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Modern challenges within the law of state responsibility for human rights violations committed by non-state actors: special focus on business activity

di
Marta Sosa Navarro [*]

I. INTRODUCTION

The subject of State responsibility for human rights violations is a complex one, as it is characterised by several and overlapping aspects of international law[1]. As Brownlie puts it, when talking of State responsibility 'the question of liability of the legal person, the State, is overlaid by categories of imputability[2], direct and indirect responsibility for acts of special groups, (…) state organs, revolutionaries, and individuals[3]'.

In this multi-faceted scenario, deficiencies within the interpretation and application of the Draft Articles on Responsibility of States for Internationally Wrongful Acts[4] of 2001 (ASR) of the International Law Commission (ILC) pose renewed challenges. The rapidly-changing world order calls for the rethinking of key issues affecting the legal theory of attribution of State responsibility for internationally wrongful acts in violation of human rights norms[5].

In this state of matters, the ultimate goal of this article is to revisit the attribution challenges faced by the law of State responsibility when encountering violations of human rights norms perpetrated through a new actor within international relations and world economy: the private corporation.

[*] Lawyer and PhD in Public International Law, Universidad Carlos III de Madrid.

[1] M. Diez de Velasco, *Instituciones de derecho internacional público* (14th edn, Tecnos 2003), at 749.

[2] Intended in the sense of criminal liability.

[3] I. Brownlie, *Principles of public international law* (6th edn, Oxford, 2003) at 431.

[4] There is, at present, a wide consensus on the customary status of this legal set of rules, which can be deemed to enshrine the international law of State responsibility.

[5] Understood here in its wide sense, hence comprising acts perpetrated either by State's organs or by non-State actors under art. 5 and art. 8 ASR, respectively.

II. DEVELOPMENTS WITHIN THE THEORIES OF ATTRIBUTION OF STATE RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS COMMITTED BY STATE ORGANS AND NON-STATE ACTORS

A. Public, semi-public or private corporations exercising elements of governmental authority (article 5 ASR).

The law of State responsibility has crystallized a broad notion of 'organ of the State', by equating the acts of the latter to the conduct of bodies which, 'though not organs, may be empowered by the law of a State to exercise elements of governmental authority[6]'. There is little doubt that the intention behind the wording of this article was to provide the tools to enable the attribution of State responsibility in those cases in which it is the State itself to perpetrate the violation through entities different from its formal organs[7].

Non-exhaustive examples of international case-law addressing issues of attribution with respect to entities exercising elements of governmental authority include the *Tadic* case, whereby the Appeals Chamber of the International Tribunal for the Former Yugoslavia (ICTY), in commenting on the 1986 Judgment of the International Court of Justice (ICJ) on the Military and Paramilitary Activities in and against Nicaragua, held that the

State incurs responsibility for acts in breach of international obligations committed by individuals who enjoy the status of organs under the national law of that State or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority[8].

The ICTY ultimately provides some useful elements to identify what has been described as a

realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives[9].

Despite the existence of important precedent-setting case-law among judgements issued by international tribunals, the richest case law on this matter can be found in arbitral decisions. In its interlocutory decision in the *Hyatt International*

[6] International Law Commission, *Draft Articles on Responsibility of the States for Internationally Wrongful Acts,* November 2001, Supplement No. 10 (A/56/10), Commentary 2 to art. 5.
[7] See, in this sense, Commentaries 1 and 2 to art. 5.
[8] ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, Judgement, Case No. IT-94–1-A, 15 July 1999, para.109.
[9] ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 122.

Corporation case, from a combined examination of 'the circumstances of [the corporation's] establishment, mode of governance, and (…) functions fulfilled', which were governmental in nature, the Iran-United States Claims Tribunal concluded that the given corporation 'has been and continues to be an instrumentality controlled by the Government of the Islamic Republic of Iran[10]'.

Furthermore, the *Maffezzini v. Spain* case, held before the arbitral tribunal instituted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1965 (ICSID Convention), became famous for adopting the functional test, which looks into the role to be performed by the entity, as opposed to the structural test. Interestingly, by interpreting article 5 ASR to mean that 'a State will not necessarily escape responsibility for wrongful acts or omissions by hiding behind a private corporate veil[11]', this case resorted to investment law and touched upon issues of great relevance for the purpose of this paper.

