whether they are bound by domestic law.

There is some support for the view that corporate persons have an obligation to refrain from committing acts that constitute international crimes. This view has its roots in the post-World War II criminal trials held at Nuremberg and elsewhere,⁵⁸ but it must be noted that these tribunals assessed corporate conduct in the context of adjudicating the charges against corporate directors and owners rather than the corporations themselves.⁵⁹ More recently, tort claims have been brought against corporations under the U.S. Alien Tort Claims Act

⁵⁵ C. Tomuschat, 'The Responsibility of Other Entities: Private Individuals', in J. Crawford and others (eds), *The Law of International Responsibility*, Oxford UP, 2010, 320.

⁵⁶ G. Cahin, 'The [Responsibility of other Entities : Armed Bands and Criminal Groups](#)' in Crawford, *ibid* 340.

⁵⁷ Cfr supra introduction.

⁵⁸ The *I.G. Farben* trial, for instance, shows that the tribunal viewed the corporation as a legal entity with the capacity to violate international law, where it held that '[w]here private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provisions of the Hague Regulations, is in violation of international law'. *The I.G. Farben Trial. Trial of Carl Krauch and Twenty-two Others*, Case No. 57, The Judgment of the Tribunal, 14 August 1947 – 29 July 1948, US Military Tribunal at Nuremberg, Vol. 10, The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, (London: Published for the United Nations War Crimes Commission by H.M.S.O., 1949), 44). On the German industrialists' cases see also, S R Ratner, *Corporations and Human rights: A Theory of Legal Responsibility*, 111, Yale L.J. 443,(2001), 477-78.

⁵⁹ *Ibid*.

(ATCA) for violations of the law of nations,⁶⁰ in practice often for complicity in violations of international criminal law. It has not yet been conclusively settled, however, whether claims against corporate persons are permitted under the statute.⁶¹ In any event, there is considerable support found in literature for the principle that at a minimum, private persons, including organized entities such as corporations, have the obligation not to commit such international crimes as piracy, slavery, war crimes, genocide, crimes against humanity (including apartheid), and possibly torture.⁶²

There is less support for the principle that corporations are bound by international law norms other than those of international criminal law, such as (most) norms of international human rights law.⁶³ For violations of international human rights law, the international community appears to have espoused a rather 'soft' legitimate expectations approach towards corporate human rights obligations, an approach which can notably be found in the UN Human Rights Council's *Guiding Principles on Business and Human Rights* (2011).⁶⁴ Under these principles, corporations have a moral responsibility and societal expectation, rather than a legal duty, to respect human rights in their operations, including those rights contained in the International Bill of Rights, and those contained in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.⁶⁵ At a practical level, the Guidelines describe a due diligence standard applicable to corporations.⁶⁶

Pursuant to this approach, *legal* obligations of corporations are ultimately enforced at the *domestic* rather than international level, although international mechanisms monitoring compliance with societal expectations may well be in place.

This domestic enforcement of corporate obligations may even be said to amount to an *international obligation* of the *State*, at least insofar as States have specific duties to protect individuals from third parties', including private actors' international (human rights) law violations. This is the approach taken by the aforementioned *Guiding Principles*, as well as by the *Montreux Document* (2008),⁶⁷ which tasks States to ensure responsibility for activities of private military and security companies (PMSCs), a special category of corporations, through their obligations under international law.⁶⁸

⁶⁰ "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

⁶¹ *Doe VIII v. Exxon Mobil* F3d July 8, 2011 (Dist. Col. CA); in contrast see: *Kiobel v. Royal Dutch Petroleum Co.*, 621 F3d 111 (2d Cir. 2010) affirmed: *Kiobel v. Royal Dutch Petroleum Co.*, No. 06-4800-cv, 06-4876-cv, 2011 U.S. App. LEXIS 2200 (2d Cir. Feb. 4, 2011): affirmed on other grounds *Kiobel v. Royal Dutch Petroleum Co.*, --- U.S. ---, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013) (finding that a presumption against extraterritorial application of the statute applies).

⁶² Cf. C Bassiouni, *International Crimes: Jus Cogens and Obligations Erga Omnes*, 59, L. & CONTEMP. PROBS., (1996), 68; R G Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in NON-STATE ACTORS AND HUMAN RIGHTS 177, (Philip Alston, ed., Oxford University Press: 2005), 216. ("Consider first the body of *per se* violations that are wrongful with or without state action [...]: piracy, slavery, genocide, certain war crimes, etc.. Every corporation must be considered on notice that conduct that falls within this extraordinary category will be wrongful, and they may face a variety of sanctions for engaging in it.').

⁶³ Where they do not incur direct obligations under international law, they may, however, well aid and assist, or be complicit in international law violations committed by subjects which do incur such obligations, notably States. Andrew Clapham has interestingly submitted that the rules on state responsibility for aiding and assisting may apply *per analogiam* to corporations involved in conduct that does not rise to the level of an international crime but constitutes 'international torts'. This would require a further development of Article 16 of the ILC Articles on State Responsibility for purposes of application to aiding and assisting/complicity by non-state actors rather than States. See A Clapham, *The Human Rights Obligations of Non-State Actors*, (2006), 261-263. A non-state actors could then incur liability for aiding and assisting provided that he (a) is aware of the circumstances making the activity of the assisted state a violation of international human rights law; (b) gives assistance with a view to facilitating the commission of such a violation and actually contributes significantly to the violation; and (c) the act would be internationally wrongful if the complicit entity committed the act itself. A Clapham, 266.

⁶⁴ (6 July 2011) UN Doc. A/HRC/RES/17/4, which describes at Principle 23 that, "[i]n all contexts, business enterprises should: ... (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate."

⁶⁵ <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> at principles 11 and 12.

⁶⁶ <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> at principle 15.

⁶⁷ ICRC, 'The Montreux Document On Pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict' (17 September, 2008) ('Montreux Document') accepted by 43 states. See further, J Cockayne et al, *Beyond Market Forces Regulating the Global Security Industry*, (International Peace Institute, 2009), 18; E Karska, *Gaps in International Human Rights and Humanitarian Law in Relation to Accountability Involving Private Military and Security Companies*, 2(2), Polish Review of International and European Law, (2013), 72.

