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INTERNATIONAL HUMANITARIAN LAW AND BUSINESS: FINDING A BRIDGE[1]

O DIREITO INTERNACIONAL HUMANTÁRIO E AS EMPRESAS: PROCURANDO UMA PONTE

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Abstract: This article aims at analysing whether rules of international humanitarian law are applicable to business and if yes, to what extent. Additionally, the consequences for International Humanitarian Law (IHL) violations by companies are analysed. We highlight that enterprises, their personnel and property which are not directly linked to a conflict enjoy the protection under Geneva Conventions from deliberate or indiscriminate attacks, as well as from pillaging and violations of private property. However, keeping neutrality in armed conflicts is a difficult task for companies and there are different ways in which they can contribute to human rights violations and abuses as well as commit international crimes. In order to prevent such violations, companies should conduct hHRDD and comply with IHL rules. Non-compliance with them may lead to reputational and organisational risks for companies as well as bring companies to criminal and/or civil responsibility.

Keywords: International Humanitarian Law; business; companies; business and human rights; armed conflict, Geneva Conventions; heightened human rights due diligence.

Resumo: Este artigo tem como objetivo analisar se as regras do Direito Internacional Humanitário são aplicáveis às empresas e, em caso afirmativo, em que medida. Além disso, são analisadas as consequências das violações do DIH por parte das empresas. A autora destaca que as empresas, os seus empregados e os bens que não estão diretamente ligados a um conflito gozam da proteção prevista nas Convenções de Genebra contra ataques deliberados ou indiscriminados, bem como contra pilhagens e violações da propriedade privada. No entanto, manter a neutralidade nos conflitos armados é uma tarefa difícil para as empresas e existem diferentes formas pelas quais elas podem contribuir para violações e abusos dos direitos humanos, bem como cometer crimes internacionais. Para evitar tais violações, as empresas devem implementar a *due diligence* intensificada e cumprir as regras do DIH. O não cumprimento das mesmas pode levar a riscos reputacionais e organizacionais para as empresas, bem como provocar a responsabilidade criminal e/ou civil.

Palavras-chave: Direito internacional humanitário, negócio, empresas, empresas e direitos humanos, Convenção de Genebra; *due diligence* intensificada e direitos humanos.

1. The text presented in this article is a subchapter of my Master thesis defended at the University of Lisbon School of Law in February 2024 under the topic "Human Rights Due Diligence in Conflict-Affected and High-Risk Areas".

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1. Introduction

The field of business and human rights has become an integral part of our daily lives and we have not even noticed that. This can be seen from both positive and negative perspectives. On the one hand, business contributes to the development of the world economy, deepens the processes of globalization, it can be our employer and help improve living standards, but, on the other hand, a wide range of violations of our rights and freedoms can be committed by enterprises internally (e.g., our labour rights as employees) and externally (e.g., violations of our rights as consumers or the rights of local communities).

Business always operates in complex environments due to a number of subsidiaries, production plants, employees, suppliers, different jurisdictions involved, and so on. And the situation gets even more complicated when it comes to companies' operations in conflict-affected areas (hereinafter "CAR areas"). There, business faces danger of being complicit in human rights violations and abuse and even war crimes and crimes against humanity. Even when a company attempts to declare its "neutrality" due to its detachment from the political processes taking place in a country, believing that it is simply conducting economic activities, it nevertheless influences the events taking place in the country (UN, 21 July 2020: § 43).

According to the Report of the UNWG "Business, human rights and conflict-affected regions: towards heightened action", conflicts are on the rise around the world, for instance, since the adoption of the UNGPs in 2011, the number of civil wars has almost tripled, with a sixfold increase in combat-related deaths, peaking in 2016 when conflicts broke out in 53 countries. Moreover, more than 71 million people have been forcibly displaced by war, violence, and persecution, resulting in the world's largest humanitarian crisis since the end of World War II (UN, 21 July 2020: § 1).

At the same time, as follows from the Heidelberg Institute for International Conflict Research report for 2022 on political conflicts around the world, the global political conflict panorama in 2022 was marked by an increase in the number of highly violent conflicts. Both the number of wars and of limited wars increased from 20 to 21 respectively. As opposed to 2021, one war was observed in Europe [→ Russia – Ukraine] and another conflict in the Americas [→ Haiti (inter-gang rivalry)]. Out of the 21 limited wars observed in 2022, nine escalated from violent crises or non-violent conflicts. The number of violent crises also increased from 164 to 174, of which around 30%, or 53 in total, were observed in Asia & Oceania. Violent intrastate conflicts continued to be the most numerous conflict type, encompassing 136, or around 30%, of all observed conflicts[3].

As it is known, as soon as a conflict starts, the norms of international humanitarian law are applied. And then comes the question, what should business do in CAR areas, whether it has any obligations and protection under the Geneva Conventions and what are the consequences for IHL violations committed by business. This article aims at looking into these questions and responding to them. For this purpose, the text is divided into four sections. The first one gives a brief overview of the phenomenon of armed conflicts and the scope of IHL application. The second one dives into IHL application to business while the last two discuss the possible ways for

3. Heidelberg Institute for International Conflict Research. The Conflict Barometer 2022. Current version. URL: https://hiik.de/conflict-barometer/current-version/?lang=en (accessed 1 March 2024).

companies to contribute to IHL violations and the risks that they face for such contributions respectively.

2. Armed conflicts in International Law

It is a well-known fact that international law contains four legal regimes, *jus contra bellum*, *jus ad bellum*, *jus in bello*, and *jus post bellum*, among its other branches. Taking into account the title of the article, we will not look into each one of them but will focus exclusively on *jus in bello*[4].

The *jus in bello*, or the so-called international humanitarian law, applies in all cases of declared war or of any other armed conflict that may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. It shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance (common art. 2 of the Geneva Convention)[5]. And finally, the provisions of the Geneva Conventions should be applied in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties (common art. 3 of the Geneva Convention)[6].

Summarising IHL application, it should be mentioned that it covers two areas: 1) the protection of those who are not, or no longer, taking part in fighting; and 2) restrictions on the means of warfare – in particular weapons – and the methods of warfare, such as military tactics[7].

The purpose of IHL is to limit the suffering caused by war by protecting and assisting its victims as much as possible. The law therefore addresses the reality of a conflict without considering the reasons for or legality of resorting to force. It regulates only those aspects of the conflict that are of humanitarian concern. That it is why it is known as *jus in bello* (law in war). Its provisions apply to the warring parties irrespective of the reasons for the conflict and whether the cause upheld by either party is just or not.

Jus in bello is unique because it grants rights to individuals (enemy nationals, whether combatants or non-combatants) vis-à-vis a belligerent state. Because of its overriding humanitarian objective, *jus in bello* theoretically applies equally between all belligerents, as proclaims the principle of the equality of application of international humanitarian law (art. 2 of the 1949 Geneva Convention, Preamble to Additional Protocol I) (Moussa, 2008: 967). However, the doctrine still maintains a discussion of granting rights to individuals by IHL. There are two opposing positions: one that thinks that contemporary IHL does not grant rights directly to individuals and that IHL protects the interests of an individual through means other than rights granting, while the second view claims that IHL has evolved so as to grant

4. For more details on the topic of *jus contra bellum, jus ad bellum, jus in bello* and *jus post bellum* and the relations between them, see, *inter alia*, David (2012: 1152).

