International Law and Corporate Participation in Times of Armed Conflict

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This Article explores the overlapping conceptions of "international legal personhood" in international criminal law and international investment law in light of the December 2016 International Ccntre for Settlement of Investment Disputes Award of Urbaser v. Argentina. It is an effort to parse out and test potential standards for investor-to-State liability for corporate participation in mass atrocities and human rights violations, particularly in instances of armed conflict. In exploring the question of when a corporation can be held financially liable for human rights violations under international investment law, this Article suggests that, while the legal status of direct corporate subjectivity remains opaque, Urbaser invites application of international criminal law liability doctrines as "boundary crossing" tools that arbitrators can use to further define the contours of corporate subjectivity to international law.

INTRODUCTION

This Article explores the overlapping conceptions of "international legal personhood" in international criminal law (ICL) and international investment law (IIL) in light of the December 2016 International Ccntre for Settlement of Investment Disputes (ICSID) Award of *Urbaser v. Argentina.* It is an effort to parse out and test potential standards for investor-to-State liability for corporate participation in mass atrocities and human rights violations, particularly in instances of armed conflict. In exploring the question of when a corporation can be held financially liable for human rights violations under international investment law, this Article suggests that *Urbaser* invites application of ICL

liability doctrines as "boundary crossing" tools that arbitrators can use to further define the contours of corporate subjectivity to international law.

The underlying assumption of this Article is that, as a matter of global public policy (if such a thing can be said to exist),[1] an international legal system that encourages legal persons to limit and even decrease the degree to which they may unintentionally participate in state-sanctioned violence by holding them financially liable to states for human rights violations and crimes against humanity (CAHs) is preferable to one in which only the state and natural persons are held accountable, i.e., the present status quo. This Article seeks to explore how such a system may manifest through judicial or arbitral lawmaking. Drawing from the rich practical foundations fostered by the International Court of Justice (ICJ), the International Law Commission (ILC), and relevant IIL scholarship, this Article takes the position that an "all or nothing" approach to granting individual rights and obligations to entities under public international law fails to recognize the intrinsic differences between legal and actual persons and thereby dodges important legal and ethical questions. With that in mind, this Article focuses on the question of how to grant appropriate rights to legal entities under IIL, and how to balance those rights against obligations in situations in which human rights are violated or crimes against humanity are committed.

The current IIL regime faces widespread legitimacy concerns. Issues arising from the "vagueness" and lack of predictability in IIL standards have ushered in the onset of what has been called a "crisis of legitimacy" for IIL.[2] In recent years in particular, and especially since the Argentinian financial crisis,[3] arbitral awards have contributed to growing concerns regarding the balance and fairness of claims. A large part of the legitimacy debate centers upon the single directionality,

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[1] *See generally* U.N. DEV. PROGRAM, GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE TWENTY-FIRST CENTURY (Inge Kaul, Isabelle Grunberg & Marc A. Stern eds., 1999) (discussing the existence of global public policy based on the idea of global public goods).

[2] *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521–1625 (2005). *See also* Public Statement on the International Investment Regime of 31 August 2010, YORK UNIVERSITY OSGOODE HALL LAW SCHOOL, http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/ (last visited May 11, 2017) (describing the issues raised by this backlash, where pro-investor interpretations of investment treaties were critically questioned, and which recommended withdrawal or renegotiation of investment treaties).

[3] *See generally* José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse Into the Heart of the Investment Regime*, *in* THE YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY, 379–478 (Karl P. Sauvant ed., 2009) (providing a general overview of the Argentine financial crisis and its relationship to international investment law).

or "asymmetry", of claims that fall within the jurisdiction of arbitral tribunals.[4] This asymmetry is twofold: it manifests both procedurally and substantively. From a procedural standpoint, international investment law provides investors a cause of action against States to protect investments in a host State, but does not provide host States a cause of action against investors, and generally refutes attempts by States to bring counterclaims against investors.[5] From a substantive standpoint, international investment law does not impose substantive obligations on investors, but it does grant them rights. Indeed, as the ICSID in *Spyridon Roussalis v. Romania* put it:

> The Tribunal…considers that the [bilateral investment treaty (BIT)] limit[s] jurisdiction to claims brought by investors about obligations of the host State. The meaning of the 'dispute' is the issue of compliance by the State with the BIT…*the BIT imposes no obligations on investors, only on contracting States*.[6]

As a reaction to this asymmetry, calls for reform have prompted States to adopt new counterclaim clauses in investment treaties as a means to impose some obligations on States, at least insofar as their commitment to the investment treaty at issue is concerned.[7] However, thus far, these attempts have amounted to mere reflections of the *Roussalis* standard, some of which have been particularly creative. The *Roussalis* standard essentially places the investor at liberty to consent to counterclaims.[8] Even the defunct Trans-Pacific Partnership (TPP), with paragraphs devoted to counterclaims in its investment chapter,[9] implemented a

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[4] *See, e.g.*, Anne K. Hoffman, *Counterclaims*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID, 505–520 (Meg Kinnear et al. eds., 2015).

[5] This is a general rule, but in rare circumstances, tribunals have found jurisdiction to hear counterclaims. *See, e.g.*, Saluka Investments BV v. The Czech Republic, UNCITRAL, May 7, 2004, https://www.italaw.com/sites/default/files/case-documents/ita0739.pdf; *see also* Antoíne Goetz & Consorts and SA Affinage des Metaux v. Burundi, ICSID Case No. ARB/01/2, Award (June 21, 2012), https://www.italaw.com/cases/1487; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012), https://www.italaw.com/cases/767; *see also* Limited Liability Company AMTO v. Ukraine, SCC Case No. 080/2005, Final Award (Mar. 26, 2008), https://www.italaw.com/cases/79; RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14, Award, (Mar. 13 2009), https://www.italaw.com/cases/940.

[6] Emphasis added. Spyridon Roussalis v Romania, ICSID Case No. ARB/06/1, Award (Dec 7, 2011), https://www.italaw.com/cases/927.

[7] *See* 2015 Model Text for the Indian Bilateral Investment Treaty, ch. 14, art. 14.11, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf; *see also* Trans-Pacific Partnership Agreement, ch. 9, art. 9.19(2), https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text; *id.* at art.9.19(2) n.32 [hereinafter TPP].

[8] Hoffman, *supra* note 4; *see also* Christian Tietje & Kevin Crow, *The Reform of Investment Rules in CETA, TTIP, and Other Recent EU-FTAs: Convincing?*, *in* MEGA-REGIONAL AGREEMENTS: TTIP, CETA, TISA. NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC RELATIONS (Stefan Griller et al. eds., 2017).

[9] TPP, *supra* note 7 at ch. 9, art. 9.19(2).

similar asymmetrical standard through some tricky language in a footnote.[10] Notably, the counterclaim language of the 2015 Model India BIT[11]—which looked extremely promising for States—was eliminated in the 2016 version of that treaty.[12]

But in December 2016, in *Urbaser v. Argentina*, an ICSID tribunal drastically parted from this trend. The *Urbaser* Tribunal not only acknowledged the right of a host State to bring counterclaims not anticipated by the investor, implying a symmetrical nature to BITs; but it also affirmed the existence of obligations for investors.[13] *Urbaser* grounded both acknowledgments in general international law,[14] which prompts the present inquiry into how other branches of general international law may further inform IIL's approach in other contexts where a corporation is alleged to be financially liable to a State for human rights violations.

Under ICL, the leaders of States and military organizations can be held jointly liable as a "joint criminal enterprise" (JCE), a judge-made doctrine that first emerged from the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Tadić*.[15] One formulation of JCE—JCE III—is particularly controversial because it eliminates the individual *mens rea* element typically required to assign criminal culpability; it seeks instead to determine the JCE's "common purpose" and, subject to certain conditions, projects that purpose onto each participant in the enterprise.[16] In this sense, a JCE carries "international legal personhood" insofar as an enterprise is treated as an individual for *mens rea* purposes. By contrast, in the event that a corporate entity is involved in an armed conflict, it has been unclear whether those treaties or rules of custom that enable ICL to apply to private actors (such as the Genocide Convention) and to political entities (through JCE) also apply to corporate entities. The *Urbaser* decision moves toward an answer.

To this end, Part II of this Article provides a brief background on *Urbaser*, and Part III provides an overview of the debatable status of corporations as legal persons under international law. Part IV then explores how the *Urbaser*

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[10] *Id.* at ch. 9, n.32.

[11] *See, e.g.*, Grant Hanessian & Kabir Duggal, *The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?*, 32 ICSID REV. 216–26 (2016).

[12] *See* 2016 Model Text for the Indian Bilateral Investment Treaty, May 11, 2017, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

[13] *See* Urbaser v. Arg., ICSID Case No. ARB/07/26, Final Award (Dec. 7, 2016), http://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

[14] *Id.* at ¶¶ 1188–1190.

[15] Prosecutor v. Tadic, Case No. IT-94-1-A, Appeal Judgement, (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999).