Other indications to identify criteria for the attribution of State responsibility in this scope include findings according to which 'the responsibility of the State can be engaged in contracts signed by public enterprises distinct from the State, when the State still retains important or dominant influence[12]'. Additional examples include the *Helnan International Hotels A/S v. Egypt* case, where the relevant arbitral tribunal established that *de facto* exercise of elements of governmental authority, (even if the domestic entity has not been empowered by law to exercise elements of the governmental authority), permitted the attribution of the relevant actions to the Egyptian State[13]'.

B. *Private corporations acting on the instructions of, or under the direction or control of, that State (article 8 ASR).*

The theory of attribution for acts of non-State actors amounting to violations of human rights norms pursuant to article 8 ASR is far from being fully defined. Enforced disappearances perpetrated by paramilitary groups within the Colombian internal

[10] Iran-United States Claims Tribunal Reports, vol. 9, p. 93-94.
[11] *Maffezini v. Kingdom of Spain*, Case No. ARB/97/7, Decision on objections to jurisdiction, 25 January 2000, para.78, reproduced in *ICSID Review – Foreign Investment Law Journal* (2001) vol.16, at 29.
[12] *Consorzio Groupement LESI-DIPENTA v. People's Democratic Republic of Algeria*, Case No. ARB/03/08, Award, 10 January 2005, para. 19, reproduced in *ICSID Review – Foreign Investment Law Journal* (2004) vol. 19 at 455-456 and LESI *S.p.A. and Astaldi S.p.A. v. People's Democratic Republic of Algeria*, Case No. ARB/05/3, Award, 12 July 2006, para. 78.
[13] *Helnan International Hotels A/S v. The Arab Republic of Egypt*, Case No. ARB 05/19, Decision on objections to jurisdiction, 17 October 2006, para. 92 and 93.

conflict[14], extrajudicial killings and torture committed by private security forces acting under control of the State in the context of the United States' war on terror[15] and State-sponsored terrorism[16] are among some of the most diffused examples of State responsibility for acts committed by non-State actors. Such situations have received, in the recent years, paramount attention from the academic community[17].

Extensive case law emanating from international tribunals, regional courts of human rights and claims tribunals, as well as statements from other international bodies, have contributed to shape some of the most controversial elements underlying the theory of attribution of State responsibility for acts perpetrated by non-State actors amounting to grave breaches of human rights law. A full review of relevant court pronouncements in this sense falls beyond the scope of this article. As a sample, the three land-marking ICJ decisions that have most notably shaped the development of the theories of attribution in this context should be highlighted: the case concerning *United States Diplomatic and Consular Staff in Tehran* (1980), the *Military and Paramilitary Activities in and against Nicaragua* case (1986), and the *Genocide Convention* case (2007). In the first case, the Court addressed the interesting question of the requisites that can potentially trigger the legal 'transformation' of a situation from a private act to an act of the State, with consequences within the scope of international responsibility:

(…) expressions of approval of the take-over of the Embassy (…) came immediately from numerous Iranian authorities (…). The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy (…) The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and the detention of the hostages into acts of that state[18]''. The other two cases tackled, instead, issues of utmost importance for the

[14] A. Manero Salvador, 'Colombia and the international responsibility for enforced disappearance', in *Anuario Español de Derecho Internacional* (2012) vol. 28, at 121-123.

[15] See, among others, L. Sadar, 'Extraordinary rendition, torture and other nightmares from the war on terror' (2007) in *George Washington Law Review*, vol. 75 and A. Pastor Palomar, 'Blackwater ante el derecho internacional: el negocio de la inmunidad' (2008) in *Revista Española de Derecho Internacional,* vol. 60, at. 427-455.

[16] M. Kowalski, 'Armed attack, non-State actors and a quest for the attribution standard' (2010), in *Polish Yearbook of International Law,* vol. 30, at 101-130.

[17] The proliferation of academic articles on the responsibility of States for the conduct of armed opposition groups provides a sample of this crescent interest. See, among others, C. Ryngaert and A. Van de Meulebroucke, 'Enhancing and enforcing compliance with international humanitarian law by non-State armed groups: an inquiry into some mechanisms' (2012) in *Journal of Conflict and Security Law,* vol. 16, at 443, and A. Clapham, 'Human rights obligations of non-state actors in conflict situations' (2006), in *International Review of Red Cross*, vol. 863, at 491.