5. ICRC. International Humanitarian Law Databases. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. *Geneva,* 12 August 1949. URL: https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949?activeTab=undefined (accessed 2 March 2024).

6. Ibid.

7. ICRC. What is IHL? Factsheet. URL: https://www.icrc.org/en/download/file/4541/what-is-ihl-factsheet.pdf (accessed 2 March 2024).

rights to individuals corresponding to the obligations of states and, potentially, non-state armed groups[8].

As for the application of rules, it is important to mention that the provisions of IHL are not voluntary; they have binding universal force – anybody who is involved in and/or linked to armed conflict has certain responsibilities under IHL. Thus, it is applicable to states, international organisations, national liberation movements, parties to the non-international armed conflict and individuals, including companies (their corporate personnel and executives, whose activities are closely linked to an armed conflict) (ICRC, 2006: 14).

The discussion about the application of IHL brings us to its two crucial principles (which are considered some of the most important ones), the principle of equality and reciprocity. The first one means that all parties (those engaged in both an international and a non-international armed conflict) have equal obligations under IHL[9]. This principle can be derived from the Preamble of the Additional Protocol to the Geneva Convention, which proclaims that "the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict" and the Art. 96(3) of the same Additional Protocol[10].

The second one can be divided into the so-called "negative" and "positive" reciprocity. The negative one can be derived from the Art. 1 of the Additional Protocol to the Geneva Convention. The commentary to it shows that "a Party should be prevented from claiming to be exempt from the obligation to respect a particular provision, or the Protocol as a whole, because an adversary had not respected this provision or the Protocol as whole".[11]. As for the "positive" reciprocity, it is used by the Parties to mutually encourage each other to go beyond what is laid down by humanitarian law[12].

As mentioned above, IHL is applicable to different subjects, among which parties to international or non-international armed conflicts and individuals. Here we come to the question of whether it is applied to business, which will be discussed in the next chapter.

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8. For further discussion on the IHL and its possibility to grant rights to individuals, see, *inter alia*, Provost (2002: 418); Meron (2000: 239-278); Greenwood (1999: 277-294); and Hill-Cawthorne (2017: 1187-1215).

9. It is important to mention here that there is also a doctrinal discussion on whether all parties to the armed conflicts have equal obligations under the IHL. Some authors defend the existence of the so-called doctrine of the common but differentiated responsibilities. To find out more on this discussion, see, *inter alia*, Sassòli, Shany (2011: 425-436) and Blum (2011: 163-218).

10. ICRC. International Humanitarian Law Databases. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. URL: https://ihl-databases.icrc.org/en/ihl-treaties/api-1977?activeTab=1949GCs-APs-and-commentaries (accessed 3 March 2024)

11. ICRC. International Humanitarian Law Databases. Article 1 - General principles and scope of application, Commentary of 1987, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. § 49. URL: https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-1/commentary/1987?activeTab=undefined (accessed 3 March 2024)

12. Ibid., § 50.

3. Are companies to comply with IHL?

We could simply put a "yes" here and get to the next part of the article, but such a response would undoubtfully provoke various counter-questions. Thus, let's look into it in more detail over the next few pages.

We should start by saying that in international human rights law, companies have internationally established responsibilities to respect human rights under United Nations Guiding Principles on Business and Human Rights (hereinafter – "UNGPs"). Principle 17 of the UNGPs proclaims that in order to identify, prevent, mitigate, and account for how companies address their adverse human rights impacts, business enterprises should conduct human rights due diligence (hereinafter "HRDD") (UN, 2012: 6). This process allows companies to access human rights impact for an enterprise to maintain a true picture of its human rights risks over time, taking into account changing circumstances (UN, 2012: 6).

Bearing in mind that the risk of gross human rights abuses is heightened in conflict-affected areas (UN, 2011), action by States and due diligence by business should be heightened accordingly, as it is proclaimed in the Principle 7 UNGPs (UN, 21 July 2020: § 13). Additionally, Principle 23(c) highlights that "in all contexts, business enterprises should […] treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate" (UN, 2011: 26). Thus, companies should conduct *heightened* (or *enhanced*) *human rights due diligence* (hereinafter "hHRDD").

In comparison to the "classic" HRDD which helps businesses to know how to avoid or minimise human rights risks to people, hHRDD strengthens the understanding of the context in which businesses operate and ensures that companies' activities do not contribute to violence by identifying flash points, potential triggers, or the forces that are driving the conflict. This process includes a conflict-sensitive approach that complements the ongoing HRDD (UN, 2011: 26). For the purposes of the OECD Guidelines, "contributing to" an adverse impact is interpreted as a substantial contribution, meaning an activity that causes, facilitates, or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions (UNDP, 2022: 23).

In addition to conflict sensitivity, hHRDD incorporates atrocity prevention, transitional justice, and peacebuilding frameworks into due diligence processes (Vaughan, Lovatt, 2 November 2022).

Here, we come to a case where companies are to comply not only with the responsibility to respect human rights under UNGPs but also with the rules established by IHL, which are obligatory for those actors who find themselves on the territory of an armed conflict. This comes as a contrast to the voluntary commitments of companies in the human rights field (like human rights due diligence, corporate social responsibility, etc.) which do not substitute the necessity of compliance with IHL when it comes to operations in CAR areas. Indeed, conflict analysis and respect for IHL is complementary to the values and goals of established human rights frameworks.

Jonathan Kolieb, while discussing the necessity of IHL norms in business activities, stresses that "human rights […] should not be understood by reference to human rights treaties alone. In conflict-affected areas, responsible corporate best practice must include respect for both IHL and IHRL norms" (2020: 143). And this comes as no surprise, since any armed conflict poses the greatest threat to the very existence of human beings, not

only to the guarantees of their rights. Besides, businesses' attention to international humanitarian law will help them to better understand conflict-affected areas where they operate, to mitigate risks of gross human rights violations, and to better protect their personnel and assets (Kolieb, 2020: 156).

Human rights and IHL should be key elements of companies' due diligence and risk management activities in CAR areas. By failing to adequately integrate IHL and conflict sensitivity into due diligence and other policies, companies risk harming the communities in which they operate and expose themselves to unnecessary operational, financial, and reputational risk as well as significant criminal and civil liability.

Here comes another crucial question – what is the place of IHL in CAR areas and in business that operates on such territories?

As the ICRC mentions, IHL is relevant for companies since it protects their staff (local, expat or outsourced) as well as their property (ICRC, 2006: 17-18). Through the principle of immunity of the civilian population, all civilian factories, offices, vehicles, lands, and resources are also protected from deliberate or indiscriminate attacks, as well as from pillaging and violations of private property, which must be returned or indemnified at the end of the conflict (art. 48 of the Additional Protocol (I) to the Geneva Convention, art. 13 of the Additional Protocol (II), art. 51(4) and (5) of the Additional Protocol (I) and art. 52 of the Additional Protocol (I)) (Prandi, 2011: 22). Thus, it is of utmost importance for companies to include such rules into their human rights policy. However, the ICRC admits that even though many companies have adopted human rights policies, very few have yet included policies on IHL (Prandi, 2011: 21).