[16] *See, e.g.*, Andrés Pérez, *Here to Stay? Extended Liability for Joint Criminal Enterprise as a Tool for Prosecuting Mass SGBV Crimes*, 19 ASIL INSIGHTS 13 (June 12, 2015), https://www.asil.org/insights/volume/19/issue/13/here-stay-extended-liability-joint-criminal-enterprise-tool-prosecuting (examples of JCE III articulations and current associated controversies).

obligations—what a colleague and I have termed "the *Urbaser* spectrum"[17]—contribute to a broader discussion on the limits of corporate legal personhood under public international law. Through a hypothetical application of an ICL-IIL hybrid standard for determining corporate *mens rea*, Part V suggests that, in times of armed conflict, the *Urbaser* spectrum provides an avenue through which corporate entities—and not merely individuals acting in their corporate capacity—are obligated not to contribute to Crimes Against Humanity, and Part VI provides three hypotheticals against which to test these obligations. Part VII concludes with a discussion on the implications of the obligations and the hypotheticals for investors and States.

I.
BACKGROUND ON *URBASER*

Argentina privatized drinking water and sewage services in the 1990s, which prompted a number of foreign companies to invest in providing those services.[18] In the early 2000s, during the Argentinian financial crisis, the Duhalde administration froze tariffs in a manner these and other foreign companies considered expropriatory. As a result, many foreign companies resorted to investor-State dispute settlement (ISDS) mechanisms established in Argentina's various bilateral investment treaties (BITs). *Urbaser* is the latest in a long line of controversial cases to join this saga.[19]

The Claimants, Urbaser and Consorcio de Aguas Bilbao Biskaia (CABB), were majority shareholders of Aguas del Gran Buenos Aires S.A. (AGBA), a water and sewer conglomerate. AGBA entered into a contract with the Province of Buenos Aires in December 1999.[20] The region to which AGBA provided

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[17] *See* Kevin Crow & Lina Lorenzoni Escobar, *International Corporate Obligations and the* Urbaser *Standard: Breaking New Ground?*, 36 B.U. INT'L L.J. 102–03 (2018). In that article, we articulate three standards for potential liability set out in *Urbaser* that are reproduced in this Article. We argue that, because the standards seem to punish only cartoonishly evil behavior, they are largely nominal. However, in that article, we explore the role of Corporate Social Responsibility, and the commitments of individual corporations to CSR, in the assessment of corporate functions in international arbitral tribunals, and we conclude that because *Urbaser* recognized a corporation's internal CSR standards as a measure for determining the aims of its behavior, *Urbaser* could be considered a small win for human rights activists.

[18] *See* Diego Petrecolla & Martín Lousteau, *FDI in Argentina in the 1990s*, 2 LATIN AMERICAN BUS. REV. 33–54 (2001).

[19] CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award (May 12, 2005), https://www.italaw.com/cases/288; BG Group PLC v. Arg., UNCITRAL Final Award (December 24, 2007), https://www.italaw.com/cases/143; TSA Spectrum de Argentina S.A. v. Arg., ICSID Case No. ARB/05/5, Award, (December 19, 2008), https://www.italaw.com/cases/1118; SUAR International SA v. Arg., ICSID Case No. ARB/04/4, Award (May 22, 2014), https://www.italaw.com/cases/1456. *See also* Urbaser v. Arg., ICSID Case No. ARB/07/26, Final Award, ¶ 49 (Dec., 7 2016), http://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf (recalling the cases that have derived from privatization of water and sewage services in several Argentine provinces).

[20] Urbaser held 27.4122% of the capital stock and CABB held 20%. *See* Urbaser v. Arg., ICSID Case No. ARB/07/26, Final Award, ¶ 61–62 (Dec., 7 2016), http://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

services had a population of about 1.7 million low-income inhabitants.[21] Only 35 percent of these inhabitants had drinking water services and only 13 percent had sewage services.[22] Argentina argued that one of the main purposes of the contract was to promote expansion of this coverage,[23] and indeed, it relied on the private sector for its technical and financial capacity to achieve this expansion.[24] The Claimants argued that Argentina's decision to freeze tariffs in 2002 negatively impacted the economic-financial equation that prompted AGBA to accept the contract; they brought fair and equitable treatment (FET), discrimination, and expropriation claims on this basis.[25] Argentina, on the other hand, argued that AGBA's difficulties with the contract were due to AGBA's deficient management and, in particular, to its failure to perform obligations to invest in the expansion of services.[26]

Most significantly, Argentina filed a counterclaim alleging that the Claimants' failure to invest violated the Claimants' obligations under international law, specifically those based upon the human right to water.[27] Argentina argued that the contract gave rise to bona fide expectations that the Claimants would invest.[28] By failing to do so, the Claimants not only violated good faith and *pacta sunt servanda* principles, but also affected human rights.[29] While the Claimants argued that human rights bind States, not private parties, Argentina countered that because the obligation during the concession was to guarantee access to water, and because both BIT parties were signatories to certain human rights treaties, the obligation of Claimants was to comply with a fundamental right.[30]

II.
ON CORPORATE SUBJECTIVITY TO INTERNATIONAL LAW

The *Urbaser* Tribunal stated that it was "reluctant" to take a principled position on whether private companies should bear human rights duties.[31] However, while past tribunals considered that corporations are not subjects of international law and therefore not duty holders under international law,[32] *Urbaser* found that this approach had "lost impact and relevance" in the present

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[21] *Id.* ¶ 57.
[22] *Id.*
[23] *Id.* ¶ 69.
[24] *Id.* ¶ 55.
[25] *Id.* ¶ 74.
[26] *Id.* ¶ 36.
[27] *Id.*
[28] *Id.*
[29] *Id.* ¶ 1156.
[30] *Id.* ¶ 1157.
[31] *Id.* ¶ 1193.
[32] *Id.* ¶ 1194. *See generally* José E. Alvarez, *Are Corporations 'Subjects' of International Law?*, 9 SANTA CLARA J. INT'L L. 1 (2011).

IIL landscape.[33] The Tribunal found that through the Spain-Argentina BIT's most favored nation (MFN) clause, investors are entitled to invoke rights resulting from international law: "If the BIT therefore is not based on a corporations' incapacity of holding rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations."[34] The Tribunal's reasoning is premised on the fact that under the BIT the investor can bring claims and invoke *rights* grounded in international law, especially through the MFN clause.[35] Surely then, the investor could be held to *obligations* under international law. The Tribunal also inferred the subjectivity of corporations through corporate social responsibility (CSR): a "standard" of crucial importance that is accepted by international law and in consideration of which transnational companies are no longer "immune" from international subjectivity, at least not in the strict sense.[36]

The existence of rights for transnational corporations is often invoked to ground the establishment of a "full" international subjectivity that includes obligations.[37] In this sense, *Urbaser* does not refute the many scholars who have made this argument,[38] but it certainly stops short of "full" subjectivity in the sense that States are subject. Indeed, international subjectivity remains a "theoretical minefield,"[39] and the Tribunal's reasoning leaves open a more critical approach to whether rights in international law must necessarily be mirrored as duties.[40] The complex directionalities of rights and obligations between legal persons, natural persons, state governments, and non-state government organizations further obfuscate the appropriate treatment of corporations under international investment law in general, much more so in times of armed conflict. It is true that under international law, individuals most often receive only protections without obligations, particularly if one excludes human rights treaties apart from the Universal Declaration of Human Rights (UDHR) and the Covenants.[41] But

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[33] *Urbaser*, ICSID Case No. ARB/07/26 ¶ 1194.

[34] *Id.*

[35] *Id.*

[36] *Id.* ¶ 1195.

[37] *See generally* Alvarez, *supra* note 32.

[38] The *necessity* of the correlation between rights and duties, however, is dogmatically questionable, at least under the traditional theory of international subjectivity. *See* Karsten Nowrot, "*Wer Rechte hat, hat auch Pflichten!"? Zum Zusammenhang zwischen völkerrechtlichen Rechten und Pflichten transn ationaler Unternehmen*, *in* BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT (Christian Tietje ed., 2012), http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft7.pdf. Nowrot provides an extensive overview of the theory of subjectivity under international law and a critical approach to the conclusion that rights must be mirrored by duties.

[39] Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946 (1990). Koskenniemi uses the phrase "theoretical mine field" in reference to "mysteries" of customary law formation. *Id.* at 1947.

[40] *See* Nowrot, *supra* note 38.

[41] There are less-frequently litigated human rights treaties that do, in fact, place explicit obligations on individuals, such as the Inter-American Commission on Human Rights, American Declaration on the Rights and Duties of Man, May 2, 1948, 43 AM. J. INT'L L. SUPP. 133; and the Organization of African Unity, African Charter on Human and Peoples' Rights, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

individuals increasingly incur obligations to the international community through treaties too, most obviously the obligations codified in the Rome Statute of the International Criminal Court (ICC).[42] Thus, it is not inconceivable that legal persons could also incur obligations from treaties between States, such as those in IIL.