⁶⁸ See further, Centre Universitaire de Droit International Humanitaire (CUDI), 'Expert Meeting On Private Military Contractors: Status And State Responsibility For Their Actions' (University Centre For International Humanitarian Law, 29-30 August 2005) <http://www.adh-geneva.ch/docs/expert-meetings/2005/2rapport_compagnies_privees.pdf> ('Expert Meeting'). Montreux Document, above n 67; Foreign Affairs Committee of the House of Commons, 'Private Military

It is important to note however that States have not rigorously discharged such an obligation. How States have dealt with PMSCs is a case in point. In principle, PMSCs are answerable via the national laws of their state of incorporation, host state, or hiring state. These laws are nevertheless not always rigorously enforced due to investigative difficulties for incidents outside of state territory, concerns over extraterritorial reach, or host states' failed institutional structures. When an incident occurs in a conflict situation, often involving a failed state, the likelihood of the *host state* ever being able to subject the author of the unlawful act to the local law is rather slim. Furthermore, agreements between a host state and another state may preclude application of local law.⁶⁹ *Incorporating* states wishing to attract corporate business activity may be disinclined to place onerous regulatory demands on such entities for taxation and employment reasons, and enforcement by *hiring* states may depend on the terms of the contractual arrangement with the PMSC and the robustness of their extraterritorial legislation, if they have it. The unwillingness of states to undertake prosecutions is an issue,⁷⁰ as demonstrated by the U.S. experience with prosecuting PMSC employees,⁷¹ painfully highlighting that one of the largest state users of PMSCs did not have adequate investigative machinery in place.⁷² The U.S. cases concerning incidents involving the most notorious PMSC, Blackwater, were eventually settled out of court,⁷³ which leaves the question open as to where legal responsibility exactly lies.

If States cannot adequately address such corporate misbehaviours, other methods are available and they ought to be mentioned here. As noted, the Guiding Principles on Business and Human Rights cite corporations' (non-legal) responsibility to respect human rights, and their (non-legal) obligations to conduct a due diligence inquiry so as to limit their impact on the enjoyment of human rights. One may also contemplate, however, making corporations holders of *direct* obligations under international (human rights/criminal) law. The extension of international legal personality to corporate entities is a legal minefield, however.⁷⁴ Among the hurdles to overcome are States and corporations' disinclination to change the state-centric *status quo*,⁷⁵ profit-seeking

Companies: Options for Regulation' (House of Commons, February 12 2002); J Crawford, *Responsibility of States and Non-State Actors*, 104, Kokusaiho Gaiko Zassi (Journal of International Law and Diplomacy), (2005), 44-46.

⁶⁹ This was the case in Iraq where PMSCs and their employees came under the jurisdiction of Coalition Provisional Authority Order 17 immunity. Iraq Coalition Provisional Order no. 17 < www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf > 'Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors', which states explicitly that under 'international law... [they] are not subject to the laws and jurisdiction of the occupied territory' but rather the law of their parent countries'.

⁷⁰ See e.g., Human Rights First, 'Private Security Contractors at War Ending the Culture of Impunity' (Human Rights First, 2008) <www.humanrightsfirst.org>.

⁷¹ The first example of a non-national US civilian contractor being subject to military law was only recently heard in the US Court of Appeal for the Armed Forces (CAAF). *United States v Alaa Mohammad Ali ('Ali')* 71 M.J. 256 (C.A.A.F. 2012). See also M Dahl, "Runaway Train" *Controlling Crimes Committed By Private Contractors Through Application Of The Uniform Code Of Military Justice*, 14, Barry Law Review, (2010), 55.

⁷² Various legislative changes had to be introduced. These included to the Uniform Code of Military Justice (UCMJ) and the Military Extraterritorial Jurisdiction Act (US) 2000('MEJA'). **UN Human Rights Office of The High Commissioner For Human Rights 22nd Session** A/HRC/22/L.29 regarding the Open-ended Intergovernmental Working Group Human Rights Council, 22 March 2013. The US as a member argued that '[a] new international law on activities of private military and security companies was not needed, what was needed was the better implementation of existing norms.' The Military Extraterritorial Jurisdiction Act of 2000, Pub L No 106-523, 114 Stat 2488 (US).

⁷³ See, *Estate of Himoud Saed Abtan, et al. v. Blackwater USA, et al.*" (C.A. No. 07-1831) in the U.S. District Court for the District of Columbia. Five cases consolidated against Blackwater *In Re Xe Services Alien Tort Litigation* U.S. District Court Eastern Virginia 1:09-cv-00615-TSE-IDD (*In Re Xe*) dealing with 64 plaintiffs, Defendant's included 11 business entities collectively referred to as XE and the CEO Eric Prince.

⁷⁴ See, Crawford above n 68, 54-57. The debate concerning the recognition of international obligations for such entities is still in need of development. See, ILA, Non State Actor Committee, First Report of the Committee Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues, The Hague Conference (2010), and *ibid.*, Second Report of the Committee

Non-State Actors in International Law: Lawmaking and Participation Rights, Sofia Conference (2012), <<http://www.ila-hq.org/en/committees/index.cfm/cid/1023>>.

⁷⁵ See the UN Commission on Human Rights 14 August 2003, the UN Sub-Commission for the Promotion and Protection of Human Rights approved in Resolution 2003/16 U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003) a set of "Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises" which were never adopted largely due to the attempt to place direct ILO on corporate entities. See further, D Weissbrodt and M Kruger, *Norms On The Responsibilities Of Transnational Corporations And Other Business Enterprises With Regard To Human Rights*, 97, American Journal of International Law, (2003), 901; D Kinley and R Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6(3), Human Rights Law Review, (2006), 447. However the latest iteration, the UN Framework, John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the 'Protect-Respect and Remedy' Framework' (Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 21 March 2011) <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> and Special Representative of the Secretary-General, 'Guiding Principles on Business and Human Rights' (2011) HR/PUB/11/0 in which direct ILO is placed

corporations' lack of democratic legitimacy, and related concerns over corporations' roles as public policy agents. The failure to draft conventions regulating the activities of transnational corporations,⁷⁶ and regulating PMSCs in particular, are clear reminders thereof.⁷⁷ In international criminal law, the main hurdle may be the adage *societas delinquere non potest* (a legal entity cannot be blameworthy), a philosophical position that is prevalent in a number of States. Still, legal development at the domestic level has seen greater integration of the juridical person in alignment with that of the natural person for the purpose of criminal liability.⁷⁸ In many domestic legal systems, corporations can indeed be sanctioned;⁷⁹ a 2006 study by the Norwegian research institute FAFO surveyed the laws of 16 countries and found that the majority of them included the concept of corporate criminality within their legal systems, noting that "[...] state practice within domestic laws of many countries, across a variety of legal systems and traditions, has expanded criminal laws to include legal persons."⁸⁰ This may create a bottom-up groundswell, from the domestic to the international legal level, that may result in the ultimate recognition of corporate international criminal responsibility.