Moreover, the Geneva Conventions proclaim additional protection for the business personnel. Among such protection, we can find:

1) Protection against violence to workers' life, health and physical or mental well-being (art. 34 of the Geneva Convention (IV), art. 32, 75(2) of the Additional Protocol (II), art. 4(2) of the Additional Protocol (II));

2) Protection of workers (as civilians) deprived of liberty (art. 42, 43, 78, 82 of the Geneva Convention (IV) and the norms proclaimed in Geneva Convention (III), art. 75(3) of the Additional Protocol (I));

3) If a business enterprise staff is charged with a criminal offence linked to an armed conflict, the essential guarantees of independence and impartially are proclaimed (art. 84 of the Geneva Convention (III), art. 71 of the Geneva Convention (IV), art. 75(4) of the Additional Protocol (I), art. 6(2) of the Additional Protocol (II)) as well as the procedural guarantees (art. 82-108 of the Geneva Convention (III), art. 71-78 of the Geneva Convention (IV), art. 75(4) of the Additional Protocol (I) and art. 6 of the Additional Protocol (II)).

Besides, the Geneva Convention sets forth 1) additional protection for companies' property (art. 46 of the Hague Regulations and art. 33 of the Geneva Convention (IV)) and 2) compensation if the property is seized by the occupied power (art. 52-53 of the Hague Regulation).

Finally, it should be mentioned that IHL establishes criminal and/or civil responsibility for companies in case of noncompliance or complicity with any violation of IHL rule. For example, in a lawsuit filed against Royal Dutch Shell for its actions in Nigeria in the 1990s, the company was not only accused of environmental human rights violations for oil spills in the Niger

Delta, but also for backing the armed forces that were oppressing and repressing the protesting local communities (Vidal, 2011) [13].

As we have already seen, and we will stress it once again here, nowadays, the fact that a company has to deal in its operations (as a producer, supplier, buyer, etc.) with CAR areas does not come as a surprise. Taking into account that there are more than 110 armed conflicts around the world that are present on every continent and that business is pretty much present in every country in the world, earlier or later these companies will have to deal with operations in CAR areas.

Companies from different sectors (banking & finance; oil & gas, food & beverage; technologies & telecommunication; pharmaceutical and so on) are exposed to these conflicts. All of them may one day face a risk of either breaching IHL rules themselves while operating on the territory of a CAR area or a risk of helping third persons do so. They may not only cause harm to human rights and freedoms, and the livelihood of a society that finds itself in such an area, but also have significant reputational and financial damage as well as legal accountability.

Overall, IHL grants protection to companies, but at the same time, it imposes certain legal obligations on the executives and staff of these companies that are closely linked to the conflict. Specifically, issues related to the provision of security services to companies in these situations of conflict, either public or private, require special attention (Prandi, 2011: 22).

Here comes the time to look deeper into the question of what it means for business to be "closely linked" to an armed conflict. A quick example that comes to mind would be when business personnel are caught up in direct violations of IHL, e.g., killing or harming civilians, destroying civilian property, and so on. Another example would be where a company works with an armed group involved in, for example, exploiting natural resources, or purchasing natural resources from that group, which results in indirectly supporting or furthering the war effort. Moreover, business activities may be considered closely linked even if they do not take place during actual fighting or on the physical battlefield, and even if the business did not actually intend to support a party to the hostilities and claimed to keep neutrality.

David Hughes suggests three ways in which business actions may be linked to or could be perceived to be linked to armed conflicts (2020):

1) Direct violation of IHL by breaching laws of war. For example, a company's security contractors attack and kill civilians (which happened in a famous Blackwater case that took place in Baghdad, Iraq during the Iraq war in September 2007);

2) Contributions to IHL violations committed by others, where business plays a secondary role and aligns with the conduct of others (parties of conflict) and/or wilfully ignores the possible consequences of being found complicit in IHL violations or war crimes. For example, a company produces missiles and sells them to a party of a conflict which commits war crimes with this weapon or in some way violates IHL by using this weapon. One more example from a non-international armed conflict and a company that wants to start a mining activity in this country. Such an activity will certainly influence local communities because they will have to be displaced. Thus, they protest the development of the mine. Since business needs force the

13. Some more cases filed against companies will be considered later in this article.

people into displacement, it pays the government to involve national armed forces to forcefully displace civilians;

3) Indirect or accidental contribution to IHL violations. For example, a business operating in a country-aggressor pays taxes there that go to purchase weapons and supplies for war efforts. This does not mean the business directly violates or supports a third party's violations of IHL. Rather, its conduct has an incidental impact, usually without the relevant personnel's knowledge or intent. Notably, though, there may still be risks – including possible criminal and civil liability risks.

To prevent the three abovementioned scenarios, business should be proactive and listen to what IHL rules are, how they influence or may influence company of a certain sector, as well as a geographical context of the company's operations. One more important thing for business to remember: one of IHL's goals is treating people, who find themselves on a territory of a conflict, with respect and dignity. Moreover, IHL tries to help achieve at least some level of humanity during an armed conflict. Thus, business, by understanding this, also understands why and how it should contribute to upholding or improving humanity if an armed conflict occurs on the territory of its operations.

Besides, IHL provides a range of protections to affected businesses, since people and buildings not involved in the fighting are protected under IHL. As long as a business maintains its "civilian" status, all of its personnel, facilities and assets will be entitled to protection against armed attacks. This is one of the benefits for business that takes into account IHL while operating in CAR areas. And it is not just some benefits focused on businesses themselves, it is also about leverage since we cannot deny the fact that business can bring changes and can influence for change, even in CAR area, sometimes even greater than during peaceful times. Corporations are a huge source of income, big employers, service and goods providers, taxpayers, and have their strategic value. Business should undoubtfully use this leverage to engage with stakeholders and deliver a certain message to parties of conflict.

4. How can companies contribute to IHL violations?

We previously mentioned that business' actions may be linked to an armed conflict and IHL violations and that better understanding of IHL may help business identify and mitigate those risks. Next, we should mention some of the most relevant conflict-related situations for business and how it may contribute to:

1) Direct and indirect harms to civilians;

2) Forced displacement of civilians;

3) Assets and property plundering;

4) Damage to the environment;

5) Military occupation.

Now let's look into each one of these situations separately, starting with the direct and indirect harms to civilians. The Fourth Geneva Convention protects civilians in areas of armed conflicts and occupied territories, as well as the Second Additional Protocol to the Geneva Convention. For instance, art. 13 of the first document states that the provisions of Part II cover the

populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.[14]. Furthermore, Chapter II of the Additional Protocol establishes measures in favour of women and children (Art. 13)[15].

Thus, business operating in conflict-affected areas should ensure compliance with these rules, and that it does not harm civilians directly or indirectly. Besides, it should take precautionary measures regarding its personnel, who may be considered to be "directly participating in hostilities". This concept entails that persons carry out acts that aim to support one party to the conflict by directly causing harm to another party, either directly inflicting death, injury, or destruction, or by directly harming the enemy's military operations or capacity. If and for as long as civilians carry out such acts, they are directly participating in hostilities and lose their protection against attack (ICRC, 2009).

Some of the examples of actions through which companies can be linked to IHL violations are the ones where they 1) provide financial or material support to a party to the armed conflict e.g., through the provision of jet fuel which is then used in air strikes on civilians (the *Kolmar* case); 2) provide advice to one of the armed forces on the conduct of hostilities, for example by providing technical advice on how to engineer environmental damage by destroying a dam; 3) manufacture or supply prohibited weapons to end users who the business knows will violate IHL (the *Van Anraat* case, the *BAE Systems* case), and 4) assist in mobilisation efforts by providing lists of eligible employees who then go on to commit war crimes (examples of Raiffaisen Bank, Auchan and Buzzi Unicem in Russia) (Business and Human Rights Compliance, 2023: 8-9).