An analysis of international corporate subjectivity must begin with international subjectivity generally and then proceed to an application of subjectivity to the specific case of corporations. To this end, in the seminal *Reparations to Injuries* case,[43] the ICJ was careful to stress that subjects of international law are not necessarily identical in their nature or in the extent of their rights.[44] Although the ICJ concluded that the United Nations (UN) was indeed an international person, the court stressed that this conclusion was "not the same thing as saying that [the UN] is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State."[45] The ICJ stated that the rights and duties of an organization depend on its purposes and functions.[46] At the same time, the ICJ's decision is devoid of actual criteria to delimit subjectivity.[47]

The ICJ's open-ended "purpose and function" criteria for determining whether international law imposes obligations on international organizations essentially establishes a case-by-case approach. Perhaps obligations can only be imposed for the special case of the UN, which is in many ways unlike any other non-corporate legal person. Indeed, for the purposes of establishing international duties for corporations or for investors in investor-State arbitration, it is debatable whether international subjectivity for corporations is even an adequate category, due to its incongruous analogy with the State.[48] States are territory-based regulators which in theory act in the public interest, whereas businesses are private, profit-seeking, and do not have territorial control or legal jurisdiction.[49] And, as some scholars have pointed out, taking the State as a reference for the

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[42] That is, the Rome Statue applies only to individuals, not to states, although states accede to the ICC's jurisdiction. *See* Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 3, https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf [hereinafter Rome Statute].

[43] *Reparation of Injuries suffered in the service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11, 1949). The UN was described by the ICJ as an organization "which occupies a position in certain respects in detachment from its Members."

[44] *Id.* at 178.

[45] *Id.* at 179.

[46] *Id.* at 180.

[47] *See* Alvarez, *supra* note 32, at 12, 26.

[48] *Id*. at 31. Álvarez, however, takes efforts to point out that skepticism about the "personhood" of corporations should not be confused with doubts about whether international corporations have responsibilities (as well as rights) under international law. Clearly now they have both. *Id.*

[49] Yousuf Aftab, *The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation readiness for Extractive-Sector Companies*, ROCKY MT. MIN L. INST., 1, 9–10 (2014).

international law obligations of non-State actors (a "top down" approach) loses sight of the ways that corporations are distinct from States or natural persons.[50]

Using the category of international subjectivity, the *Urbaser* Tribunal seems to sidestep these difficulties. However, the dogmatic weight of this language is not reflected in the analysis ultimately undertaken in *Urbaser*.[51] The Tribunal's considerations on subjectivity of corporations are premised by the rejection of principled positions and by the consideration that the subjectivity of investors cannot be rejected by necessity, but the Tribunal did not offer criteria to delimit corporate international subjectivity. Nevertheless, the Tribunal seems to consider that the purposes and functions of the corporation determine the frame of its potential subjectivity; this is especially apparent in the Tribunal's careful articulation of the differences between the State and the corporation as "service providers."[52]

Regardless of the theoretical shortcomings, *Urbaser* affirms subjectivity for corporations,[53] but leaves open the characteristics of this subjectivity. Is a corporation subject to international law the same way a State is subject to international treaty obligations, even though the corporate entity is not a signatory? Or should the subjectivity of a corporation appear more like the subjectivity of an individual to international adjudication, for example, as under the ECHR or the Rome Statute?

The International Law Commission's (ILC) recent Study on Fragmentation provides some guidance on interpretative approaches to importing "subjectivity" and other legal concepts between international and domestic law regimes.[54] The ILC Study encourages boundary crossings by deploying certain interpretative rules where possible to achieve harmonized international law across distinct sub-regimes. It urges treaty interpreters to use customary rules as unifying gap-fillers where the traditional rules of treaty interpretation so permit.[55] More specifically, as Alvarez puts it, the ILC Study "recommends that (i) where a treaty is silent on a matter, the customary rule should presumptively apply (*fall-back*); (ii) where the treaty is not silent, but the terms used are unclear and yet have a recognized meaning in customary international law, one is encouraged to interpret the treaty rule consistently with the customary rule (*harmonized fall-back*); and (iii) only where the treaty is clear and leads to a different result to the customary rule should one apply the treaty rule to the exclusion of that rule (*contract-out*)."[56] Most, if

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[50] *See, e.g.*, Álvarez, *supra* note 32, at 26.

[51] This reveals the gap between theory and practice that is made especially evident in the domain of subjectivity in international law. *See* Nowrot, *supra* note 38, at 25.

[52] Urbaser v. Arg., ICSID Case No. ARB/07/26, Final Award, ¶1206 (Dec., 7 2016), http://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

[53] For a more thorough analysis of *Urbaser* and CSR, *see* Crow & Escobar, *supra* note 17, at 10–23.

[54] *See generally* Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* UN Doc A/CN.4/L.682, 11 (13 April 2006) (report of the study group of the International Law Commission) [hereinafter ILC Study].

[55] *Id.*

[56] José E. Álvarez, *Boundary Crossings*, 17 J. WORLD INV. & TRADE 171, 179–80 (2016). As

not all, BITs are silent on the subject of corporate subjectivity with respect to general international law.[57]

III.
THE *URBASER* SPECTRUM: THREE STANDARDS FOR CORPORATE OBLIGATIONS

So what does *Urbaser* actually change about the obligations of a foreign investor to a host State under classical BIT interpretation when it comes to human rights?[58] Most importantly for our purposes, *Urbaser* found that legal instruments traditionally governing state obligations, like BITs and the Geneva Conventions, "may also address multinational companies."[59] In parsing out how this relationship may appear, *Urbaser* describes a spectrum of three standards for potential investor liability based in public international law. At one end of the spectrum, *Urbaser* accords both investors and States an obligation not to engage in activity *aimed* at destroying human rights,[60] and at the other end, an obligation not to act in ways that are prohibited by peremptory norms.[61] In the following analysis of the three standards on the spectrum, two distinct sources emerge from which a Tribunal may find justiciable performance obligations for corporations: through treaty, or through general principles of international law.

A. Urbaser's First Standard: An Obligation Not to Aim at Destroying Human Rights

The first standard reflects the JCE *mens rea* requirement under ICL—*intent* to destroy—which amounts to an almost cartoonish standard for investor liability under IIL. After analysis of Covenants, the Tribunal concludes that investors and States have an obligation *not to* engage in activity *aimed at* destroying human

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elaborated in rule 20 of the ILC's Conclusions:

Application of custom and general principles of law. Customary international law and general principles of law are of particular relevance to the interpretation of a treaty under article 31(3)(c) especially where: (a) The treaty rule is unclear or open-textured; (b) the terms used in the treaty have a recognized meaning in customary international law or under general principles of law; (c) The treaty is silent on the applicable law and it is necessary for the interpreter, applying the presumption in conclusion (19)(a) above, to look for rules developed in another part of international law to resolve the point.

Koskenniemi, *supra* note 54, at 15. *See also* Javier El-Hage, *How May Tribunals Apply the Customary Necessity Rule to the Argentine Cases?*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2011-2012, 452–54 (Karl P. Sauvant ed., 2012) (specifically analyzing the appropriate application of a customary international law rule in the context of the U.S.-Argentina BIT).

[57] To the knowledge of this author, there is not a single international investment treaty that touches on this subject, but I have not analyzed all 3000-plus of them.

[58] *See* Crow & Escobar, *supra* note 17, at 87.

[59] Urbaser v. Arg., ICSID Case No. ARB/07/26, Final Award, ¶1196 (Dec., 7 2016), http://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf .

[60] *Id.*

[61] *Id.* ¶ 1215.

rights.[62] According to the tribunal, this standard "complements" positive rights (dignity, housing, etc.) without actually according them.[63]

This initial standard appears nominal; the type of action required to meet the standard is unclear and the mental state required for the action is debatably unprovable.[64] Indeed, for a successful counterclaim by this standard, Argentina would need to demonstrate that Claimants actively aimed to destroy Argentina's ability to provide clean water and sanitation. There is no international legal standard by which to demonstrate the "aim" of a corporate entity, but in theory, the Tribunal could have borrowed from ICL's JCE doctrines.[65] The goal of general JCE, initially spawned by the Nuremberg Tribunals, was to bypass the justifications of sovereign immunity or superior responsibility when it came to assigning responsibility to individuals for the commission of mass atrocities.[66] In parsing out a corporate *mens rea* standard for an IIL case, therefore, JCE's utility does not lie in transposing the *mens rea* element from a corporation to an individual. Rather, JCE, particularly JCE III, is useful because it employs a standard by which to determine the mental state of a legal person—an "enterprise" in JCE but a "corporation" for our purposes here—without attaching any requirement for individual *mens rea*.[67] The corporate standard, first articulated by

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[62] *Id.* ¶ 1214.

[63] *Id.*

[64] Domestically, most jurisdictions hold that corporations are incapable of committing crimes because they are incapable of authorizing them; it is only the individuals within them that can foster the *mens rea* necessary to incur criminal culpability. *See, e.g.*, ALICE DE JONGE, TRANSNATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY IN THE GLOBAL BUSINESS ENVIRONMENT 127 (Edward Elgar Pub., 2012). However, on the international stage, lawyers would be remiss to ignore JCE's similarity to the corporate legal person. It is worth noting also that JCE III in particular places great weight on what would appear to be the *mens rea* of the enterprise; through the structure of the enterprise, it lowers the *mens rea* standard necessary to prove individual culpability.