The fact that some conventions, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, provide a method giving individual states that have not previously adopted corporate criminal sanctions leeway to accommodate the imposition of such sanctions, may serve as further evidence of an international trend towards corporate responsibility.⁸¹ It remains to be seen, however, how a criminal sanction regime that has traditionally focused on the attributes of an individual can be amended to suit corporate responsibility, for example, in relation to the ascertainment of the mental intent of a corporate structure, and regarding the sanction.⁸²

Despite these concerns, it seems accepted among experts and scholars that bestowing corporate actors with international obligations through conventional mechanisms remains conceivable from a conceptual standpoint. So far, however, international instruments have mainly imposed obligations on *States* in respect of corporate activities, rather than on the *corporations themselves*. Prominent examples are (1) the *OECD Guidelines for*

only on the state have been favourably received
<http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. >

⁷⁶ **Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights**, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

⁷⁷ UN *Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies* (Draft Convention). 'Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination' (A/65/325, UN General Assembly 25 August 2010) Working Text for a Potential Draft Convention on Private Military and Security Companies (PMSCs), UN Working Group on the Use of Mercenaries sets out a draft convention with the goal to "establish minimum international standards for States parties to regulate the activities of PMSCs and their personnel" 4; See Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, A/HRC/15/25 (containing 'The draft of a possible Convention on Private Military and Security Companies' in the annex). See further, J C Haile, *New U.N. Draft International Convention On The Regulation, Oversight And Monitoring Of Private Military And Security Companies*, 6(9) International Government Contractor, (2009), 69.

⁷⁸ See e.g., J Kyriakakis, *Corporate Criminal Liability And The ICC Statute: The Comparative Law Challenge*, Netherlands International Law Review, (2009), 333; M Donaldson and R Watters, 'Corporate Culture' As A Basis For The Criminal Liability Of Corporations, (Allens Arthur Robinson, 2008).

⁷⁹ Implementation of General Assembly Resolution 60/251 of 15 March 2006, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Business and human rights: mapping international standards of responsibility and accountability for corporate acts A/HRC/4/3519 (19 February 2007), para. 22 "Indeed, corporate responsibility is being shaped through the interplay of two developments: one is the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute; the other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating an expanding web of potential corporate liability for international crimes, imposed through national courts." <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/108/85/PDF/G0710885.pdf?OpenElement>.

⁸⁰ As the report summarizes:

"The results of the survey indicate that it is the prevailing practice to apply criminal liability to legal persons among 11 of the countries surveyed (Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom and the United States). In five countries (Argentina, Germany, Indonesia, Spain and the Ukraine), current jurisprudence does not recognize such liability as a conceptual matter. In two of those countries (Argentina and Indonesia), the national legislature has ignored conceptual issues and has adopted specific statutes making legal persons liable for important crimes[...]" See A Ramasastry and R C Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law A Survey of Sixteen Countries*, (Oslo: FAFO, 2006), 13, <http://www.faf.no/pub/rapp/536/536.pdf>.

⁸¹ OECD Anti-Bribery Convention, opened for signature 17 December 1997, 37 *ILM* p. 1 (entered into force 15 February 1999) (OECD Anti-Bribery Convention) Articles 2 and 3(2).

⁸² See e.g., S R Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111, The Yale Law Journal, (2001), 443; S Deva, *Human Rights Violations by Multinational Corporations and International Law: Where to from Here?*, 19, Connecticut Journal International Law, (2003), 1.

*Multinational Enterprises*⁸³ (which have been adopted by 44 states and address a wide range of policy areas including labour, taxation, environment and competition, and entail a National Contact Point complaints mechanism, whereby adhering states establish offices), (2) the International Labour Organization's *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*,⁸⁴ which provides guidelines regarding employment, training, conditions of work and life, and industrial relations, and includes the statement that "[a]ll the parties concerned by this Declaration" are to respect state sovereignty, obey national laws and respect the international bill of rights and the ILO constitution,⁸⁵ (3) the *International Convention for the Suppression of the Financing of Terrorism*⁸⁶, which declares that a legal entity must be exposed to potential domestic legal liability when a person responsible for the management or control of that legal entity finances terrorism,⁸⁷ (4) the *United Nations Convention against Transnational Organized Crime* or Palermo Convention⁸⁸, and its three protocols relating to human trafficking, illicit firearms and migrant smuggling,⁸⁹ which declare⁹⁰ that states must establish potential liability of legal persons within their domestic systems for participation in several offenses outlined in the convention,⁹¹ (5) the *United Nations Convention against Corruption*,⁹² which requires that States Parties establish legal person liability under national law for convention offences,⁹³ (6) the *OECD's Anti-Bribery Convention*,⁹⁴ which obliges States Parties to criminalize the bribery of foreign officials by any person.

(b) *The sui generis case of private actors incurring international tortious liability*

⁸³ <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationaleenterprises.htm>

⁸⁴ Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th (November 2000) and 295th Session (March 2006).

⁸⁵ Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th (November 2000) and 295th Session (March 2006) at Article 8.

⁸⁶ *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, 39 I.L.M. 268, online: <<http://untreaty.un.org/english/Terrorism/Conv12.pdf>; On ratification status see United Nations Treaty Collection, "CHAPTER XVIII: Penal Matters" *Multilateral Treaties Deposited with the Secretary-General*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-11&chapter=18&lang=en.)

⁸⁷ See *International Convention for the Suppression of the Financing of Terrorism*, *id.* at Articles 2 & 5. Article 5 (1) of the convention holds that:

Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.

⁸⁸ *United Nations Convention against Transnational Organized Crime*. On ratification status see United Nations Treaty Collection, "Chapter XVIII: Penal Matters" *Multilateral Treaties Deposited with the Secretary-General*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-12&chapter=18&lang=en.

⁸⁹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 15 November 2000, (entered into force: 25 December 2003), (Status: Parties: 128); *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*, 31 May 2001 (entered into force: 3 July 2005) (Status: Parties: 79); *Protocol against the Smuggling of Migrants by Land, Sea and Air*, 15 November 2000 (entered into force: 28 January 2004) (Status: Parties: 119); all three online: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

⁹⁰ *United Nations Convention against Transnational Organized Crime*, at Articles 2 & 10. Article 10 ("Liability of legal persons") of this convention holds that

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention. [...]

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

⁹¹ *United Nations Convention against Transnational Organized Crime*, *id.* Articles 5, 6, 8 & 23.