Next follows the forced displacement of civilians. IHL does not give a specific definition of this term. As ICRC mentions, IHL uses a variety of terms that can collectively be referred to as acts of "forced displacement" (ICRC, 2019). For instance, art. 49(1) of the Fourth Geneva Convention prohibits individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, regardless of their motive[16]. However, the second paragraph of this article permits total or partial evacuation of a given area if the security of the population or imperative military reasons so demand[17]. Likewise, art. 17 of the Additional Protocol II to the Geneva Convention stresses that the displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand[18], while also highlights that they should not be compelled to leave their own territory for

14. Convention (IV) relative to the Protection of Civilian Persons in Time of War. *Geneva,* 12 August 1949. URL: https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949 (accessed 3 March 2024).

15. Footnote 10.

16. Footnote 14.

17. Ibid.

18. ICRC. International Humanitarian Law Databases. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. URL: https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977 (accessed 3 March 2024)

reasons connected with the conflict [19]. Such displacement can be either internal (within country's borders) or external (beyond country's borders).

Unlawful deportation or transfer constitutes a grave breach according to Art. 147 of the Fourth Geneva Convention and Article 85(4)(a) of Additional Protocol I. Besides, the forced displacement of the civilian population is a crime against humanity in both international and non-international armed conflicts under the Statute of the International Criminal Court (Art. 7(2)(d) of the Rome Statute). In the language of the Rome Statute, forced displacement is called a deportation or forcible transfer of population and it can be done through expulsion or other coercive acts from the area in which the population is lawfully present, without grounds permitted under international law [20].

As it has been mentioned *supra*, forced displacement may occur because of either a deliberate strategic move by one party to an armed conflict or due to the consequences of an armed conflict. For instance, the violence in Colombia during 1995-2005 studied by the ICRC shows that the forced displacement of civilians during the conflict took place as part of a military involvement and as a consequence of violence and fighting (ICRC, 2019: 24).

Interestingly, situations may occur where State armed forces and non-State armed groups employ to force civilians out of their homes. They do not explicitly order displacement, nor do they organize it, but they provoke it deliberately by using methods such as direct attacks against civilians, sexual violence, public beatings, threats against people's lives and safety, and direct attacks against civilian objects, including homes, places of work, infrastructure, and religious and cultural property (Pellathy, 2004: 13). In addition to other violations of IHL, these cases may also amount to forced displacement as prohibited by IHL (ICRC, 2019: 38).

Regardless of whether a conflict is ongoing or not, business may be interested in accessing some resources and/or parts of a territory, as well as establishing transport routes. Thus, companies should be cautious when it comes to the necessity of displacing certain groups of population to obtain such access and/or to establish the routes, as it may amount to the war crime of forced displacement. Moreover, if a government or other forces assists business or act on it behalf to move the groups of people, this can be considered as a force displacement as well.

An example of a company's involvement in forced displacement is the famous *Lundin* case. There, the company allegedly paid the Sudanese army and non-state armed groups to forcibly displace the local population from oil-rich areas, in order to secure their operations. Between 1997 and 2003, almost 200,000 civilians were forcedly displaced, and thousands died (TRIAL International, 2023). The company was and is now tried in Sweden for complicity in war crimes committed on a territory that nowadays is South Sudan.

The next situation relevant for business is assets and property plundering. Art. 33-34 of the Fourth Geneva Convention prohibit pillage, reprisals,

19. Ibid.

20. Rome Statute of the International Criminal Court, A/CONF.183/9. UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998: Rome), 17 July 1998. 88 p. URL: https://digitallibrary.un.org/record/260261 (accessed 4 March 2024)

indiscriminate destruction of property and the taking of hostages [21]. Additionally, rule 52 of the customary IHL prohibits pillaging in both international and non-international armed conflicts [22].

The Statute of the International Criminal Court proclaims that destroying or seizing the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war, constitutes a war crime in international armed conflicts (art. 8(2)(b)(xiii)) [23]. There is also a specific practice collected with respect to the pillage of cultural property (see Rule 40) and of property of the wounded and sick (see Rule 111), the dead (see Rule 113) and persons deprived of their liberty (see Rule 122) [24].

Pillage (or plunder) can be defined as the forcible taking of private property for private or personal use by an invading or conquering army from the enemy's subjects, which must be done [25].

For businesses operating in conflict zones, the possibility of being involved in plundering may include the acquisition of private and/or state property and/or an asset that is unlawful because it was done through the use of threats, intimidation or a position of power derived from the business's presence in the armed conflict. This is of especial importance for business that operates in the mining and oil & gas sectors.

We have already heard about some cases where business was charged with pillaging. For instance, the case of Michel Desaedeleer, a Belgian and American citizen, who allegedly participated in enslavement as a crime against humanity, and in the looting of "blood" diamonds as a war crime in Kono district, in the East of Sierra Leone during the civil war in the country in 1991-2002. It was alleged that the businessman was working with the rebel group (Revolutionary United Front), who needed him to export the diamonds outside the country (TRIAL International, 2016).

Taking into account the gravity of the situation, the United Nations Security Council adopted a resolution 1306 (2000) where it established a panel of experts to collect information about the link between trade in diamonds and trade in arms and related material (UN Security Council, 5 July 2005: § 19). As a result of the investigation and measures taken, Michel Desaedeleer was arrested in Malaga (Spain) in August 2015, following the European Arrest Warrant issued against him by the Belgian authorities. A month later he was transferred to Belgium, where he was indicted of crime against humanity and war crime and placed in preventive custody, but he did not get to be trialled since he died in custody the year after.

This is the case, which shows that businesses should take precautionary measures while entering into agreements with parties to an armed conflict, as well as while entering the markets during the conflicts since it could entail

21. Footnote 14.

22. ICRC. International Humanitarian Law Databases. Customary IHL Database, Rules. Rule 52 "Pillage" of the Customary International Humanitarian Law. URL: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule52 (accessed 4 March 2024).

23. Footnote 20.

24. Footnote 22.

25. The definition has been combined from the one given by Black's Law Dictionary, Fifth Edition. *West Publishing, St. Paul, Minnesota,* 1979. p. 1033, as well as the elements of Crimes that fall within the jurisdiction of the ICC (Article 8(2)(b)(xvi) and (e)(v)).

significant legal consequences. In the next chapter, we will see in more detail how business should assess risks and what it should do in CAR areas.

One more important situation where business may have its influence is the environment. Any armed conflict brings a significant damage and destruction to the environment, and since it is indispensable to the survival of the world's community, IHL also aims at protecting it. The Guidelines on the Protection of the Natural Environment in Armed Conflict prepared by the ICRC reveal that most major armed conflicts between 1950 and 2000 took place in biodiversity hotspots, putting delicate ecological balances at risk. Countries experiencing conflict are also on the front line of climate change: 12 of the 20 countries that, according to the ND-GAIN Country Index, are the most vulnerable to climate change are also sites of armed conflict (ICRC, 2020: 4).

If we look back at the armed conflicts that happened over the mentioned period, we will find lots of examples where nature was directly harmed. For instance, the use of herbicides during the Vietnam War, the burning of Kuwaiti oil wells during the 1990-1991 Gulf War, and the extensive deforestation during the conflicts in DRC. This all led to the necessity of heightened respect and protection of the environment.