[65] Here, JCE is described as 'doctrines' rather than 'doctrine' because the evolution of JCE has produced three similar but separate doctrines, each with slightly different *mens rea* requirements. Jose Alvarez's has cautioned generally about transposing such concepts of public law to the international investment arena, even as a way to generally inform arbitral interpretation, because the circumstances and stakeholders in the various branches of international law tend to differ so vastly. *See* Álvarez, *supra* note 56 at 171–228. *See also* ILC Guidelines, rule 20; Vienna Convention on the Law of Treaties art. 31–32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[66] For a brief history of JCE's evolution, *see* Giulia Bigi, *Joint Criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of Senior Political and Military Leaders: The Krajišnic Case*, *in* 14 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 51–83 (von Bogdandy & Wolfrum eds., 2010).

[67] I recognize that the equation of an "enterprise" in JCE to a "corporation" under general international law is problematic, at least because of the different avenues through which corporations and JCEs are formed. Nevertheless, JCE is the only such tool in international law available to determine mens rea, and as such, could be considered by an ICSID Tribunal's interpretation of "aimed". This is because the ICSID Convention requires that the terms of treaties litigated under its rules be interpreted according to the VCLT art. 31. The VCLT Article 31(3)(c) stipulates that, in interpreting treaty language "any relevant rules of international law applicable in the relations between the parties" be taken into account. And as an element of public international law to which virtually all the world's states are party, the ICJ Statute can inform the sources arbitrator use; specifically, Art. 38(1) of that statute stipulates that "international custom" and "general principles of law" can be considered, among

the ICTY, is that the legal person have a "common plan or purpose," which can be demonstrated through the results of the legal person's actions.[68]

In *Urbaser* and in ICSID cases generally, the results of a legal person's actions are highly unlikely to reach the level of criminality required for entity liability under ICL. The only crimes under the Rome Statute that require a demonstration of the "intent" or "aim" of an enterprise to incur liability are that of Genocide,[69] and the crime against humanity of "[o]ther inhumane acts. . . intentionally causing great suffering."[70] Unless a denial of water and sewage rights could be construed as an "intent to destroy, in whole or in part" the Argentinian people, or as an inhumane act intended to cause "great suffering," *Urbaser*'s standard would not be met. Even considering the lower standard of proof for civil as opposed to criminal cases (preponderance of the evidence rather than beyond a reasonable doubt),[71] the fact that most "crimes against humanity" require a mental state only of "knowledge" for a JCE—rather than a demonstration of "intent" or "aim"—highlights the almost cartoonish absurdity of *Urbaser*'s counterclaim standard.

B. Urbaser's Second Standard: An Obligation to Perform

The middle standard on the *Urbaser* spectrum veers away from the "aimed at" extreme in asking whether other parts of international law, and specifically water and sanitation, impose positive obligations on investors.[72] After surveying multiple sources, the Tribunal found that both investors and States have an obligation to comply with *some* performances required by public international law.[73] However, the required performances significantly differ. While the State has a positive performance obligation to provide access to water and sanitation services,[74] there is no basis in international law that would accord the same positive performance obligation to the investor, at least with respect to the human right to water.[75] Rather, the investor could only be obligated to provide water and sewage on the basis of private contractual law. However, the investor could be obligated to fulfill those contractual obligations in a way that did not violate general international law, which would be the only justiciable question before an

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other sources.

[68] The Rome Statute requires that the "aim" of each individual to further the criminal purpose of the enterprise, but the standard remains results-based for demonstrating "common plan." *See* Rome Statute, *supra* note 42, at art. 28. The intent behind individual participation in the enterprise—the most controversial element of JCE III—is not at issue here.

[69] *See id.* at art. 6.

[70] *Id.* at art. 7.

[71] *Id.* at art. 66.

[72] Urbaser v. Arg., ICSID Case No. ARB/07/26, Final Award, at ¶ 1210 (Dec., 7 2016), http://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf

[73] *Id.* ¶¶ 1193–1220.

[74] *Id.* ¶¶ 1211–1212.

[75] *Id.* ¶¶ 1211–1220.

arbitral tribunal.[76] The Tribunal does not exclude the possibility that a justiciable international obligation could exist, but such an obligation must arise either from another treaty or from a general principle of international law.[77] It found neither in this case.

The reasoning in *Urbaser* appears to reject private law theories about IIL by drawing a sharp distinction between an investor's contractual obligations and general international law.[78] At the same time, it could seemingly elevate private investors to the level of states in international economic law by drawing just such a distinction.[79] Curiously, it also appears to create horizontal obligations, even if limited, between investors as foreign individuals and citizens of a host State—a perplexing and paradoxical position from the perspective of traditional human rights law.[80] On the one hand, unless it can be gleaned from the prohibition on aggression enshrined in the Geneva Conventions,[81] there is no negative obligation on States not to actively engage in activity "aimed at" obstructing the activity of other states in protecting the human rights of citizens. On the other hand, individuals have neither positive nor negative obligations under the ICCPR and the ICESCR; these Covenants impose positive obligations only upon States.[82] However, according to *Urbaser*, the Covenants now impose negative obligations on investors as well.[83] This convoluted web of liabilities between individuals and States, international law and individuals, and international law and private law constitutes the second *Urbaser* standard: the middle ground.

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[76] "Although the conduct of corporations under these treaties is regulated by an international instrument, the international legal obligation under the treaty rests with the state, which needs to adopt national measures to regulate the activity of the corporations on the domestic legal level. Corporate responsibility under these treaties is thus purely domestic rather than international". Eric De Brabandere, *Non-State Actors and Human Rights, Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM, 268, 275 (D'Aspremont ed., 2011).

[77] *Urbaser* ¶ 1207.

[78] *See id.* ¶¶ 1182–1220.

[79] The Tribunal's finding implies that the investor is bound by treaties that typically govern only state action toward individuals, which suggests that investors carry greater obligations than individuals. However, the finding does not place investors under the same standard as states under international law, as is clear in the first 'negative' standard. Thus, investors appear to be placed in an undefined zone with greater responsibilities than individuals but lesser responsibilities than states. *See Urbaser* ¶¶ 1207–1210.

[80] CSR nuances this to the extent that horizontal relationships are created beyond the binary dichotomies of binding or non-binding law. As we will see at point 2) below, after the United Nations Guiding Principles, it is universally accepted that companies hold responsibilities—a category that is distinct but not necessarily below the category of obligations—vis-à-vis the society in which they operate. These responsibilities are thus horizontal.

[81] *See, e.g.*, International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 287.

[82] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

[83] *Urbaser* ¶¶ 1211–20.

C. Urbaser's Third Standard: An Obligation to Abstain

In the third standard comprising the *Urbaser* spectrum, the Tribunal states that investors have an obligation to abstain from activity prohibited under general international law,[84] which includes international criminal law, international human rights law, and the law of armed conflict. This standard notably renders intent irrelevant in such cases. It would appear that "activity prohibited under general international law" refers to activity that would violate *jus cogens* rights, but the Tribunal is quick to state that the constitution of such violations "is not a matter for concern in the instant case" because no such activity had occurred.[85] Nevertheless, footnote 446 to the Award may provide some insight into situations in which the *jus cogens* standard might amount to "a matter for concern."[86] That footnote essentially states that because no prohibited activity under "general international law" is at stake, Argentina's reliance in its counterclaim on the 1980 United States Court of Appeals for the Second Circuit case of *Filártiga v. Peña-Irala* was unconvincing.[87] The Tribunal does not detail how exactly Argentina relied upon that case and none of the submissions of the parties have been made available to the public.[88] However, one might presume that, because *Filártiga* involved a civil claim heard and upheld in the U.S. for wrongful death by a torture committed in Paraguay, the *Urbaser* Tribunal found the *Filártiga* norm on torture insufficiently applied when it came to a discontinuance of water and sewage services. Footnote 446 implies that it is the lack of a violation of *jus cogens* alone that renders *Filártiga* unconvincing. Thus, it implies that the converse is presumably true: if there is a violation of *jus cogens*, the *Filártiga* reasoning would be "convincing". In *Filártiga*, the Second Circuit found that a violation of "the law of nations"—based upon the UN Charter, the UDHR, other international instruments and customary international law—could stand in US courts under the Alien Tort Statute, even though the parties did not explicitly agree to grant the US such jurisdiction.[89] The court proceeded to find that torture was "clearly" a violation of the law of nations.[90]

While *Filártiga* involved a dispute between individuals, *Urbaser* opens a similar window through which States may be able to hold foreign individuals liable for financial damage caused by the investor's violations of *jus cogens*.[91] Indeed, Tribunals have found *jus cogens* a justiciable standard to impose liability in the past.[92] Under the *jus cogens* prong of the *Urbaser* spectrum, no showing of

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[84] *Id.* ¶ 1210.

[85] *Id.*

[86] *Id.* ¶ 322, n.446.

[87] *Id.*

[88] *See generally Urbaser*.

[89] *Filártiga v. Peña-Irala*, 630 F.2d 876, 887 (2d Cir 1980).

[90] *Id.*

[91] *Urbaser* ¶ 1210.