⁹² *United Nations Convention against Corruption*, 31 October 2003, in GA Res. 58/4, UN GAOR, 58th Sess., UN. Doc. A/RES/58/4 (2003), http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (entered into force 14 December 2005) (reprinted in 43 I.L.M. 37); On ratification status see United Nations Treaty Collection, "Chapter XVIII: Penal Matters" *Multilateral Treaties Deposited with the Secretary-General*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-14&chapter=18&lang=en.)

⁹³ *United Nations Convention against Corruption*, *id.* at Article 26. The wording closely resembles that seen in the *United Nations Convention against Transnational Organized Crime*. See *United Nations Convention against Transnational Organized Crime*, *supra* note at Article 10.

⁹⁴ <http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf>

Whereas human rights, international criminal law, labour law, and anti-corruption conventions refrain from imposing direct obligations on corporations, in the fields of environmental law, energy law, space law, and law of the sea, a number of rather technical conventions appear to impose obligations on private economic operators. These obligations establish tortious liability for injurious consequences arising out of acts or omissions not (necessarily) involving a breach of any rule of international law (e.g. environmental damage as a result of lawful nuclear or space activities). Such international liability – a special form of international responsibility – evolved from attempts to invoke the civil liability of those responsible (the non-State actors operating dangerous installations) rather than of the State. It can be explained by the concern during the 1960s and 1970s to place victims in the best position to claim and obtain prompt and effective compensation, and now finds a theoretical justification in the ‘Polluter Pays principle’.⁹⁵ The imposition of such tortious liability on private actors, which may not even be based on ‘fault’ or ‘wrongfulness’ is most appropriate in cases of ultra-hazardous activities, and activities entailing risk or having similar characteristics’.⁹⁶ An (non-exhaustive) overview of conventions providing for such liability is provided here.

Article 137 of the **UN Convention on the Law of the Sea** (UNCLOS, 1982) prohibits natural or juridical persons (aside from States) from acquiring or exercising rights with respect to ‘the Area’ (i.e., the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction),⁹⁷ or from appropriating any part thereof. That said, natural and juridical persons are eligible to carry out activities in the Area, in accordance with Article 153(2) UNCLOS, provided that they be either nationals of a State party or effectively controlled by its nationals, and are sponsored by such State.⁹⁸ When damage arises out of a wrongful act in the conduct of the operations of such a contractor, as a result of its activity, its responsibility or liability will be engaged in accordance with Article 22 of UNCLOS Annex III. In an important advisory opinion (2011), the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) clarified the obligations of these non-state actors.⁹⁹ The ITLOS held in particular that contractors are under an obligation to cooperate with the International Seabed Authority (the ‘Authority’) – which administers the Area – in the establishment of monitoring programmes to evaluate the impact of deep seabed mining on the marine environment.¹⁰⁰ In addition, the ITLOS ruled that the main liability for a wrongful act committed in the conduct of the contractor’s operations or in the exercise of the Authority’s powers and functions rests with the contractor and the Authority, respectively, rather than with the sponsoring State.¹⁰¹ This is a clear confirmation of the autonomy of the obligations of non-state actors *vis-à-vis* those of States.

Rules on international obligations and liability of non-state economic operators can also be found in the field of **civil liability for oil pollution**. In fact, in this field, primary obligations to pay compensation rest on (non-state) ship-owners rather than States. Article VII of the 1992 Civil Liability Convention¹⁰², for instance, provides compulsory liability insurance for ship-owners registered in a Contracting State and carrying more than 2,000 tons of oil in bulk as cargo. Similar rules could be found in the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by State (the HNS Convention) and in the 2001 International Convention on Civil Liability for Bunker Oil Pollution

⁹⁵ P Guttinger, *Allocation of responsibility for harmful consequences of acts not prohibited by international law*, in J Crawford, A Pellet, and S Olleson (eds.) and K Parlett (ass’t ed.), *The Law of International Responsibility*, (Oxford: Oxford University Press, 2012), 518.

⁹⁶ *Institute de Droit International*, Resolution on ‘Responsibility and Liability under International Law for Environmental Damage’, Strasbourg Session, 4 September 1997, Article 5.

⁹⁷ *I.e.*, the definition of the Area in Article 1.1(1) of UNCLOS.

⁹⁸ Note that the legal status of the entities is thus effectively a function of their status under the domestic law of a State Party to UNCLOS.

⁹⁹ Advisory Opinion, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, List of Cases No. 17, 1 February 2011. The Tribunal also clarified the obligations of States, including due diligence obligations with respect to the activities of non-state actors. See *Ibid.*, 40, para. 131 (“The due diligence obligation of the sponsoring States requires them to take all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor.”) See also Article 139(2) UNCLOS (“A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, para. 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, para. 4, and Annex III, article 4, para. 4.”).

¹⁰⁰ *Ibid.*, 44, para. 143 (particularly through the creation of ‘impact reference zones’ and ‘preservation reference zones’). In the Annex to the 1994 UNCLOS Agreement, an international cooperation obligation for contractors with respect to technology acquisition was already enshrined for that matter: Section 5(1)(b) of the Annex to the 1994 Agreement empowers the Authority to “request all or any of the contractors and their respective sponsoring State or States to cooperate with it in facilitating the acquisition of deep seabed mining technology by the Enterprise or its joint venture, or by a developing State or States seeking to acquire such technology on fair and reasonable commercial terms and conditions, consistent with the effective protection of intellectual property rights.”

¹⁰¹ Advisory opinion, *Ibid.*, para. 200.

¹⁰² Article VII, International Convention on Civil Liability for Oil Pollution Damage (CLC), (1969), Brussels.

Damage.¹⁰³ The latter Convention makes it clear that it imposes obligations on *any person*, such person being defined as “any individual or partnership or any public or private body, whether corporate or not”.¹⁰⁴ It is of note that under these Conventions, where the insurance does not cover an incident, or is insufficient to satisfy the claim, oil pollution funds will pay compensation.¹⁰⁵ A similar system has been proposed for damage done by a contractor to the Area.¹⁰⁶

Direct responsibility for private operators could also be found in the field of **nuclear energy**. Article 3 of the OECD Paris Convention on Third Party Liability in the Field of Nuclear Energy (1960)¹⁰⁷ provides that the operator of a nuclear installation shall be (objectively) liable for the damage to or loss of life of any person, and damage to or loss of any property upon proof that such damage or loss was caused by a nuclear incident in such installation.¹⁰⁸ Similarly, Article II of the Vienna Convention on Civil Liability for Nuclear Damage (1963)¹⁰⁹ provides that the operator of a nuclear installation shall be liable for nuclear damage upon proof that such damage has been caused by a nuclear incident.