Thus, IHL contains a number of rules prohibiting environmental damage. Among them is art. 55 of the Additional Protocol to the Geneva Convention, which stresses that care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage and that this protection includes a prohibition of the use of methods or means of warfare that are intended or may be expected to cause such damage to the natural environment and thereby prejudice the health or survival of the population [26]. Furthermore, art. 14 of the Additional Protocol (II) to the Geneva Convention prohibits attacking, destroying, removing, or rendering useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works [27].

There is no internationally agreed-upon definition of the "natural environment", as well as the one for the purposes of IHL. The above-mentioned Guidelines understand it as the natural world together with the system of inextricable interrelations between living organisms and their inanimate environment, in the widest possible sense [28]. The notion of the natural environment under IHL includes everything that exists or occurs naturally, such as the general hydrosphere, biosphere, geosphere, and atmosphere (including fauna, flora, oceans and other bodies of water, soil, and rocks) [29]. The natural environment moreover includes natural elements that are or may be the product of human intervention, such as foodstuffs, agricultural areas, drinking water, and livestock [30].

26. Footnote 10.

27. Footnote 18.

28. Ibid.

29. ICRC. International Humanitarian Law Databases. Article 55 – Protection of the natural environment, Commentary 1987 on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. § 2126. URL: https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-55/commentary/1987?activeTab=1949GCs-APs-and-commentaries (accessed 4 March 2024).

30. Ibid.

Companies can harm it directly by exacerbating pre-existing environmental or climate-related problems. And indirectly by, for example, participating in deforestation and mining on the territory of a conflict, providing advice and/or service to a party of an armed conflict on power station construction or sharing scientific knowledge on how to develop weapons that cause environmental harm.

The case that we will provide next did not happen in a CAR area but is an important one to see how a company can harm the environment. The case concerns three separate incidents related to Royal Dutch Shell (now Shell plc) and the oil spills in the Niger Delta in Nigeria (the first incident – an underground pipeline near Oruma in 2005; the second one – an underground pipeline near Goi in 2004; and the third one – a wellhead near Ikot Ada Udo). The claimants were Nigerian fish farmers, who held both Shell Nigeria and its parent company Royal Dutch Shell liable for negligent maintenance of the pipelines and wellhead, inadequate response to the spills and insufficient clean-up, thereby causing significant damage. They were supported in their claims by Dutch NGO Friends of the Earth Netherlands (Bernaz, 2021). Shell argued that the spills had been caused by sabotage. However, the arguments had not been proven beyond a reasonable doubt; thus, in 2021, 17 years after the first spill took place, the Court of Appeal in the Hague sided with the farmers in finding Shell's Nigerian subsidiary responsible for four out of six pipeline leaks covered by the lawsuit, as well as declaring that the parent company, Royal Dutch Shell, had violated its duty of care and would pay 15 million euros to affected communities in Nigeria (Vetter, 2021; Reuters, 2022).

The last conflict-related situation that was mentioned above is military occupation. As it is known and has already been mentioned above, IHL rules apply not only to armed conflicts, but also to the situations of occupation, which means that one state fully or partially invades another one and exercises effective control over this territory without the other party's consent. Taking into account the "internationality" of such a conflict, the rules of the international armed conflict (rather than a non-international one) apply. Besides, art. 1(4) of the Additional Protocol to the Geneva Conventions mentions that IHL rules also apply to the situations where people are fighting against alien occupation in the exercise of their right of self-determination [31]. Interestingly, IHL rules apply even if the occupation meets no armed resistance (art. 2(2) of the First Geneva Convention).

The determination of the existence of an occupation is a complex process due to the absence of a definition of occupation in the Geneva Conventions. Instead, the notion of occupation has only been sketched out by Article 42 of the 1907 Hague Regulations, which reads: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised" [32].

Businesses operating on an occupied territory must take into account IHL rules, since the occupied territory is also in a high risk of human rights violations and abuses. Moreover, the conflict-related situations that have

31. Footnote 10.

32. ICRC. International Humanitarian Law Databases. Article 2 – Application of the Convention, Commentary of 2016, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. *Geneva,* 12 August 1949. § 294. URL: https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016.

already been mentioned on the previous pages can also occur on an occupied territory, such as forced displacement; pillage and destruction of private property; exploiting natural resources etc.

Probably the most famous case of occupied territories is Palestine, which has been occupied by Israel since 1967. Israel builds settlements on Palestinian territory and displaces Israeli citizens there. Quite a few foreign governments, as well as the UN, recognize Israeli control over the territory as occupation. For instance, the UK government released a guidance on the risks for business in the occupied territories. It stresses that "there are clear risks related to economic and financial activities in the settlements, and we do not encourage or offer support to such activity. Financial transactions, investments, purchases, procurements as well as other economic activities (including in services like tourism) in Israeli settlements or benefiting Israeli settlements, entail legal and economic risks stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognised as a legitimate part of Israel's territory. This may result in disputed titles to the land, water, mineral or other natural resources which might be the subject of purchase or investment" (Government of the United Kingdom, 2022).

International organisations and NGOs around the world have been tracing the involvement of foreign companies in Israeli activities on Palestinian territory, especially ones related to settlements. Thus, they have found out that companies such as TripAdvisor, Booking, or Airbnb are profiting from and contributing to human rights violations that happen on this territory. TripAdvisor has an archaeological site listed as a tourist attraction, without warning visitors that it is managed by settlers. Visitors to the site make a financial contribution to the neighbouring settlement that manages the ruins. A visitor centre serves as a showcase for production and goods that are grown or manufactured by settlers from the surrounding area – including wine, herbs, olive oil and handicrafts (Amnesty International UK, 2021).

Same story with tech giant Hewlett-Packard. NGOs from all over the world highlight the company's role in providing key services and technology infrastructure that enable the Israeli military occupation of Palestinian lands and suppression of Palestinian human rights (Middle East Monitor, 2016).

Besides, the UN Human Rights Office issued a report on business enterprises involved in certain activities relating to settlements in the Occupied Palestinian Territory, in response to a request made by the UN Human Rights Council in resolution 31/36 (UN Human Rights Council, 2020). The Office created a database of 112 business enterprises based in France, Israel, Luxembourg, the Netherlands, the UK, and the US involved in such activities [33].

The abovementioned behaviour by companies in CAR areas pose certain risks to companies which will be discussed over the next few pages.

33. UN. Human Rights Council. Database of all business enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem. Report of the United Nations High Commissioner for Human Rights. UN A/HRC/43/71, 28 February 2020. URL: https://undocs.org/en/A/HRC/43/71.

5. Risks companies face for operating in conflict-affected areas

There are three groups of risks:

1) operational risks, related to the risk of loss from inadequate internal process, practice and system, or from external events;

2) reputational risks – business' reputation decreases due to rising negative perceptions on the part of customers, shareholders, partners, investors, regulators, and the community in general. This type of risk may negatively influence a company's value and profits;

3) liability risks – constitute a company's responsibility for the damages resulting from IHL breaches. It includes both criminal and civil liability and may even include other types of liability.

Starting with the operational risks, we should mention that they arise from the fact that a company has physical presence or suppliers in conflict regions. Operational risk summarizes the uncertainties and hazards a company faces when it attempts to do its day-to-day business activities within a given field or industry (Segal, 2023).