[92] *See, e.g.*, BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE, 143 (Oxford U.P. 2011). Sabahi discusses Turkish arbitration cases in

intent is necessary for such liability—paragraph 1210 notably omits the "aimed" language set out in paragraph 1207.[93] Fascinatingly, under this standard, an investor could be held liable for providing a State with, for example, chemicals produced without the intent of violating the Geneva Conventions,[94] but that debatably violates the Conventions nonetheless.[95]

Thus, although none of the standards set out on the *Urbaser* spectrum appear to change much about the actual arbitral practice of IIL, at least two of them open new avenues for corporate subjectivity for future arbitral tribunals. On one end of the spectrum, States must demonstrate that investors actively aimed at destroying human rights in order to succeed on a counterclaim. At the other end, in the rare event that an investor tortures, uses chemical weapons, or violates some other *jus cogens* norm under international law, the investor still carries discretion over whether to bring a claim in the first place. This arrangement is tantamount to the nominal "counterclaim" clauses in the 2015 draft model India BIT[96] and the Investment Chapter of the TPP,[97] and to the "investor consent" standard set out in *Spyridon Roussalis v. Romania*.[98] Moreover, in light of the ILC's 2006 study, the customary rules of ICL could inform corporate subjectivity in IIL: "(i) where a treaty is silent on a matter, the customary rule should presumptively apply (*fall-back*); (ii) where the treaty is not silent, but the terms used are unclear and yet have a recognized meaning in customary international law, one is encouraged to interpret the treaty rule consistently with the customary rule (*harmonized fall-back)*."[99]

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which states successfully alleged damage to their international reputation as a result of a "jurisdictionally baseless claim asserted in bad faith." *See also* PSEG Global, Inc. v. Turk., ICSID Case No. ARB/02/5, Award (Jan. 19, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0695.pdf.

[93] *Urbaser* ¶ 1210.

[94] *E.g.*, Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T 571 [hereinafter Geneva Protocol].

[95] *See, e.g.*, MONSANTO, http://www.monsanto.com/newsviews/pages/agent-orange-background-monsanto-involvement.aspx (detailing involvement with the government-sanctioned manufacture of Agent Orange during the Vietnam War).

[96] 2015 Model Text for the Indian Bilateral Investment Treaty, *supra* note 7.

[97] Trans-Pacific Partnership Agreement, *supra* note 7, ch. 9.

[98] Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award (Dec. 7, 2011), https://www.italaw.com/cases/927.

[99] Álvarez, *Boundary Crossings*, *supra* note 56. As elaborated in rule 20 of the ILC's Guidelines: "*Application of custom and general principles of law*. Customary international law and general principles of law are of particular relevance to the interpretation of a treaty under article 31(3)(c) especially where: (a) The treaty rule is unclear or open-textured; (b) the terms used in the treaty have a recognized meaning in customary international law or under general principles of law; (c) The treaty is silent on the applicable law and it is necessary for the interpreter, applying the presumption in conclusion (19)(a) above, to look for rules developed in another part of international law to resolve the point." *Id.* at 15.

IV.
CORPORATE SUBJECTIVITY AND INDIVIDUAL LIABILITY IN ICL: POSSIBLE "BOUNDARY CROSSINGS?"

In addition to providing a method to determine corporate *mens rea* via JCE, ICL may also provide some insight into determining a standard for certain corporate behavior should incur financial liability to a State.[100] There is a rich and vibrant debate amongst international criminal lawyers regarding whether and how international corporations and the individuals who run them could be held criminally liable for their contributions to crimes against humanity (CAHs),[101] but recapping a full review of that literature is beyond the scope of this article. However, at the risk of oversimplification, and in the context of criminality, There appears to be an emerging consensus among international criminal lawyers that if a corporation possesses "control over a crime"—an adaptation from German criminal law[102]—then corporate criminal liability is possible.[103] ICL would then pursue the individuals behind the "control." Alternatively, I want to suggest that for a corporation to incur financial liability for a human rights violation, a determination that the corporation itself is liable is sufficient. In the financial context, a requirement for complete control seems overly stringent. If the corporate criminality literature is to inform an IIL tribunal's analysis, it must be mitigated to the degree that the standard emerges from ICL's mission to determine which actors are "most responsible" for CAHs, and to shield those actors which were merely following orders or unwittingly producing materials that would later be used in the commission of a CAH. In the criminal context, specific knowledge requirements shield Lockheed & Martin (the United States' largest weapons

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[100] As far back as 1985, former ICJ Judge Bruno Simma noted that the prospect that any international legal regime, no matter how detailed its own treaty rules, has no need to resort to non-treaty sources of international obligation is unlikely since no international legal regime had managed to avoid them. So far as I am aware, this observation still holds true. *See generally* Bruno Simma, *Self-Contained Regimes*, 16 NETH Y.B. INT'L L. 111 (1985).

[101] *See, e.g.*, Andrew Clapham, *Workshop: Corporate Criminal Liability: New Developments in International Criminal Law*, 6 J. INT'L CRIM. JUST. 899 (2008); *see generally Special Issue – Transnational Business and International Criminal Law*, 8 J. INT'L CRIM. JUST. (2010).

[102] Indirect perpetration through an organization was originally conceived by German legal theorist Claus Roxin with the particular experience of Nazi state-orchestrated crime in mind. *See* Thomas Weigend, *Perpetration through an Organisation: The Unexpected Career of a German Legal Concept*, 9 J. INT'L CRIM. JUST. 91, 94–97 (2011).

[103] For detailed analysis of this form of liability and its origins and application at the ICC, see generally *Symposium: Indirect Perpetration: A perfect Fit for International Prosecution of Armchair Killers?*, 9 J. INT'L CRIM. JUST. 85; Neha Jain, *The Control Theory of Perpetration in International Criminal Law*, in 12 CHI. J. INT'L L. 159 (2011); Florian Jessberger & Julia Geneuss, *On the Application of a Theory of Indirect Perpetration in Al Bashir*, 6 J. INT'L CRIM. JUST. 853 (2008); Hector Olasolo, *The Criminal Responsibility of Political and Military Leaders as Principles to International Crimes*, *in* 4 STUDIES IN INTERNATIONAL AND COMPARATIVE LAW, 116–134 and 302–330 (Mochael Bohlander ed., 2009); and Harmen G. van der Wilt, *The continuous quest for proper modes of criminal responsibility*, 7 J. INT'L CRIM. JUST. 307 (2009).

manufacturer),[104] Boeing (which produces drones),[105] General Electric (which won the largest US government contracts for military technology),[106] Northrop Grumman (which produces various drone-related technologies),[107] and many other companies. And this might be ethically palatable to most in a criminal context, but the fact that the products produced by private companies often exacerbates damage to civilians in times of armed conflict renders the status quo unviable in a civil-financial liability context.

What can IIL take from ICL in evaluating the subjectivity of corporations to international law, and how might ICL converge with the *Urbaser* spectrum to determine which corporate action should incur financial, rather than criminal, liability? There appears to be an expanse of grey area regarding the international legal status of corporate liability that rests between the extremes of Degesch (which designed the pesticide later used in Holocaust gas chambers long before Hitler took power and continued to produce it under government direction[108]) and the doctrine of "control over the crime." On one end, there is an inefficacy of inaction, and on the other, an inefficacy of stringency: "control over the crime" has yet to be successfully applied to any corporate act or actor on the international stage.[109] Thus I want to explore a possible "third way," where lowered *mens rea* standards in JCE and aiding and abetting liability might apply to corporate actors in an ISDS context.

Article 25 of the Rome Statute paragraphs 3(c) and 3(d) set out the ICC's requirements for individuals to incur aiding and abetting liability. In order to incur such liability, paragraph 3(c) indicates that a legal person facilitates the commission of a CAH with the purpose that the CAH be committed. However, paragraph 3d indicates a second, debatably lower standard. Article 25(3) states:

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[104] *See, e.g.*, Michael M. Kelley, *The Top 25 Weapons Companies in the World (Excluding China)*, BUSINESS INSIDER (Dec. 15, 2014), https://www.businessinsider.com/the-top-25-weapons-companies-in-the-world-excluding-china-2014-12/?IR=T.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *See* THE HOLOCAUST: AN ENCYCLOPEDIA AND DOCUMENT COLLECTION 155 (Paul Bartrop & Michael Dickerman eds., 2017) (explaining the pre-WWII operations of Degussa and Degesch).

[109] *See* Joanna Kyriakakis, *Developments in International Criminal Law and the Case of Business Involvement in International Crimes*, 94 INT'L REV. RED CROSS 981 (2012).

> [A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: […]
>
> (c) For the *purpose of facilitating the commission* of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
> (d) *In any other way contributes to the commission* or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be *intentional* and shall either:
>
> Be made *with the aim of furthering the criminal activity* or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; *or*
> Be made in the *knowledge of the intention of the group* to commit the crime[.][110]

Article 25(3)(d)(i) and (ii) set out a choice between standards. The first sets out a *mens rea* similar to *Urbaser*'s first standard—an obligation not to engage in activity with the *aim* of destroying human rights. The second, however, opens the window to a lower *mens rea* standard of knowledge of intention, which for practical purposes under public international law, requires knowledge of the likelihood that an international law violation will occur as a result of the "contribution."[111] The ICTY Trial Chamber also articulated a similar standard in *Tadić*, though more recent Appeals decisions from that Tribunal may require a more stringent interpretation of the aiding and abetting provisions of the ICTY statute.[112] The Trial Chamber in *Tadić* found that "there is a requirement of intent, which involves *awareness* of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime."[113] Various other ICL Tribunals, including Appeals Chambers at the ICTY and the Special Court for Sierra Leone (SCSL), agree that the appropriate interpretation of the "knowledge"

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[110] Rome Statute, *supra* note 42, art. 25 (emphasis added).