[18] ICJ, *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, para. 71 and 74.

construction of causality and, hence, attribution of responsibility: the control theories. In particular, in these two decisions, the ICJ endorsed the effective control theory[19], and claimed that the "overall control test has the major drawback of broadening the scope of State responsibility to well beyond the fundamental principle governing the law of international responsibility[20].

Moreover, in the case concerning the application of the *Genocide Convention*, the ICJ resorted to consistency within the law of State responsibility to justify the decision not to deviate from the application of the effective control test, by asserting that '(…) rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly lex specialis[21]'. On the contrary, the ICTY's Appeals Chamber took a different stand on this subject, rejecting the aforementioned effective control theory, as opposed to the global control theory[22].

Of course, scope, limits and legal nature[23] of the principles of international law concerning the attribution to States of acts performed by non-State actors have further been developed by other tribunals or judicial organs[24], whether regional[25] or international[26] in nature. From a cross-examination of these pronouncements, it can be concluded that, as suggested by the ILC, in establishing whether a given conduct has

[19] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, para. 115.
[20] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, para. 406.
[21] Ibid., para. 401.
[22] ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 137. In para. 122, to support its position, the Tribunal in fact refers to the findings of the United States-Mexico General Claims Commission in the Youmans case with regard to the application of the overall control theory to establish State responsibility for acts of State's military officials.
[23] Iran-United States Claims Tribunal, *Yeager v. Islamic Republic of Iran*, Award No. 324–10199–1, 2 November 1987, Iran-United States Claims Tribunal Reports, vol.17 (1987-IV), p.103. Para. 42 asserts the customary nature of the content of art. 8 ASR.
[24] London Court of International Arbitration, *Encana Corporation v. Republic of Ecuador*, Case No. UN3481, Award, 3 February 2006, para. 154.
[25] See, among others, European Court of Human Rights, *Young, James and Webster v. United Kingdom*, Judgment, Merits, 13 August 1981, para. 48 and 49, and *Loizidou v. Turkey*, Judgement, Merits, 18 December 1998, para. 52 and para. 56.
[26] ICJ, *Barcelona Traction Light and Power Company*, Second Phase, Judgment, I.C.J. Reports 1970, paras. 56-58.

been carried out on instructions or under the control or direction of a State, it is essential to keep at all times a case-by-case approach[27].

Despite predictions from scholars forecasting a prominent role for business enterprises within this area of law, in the light of the increasing use of corporations by States in their extraterritorial activities[28], little attention has been paid to the specific standards of proof for State attribution of human rights violations committed by business enterprises acting under the direction, control or instructions of that State.

The structure of the present research paper draws from the assumption that State's obligations with respect to human rights have an extraterritorial scope[29]. Both international case law and scholars seem to agree on this point. In order to illustrate briefly the existing consensus on the extraterritorial character of the State's obligation to protect human rights from violations of non-State actors, reference can be the made to the ICJ's Advisory Opinion on the Legal Consequences on the Construction of the Wall in the Occupied Palestinian Territory (2004)[30] on one side, and to the thesis held by McCorqoudale and Simons in their full-fledged analysis of the subject[31]. Similarly, De Schutter has relied upon treaty bodies statements to assert that 'States should take all the necessary measures to prevent human rights contraventions abroad by business enterprises that are incorporated under their laws, or that have their main seat or their main place of business under their jurisdiction[32]'. Likewise, Kinley and Augenstein have expressed the views that 'in so far States are under extraterritorial obligations to protect human rights, such obligations extend to the extraterritorial regulation and control of corporate actors[33]'.

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[27] ILC, ASR, Commentary 5 to Article 8, cited in World Trade Organization Appellate Body Report, *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, 27 June 2005, para. 69.

[28] R. McCorquodale and P. Simons, 'Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law' (2007) in *The Modern Law Review*, vol. 70 at 611. McCorquodale and Simons' thorough examination of the subject amounts to one of the most comprehensive and up-to-date analysis of issues affecting State responsibility for corporate action, which calls for further research.

[29] P. De Sena, 'Juridiction étatique et imputation des violations extraterritoriales des droits de l'homme: quelques observations', in D. Alland, O. De Frouville, and J. Vinuales (eds.), *Unité et diversité du droit international, écrits en l'honneur du Professeur Pierre-Marie Dupuy* (Martinus Nijhoff Publishers, 2014), 785-801.