Such operational risks for businesses in conflict areas may include:

1) security and safety risks for staff and company's property;

2) difficulties in retaining stable workforce;

3) interrupted operations and supply chains;

4) involvement in criminal activity; and

5) decrease in the value of company assets.

Failure to manage the operational risks may lead to operational impacts, among which are suspension or closure of operations (due to the incapacity of keeping the process going); legal consequences (permit and/or license denials); community and workers' protests; investors' disinvestment and so on. Thus, managing this type of risks while operating in CAR areas and complying with IHL rules is essential first and foremost for the workers' and operational safety. Business should consider introducing risks management into their due diligence process to identify specific risks arising from operating in specific CAR areas.

We can find an example of the consequences of the lack of operational risks analysis in companies' operations in the Russian aggression against Ukraine that escalated in 2022. One month into the full-scale invasion, a missile strike on Kyiv city centre destroyed one of the biggest malls of the Ukrainian capital and killed at least one Leroy Merlin Ukraine employee who was at the premises during the attack [34].

Another example is the case of a Decree signed by the Russian president in April 2023. It authorises temporary control over foreign companies' assets based in Russia [35]. Such a temporary administration is to be handled by

34. An explosion in Kyiv killed an employee of Leroy Merlin, which continues to operate in Russia. *Ukrainska Pravda*, 21 March 2022. URL: https://www.pravda.com.ua/eng/news/2022/03/21/7333294/ (1 March 2024)

35. President of Russian Federation. Указ Президента Российской Федерации от 25.04.2023 г. № 302 О временном управлении некоторым имуществом. URL: http://www.kremlin.ru/acts/bank/49196 (accessed 1 March 2024).

Russian Federal Agency for State Property Management (*Rosimushchestvo*). Since April 2022, four companies have already fallen victim to this decree, among them Unipro with Fortum in April 2023 (Ljunggren, 2023) and Carlsberg with Danone in July 2023 (Agence France-Presse, 2023).

Interestingly, according to the decree, it does not deprive owners of their assets. The external management is a temporary measure, which just means that the owner does not have rights to take management decisions (from a civil law perspective, the owner just loses the power to dispose the property but keeps the other two – possession and use) [36].

Such a decree is a first step towards the establishment of a basis for future adoption of expropriation legislation, which will jeopardise companies that are still staying in Russia.

As for reputational risks, we should stress that it has the effect of reducing public trust in a company. It may have a detrimental impact on a company's reputation and lead to negative perceptions by customers, shareholders, partners, investors, media, and other internal and external stakeholders.

Such risks may include:

1) negative public and media attention;

2) divestment of investors and decrease in share prices;

3) cessation of business relationships;

4) boycotts from customers;

5) being target of CSOs;

6) adverse impacts on operations far from this specific CAR area;

7) loss of new opportunities and markets;

As it has already been mentioned above and will be stressed again, conducting responsible business helps them to establish a strong connection and dialogue with employees, local communities, consumers, investors, and other stakeholders. Besides, the higher the reputation of a company on a certain territory, the higher the probability that that company will be able to use leverage in its activities in CAR areas and positively influence the conflict.

Just to exemplify the reputational risks for companies, we can mention the recent case of Mondelez International, a famous American confectionery and other food products company, which continued operations in Russia since the beginning of the full-scale military invasion of Ukraine, and moreover tripled its profits there [37]. In late May 2023, it was designated by the Ukrainian National Agency on Prevention of Corruption as a war sponsor [38]. Two weeks later, the company faced a Nordic backlash over continued business operations in Russia. SAS airlines and Norwegian Air, railway group SJ, hotel chain Strawberry, retailer Elkjop, shipping group Fjord Line, and the

36. Ibid.

37. KSE Database. Mondelez International. URL: https://leave-russia.org/mondelez (accessed 1 March 2024)

38. NAPC. Mondelez International. URL: https://sanctions.nazk.gov.ua/boycott/30/ (accessed 1 March 2024)

Norwegian Football Association were among those announcing that they would stop selling Mondelez products, which had been their official partners [39]. Moreover, in January 2024, Sweden's Royal House announced the removal of Mondelez' product Marabou from its list of suppliers because of the NACP international sponsor of war list [40].

The relevance of the risks can vary depending on the sector, company size and location. For example, the risk of a factory being targeted by an aggressor country is higher if it manufactures weapons or important components for them. Another example is a telecommunication company, which may be the target of an attack so that the occupational forces could stop transmitting the oppositional views to the population. We would argue that the "riskiest" areas are energy and mining, telecommunications, technology, defence, banking & finance, and agriculture.

Lastly, we should discuss the liability risks for companies [41]. If we look back at the history of humankind, we will find examples of companies being brought to responsibility for contributing to gross human rights violations, war efforts and collaborating with armed forces. It all started with the so-called "economic" cases after the World War II when German business executives from heavy industry and chemical sector were tried as well for their collaboration with the Nazi regime since 1930s and up until the end of World War II. It was believed that the businessmen were among those who financially and politically supported Adolf Hitler and his arrival to a position of Chancellor of Germany in 1933. They accepted the new "Aryanisation" processes at their entities, by firing Jewish employees, seizing foreign industrial property in countries occupied by Nazi and used forced labour [42].

The economic case had several main aspects: 1) the prosecution believed that some industrialists had played a role in the conspiracy to launch an aggressive war; 2) most of industrialists had been involved in the Aryanisation of industry; 3) some industrialists took advantage of plants and other property that had been occupied by the country; and 4) business recruited and deployed around 5 million slave labourers, part of whom had been work-to-death labour supplied by the Nazi extermination camps (Bernaz, 2017: 66-67).

The *Flick*, the *I.G. Farben*, the *Krupp*, the *Ministries* and the *Zyklon B* cases will be forever entered into history as the first trials of business for complicity in human rights abuse and international crimes.

We should start by understanding what the phenomenon of complicity is. The commentary to Principle 17 of the UNGPs mentions that complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties (UN, 2011: 18-19). Complicity has both non-legal and legal meanings. In the first one, business enterprises may be perceived as being "complicit" in the acts of another

39. Reuters Staff. Oreo-maker Mondelez faces Nordic backlash over Russia business. *Reuters,* 12 June 2023. URL: https://www.reuters.com/article/ukraine-crisis-mondelez-intl-nordics-idAFL8N3830M3 (accessed 1 March 2024).

40. Swedish royals reject chocolate brand active in Russia because of war, *European Pravda*, 25 January 2024. URL: https://www.eurointegration.com.ua/eng/news/2024/01/25/7178195/ (accessed 1 March 2024).

41. Taking into account the complexity of the liability risks that company face and a word-limit of the article, we will give only a brief introduction into the topic.

42. For more on the topic of the German businessmen trial, see, Ashby Turner Jr. (1985: 525).

party where, for example, they are seen to benefit from an abuse committed by that party. And as for the latter, the commentary refers to the fact that most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime (UN, 2011: 18-19).

The key word is "knowingly", meaning that a company is complicit in human rights violations if it "knows" it is providing "assistance" to an actor, and the "substantial effect" of the assistance results in a human rights violation (Natour, Nestor, 2011). Interestingly enough, at the national level the main focus falls on knowledge, intent and causation (Zerk, 2014: 24-25).