It is important to emphasize, however, that, ultimately, incurring civil liability in the environmental field remains governed by domestic law rather than international law. The relevant conventions only lay down minimum standards, which States subsequently have to implement and enforce in their domestic legal order. Principle 4 of the Draft Principles on the Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities,¹¹⁰ for instance, states that *each State should enact laws* to compensate victims of transboundary damage caused by hazardous activities within its territory, which should specifically impose strict liability on the operator or other appropriate person or entity.¹¹¹ As operators mainly fall under domestic law, they are subjects of domestic rather than international law, even if international law impacted on the content of domestic law.¹¹²

3. Non-governmental organizations

This report adopts a rather broad understanding of NGO as, for the sake of this discussion, it includes a wide range of interest groups, including business and industry groups and organized indigenous peoples’ groups. The huge number of such entities active in the international realm makes it an important category for examination albeit their diversity makes it difficult to draw general conclusions.

(a) NGOs’ international obligations

Practice witnesses situations where NGOs seem to bear obligations. It remains unclear whether such obligations qualify as international legally binding obligations properly so-called. The following paragraphs describe the sources of NGO obligations without prejudging their internationally legally binding character. Mention is made here of treaties (i), arrangements with international governmental organizations (ii), autonomous institutional arrangements (iii), other types of agreements (iv) and some specific dispute settlement regimes (v) as well as the specific situations of some regional international organizations (vi).

(i) Treaties

¹⁰³ Convention, adopted on 23 March 2001, entered into force on 21 November 2008. See for the liability rules under this Convention: Articles 3-7 of the Convention.

¹⁰⁴ Articles 1-2 of the Convention.

¹⁰⁵ Under Article 4 of the 1992 Convention, the International Oil Pollution Compensation Fund (the 1992 Fund) pays compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for the damage under the terms of the 1992 Liability Convention in case no liability for damage arises under the 1992 Liability Convention,

(ii) the ship-owner liable for the damage under the 1992 Liability Convention is financially incapable of meeting this obligation in full, and

(iii) the damage exceeds the ship-owner’s liability under the 1992 Liability Convention as limited under Article V(1).

The Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (entered into force on 3 March 2005) established an International Oil Pollution Compensation Supplementary Fund, which may supplement the compensation available under the 1992 Convention. The HNS Convention established a similar compensation fund in respect of damage in connection with the carriage of hazardous and noxious substances.

¹⁰⁶ Y Tanaka, *Responsibilities and Obligations of Sponsoring States Concerning Activities in the Area: Reflections on the ITLOS Advisory Opinion of 1 February 2011*, Netherlands International Law Review 205-230 (2013).

¹⁰⁷ 956 UNTS 251.

¹⁰⁸ See Article 7 of this Convention for the maximum liability of the operator.

¹⁰⁹ 1063 UNTS 265, as amended by a Protocol in 1997, (1997) 36 ILM 1454.

¹¹⁰ Report of the ILC, 58th Session, 2006, A/61/10, 115.

¹¹¹ See also the ‘Basel Convention’, *Global Convention on the Control of Transboundary Movements of Hazardous Wastes*, 22 March 1989, 1673 U.N.T.S. 126, which in Article 9(5) requires States to pass domestic legislation which prevents and punishes the illegal transport of hazardous substances executed by natural and legal persons.

¹¹² Tomuschat has observed in this respect that the conventional regimes “reflect a method well known to private international law, which often seeks to harmonize or make uniform the rules of internal laws by drafting an international treaty whose content will then be translated in the internal legal orders of the States parties”. Tomuschat, in Crawford and others (eds), *supra* n55, 324.

Treaties, such as under international humanitarian law (IHL) and international labor law, are sometimes said to have placed obligations on NGOs, such as obligations to safeguard interests of the parties to a conflict¹¹³ when they assume the role of a Protecting Power.¹¹⁴ It is interesting to note on this occasion that NGOs granted the right to use the Red Cross emblem and the related words to confer protection under the Convention have the concurrent obligation not to misuse these symbols.¹¹⁵

The Freedom of Association and Protection of the Right to Organize Convention, one of the fundamental International Labour Organization (ILO) conventions, seem to contain another type of NGO obligations, although the obligatory language is formulated more as a consequence of limiting convention rights than of creating actual obligations.¹¹⁶ Article 8 provides that workers' and employers' organizations shall, like other persons and collectivities, respect the law of the land in exercising the rights in the Convention in a manner that does not impair the Convention guarantees. Despite the special role and status of these NGOs as equal partners with States under the ILO's unique tripartite structure, as the NGOs cannot ratify ILO conventions, there is a democratic flaw in the binding force of this obligation. This is somewhat remedied by the fact that these organizations participate in the convention drafting, approval and operating processes.

(ii) IGO Arrangements

It is common that, in return for various participatory rights, NGOs agree to specific obligations under arrangements with numerous IGOs. International instruments govern consultative, cooperative and partnership arrangements between NGOs and diverse IGOs.¹¹⁷ These include UN organs and their committees, commissions, working groups, etc., UN specialized agencies, programmes and funds, and IGOs outside the UN system. Each arrangement has its own particular rules regarding the rights and obligations of NGOs. Perhaps the most valuable arrangement for NGOs is with the UN Economic and Social Council (ECOSOC). To obtain the many rights accompanying ECOSOC consultative status, NGOs assume obligations, such as 'to undertake to support the work of the [UN] to and promote knowledge of its principles and activities'.¹¹⁸ The International Maritime Organization (IMO) has also long adopted formal and effective relationships with a wide range of NHOs from both the private industry and environmental sectors. In return for 'observer' status that grants NGOs almost the same rights as member States in practice, the IMO Rules also impose specific obligations on accredited NGOs, including to be engaged in activities directly related to the IMO purposes¹¹⁹ and support IMO activities.¹²⁰

(iii) 'Autonomous Institutional Arrangements'

NGOs sometimes assume some sort of obligations in the context of multilateral environmental agreements (MEAs) and other treaties with organs that can act in a quasi-legislative capacity. Such treaties often create 'autonomous institutional arrangements' (AIAs) that empower their conferences and meetings of the parties (COP/MOPs) to the conventions to develop the normative content of the regulatory regime and adopt amendments using a special procedure that does not need a new instrument requiring ratification. Like the IGO arrangements, in return for participatory rights in COP/MOP sessions, NGOs accept specific obligations. For example, the 1992 UN Framework Convention on Climate Change (UNFCCC) refers to NGOs explicitly and obligates State Parties to promote public awareness and 'to encourage the widest participation in this process including that of [NGOs]'.¹²¹ The treaty and Draft Rules expressly require the COP to utilize NGOs' services.¹²² In return, NGOs must fulfill particular obligations to be accredited. Then, once admitted, their representatives are expected to comply with a UNFCCC 'code of conduct' concerning access, etiquette and safety, participation and information materials.¹²³

(iv) Other agreements

¹¹³ Article 8, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug 1949, 75 *UNTS* 31 (GC I).