[30] ICJ, *Advisory Opinion on the Legal Consequences on the Construction of the Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 207-103.

[31] These authors rely on extensive Human Rights Council comments and observations and case law from regional human rights courts to support their position. See R. McCorquodale and P. Simons, (n 28) at 602-605.

[32] O. De Schutter, 'Towards a new treaty on business and human rights' (2015), in *Business and Human Rights Journal*, vol. 1 at 45.

[33] D. Augenstein and D. Kinley, 'When human rights "responsibilities" become "duties": the extraterritorial obligations of States that bind corporations', in S. Deva and D. Bilchitz (eds.),

Human rights obligations: beyond the corporate responsibility to respect? (Cambridge University Press, 2013) at 275.

III. CORPORATE ABUSE AND STATE'S OBLIGATIONS WITHIN INTERNATIONAL HUMAN RIGHTS LAW: THE CHALLENGES OF DEFINING BUSINESSES AS NON-STATE ACTORS FOR THE PURPOSES OF ATTRIBUTION OF STATE RESPONSIBILITY.

The large-scale nature and seriousness of human rights violations perpetrated by corporations within the scope of their business operations have recently evidenced the existence of a legal *lacuna*. Dramatic examples, which range from oil spillages perpetrated by petrol giants in fragile States (e.g. Nigeria[34], Ivory Coast[35]) to the Rana Plaza garment-factory collapse causing hundreds of deaths and injured, may briefly serve to illustrate the way in which business activity may negatively impact human rights. International law has proven inadequate to prevent many of the gross human rights violations committed by corporations (multinational or not), which act within an international trade legal framework characterised by an asymmetry between business operational capacities (i.e., freedom of move and trade freedom) and State regulatory capabilities. The insufficiencies within the legal framework regulating this aspect of modern economy becomes clearer when, more often than not, these violations are paired with impunity[36].

Despite their increasing power in shaping the new international legal order[37], and notwithstanding the existence of doctrinal proposals advocating for a change in this sense[38], corporations are not considered subjects of international law, a *status* that

[34] A. Espinosa González, 'La aplicación de la responsabilidad de respetar en casos de degradación ambiental: un apunte crítico a la luz del caso Shell en Nigeria' in C. Márquez Carrasco (ed.), *España y la implementación de los principios rectores de las Naciones Unidas sobre empresas y derechos humanos* (Huygens, 2014) at 187.

[35] M.A. Manirabona, 'L'affaire Trafigura: vers la répression de graves atteintes environnementales en tant que crimes contre l'humanité' (2011) in *Revue de droit internationale et de droit comparé*, vol. 88, 535-576.

[36] For a general picture of the problem see, among others, M.A. McGregor, 'Ending corporate impunity: how to really curb the pillaging of natural resources' (2009) in C*ase Western Reserve Journal of international law,* vol. 42, 469-497; A. Grear and B.H. Weston, 'The betrayal of human rights and the urgency of universal corporate accountability: reflections on a post-Kiobel lawscape' *(2015)* in *Human rights law review*, vol. 15, 21-44 and D.Baumann-Pauly and J. Nolan (eds.), *Business and human rights: from principles to practice*, (Routledge, 2016).

[37] For a detailed and critical account on how international law has responded to challenges resulting from the uprising of the corporation as a *de facto* participant in the international relations, see R. McCorquodale, 'Pluralism, global law and human rights: strengthening corporate accountability for human rights violations' (2013) in *Global Constitutionalism*, vol. 2, 287-315.

[38] A. Clapham, *Human rights obligations of non-State actors* (Oxford University Press, 2006) at 69-74.

belongs solely to States and international organizations[39]. As a result, up until now, efforts to hold business enterprises accountable for human rights violations have taken place exclusively before domestic tribunals, mainly through civil litigation, with some recent examples of extremely hampered criminal procedures[40].

At a supranational level, it can be understood why international judicial bodies have not been asked to have their say on this issue. As far as the International Criminal Court (hereafter, ICC) is concerned[41], for this organ be able to exercise its exceptional jurisdiction[42] over corporations, it should have its Statute amended[43]. Even in the extremely unlikely event of reaching the required consensus to enable such amendment, as some authors have put it, 'international criminal law is not the panacea that solves all the theoretical and practical obstacles surrounding the debate on corporate human rights obligations[44]'.