[111] For a description of the test for aiding and abetting under customary international law, see the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes (ICJ Expert Panel), Corporate Complicity and Legal Accountability, Vol. 2, International Commission of Jurists, Geneva, 2008, pp. 17–24. However, also note the decisions of the International Criminal Tribunal for the Former Yugoslavia that import a 'specific direction' requirement as a material element of aiding and abetting. This new requirement demands that to constitute an accomplice under international criminal law, a person must not only provide assistance that has a substantial effect on the commission of an international crime, but such assistance must additionally be specifically directed toward assisting such crime. *See* Prosecutor v. Perišíc, Case No. IT-04-81-A, Appeal Judgement, (Int'l Crim. Trib. for the former Yugoslavia Jan. 28, 2013); Prosecutor v. Stanišíc, Case No. IT-03-69-T, Trial Judgement, (Int'l Crim. Trib. for the former Yugoslavia May 30, 2013). While the introduction of a 'specific direction' requirement will have significant implications for satisfying aiding and abetting in the context of commercial relationships and international crimes, this Article's primary aim is to apply doctrines that emerged from ICL in the context of IIL. Moreover, the Rome Statute, on which this Article's argument rests, was not at issue in the 2013 ICTY decisions on aiding and abetting.

[112] *See id*.

[113] Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Judgement, ¶ 674 (Int'l Crim. Trib. for the former Yugoslavia May 7, 1997)

requirement is "knowledge of the likelihood that a crime would occur," or indifference to whether a crime would occur.[114] This standard is all the more necessary when it comes to the liability of corporate persons. For as an ICJ Expert Panel on Corporate Complicity in International Crimes stated in its 2008 Report,[115] to require the elevated standard of "purpose," and not merely knowledge, would render the notion of aiding and abetting almost wholly inapplicable to corporate persons, since corporate persons are almost always motivated by the purpose of profit.[116] Thus, in order for a corporate person to incur aiding and abetting liability, the Rome Statute standard, informed by general international law, should apply. It is not necessary that the corporation intend that the actual crime occur, or even that it have "control over the crime" as is the consensus for choate liability. A corporation should incur inchoate liability if its primary intent is, for example, to increase profits for its shareholders, so long as it acts with the knowledge that increasing profits in a particular way has a likelihood of aiding or abetting a CAH.

Moreover, under the "attempt" doctrines codified in the ICC statute and other ICL statutes,[117] it is not necessary that the CAH actually occur. Instead, all that is required is that the primary actor intend to commit the CAH and attempt to do so (although the line between attempt and mere preparation is far from settled).[118] Thus, a corporate actor could theoretically incur inchoate liability for assisting preparation for a CAH that is likely to occur, even if the CAH never actually occurs.

In the event that a CAH does actually occur, perhaps the best illustration of a transferable standard for investor liability from ICL is the aiding and abetting

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[114] *See* Prosecutor v. Brima, SCSL-06-16-A, Appeal Judgment, ¶ 242 (Feb. 22, 2008): "[t]he mens rea required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator." (quoting Prosecutor v. Brima, SCSL-06-16-T, Trial Judgment II, ¶ 776 (June 20, 2007); *see also Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-A, Appeal Judgment, Special Court for Sierra Leone, ¶ 546 (Oct. 26, 2009). The SCSL Appeals Chamber subsequently endorsed this Court's jurisprudence that awareness of a substantial likelihood is a culpable mens rea for aiding and abetting liability in customary international law. Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon, Case No. STL-11-01/I, ¶ 227 (Feb. 16, 2011). In domestic legal systems this mental state ranges from "being 'indifferent' to the result, to being 'reconciled' with the result as a possible cost of attaining one's goal." ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW, 41 (2012).

[115] International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity and Legal Accountability*, Vol. 2, International Commission of Jurists, Geneva, 2008, 22–24.

[116] *Id.*

[117] *See, e.g.*, S.C. Res. 808/1993, 827/1993, May 25, 1993 (Statute of the International Criminal Tribunal for the Former Yugoslavia); S.C. Res. 1315, Jan. 16, 2002 (Statute of the Special Court for Sierra Leone).

[118] This is an old debate in U.S. jurisprudence, and different states still take different approaches. For an old but classic example of the scholarship on the issue seegenerally, John S. Strahorn, Jr., *Preparation for Crime as a Criminal Attempt*, 1 WASH. & LEE L. REV. 1 (1939).

standard applied by the SCSL in *Prosecutor v. Charles Ghankay Taylor*.[119] In that case, the Court rejected the prosecutor's claims that Taylor's role in facilitating diamond mining to fund the Revolutionary United Front was sufficient to place him at the helm of a JCE.[120] Instead, the Court found that Taylor had "aid[ed] and abett[ed]" a JCE in a role the Court described in terms remarkably similar to a business financier or investor.[121] The Court found that, for a determination of aiding and abetting, the offender's acts "must provide substantial assistance to the commission of a crime with knowledge that such acts would assist the commission of the crimes or with awareness as to the likelihood that such acts would render assistance."[122] In the case of Charles Taylor, the nature of the Revolutionary United Front's criminal conduct was so well-known that Taylor's willingness to work with the group left little question as to whether the standard was met, but that does not preclude potential liability for working with less extreme groups, especially if IIL were to draw on SCSL jurisprudence to articulate a standard for corporate financial liability. In virtually all of the world's democracies, the burden of proof for civil financial claims is lower than that for criminal claims;[123] one might presume that in IIL, a preponderance of the evidence would be sufficient to determine that a corporation's leadership was aware of a likelihood that atrocities would occur as a result of the corporation's assistance or would be perpetrated by the organization the corporation assisted.

Thus, setting aside the cartoonish JCE-esque standard set out at one end of the *Urbaser* spectrum, and departing from the domestic contract law standard set out in the middle of the spectrum, *Urbaser*'s third standard may open a window for corporate financial liability for contributions to exacerbating armed conflict. The third standard omits the requirement that corporate activity be "aimed at" promoting human rights but requires that corporations "abstain from activity prohibited under general international law." With this inroad, ICL's aiding and abetting mode of liability may provide effective "boundary crossing" tools to international investment arbitrators in determining when a corporation should incur liability for prohibited actions under general international law, including violations of human rights and CAHs.

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[119] *See Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgement Summary, Special Court for Sierra Leone (Apr. 26, 2012), http://www.rscsl.org/Documents/Decisions/Taylor/1283/Charles%20Taylor%20Summary%20Judgement.pdf.

[120] *Id.* at ¶¶ 143–44.

[121] *See id. at* ¶¶ 160, 164, 168. See also *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Trial Chamber II, Judgement, Special Court for Sierra Leone, ¶¶ 3919–4026 (May 18, 2012).

[122] *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Trial Chamber II, Judgement, Special Court for Sierra Leone, ¶ 6904 (May 18, 2012).

[123] *See, e.g.*, Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standard of Proof*, 50 AM. J. INT'L L. 243 (2002).

V.
COULD AIDING AND ABETTING LIABILITY SERVE AS A BASIS FOR FINANCIAL LIABILITY UNDER THE *URBASER* SPECTRUM?

To summarize the cornerstones of my argument so far: (1) As a matter of public policy, it is desirable to encourage corporations to avoid situations in which they assist a State in committing human rights violations or CAHs. (2) International arbitral tribunals are permitted to draw interpretive tools and normative principles from other fields of international law in what Alvarez termed "boundary .crossings." They can do this by looking to international treaties and by looking to the jurisprudence of international courts. The ILC has provided recommendations to international judges to identify appropriate times for boundary crossings when the treaty at issue is silent, and to identify the appropriate weight to be given to a source when the treaty at issue is unclear. (3) The ICJ, the ILC, and international law scholars have acknowledged that corporations can be subject to international law, but the boundaries of that subjectivity remain unclear. What seems to be clear is that corporations cannot be treated like a natural persons under international law, nor can they be treated like States. They occupy an ill-defined third category; perhaps they even occupy multiple ill-defined categories. (4) In the specific context of corporate financial liability to a State for a human rights or ICL violations, *Urbaser* provides the beginning of what could be a standard for determining when a corporation is liable. (5) To this end, the ICL doctrine of aiding and abetting as articulated in the Rome Statute and as developed by the other ICL tribunals, especially the SCSL, may provide a useful "boundary crossing" tool to further develop a standard.

Let us proceed with three hypotheticals to tease out how a hybrid IIL-ICL corporate liability standard might apply in the context of international armed conflict. All of the following hypotheticals are based on actual corporate actions in conflict zones, but I have added several non-factual elements for the sake of argument and inquiry.