¹¹⁴ Article 10, GC I provides: 'The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the...Convention'.

¹¹⁵ *Id.* (citing J Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volume I* (Geneva: ICRC, 1952), 328).

¹¹⁶ *Ibid.*

¹¹⁷ See e.g., B K Woodward, *Global Civil Society in International Lawmaking and Global Governance*, (The Hague: Martinus Nijhoff, 2010).

¹¹⁸ E/RES/1996/31 (1996), paras 1-3 and 55.

¹¹⁹ Rule 3, IMO, Rules Governing Relationship with Non-Governmental International Organizations, adopted by IMO Assembly resolution A.31 (II), 13 April 1961, as amended.

¹²⁰ *Id.*, Rule 4.

¹²¹ UNFCCC, Article 4(1)(i), 9 May 1992, 31 *ILM* 849 (1992).

¹²² *Id.*, Article 7 para. 2(l) and Draft Rules of Procedure of the Conference of the Parties and Subsidiary Bodies, FCCC/CP/1996/2 (1996), Rule 7. The same provisions are also in the Kyoto Protocol, Article 13 para. 4(i), 11 Dec 1997, Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Article 29 para. 8, 29 Jan 2000; and UN Convention to Combat Desertification, Article 22 para. 2(h), 17 June 1994.

¹²³ UNFCCC, Guidelines for the participation of representatives of non-governmental organizations at meetings of the bodies of the United Nations Framework Convention on Climate Change, March 2003.

It also happens that NGOs assume obligations by entering into formal agreements with international bodies such as the organs of international treaty regimes and IGOs. Some MEA treaty regimes formally provide for NGO participation in their implementation and verification procedures. Such NGOs tend to have been involved in the MEA's establishment. For example in the Ramsar Convention,¹²⁴ the International Union for Conservation of Nature (IUCN), a hybrid IGO/NGO, essentially acts as secretariat.¹²⁵ The Convention also gives formal status to five NGOs as 'International Organization Partners'.¹²⁶ The NGOs' obligations, in this case, include requirements to 'contribute on a regular basis and to the best of their abilities to the further development of the policies and technical and scientific tools of the Convention and to their application' and to sign a 'Memorandum of Cooperation with the Bureau of the Convention' more particularly specifying their responsibilities, supplemented by work plans.¹²⁷

In a second example, under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),¹²⁸ NGOs that established monitoring mechanisms have entered into agreements with the CITES Secretariat to submit information they compiled to supplement national reports.¹²⁹ The World Conservation Monitoring Centre (WCMC) contract obligates it to provide data management services, maintain the CITES Trade Database, and assist the Secretariat in producing an analysis of annual reports for consideration by the COP.¹³⁰ Its incorporation into the UNEP in 2000 suggests that its obligations though contractual also have some international legal character. Another NGO, Trade Records Analysis of Fauna and Flora in Commerce (TRAFFIC), signed a Memorandum of Understanding (MOU) with the UNEP and CITES in which it agreed to monitor and evaluate the effectiveness of CITES capacity building efforts.¹³¹ The MOU provision for arbitration in the UN suggests that international law may be applied in settling disputes. These legal arrangements with an organ of a treaty regime give NGOs official roles in treaty implementation and verification procedures that should qualify their obligations as international.

NGOs also seem to bear some sort of obligations under agreements with IGOs in the context of the operation of specific projects. Though contractual, some such agreements are expressly intended to be legally binding under international law. An example is the Food and Agriculture Organization (FAO) standard Letter of Agreement to regulate cooperation with NGOs for NGO projects that refers explicitly to general principles of international law in its applicable law clause.¹³² Other examples are the extensive relationships with the World Food Programme (WFP) in field level agreements (FLA) between IGOs and 'cooperating partner' NGOs and with the UN Development Programme.¹³³ The NGO obligations include submitting a budget for approval, responsibility for the receipt, storage and handling of WFP-provided commodities, maintaining proper accounts, providing suitably qualified personnel and accepting full responsibility for their acts and omissions.¹³⁴ Disputes are then settled under UNCITRAL arbitration rules and are binding on the parties.¹³⁵

(v) *Dispute Settlement Regimes*

Some dispute settlement regimes are worthy of mention here as they seem to impose obligations on NGOs when the latter are granted rights to participate in dispute settlement regimes. Increasingly international, regional, sub-regional and national judicial, quasi-judicial dispute resolution and compliance mechanisms dealing with

¹²⁴ Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, Article 6 para. 2, 2 Feb 1971, *UNTS* 14583, as amended.

¹²⁵ O Meier and C Tenner, *Non-governmental monitoring of international agreements*, Verification Yearbook, (2001), 209, <12_VY01_Meier_Tenner.pdf>; A.-K. Lindblom, *Non-Governmental Organizations in International Law*, Cambridge University Press 2005, 349.

¹²⁶ Decisions of the COP, ResVII.3 (1999), Partnership with International Organizations, para 6 (BirdLife International, IUCN, Wetlands International, and World Wide Fund for Nature (WWF)) and ResIX.16 (2005), The Convention's International Organization Partners (IOPs), para 7 (International Water Management Institute (IWMI)).

¹²⁷ Id. Annex, Rules for conferring the status of International Organization Partner of the Convention on Wetlands, paras. 1 and 4.7, <http://www.ramsar.org/cda/en/ramsar-documents-resol-resolution-vii-3/main/ramsar/1-31-107%5E20709_4000_0_>.

¹²⁸ 3 March 1973, 973 *UNTS* 14537; UNFCCC, art 7, para. 2(1).

¹²⁹ Id., 208-09 (CITES, Art XXI para 1). See Meier n125, 208-09.

¹³⁰ (09/11/00)-2, 'A Report by the IUCN-The World Conservation Union on the Effectiveness of Trade Measures Contained in The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)', prepared for Economics, Trade and Environment Unit, UNEP, 19, para 3.2.1.

