Book Review


‘Conflict situations are one of the most difficult circumstances for human rights... The most egregious business-related human rights abuses also take place in such environments’.1 Despite this, ‘the business and human rights world has paid relatively little attention to the specific obligations on corporations in times of armed conflict.’2 Since adopting the UN Guiding Principles on Business and Human Rights (2011), the doctrine and bodies of international human rights (HR) law have been widely used to address the impact of business activities on HR. However, the question of respect for HR by businesses in armed conflicts, and thus the question of their respect for international humanitarian law (IHL), has not received the same attention. Similarly, the issue of business and HR has been absent in IHL discussions. This absence may be because the focus is on states and armed non-state actors when considering armed conflict. They are the ‘main’ actors insofar as they participate directly in hostilities, but they are not the only actors; ‘businesses are not neutral actors; their presence is not without impact. Even if the business does not take a side in the conflict, the impact of their operations will necessarily influence conflict dynamics.’3 Companies can commit international crimes through participation in HR/IHL violations.


Jelena Aparac's book *Business et droits de l’homme dans les conflits armés* (Éditions Bruylant, 2021) focuses on the implications for companies who contribute to the commission of international crimes in non-international armed conflicts. Aparac analyses the contributions of companies to conflict causes and the maintenance of violence therein and attempts to build a case for the international criminal liability of companies that contribute to the commission of such crimes.

Aparac pays special attention to ‘core crimes’: war crimes, crimes against humanity, and genocide; and three categories of companies: private banks, extractive industries, and private military/security companies. Due to the nature of their goods or services, these companies are more likely to be involved in IHL-regulated activities and commission of international crimes. However, Aparac clarifies that any company may find itself in this position. For example, the evolution of conflicts resulting from technological developments has led to so-called ‘hybrid wars’ that may see technology companies as contributors to the commission of international crimes.

To facilitate her analysis, Aparac divides the book into two parts. First, how companies can be involved in non-international armed conflicts and therein commit international crimes. Second, how existing legal mechanisms, mainly international criminal law (ICL), can hold multinational corporations (MNC) accountable for international crimes in such conflicts. Thus, in the *Première partie*, she establishes the legal basis for corporate responsibility challenging the principle *societas delinquent non potest* (Title I, chapter I), showing that MNC effectively can be armed conflict actors (Title I, chapter II).

In chapter I, Aparac argues that, under international law, a company can commit international crimes, which she supports by noting the Nuremberg and Allied Military Tribunals, highlighting the need to prosecute certain businessmen for complicity in war crimes and crimes against humanity. Based on analysis of cases such as *Flick*, *IG Farben*, *Krupp*, and *Zyklon B*, Aparac notes military courts recognized that ‘a legally constituted business … may commit crimes for financial gain’ (p. 11); however, attribution of criminal acts to the

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6 Literally, ‘a society cannot commit a crime’, commonly read in English as ‘corporations cannot commit a crime’.
companies was via individual company director liability. Based on this limit, Aparac explores international corporate responsibility: the ‘realistic way’ via manager liability (p. 389), the ‘positive complementarity’ way via national jurisdictions and legislation (p. 435), and via complementarity between civil liability and ICL (p. 444).

In chapter II, Aparac argues that IHL may apply to companies. IHL, in principle, considers businesses as civilians when carrying out usual activities (i.e., those unrelated to hostilities or involving employees embedded in any armed forces). However, for IHL to protect civilians, they must abstain from ‘direct participation’ in hostilities. Direct participation refers to specific acts intended to support one party to the conflict by causing direct harm to another party; although, a company does not qualify as a direct participant merely by providing logistical and financial support to a belligerent (p. 201). Furthermore, IHL applies to acts related to armed conflicts, so if the activities of an enterprise are linked to the hostilities, IHL will be applicable to them. Aparac argues that, although a company as a legal person does not have a particular role under IHL, rules applicable to employees also apply to the company. Company employees can qualify as combatants or civilians; their status is related to that of their company, just as a rebel’s status is tied to that of their group (p. 181). In this sense, an employee’s IHL violation during direct hostilities paves the way for their company’s criminal liability.

However, if a company commits international crimes when participating indirectly in hostilities, IHL will not apply, as long as the company does not participate directly. In such cases, Aparac proposes using ICL; the normative framework provided by ICL could intervene where IHL finds its limits (p. 203).

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7 ‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’. *France and ors v Göring (Hermann) and ors*, Judgment, and Sentence, [1946] 22 IMT 203.
10 Philip Spoerri (n4) 1127.
ICL focuses on the relationship between crime and armed conflict. Armed conflicts create environments conducive to crimes by companies, and a common law criminal act in such a context could become an international crime if all the elements of that specific international crime materialize.