The International Commission of Jurists prepared several volumes on corporate complicity and legal accountability. There, in Volume 1, the authors highlight that a prudent company should avoid a certain conduct, because it crosses a threshold beyond which the company and/or its individual representatives could be held responsible under criminal law and/or the law of remedies, for complicity in gross human rights abuses committed by a government, armed group, or other actors (International Commission of Jurists, 2008: 3). They should avoid conduct if it: 1) enables the specific abuse to occur, meaning that the abuses would not occur without the contribution of the company; 2) exacerbates the specific abuses, meaning that the company makes the situation worse, including where without the contribution if the company some of the abuses would have occurred on a smaller scale, or with less frequency; 3) facilitates the specific abuses, meaning that the company's conduct makes it easier to carry out the abuses or changes the way the abuses are carried out, including the methods used, the timing or their sufficiency (International Commission of Jurists, 2008: 9).

Besides, such conduct should be avoided also if a company and/or its employees wish to enable, exacerbate, or facilitate the gross human rights abuses or, even without desiring such outcome, they know or should know of the risk that their conduct brings, or are wilfully blind to such risk. Lastly, the company should avoid such conduct if it and/or its employees are proximate to the principal perpetrator of the violations or the victims of the violations (International Commission of Jurists, 2008: 9).

Summarising, we should outline the key elements of complicity, among which, 1) mental element (*actus reus*) – what a company and/or businessperson has done; 2) proximity (*mens rea*) – how close to the abuses, in time and space the company and/or businessperson was; and 3) mental element – the state of mind of a person when they acted or refrained from acting.

This mental element consists of three test standards, among which, 1) knowledge which was mentioned above, and which means that a company and/or a businessperson knew of should have known about the violation being committed (this standard was applied considered sufficient to hold company accountable in economic trials of German industrialists after the World War II. It was also applied International Criminal Tribunal for Rwanda in *Akayesu* judgement, by the International Criminal Tribunal for the Former Yugoslavia in the Furundzija *case*, it can also be traced in the formulation of the art. 25(3)(d) of the Rome Statute and the Customary IHL); 2) intent – whether the company and/or businessperson shared the intent of the main perpetrator and 3) purpose – whether they have acted purposefully (the so-

called compromise between the first two standards can be found in the art. 25(3)(c) of the Rome Statute and some cases in the USA, such as *Talisman*).

Lastly, we should mention that to be able to sue company for the violation of IHL rules, three fundamental elements of civil liability should be met – a wrong, damage, and the causal relationship between the first two. Such violations can occur as a result of a company's actions or of actions of others (a company's employees or other entities, other companies, armed groups, or even a state).

As for the company's liability for the actions of others, it can be held responsible (at least partially), but certain conditions have to be met – vicarious liability and complicity (Mongerald, 2006: 677-679). Vicarious liability is a principle of international private law that states that a principal is responsible for the acts of his agents. For liability to arise, three conditions must be cumulatively met, namely: a wrongful act on the part of the employee, a relationship of subordination, and the existence of damage caused by the agent in the exercise of his functions (Mongerald, 2006: 679). The existence of subordination does not necessarily mean the existence of a contract between an employee and his/her employer. What is needed to exist is the authority of a "principal" over his "agent". This principal must have power of supervision, authority, and control over the way in which the agent's work is carried out (Mongerald, 2006: 679). The establishment of subordination in the relations between employer and employee may not provoke that many difficulties, what is quite tricky is the relations between a company and a sub-contractor and the question of whether such relations have subordination since the sub-contractor possesses a certain independence from the contracting company and is often incompatible with the degree of control required for the presumption of the principal's liability to apply (Baudouin, 1994: 361-363). Thus, only if it can be proven in a certain way that a contracting company retains a degree of control over its sub-contractor's activities, then the principle can be applied.

Since complicity, as the second condition that should be met, has already been discussed above, we should now briefly look into the existing case law on the topic. If we look at the post-tribunal world, we will notice that there has not been much development on the attempts to hold companies accountable, although atrocities and conflicts were happening around the world and that companies were present in these CAR areas. However, we can find some cases where business have already been charged and found complicit in war crimes. Fortunately, or not, so far, such cases have mostly happened in national jurisdictions since the adopted version of the Rome Statute excluded the proposals to try companies in the ICC. However, what should be stressed is the fact that the art. 25 of the Rome Statute permits prosecution of companies' directors. Although there are no cases against businessmen in the ICC, the Prosecutors of the ICC do support the idea of the amendments to the Rome Statute in order to allow prosecution of corporations (Kolieb, Letch, 2022).

However, some of the international tribunals did hear cases of businessmen involved in human rights violations and abuses. The tribunal that demands our close attention is the International Criminal Tribunal for Rwanda. One of the businessmen indicted under the proceedings was Félicien Kabuga, a multimillionaire businessman from Rwanda and a president of the *Comité d'initiative of Radio Télévision Libre des Mille Collines*, a creator of the National Defence Fund which allegedly funded Interahamwe (a youth militia group which was physically executing the genocide), and a creator of a private radio station "Radio Machete" which played an important (in a negative way) role in genocide as well. He was indicted in 1998 for his alleged

role in spreading anti-Tutsi messages with the aim of promoting crimes against Tutsis during the genocide in Rwanda and was charged with direct and superior responsibility for genocide, complicity in genocide, attempt to commit genocide, conspiracy to commit genocide, incitement to commit genocide, and crimes against humanity for acts of extermination and persecution [43]. This case marks a modern approach to the reality in which corporate entities can commit acts of genocide and that collective accountability for mass violence does exist [44].

Two more cases that are crucial for us while we speak about ICTR are the case of Michel Bagaragaza, a businessman and government responsible for the Rwandan tea industry, and Alfred Musema, a director of the Gisovu Tea Factory. The first businessman controlled 11 tea factories with approximately 55,000 employees [45]. The prosecution claimed that Bagaragaza used his supreme position and aided in targeted killing of more than 1000 Tutsi who had sought refuge at Kesho Hill and Nyundo Cathedral [46]. Besides, he participated in meetings with the bourgmestre and the chief of *Interahamwe* where he found out about the planned attacks and moreover, he authorised that vehicles and fuel from two Tea Factories be used to transport members of the *Interahamwe* for the attacks, that personnel from the factories participate in the attacks, that the attackers be provided with heavy weapons, and lastly, he provided financial support to *Interahamwe* to buy alcohol for its members to maintain their motivation to participate in killings in the future [47]. He pleaded guilty and was sentenced to eight years of imprisonment [48].

The second businessman mentioned in the previous paragraph, Alfred Musema, was charged with genocide or, in the alternative, with complicity in genocide, conspiracy to commit genocide, and various crimes against humanity and war crimes [49]. The prosecution claimed that he had personally participated in a number of crimes and had aided in the crimes of others by providing motor vehicles, uniforms, and other property belonging to the Gisovu Tea Factory for use in attacks, transporting armed forces to the site of attacks, and directing and encouraging violence [50].

This case is an example of the subordinate relationship between Musema and his employees since he had legal and financial control over the employees of this tea factory, particularly through his power to appoint and remove them from their positions at the Tea Factory, and thus, by virtue of these powers, he was in a position to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at

43. International Justice Resource Center. Kabuga. URL: https://ijrcenter.org/international-criminal-law/ictr/case-summaries/kabuga/.