A. Hypothetical One: Monsanto and Vietnam

To begin with an obvious (and controversial) hypothetical, suppose that today's law applies to the Vietnam War in the 1970s, that both the United States and Vietnam have ratified the Rome Statute and the Vienna Convention on the Law of Treaties. Finally, suppose also that Monsanto exists just as it did in the 1970s (it was recently purchased by Pfizer), with business operations in Vietnam that exceed "mailbox company" status (this is necessary for IIL law to hypothetically apply).[124] Just like in the 1970s, the United States government sets

[124] A 'mailbox' company is typically an organization set up for legal rather than business purposes. The test typically applied by tribunals in determining whether a company is a mailbox company is an analysis into whether the company has 'substantial business activity' in the jurisdiction in which it is incorporated. *See Plama Consortium Ltd. v. Bulg.*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, (Feb. 8, 2005), *reprinted in* 20 ICSID Rev.-FILJ 262 (2005).

manufacturing specifications for an herbicide known as Agent Orange, a combination of two common herbicides already produced by Monsanto, and commissions Monsanto and several other companies to produce the herbicide. The US government then sprays Agent Orange in a strategic effort to cut off the food supply of its "enemy combatants" from North Vietnam. Monsanto did not design the chemical, nor did it design the spray distribution system, which caused particles of the chemical to land far distances from the intended targets. However, Monsanto also did not test the combination in its own laboratories or design a distribution system that would minimize the potential damage caused to humans through exposure. Indeed, neither domestic nor international law imposed an obligation upon Monsanto to do either of those things.[125] Given these facts, and given the standards set out in the previous sections, under what circumstances could Monsanto be held liable for damages?

The U.S. most likely distributed Agent Orange in a "widespread and systematic" manner as a result of orders during an "attack."[126] The distribution at least partially targeted a civilian population—even though the primary targets were North Vietnamese combatants, these combatants were not the only ones who consumed the targeted crops, and presumably, they were not the individuals who worked in the targeted fields.[127] Monsanto chose only to manufacture the chemical; it did not choose the targets or how to distribute it. Furthermore, it could not have thought that the US government would "likely" commit a crime against humanity. There is a possibility that the mere production of the chemical was an activity "aimed at" destroying human rights, but this would require some evidence of Monsanto's knowledge that the chemical was extremely harmful, and there is none. However, under the third standard on the *Urbaser* spectrum, there is only an obligation to abstain from violating *jus cogens* norms, such as the use of chemical weapons, regardless of whether Monsanto intended to do so.

This liability likely would not stick under the *Urbaser* standard alone: Monsanto is not in breach of its obligation to abstain unless that obligation can be said to extend to production alone, not distribution. Such a standard would suggest extreme results: every producer of every bullet used in every gun could be liable for violating *jus cogens* norms. However, if we employ lessons from ICL jurisprudence and treaty text, we can tighten the sphere of liability: Monsanto would only be liable if it knew that it was likely that the chemical would harm

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[125] The producers of Agent Orange settled suits brought against them in the U.S. in a politically-charged class action suit in 1984. The claim was based on US products liability tort law. *In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984).

[126] For a discussion on what constitutes 'widespread and systemic' 'attacks', the seminal ICTY case defining these terms is *Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, Judgement, Int'l Crim. Trib. for the former Yugoslavia, ¶¶ 427–31 (Feb. 22, 2001).

[127] ICL and the Geneva Conventions distinguish between treatment of 'civilians' and 'combatants' in defining the parameters of international war crimes. Article 7 of the Rome Statute defines 'crimes against humanity' as a specified criminal act "committed as part of a widespread and systematic attack on a civilian population, with knowledge of the attack". Rome Statute, *supra* note 42, art. 7(1).

human beings, and if it knew that the U.S. government was likely to use Agent Orange in a way that exposed human beings to the chemical.

B. Hypothetical Two: The Reich Group and Nazi Germany

A common narrative explaining the rapid expansion of international law post-WWII is that the international human rights and economic regimes conceived between the 1940s and 1970s were necessary to prevent a -reoccurrence of events similar to those that took place during the war.[128] Let us therefore examine how effective our current tools would be under similar circumstances. Suppose that the post-WWII international legal systems, barring EU law, existed during WWII), and Germany was subject to all of the international treaty obligations to which it is presently bound. On 28 April 1938, as a response to the German insurance company's concerns that civil violence against Jewish businesses was resulting in a massive increase in the number of collectable claims, the Reich Supervisory Board told the Reich Group for Insurance that "in the National Socialist State the marketing of riot insurance and the mention of riot, domestic or civil unrest, disturbance of the peace, mob action, plundering, strikes, lockouts, and sabotage in general insurance conditions of the other insurance branches is insupportable."[129] In effect, the German government eliminated domestic coverage against civil disturbances because the State insisted that the New Germany did not have civil disturbances.[130] The Reich Group for Insurance thereafter claimed non-liability to their customers and referred them to the courts and the government if they sought payment.[131]

The Reich Group did not only insure Jewish businesses in Germany, but also in Nazi occupied territories such as Poland, and for the purposes of this hypothetical, let us assume that Poland is still an autonomous, unoccupied state. Following the Reich Supervisory Board's decree, the Reich Group and foreign insurers alike stopped selling policies that covered civil disturbances.[132] Foreign insurers insisted on nonliability for civil disturbance claims, arguing that, as a matter of common knowledge, police and government personnel routinely stood by idly while Jewish property was destroyed: the State bore liability, not the insurers.[133] The government responded to the pressures of foreign companies by issuing paper vouchers for some of these claims, the value of which it could revoke at any time. And it eventually did: Section 81a of the Reich Insurance Decree gave the government power to set aside existing clauses and conditions if

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[128] *See, e.g.*, MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS, HUMAN RIGHTS AS IDOLATRY, 326 (2000).

[129] NETWORKS OF NAZI PERSECUTION: BUREAUCRACY, BUSINESS, AND THE ORGANIZATION OF THE HOLOCAUST, ch. 5 (Gerald D. Feldman & Wolfgang Seibel eds., 2005).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

it deemed such action to be "in the public interest."[134] Let us suppose, for the hypothetical, that the Polish government continued to require the Reich Group to pay out insurance claims resulting from civil unrest, and let us further suppose that, emboldened by the evasion of liability in Germany, the Reich Group views the Polish government's actions as expropriatory. The Reich Group initiates a claim based under the hypothetical Germany-Poland BIT, which is identical to the Argentina-Spain BIT, and Poland initiates a counterclaim alleging that the Reich Group is actively obstructing human rights.

Recall that present day international law applies to the past in this hypothetical (except for EU law). Article 17 of the UDHR states that "Everyone has the right to own property alone as well as with others. No one shall be arbitrarily deprived of his property."[135] Article 7 of the Rome Statute criminalizes widespread and systematic "persecution" of any "identifiable" civilian group, a definition which encompasses Jewish business owners.[136] Article 7(2)(g) clarifies that "persecution" means "the intentional and severe deprivation of rights contrary to international law."[137] While the notion that property rights are human rights is controversial and shaky at best,[138] the language of the Rome statute calls only for a severe deprivation of a right, not necessarily a "human right" in the same sense as those explicitly recognized by the Covenants. An arbitrary deprivation of property is certainly contrary to international law,[139] and indeed, it was the basis of a substantial portion of expropriation claims under the world's various BITs[140] (almost all distinguish between justifiable and non-justifiable expropriation, and many cite US Fourth Amendment "takings" jurisprudence as theoretical underpinnings[141]).And finally, recall that in the *Charles Taylor* case, Taylor was convicted of aiding and abetting a JCE because of his role in financing organizations that committed CAHs; he was not convicted of participation in the JCE itself.[142]

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[134] Andre Botur, *Privatversicherung im Dritten Reich. Zur Schadensabwicklung nach der Reichskristallnacht unter dem Einfluß nationalsozialistischer Rassenund Versicherungspolitik*. [Berliner Juristische Universitätsschriften. Zivilrecht, Bd. 6], pp. 71-73 (1995).

[135] G.A. Res. 217 (III), Universal Declaration of Human Rights, art. 17 (Dec. 10, 1948).

[136] *See* Rome Statute, *supra* note 42, art. 7(1).

[137] *Id.* art. 7(2)(g).

[138] Most prominently, Austria School economist Murray N. Rothbard's 1959 essay that described human rights as an extension of each individual's "property right" over their own body, and accordingly, material things produced by the body are an extension of those rights. Murry N. Rothbard, *Human Rights Are Property Rights* (1959), https://fee.org/articles/human-rights-are-property-rights/.

[139] This is apparent from numerous treaties and prohibitions in the constitutions of many of the world's countries.

[140] *See, e.g.*, OECD *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, OECD Working Papers on International Investment, No. 2004/04 (2004), http://dx.doi.org/10.1787/780155872321.

[141] The seminal regulatory takings case in the U.S., *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922), has been cited in numerous ICSID and UNCITRAL Awards over the past century, one recent example being the somewhat controversial case of Methanex Corp. v. United States of America, UNCITRAL Rules, Final Award of the Tribunal on Jurisdiction and Merits, Part IV (August 3, 2008).