Having established that companies can contribute to the commission of international crimes by participating directly or indirectly in armed conflict, Aparac addresses the imputation of acts that may give rise to MNC international criminal responsibility, i.e., how to attribute a crime to a company (Title II). The author points out that the key to accusations must lie in their contribution to the execution of international crimes (Chapters I & II). For this purpose, the author argues that ICL is the most appropriate way to judge companies in their international dimension.12

To exemplify this appropriateness, Aparac proposes a hypothetical exercise, presenting the elements that characterize war crimes, crimes against humanity, and genocide and analyzing these elements in actual MNC cases. She aims to establish that MNC can fulfill the conditions to recognize a natural person as responsible for the commission of an international crime (actus reus and mens rea). Aparac studies three cases: the Blackwater case in Iraq (war crimes); the United States v. BNP Paribas (crimes against humanity); and the Presbyterian Church of Sudan et al. v. Talisman Energy (genocide), and concludes that the companies were guilty. She also highlights the legal challenges for MNC international criminal liability, particularly the lack of jurisdiction of a competent international court.

In the Deuxième partie, Aparac examines implementing MNC international responsibility, focusing on international criminal responsibility, before the International Criminal Court (ICC) (Title I, chapter I) and in a new generation of international jurisdictions (Title I, chapter II). Aparac criticizes international law’s lacking adaptability regarding MNC international criminal responsibility and the pretext that they do not have legal personality. Instead, she proposes that as individuals have rights, obligations, and legal personalities under international law, MNC can enjoy the same. As such, she argues, international criminal trials could be the most appropriate forum for achieving corporate responsibility. In fact, in post-conflict scenarios like in Colombia and Argentina, victims demanded that the truth about private companies’ involvement in gross HR violations is recognized and that companies or their managers be assigned responsibility.

12 Among other things because ICL serves to sanction IHRL; it is an implementing arm of IHRL. Philip Grant, Robert Kolb, Droit international pénal: précis, (1st ed, Bâle Helbing & Lichtenhahn 2008).
However, there is a risk that Aparac overstates ICL’s potential. Indeed, expectations of ICL establishing MNC legal liability arise from a lack of alternatives. Furthermore, ICL only addresses conduct that amounts to an international crime. Therefore, only certain corporate conduct sufficiently links to the commission of HR or IHRL violations, and, in turn, only some of these violations would constitute international crimes. ICL thus covers only a segment of the problem.

Regarding the limits of the ICC in establishing MNC international responsibility, beyond lack of jurisdiction to try legal persons (Rome Stat. Art. 25(1)), the ICC can only handle a fraction of international criminal cases since it has jurisdiction only over international crimes which, according to the Rome Statute, are genocide, war crimes, and crimes against humanity. Criminal conduct that does not constitute one of these crimes falls outside the competence of the ICC. As such, it focuses on persons directly implicated in crimes. An extra obstacle is that corporate executives often play a supportive rather than an active role in crimes and are usually located at a considerable distance from the scene of the crimes. In response, Aparac analyses alternative ways to establish company criminal liability, e.g., the possibility of introducing amendments to the Rome Statute (p. 403).

Aparac emphasizes that, although ICC jurisdiction is limited to natural persons, there are provisions that allow for the prosecution of criminal conduct committed by corporate officers on behalf of a company. She examines the Joshua Sang case in Kenya and the Chiquita case in Colombia. Both cases involved criminal responsibility of MNC executives. The Chiquita case shows that 1) non-financial, military, or extractive companies can be involved in the commission of war crimes, and 2) a company director’s criminal liability could become a complementary way to hold companies accountable. Chiquita became the first North American company charged with making financial arrangements with terrorists after paying the AUC (a paramilitary group) approximately $1.7 million in ‘security’ fees between 1997 and 2004, in violation of anti-terrorism legislation. Following the indictment, the company signed a plea agreement on 19 March 2007, admitting to having dealt with a

14 Ibid 12.
terrorist group.\textsuperscript{17} The real problem with such ‘financing’ goes beyond the payments themselves; from an HR and IHL perspective, the concern is what the AUC did or could have done as armed actors thanks to the economic contributions of the company.\textsuperscript{18}

This book is essential for academics, practitioners, HR defenders, and civil society organizations interested in corporate HR abuses in armed conflict. Aparac provides legal tools to advance the accountability of business actors linked to HR and IHL violations that constitute international crimes. It also is a must-have for legal and HR teams of companies developing economic activities in armed conflicts; they must consider such context and that their conduct can support the commission of international crimes, compromising their responsibility. Finally, this book is of interest to states, so that in implementing national laws on corporate HR due diligence and negotiating legally binding instruments to regulate MNC, they can consider criminal law tools to hold companies accountable.

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\textsuperscript{18} Ibid 15.