¹³¹ MOU, 1 Nov 1999, art 3, <<http://www.cites.org/common/disc/sec/CITES-TRAFFIC.pdf>>. See Meier above n125, 208-09 & nn 9-10.

¹³² A-K Lindblom, 'Non-Governmental Organizations and Non-State Actors in International Law', in Bob Reinalda (ed.), *The Ashgate Research Companion to Non-State Actors* (Burlington, VT: Ashgate, 2011), 148-160, 159 n 19; Lindblom n125 above, 350 (citing FAO Standard Letter Agreement, cl 3(f)).

¹³³ Id. See How to Work with WFP-*Manual: A Handbook for Non-Governmental Organizations (NGOs)*, Dec 2005, 73-78, Annex 1: Field Agreement Template, 74-78, <http://www.wfp.org/sites/default/files/How%20to%20Work%20with%20WFP_%20English.pdf>.

¹³⁴ *Ibid.*, 74-75, paras. 4.1-4.17

¹³⁵ *Ibid.*, 78.

questions of international law allow submissions by NGOs, corporations and other third party, non-party NSAs. NGOs have acted as court- or party-appointed experts for fact-finding or legal analysis, testified as witnesses, participated as ‘non-parties’ or *amici curiae* and even sometimes instituted cases or intervened as parties where procedural rules provide *iuris standi* rights.¹³⁶ For example, an NGO may be permitted to appear as a ‘friend of the court’ before the WTO Dispute Settlement Body if it complies with WTO Dispute Settlement Understanding rules, including confidentiality rules. The Panel in *European Communities-Export Subsidies on Sugar* rejected an NGO *amicus curiae* brief partly because it was ‘based on confidential information and is thus evidence of a breach of confidentiality which disqualifies the credibility of the authors’.¹³⁷

(vi) Regional IGOs

Eventually, attention must be turned to regional and sub-regional IGOs which have adopted arrangements governing their association with ‘civil society’ that allow NSA participation or consultation and impose correlative obligations and accountability for violating such rules. For example, for an international NGO to qualify for ‘participatory’ status for ‘cooperation’ with international NGOs (replacing the former ‘consultative’ status) with the Council of Europe (CoE), it must ‘undertake’ obligations to promote respect for CoE standards, conventions and legal instruments in the member States and assist in their implementation and to report to the Secretary-General every four years.¹³⁸ The first is an implicit agreement to comply with international rules.

In a second example the African Union (AU) provides for membership in an AU organ, the Economic, Social and Cultural Council (ECOSOCC), of 150 ‘Civil Society Organizations’ (CSOs), including NGOs.¹³⁹ This represents a comprehensive attempt to institutionalize NSA participation in all AU intergovernmental processes that is far more inclusive than the ILO’s tripartite corporatist structure, though it is merely advisory. The right of CSO membership comes with obligations to ‘have objectives and principles’ consistent with Articles 3 and 4 of the AU Constitutive Act and to adhere to a strict CSO Code of Ethics and Conduct enforced by an ECOSOCC Steering Committee.¹⁴⁰

(b) Responsibility of NGOs

Should the abovementioned obligations prove of an internationally legally binding character, there would seem to be no consensus on the existence of general secondary rules of international law establishing the responsibility of NGOs for violations of their international legal obligations. Instead, responsibility seems to be rather imposed directly by the bodies with which NGOs have consensual relationships, and importantly, NGOs agree to assume the obligations and the responsibility and penalties for the violations that accompany them. Moreover, in most cases failure to comply with obligations may be and is enforced by the other party, generally by impacting on the NGO’s participation rights. On the other hand, the emergence of non-consensual obligations and responsibility and the fact that numerous NGOs are engaged in international activities outside formally governed institutional arrangements indicates that there is a significant gap in existing international law that needs to be filled. This report only ought to mention a few examples.

It is noteworthy that, in *associations with IGOs*, generally internal organs are constitutionally tasked with the job of monitoring and enforcing NGO compliance with their obligations. For example, the UN ECOSOC Committee on Non-Governmental Organizations (CONGO) reviews the NGOs’ required quadrennial reports of their activities. If an NGO breaches its obligations, CONGO may recommend that the ECOSOC suspend or withdraw its consultative status on three grounds: acting contrary to the purposes and principles of the UN Charter; receipt of proceeds from international criminal activities; and failure to make any positive or effective contribution for three years.¹⁴¹ CONGO reports reveal that these cases can be controversial and political, which can obscure NGO obligations.¹⁴² They also show that NGO failures to meet reporting obligations regularly result in suspension or withdrawal of consultative status, strengthening the international character of the obligations as there is no appeal of such decisions outside the international system.¹⁴³

Like the ECOSOC, the IMO monitors NGO compliance internally; it maintains strict control over its relations with NGOs, including withdrawal of consultative status. The IMO Council is tasked with the periodic review of the list of NGOs in consultative status, submission of a report to the IMO Assembly assessing the extent accredited NGOs have complied with their undertakings, and recommendation of continuation or termination of

¹³⁶ See e.g., Woodward, n117, chap. 8.

¹³⁷ *Complaint by Brazil*, Report of the Panel, 15 Oct 2004, WTO Doc WT/DS266/R, paras. 7.82-7.85.

¹³⁸ CoE Committee of Ministers, Appendix to Res(2003)8 and Res(2003)9, 19 Nov. 2003, Res(2003)8, 9(c) & (f).

¹³⁹ Statutes of the ECOSOCC, Assembly/AU/Dec.48(III), 8 July 2004, Article 3.

¹⁴⁰ *Id.*, Article 6 paras. 2 and 10. See M S Amr, *The Economic, Social, and Cultural Council of the African Union*, in A A Yusuf and F Ouguerouz (eds), *The African Union: Legal and Institutional Framework: A Manual on the Pan-African Organization* (Leiden: Martinus Nijhoff, 2012), 159-183, 163-67.

¹⁴¹ *Id.*, Part VIII para. 57.

¹⁴² E.g. E/2012/32 (Pt II), 32-34; E/2009/32 (Pts I & II); E/2006/32 (Pt I); & E/2000/88. See Lindblom n125 above, 348-349.