[39] For a detailed overview of the debate on this issue and the arguments supporting this position, see J.E. Álvarez, 'Are corporations subjects of international law?' *(2011)* in *Santa Clara Journal of International Law*, vol. 9. The debate is far from being closed though, and its roots can be drawn back to Dame Rosalyn Higgins' observations in respect of the lack of functional purpose of establishing a distinction between subjects and objects in international law: 'the whole notion of 'subjects' and 'objects' has no credible reality, and […] no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint', see R. Higgins, *Problems and process. International law and how we use it* (Clarendon Press, 1995) at 47. For a critique of the liberal international position in respect of non-State actors in international law, see Slaughter's theory, who holds that 'the "first assumption" of "a liberal theory of international law" is that the primary actors in the international system are individuals and groups acting in domestic and transnational civil society', A.M. Slaughter, 'International law in a world of liberal States' (1995) in *European Journal of International Law*, vol. 6, at 508. See also Chetail's contribution to the topic in V. Chetail, 'The legal personality of multinational corporations, State responsibility and due diligence: the way forward', in D. Alland, O. De Frouville, and J. Vinuales(eds.), *Unité et diversité du droit international, écrits en l'honneur du Professeur Pierre-Marie Dupuy*, (Martinus Nijhoff Publishers, 2014) 105-130.

[40] M. Sosa Navarro and A. Espinosa González, 'Corporate liability and human rights: access to criminal judicial remedies in Europe', in A. Bonfanti (ed.), *Business and human rights in Europe: international law challenges*, (Routledge, 2018) 223-233.

[41] Most European States are parties to the Statute of the ICC.

[42] This is based on the principle of complementarity, according to which the ICC is only allowed to intervene in the absence of domestic prosecution.

[43] An interesting exception is found in the *News TV S.A.L.* and *Akbar* cases before the Special Tribunal for Lebanon. For a monographic study on the first time in which an international tribunal addressed the criminal liability of corporations, see N. Bernaz, 'Corporate criminal liability under international law. The News S.A.L. and Akhbar Beirut S.A.L. cases at the Special Tribunal for Lebanon' *(2015)* in *Journal of International Criminal Justice*, vol. 13, 313-330.

[44] On one side, as mentioned, the ICC does not does have jurisdiction over legal persons. Secondly, this court can only investigate crimes committed after the entry into force of its Statute (2002). Thirdly, core international crimes do not cover the bulk of human rights violations committed by corporations, which lay more within the scope of labour rights or access to resources, such as water, by affected communities. In the following article, it is argued

Upon initiative of Ecuador and South Africa, an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, is currently being discussed at the United Nations[45]. This new treaty will attempt to fill some of the gaps of the United Nations Guiding Principles on Business and Human Rights (hereafter, UNGP), adopted in 2011, which are increasingly becoming the most recognised soft-law instrument regulating the relationship between business activity and human rights[46]. Despite the civil society's call for the inclusion of direct human rights obligations and corporate criminal liability within the forthcoming treaty, the relative draft takes for now a State-centred approach, by covering exclusively the international obligations of States in this realm[47].

Against this background, the reasons motivating the need of a shift of the study focus from the business enterprise to the State, from corporate accountability to State responsibility, can be easily inferred. The challenges posed by the transnational character of business impacts on human rights norms demands revisiting and rethinking certain aspects of international law on State responsibility.

In this sense, the main goal of this article is to set the basis for a holistic reflection on these issues. By contextualising the problem and presenting an updated picture of the role of the law of State responsibility in protecting individuals against human rights violations committed by non-State actors, this paper shines the light on the potential resort to this area of international law to prevent corporate abuse.

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that the structural differences between human rights law and international criminal law results in the discussions on corporate responsibility under these two fields running parallel: L. Van Den Herik and J. Letnar Černič, 'Regulating corporations under international law: from human rights to international criminal law and back again' (2010) in *Journal of International Criminal Justice*, vol. 8, at 743.

[45] The text of the *Draft Zero Treaty* has been the object of the recently concluded discussions during the fifth round of negotiations held in Geneva. For a full account of the content of the debates, see the *Draft report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights,* 14-18 October 2019, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/IGWG_5th_DraftReport.pdf.

[46] Other soft law instruments that have also contributed to frame the current soft legal framework within the area of business and human rights include: the International Labour Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the United Nations Global Compact initiative on corporate social responsibility and the OECD Guidelines for Multinational Enterprises.