[142] *See Prosecutor v. Taylor*, ¶ 168.

In this hypothetical, *Urbaser*'s "aimed at" standard might apply if the tribunal recognized a human right to be free from the arbitrary deprivation of property, but it would still be a stretch to claim that seeking to avoid payment was arbitrary deprivation of payment. However, if a tribunal employed boundary crossing tools from the *Charles Taylor* case, an argument could be more easily made that the Reich Group should be held individually financially liable: the Nazi Party's persecution of Jewish people, even in the 1930s, was so well-known that the Reich Group could not plead ignorance, and by transferring payment responsibility from the Reich Group (in the form of cash) to the German government (in the form of vouchers), the Reich Group could be said to have aided and abetted the CAH of arbitrary deprivation of property.

This is an extreme hypothetical, but it is relevant to consider for two reasons. First, it charts a financial liability through which victims of CAHs may be compensated in international legal venues apart from ICL Tribunals. This is significant because victim compensation is an area in which ICL Tribunals have made great strides forward (especially recently),[143] but is nevertheless an area in which ICL Tribunals still fall tragically short.[144] And second, the hypothetical highlights IIL's capacity to deter those CAHs that hurt the financial interests of transnational corporations. If the Reich Group knew that it could not avoid liability for civil disturbance claims, it may have placed greater pressure on the government to discourage such violence.[145] In fact, this was the Reich Group's initial approach, and it was only after the German government gave them an "out" through the vouchers that they eased up on lobbying against the destruction of Jewish property.[146] Perhaps IIL deprives governments of the ability to provide such "outs" to transnational corporations.

C. Hypothetical Three: Northrop Grumman and Afghanistan

Northrop Grumman is the largest producer of drone-related communications and navigations technologies in the United States.[147] It has offices in several Greater Middle Eastern countries, including Afghanistan.[148] Moreover, it is no secret that the US drone strikes in Afghanistan have produced an unfortunate

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[143] *See* Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-236, Order, Trial Chamber VIII (Aug. 17, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_05117.PDF.

[144] Although there are more than 4,000 'civil party' cases on file at the ECCC, political hurdles and changes to the ECCC's Internal Rules have rendered that tribunal's enhanced victim participation all but nominal. *See* Ignaz Stegmiller, *Legal Developments of Civil Party Participation at the ECCC*, *in* THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, 535–550 (Simon M. Meisenberg & Ignaz Stegmillar eds., 2016).

[145] NETWORKS OF NAZI PERSECUTION: BUREAUCRACY, BUSINESS, AND THE ORGANIZATION OF THE HOLOCAUST, ch. 5 (Gerald D. Feldman & Wolfgang Seibel eds., 2005) [hereinafter NETWORKS OF NAZI PERSECUTION].

[146] *See generally* NETWORKS OF NAZI PERSECUTION, *supra* note 145.

[147] This information is stated on the company's official website. See http://www.northropgrumman.com/Pages/default.aspx.

[148] *Id.*

number of civilian casualties; 116 if one accepts the US government's numbers in the 2016 ODNI report,[149] or 474 if one prefers to trust the Bureau of Investigative Journalism.[150] Suppose that, recently, in full knowledge of the civilian casualties produced as a result of drone strikes, Northrop accepts a new contract from the US government to extend the communicable area in Afghanistan in which drones can accurately navigate, and provides company personnel to operate and maintain the necessary equipment.[151] Finally, suppose that, somewhat predictably, more civilian deaths result from drones utilizing Northrop's technology.

No matter which civilian casualty numbers one believes, it cannot be credibly argued that the drone attacks are systematic attacks directed at a civilian population, as the chapeau to Article 7 of the Rome Statute requires.[152] However, drone attacks are designed with far greater specificity than the traditional law of war assume to be possible. Although a grave breach of the Geneva Conventions requires that an attack as a whole not have a disproportionate effect on the civilian population, because drone attacks are individually designed with an extremely high degree of specificity, a drone attack determination of a "grave breach" of the Conventions or a "target" under Article 7 should be determined on an individual basis, rather than looking at drone warfare as a whole. This targeting also differs from traditional warfare, in that the civilians attacked were actually the targets of the strikes, as former-President Barack Obama admitted.[153] Moreover, it could be argued that a "civilian population" should be defined within the scope of the strike as well—the civilian population present in the area chosen for the strike. If these arguments were accepted (which is unlikely[154]), Afghanistan would still need to establish that Northrop considered it extremely likely that the US government would continue to mistakenly target civilians in drone strikes. Recall that, under the Rome Statute's aiding and abetting liability, and accepting the "public knowledge of atrocities" standard accepted by the SCSL in *Prosecutor v. Charles*

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[149] *See generally* OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, SUMMARY OF INFORMATION REGARDING U.S. COUNTERTERRORISM STRIKES OUTSIDE AREAS OF ACTIVE HOSTILITIES (2017).

[150] *See* "Drone Wars: The Full Data," THE BUREAU OF INVESTIGATIVE JOURNALISM. https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data.

[151] It recently did exactly this, but it did so in a no-bid contract, which would complicate the hypothetical with issues of control. *See generally* U.S. Dep't of Defense, Contracts, May 24, 2017, https://www.defense.gov/News/Contracts/Contract-View/Article/1192914/.

[152] Rome Statute, *supra* note 42, art. 7.

[153] *See, e.g.*, Dexter Filkins, *Operators of Drones are Faulted in Afghanistan Deaths*, N.Y. TIMES, May 29, 2010, http://www.nytimes.com/2010/05/30/world/asia/30drone.html (to be clear, the civilians were mistakenly thought to be "combatants," but the civilians killed were nevertheless the actual targets of the strikes).

[154] *See, e.g.*, Massimo Renzo, *Crimes Against Humanity and International Criminal Law*, 31 LAW AND PHILOSOPHY 443, 445, 447–48 (2012) (noting the difficulty of applying ICL to individual HR violations, especially with respect to group dimensions of ICL crimes). *See also* Rome Statute *supra* note 42, art. 7 (requiring an expansive interpretation of the phrase "attack on" in defining a crime against humanity as a criminal act "committed as part of a widespread and systematic attack on a civilian population").

Taylor, further civilian killings would not need to occur so long as Northrop accepted the likelihood that they would occur. But if this were the standard implemented, it would also produce extreme results: Northrop or similarly situated companies might not accept any contract in circumstances in which a military had already caused a significant number of civilian deaths, because if they accepted the contract, they could be held financially liable for future damages on the grounds that they accepted the likelihood that further deaths would occur.

CONCLUSION

Even if arbitrators imported the most permissive corporate-person liability doctrines from ICL, holding corporations financially liable for CAHs under IIL would be almost impossible. Moreover, even if the avenues I have suggested could provide a basis, arbitrators could only do so on the basis of questionable "boundary crossing" tools endorsed by the ILC in instances of treaty silence. Considering IIL's ongoing "crisis of legitimacy," a decision on these grounds might do more harm than good for the future of corporate subjectivity. Thus, once it is agreed that it would be desirable to incentivize corporations to double-check the effect of the military products or services they are contracted to provide or perform, international lawyers should then investigate the ways in which IIL, ICL, and international legal subjectivity is designed to shield corporations from liability, followed by identifying and critiquing the factors that motivated that design. In some cases, corporations may 'go along' with State-sanctioned violence simply because there is no legal incentive for resistance. In other cases, the products a corporation designs and manufactures add considerable gravity to the degree of the atrocities committed by States and by non-State JCEs. This Article does not suggest that corporations are the cause of these atrocities, but it does highlight the lack of international legal incentives for corporations to limit and eliminate their involvement in mass atrocities, particularly those involvements that may be less susceptible to the public eye.

To this end, however, IIL's widespread "crisis of legitimacy" is priming the field for (hopefully positive) changes. Although the optimism of international human rights lawyers regarding *Urbaser* is likely premature,[155] *Urbaser* pushes the boundaries of potential investor-to-State liability in instances of CAHs and armed conflict in at least two ways. First, it invites "boundary crossings" from ICL through language suggestive of corporate *mens rea* standards, including application of ICL theories of enterprise liability, and as this Article suggests, application of "aiding and abetting" JCEs through financial or other services, such as design or manufacturing. Second, even if future Tribunals never draw from ICL theories of individual subjectivity to international law, *Urbaser* nevertheless sets out a framework from which we can begin to conceptualize corporate subjectivity in the non-criminal context. We can clearly see that IL treats legal persons

[155] *See generally* Crow & Escobar, *supra* note 17.

differently from natural ones and that it treats States differently from both. *Urbaser* makes clear that each entity occupies its own legal territory, and it moves toward a sort of self-defining standard for corporate subjectivity: the corporation's functions determine the scope of its international subjectivity. But this standard begs several questions: which functions expose corporations? Should some functions expose corporations to more liability than others, and if so, how can the liability-weight be measured? And would this exposure produce negative externalities? For example, would corporations avoid contracts for providing public services such as water and sewage due to greater liability exposure? Accordingly, *Urbaser's* implications for corporate obligations under international law—and the subjectivity of corporations to international law on the basis of their status as "organs of society"—warrant further discussion.