¹⁴³ E.g., E/2011/32 (Pt II) & E/2012/221; E/C.2/2013/CRP.12 (154 1-year suspensions for failure to file quadrennial report) and E/C.2/2013/CRP.14 (159 withdrawals for continued outstanding reports).

such status.¹⁴⁴ IMO Guidelines elaborate grounds for refusal or withdrawal of accreditation, including if in the opinion of the Assembly or Council, an NGO has not made a significant contribution to IMO work.¹⁴⁵ The IMO regularly assesses NGO accreditation and withdraws consultative status granted to NGOs.¹⁴⁶

As in arrangements with IGOs, *regional and sub-regional IGOs* may hold NGOs with which they have relationships responsible to them through their formal rules granting participation or consultation rights and imposing various obligations. Violation of the obligations generally results in termination of NGO rights. In the examples mentioned before, the CoE Secretary-General monitors INGO compliance based on a review of their obligatory reports, and failure to comply with the obligations or taking ‘any action which is not in keeping with its status as an [INGO]’ can result in withdrawal of its participatory status.¹⁴⁷ Likewise, in the ECOSOCC, the General Assembly Presiding Officer monitors CSO compliance, and failure to maintain eligibility requirements results in termination of membership. The Presiding Officer, after consulting the Bureau, must ask the ECOSOCC to remove the member from office.¹⁴⁸

The foregoing shows that international law, when it comes to NGOs’ obligations and responsibility, remains very much in limbo. This does not mean that international law is silent on the matter. It seems that many *ad hoc* arrangements provide for some obligations whose breach can be the object of some retributive mechanisms. It remains uncertain whether such obligations and the effects attached to their violations are properly legal.

4. Concluding observations

The above overview shows that NSAs have a limited number of obligations under international law. The extent of such obligations largely depends on the actor and on the field of law relevant to the NSA’s activities. It is noteworthy that the conceptual and theoretical foundations of such obligations often remains uncertain. Given the long involvement of AOGs in armed conflicts, it comes as no surprise that international humanitarian law has been the first field where obligations have been found to be imposed on them. By the same token, given the potentially harmful environmental consequences of certain business activities, it is unsurprising that conventions in the field of environmental and energy law have imposed liabilities on private economic operators.

As far as primary obligations are concerned, it must be recognized that beyond international humanitarian law and environmental law, important legal controversies pertaining to the nature and scope of NSA obligations continue to play out in respect of various categories of NSAs. It is notably contested whether AOGs and corporations have, as collective entities, obligations under international human rights law and international criminal law, insofar as the pertinent norms do not rise to the level of *jus cogens*. Given these NSAs’ potential to adversely affect the public goods protected by international human rights and criminal law norms, they may at least be *expected* to comply with such norms. As far as the human rights obligations of corporations are concerned, such expectations have given rise to a host of corporate social responsibility initiatives, which have been further bolstered by the 2011 UN Guiding Principles on Transnational Corporations and Human Rights.

By and large, it appears that NSAs have few uncontested direct obligations under international law. But where NSAs are not formally bound by international law, their activities remain governed by domestic law. At the same time, it cannot be denied that the quest to impose *international* obligations on NSAs has precisely been triggered by (some) States’ unwillingness or inability to fully bring their laws to bear on NSA activities.

It also transpires from the overview given, that, as a direct consequence of the prevailing uncertainty as to the exact obligations of NSAs under international law, little attention has been devoted to questions of legal responsibility. Under international law, responsibility requires that an *internationally wrongful act*, i.e., an act which violates an international legal obligation, be committed in the first place. Insofar as obligations have proved relatively uncontroversial – mainly obligations under international humanitarian law – legal practice and scholarship has devoted some attention to responsibility issues, in particular to the attribution of individuals’ conduct to the collective entity, and to reparations as consequences of responsibility. As NSAs are subject to domestic law, some inspiration may also be sought in how domestic law has addressed issues of responsibility, although one must keep in mind that domestic analogies should always be used with care.

While NSAs have come to be recognized as participants in the dynamic international legal system,¹⁴⁹ it is striking that the State continues to play a prominent role in respect of obligations and responsibilities of NSAs. Not only are NSAs, even if transnationally active, subject to obligations under domestic law, international law may at times also *require* that States regulate the behaviour of NSAs. A large number of conventions in the field of environmental and energy law, while apparently imposing international liability obligations of private economic operators, in fact oblige States to enact and enforce the necessary legislation with respect to such operators. Similarly, international human rights conventions oblige States to take the necessary measures to

¹⁴⁴ Rule 10, IMO NGO Rules.

¹⁴⁵ IMO, Guidelines for the Granting of Consultative Status, (1978), as amended, paras. B-VI-VIII.

¹⁴⁶ E.g., IMO, A 27/Res.1059(27), 30 Nov. 2011.

¹⁴⁷ CoE Committee of Ministers, n138 above, Res(2003)8, 16(a) & (d). See Lindblom n125 above, 350 n30.

¹⁴⁸ Rule 77(2), ECOSOCC Draft Rules of Procedure.

¹⁴⁹ See J d’Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, (London: Routledge, 2011).

prevent and punish violations committed by NSAs.¹⁵⁰ Furthermore, in the absence of international dispute-settlement mechanisms with jurisdiction over NSA obligations,¹⁵¹ cases involving NSA obligations and responsibility are, and will continue to be litigated before *domestic courts*, which in some legal systems can directly apply international law.¹⁵² This allows *individual States* to interpret and further develop questions of international obligations and responsibilities of NSAs (a scenario that, for that matter, may result in divergent interpretations of the nature and scope of NSA obligations, in the absence of a transnational judicial dialogue). Finally, internationally wrongful acts may be committed as a result of acts involving *States and NSAs*. States may support AOGs which go on to commit violations of international humanitarian law, or corporations may assist States in committing human rights violations. How responsibility for such wrongful acts is precisely shared between States and NSAs is to be further explored.¹⁵³

¹⁵⁰ One could submit that these conventions impose *indirect* obligations on NSAs. While ultimately NSAs are expected to change their behaviour as a *result* of international law, obligations are formally imposed on States only.

¹⁵¹ Investment tribunals have jurisdiction over private investors, in the sense that the latter have *locus standi*, but cases before such tribunals revolve around the *obligations* of States under international investment treaties, rather than around the obligations of the investors. See, e.g., Article 2(1) of the 2012 U.S. Model Bilateral Investment Treaty, which states that the treaty only ‘applies to measures adopted or maintained by a Party’, a Party being a State Party to the Treaty.

¹⁵² See, e.g., the U.S. Alien Tort Statute, 28 U.S.C. § 1350 (conferring jurisdiction on federal courts to hear ‘**any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States**’).

¹⁵³ See on the concept of shared responsibility: A Nollkaemper and D Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34, Michigan Journal of International Law, (2013), 37.