44. See, *inter alia*, Della Morte (2005: 1019-1033) and Bratspies (2005: 9-37).

45. International Criminal Tribunal for Rwanda. *Prosecutor v. Michel Bagaragaza*, ICTR-05-86-S Sentencing Judgement, 17 November 2009. § 18. URL: http://www.haguejusticeportal.net/Docs/ICTR/Bagaragaza_Sentencing_Judgement_EN.pdf (accessed 5 March 2024).

46. Ibid., § 20.

47. Ibid., § 25.

48. Ibid., § 44.

49. International Criminal Tribunal for Rwanda. *Prosecutor v. Afred Musema*, ICTR-96-13-T, Judgement and Sentence, 27 January 2000. URL: https://www.refworld.org/cases,ICTR,48abd5791a.html (accessed 5 March 2024).

50. Ibid., § 5.

the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. He was also in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms, or other Tea Factory property in the commission of such crimes [51]. This case shows that the civil responsibility doctrine can be applied to the criminal cases too.

Despite of the breakthrough in holding business accountable for involvement in atrocities, the ICTR was criticised for the fact that the prosecutors had not paid any attention to foreign companies involved in the country, e.g., banks and arms companies (Baars, 2019: 320-323).

Descending to the national level, we can notice that in recent times, the domestic courts have become quite proactive in what concerns corporate prosecutions. National legislations allow states all over the world to hold companies criminally liable for human rights and IHL rules violations. Besides, the adoption of the Rome Statute and the establishment of the ICC catalysed states to introduce legislation on international crimes that, taken together with national rules of criminal law, permits the states to prosecute companies for international crimes (Kyriakakis, 2021: 168).

Dutch courts are on the forefront of holding businessmen accountable for contributing to human rights violations in CAR areas. Among such cases are Frans van Anraat and Guus Kouwenhoven. The former was tried and convicted for selling the chemical substance thiodiglycol to Saddam Hussein's regime in Iraq during the 1980s, which was later used in the manufacture of mustard gas used in the war against Iran and as a part of a genocide of Kurdish population in northern Iraq [52], while the latter was tried and convicted for aiding and abetting war crimes committed by former Liberian President Charles Taylor (TRIAL International, 2016).

As for the cases related to corporate prosecution, we should start by saying that some countries around the world have in their criminal law the possibility to prosecute not only natural persons, as the Rome Statute provides, but also the legal ones. Here comes the question: why is individual responsibility not enough and why do we need to prosecute the whole company? There are several reasons for that. First, because crimes committed by companies cannot always be reduced to a single person, since each one of us individually cannot properly embody a corporate decision and its outcomes (Fisse, Braithwaite, 1993: 31) As an example, the authors refer to situations where the corporate policies that led to violations have been devised by individuals who no longer work in this company (Fisse, Braithwaite, 1993: 46). Secondly, punishing a company directly and not an individual, would have lasting results, since its prosecution can serve as an incentive to the corporation to internally analyse and change its processes which would influence company's conduct in the future (Fisse, Braithwaite, 1988: 489). Besides, in all situations, we tend to blame the specific company. We do not say a CEO "A" of a company "X" is responsible for the illegal displacement of civilians during the civil war in country "C"; we rather discuss this certain crime in relation to the actions of a company "X" without paying attention to whom the CEO of this company is (Ramasastry, 2002: 97). This argument is being taken further regarding corporations with developed structure. It has been suggested that in case subsidiaries of such a company

51. Ibid., § 880.

52. International Crimes Database. *Public Prosecutor v. Frans Cornelis Adrianus van Anraat*. URL: https://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/ (accessed 5 March 2024).

have been accused of violations, the litigation should also be initiated against the parent company since it is the one that has the power to impact the whole corporate structure (Clough, 2005). And thirdly, the criminal prosecution would allow access to corporate assets as a mean of reparations to victims (Kyriakakis, 2007).

Additionally, it should be mentioned that countries also tend to adopt the principle of universal jurisdiction for breaches of international criminal law. Its idea lies in the fact that national criminal legislation provisions allow countries to investigate and prosecute international crimes, even when such crimes are committed outside their national territory, and regardless of whether the perpetrator or the victims are nationals of this specific state or not (De Schutter, 2006: 3). Thus, companies and/or businesspeople who commit international crimes may be prosecuted in more than one country, despite there being no obvious or direct link between this specific country, and the alleged crime, and the alleged perpetrator.

Several cases that should be highlighted here are: 1) the *Anvil Mining* case (the Australian company got in a prosecution spotlight for the alleged role in the Congo massacre of 70 people in 2004) (Geoghegan, 2007); 2) the *Lafarge* case (the company was accused of making arrangements with the Islamic State and several other armed groups in order to keep its Jalabiya cement factory plant open and running between 2012 and 2014 in northeastern Syria)[53], and 3) the *Amesys* case (the company is being accused of complicity in the Libyan regime's torture by providing software technologies that permit the state to track, identify, locate, and repress political dissidents) (TRIAL International, 2023).

6. Conclusions

Most armed conflicts, both past and present, are based on or at least closely related to the economic interests of the parties to such confrontations or stakeholders involved in the conflict.

Companies doing business in conflict-affected areas or trading with businesses that are involved in armed conflict face a number of complex human rights risks and may also be directly or indirectly involved in crimes that could be qualified as international crimes such as war crimes, crimes against humanity or genocide. In these situations, the environment becomes volatile and thus, the "classical" due diligence process gets less efficient by the fact that the context of the conflict is subject to rapid changes. That is why companies should conduct hHRDD which adds to the "ordinary" HRDD a conflict-sensitive analysis.

In addition to the hHRDD process companies should comply with IHL, since it will allow them to better understand the situation in which they operate, what guarantees and obligations they have in such complex environment. Companies, their personnel and property which are not directly linked to a conflict enjoy the protection under Geneva Conventions from deliberate or indiscriminate attacks, as well as from pillaging and violations of private property. Besides to the fact that companies have protection under IHL, compliance with its norms will help businesses prevent harming the communities where they operate and expose themselves to unnecessary

53. ECCHR. Lafarge in Syria: Accusations of complicity in grave human rights violations. URL: https://www.ecchr.eu/en/case/lafarge-in-syria-accusations-of-complicity-in-grave-human-rights-violations/ (accessed 5 March 2024).

operational, financial, and reputational risks, as well as serious criminal and civil liability at both national and international levels.

Since the military tribunals in post-World War II, attempts have been made to hold accountable businessmen involved in human rights violations by International Tribunals, among which is the International Criminal Tribunal for Rwanda. Additionally, companies' directors can be tried in ICC under art. 25 of the Rome Statute.

Regardless of some developments at the international level, our article suggests that in recent times national courts have become much more active in bringing companies to criminal liability for violations of human rights and IHL.

The importance of the development of the possibility of bringing legal entities into criminal liability is explained by several reasons:

1) that crimes committed by companies cannot always be reduced to one person, even if it is a director;

2) direct punishment of the company has long-term results, since it is the persecution of the corporation that can serve as an additional incentive for the implementation of hHRDD processes, which can positively affect companies' behaviour in the conflict zone;

3) criminal prosecution allows access to corporate assets as a means of reparation for victims.

Lastly, it should be noted that nowadays countries also tend to accept the principle of universal jurisdiction over violations of international criminal law, which allows them to prosecute international crimes, even when such crimes are committed outside national territory, and regardless of whether the perpetrator or victims are citizens of that state or not.

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