[47] This feature has been object of hard criticism, both from civil society organizations and academia. See, among others, N. Bernaz, 'The draft UN treaty on business and human rights: the triumph of realism over idealism' (2018) in *Reflections on the zero draft blog series,* available at https://www.business-humanrights.org/en/the-draft-un-treaty-on-business-and-human-rights-the-triumph-of-realism-over-idealism.

To do so, two key questions that need to be answered have been identified:

Under the (current status of) law of State responsibility as enshrined in ASR,

1. May a State incur in international responsibility for human rights violations perpetrated by public or private corporations (a) exercising elements of governmental authority[48] and (b) acting on the instructions or under the direction or control of that State[49]? (Q1)

2. May a State incur in international responsibility for failing to comply with its duty to protect human rights from violations of non-State actors, in particular by 'preventing corporations - both national and transnational, publicly or privately owned - from breaching rights and taking steps to punish them and provide reparation to victims when they do so[50]'? (Q2)

These questions should however be addressed from the two-fold perspective of the State's obligations under international human rights law: namely, the State's negative obligation to respect human rights (Q1) and the State's positive obligation to protect human rights from violations by non-State actors (Q2)[51].

A. State's negative obligation to respect human rights

The privatization of functions previously performed by governments, including welfare services[52], prisons[53], schools and supply of water, gas and electricity, coupled

[48] ILC, ASR, art. 5.
[49] Ibid., art. 8.
[50] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries, UN Doc. A/HRC/4/35/Add.1, 13 February 2007, para. 7.
[51] For an updated review of this classical distinction, see D. Shelton, 'Positive and negative obligations' in D. Shelton (ed.), *The Oxford handbook of international human rights law*, (Oxford University Press, 2013).
[52] C. Methven O'Brien, 'Essential services, public procurement and human rights in Europe' (2015) University of Groningen, Faculty of Law, Research Paper Series No. 22/2015, at 3.
[53] Some of the most notorious cases include Spanish transport corporation *Ferrovial* alleged implications in torture to immigrants in Australia's offshore detention centres and human rights violations perpetrated by private contractors in Abu Ghraib prison in Iraq. See, for instance, M.

with modern market tendencies towards deregulation and liberalization, are among the many factors which have determined the prominent role that non-State actors – in particular, corporations – have assumed in the recent years with respect to the enjoyment of human rights.

In their supply chains, companies

can meet exploitative child labour, discrimination, risks to health and life, forced labour. The extractive industries can be involved in the spoliation of the environment and the destruction of communities. (…) Simply through their presence companies provide economic support and moral sanction to oppressive governments. If they lack appropriate policies, companies risk the legitimate charge of complicity with oppression in pursuit of profit[54].

Examples within the extractive industry include, among others, the Shell Petroleum case for the pollution of the Ogoni region in Nigeria, or the allegations of abusive employment conditions by State-owned Chinese companies suffered by workers within copper mining activities in Zambia[55]. Information technology companies have also allegedly been involved in human rights violations, ranging from infringements of the freedom of information through cooperation with repressive governments[56] to violation of privacy[57] and exploitative labour conditions[58].

Bina, 'Private military contractor liability and accountability after Abu Ghraib' (2005) in *John Marshal Law Review*, vol. 39, at 1237.

[54] G. Chandler, 'Corporate liability: human rights and the modern business', (Conference, 12 June 2006) cited in P. Alston and R. Goodman, *International human rights*, (Oxford University Press, 2013), at 1463.

[55] Human Rights Watch, 'You'll be fired if you refuse. Labor abuses in Zambia's Chinese State-owned copper mines' (4 November 2011) available at https://www.hrw.org/report/2011/11/04/youll-be-fired-if-you-refuse/labor-abuses-zambias-chinese-state-owned-copper-mines

[56] In an ongoing criminal case in France, the corporation Amesys has been accused of complicity with human rights abuses by the Gaddafi government in Libya for providing it with surveillance equipment. For further information on the case, see https://www.business-humanrights.org/fr/proc%C3%A8s-amesys-libye

[57] The Guardian, 'Optic Nerve: millions of Yahoo webcam images intercepted by GCHQ' (24 February 2014) available at https://www.theguardian.com/world/2014/feb/27/gchq-nsa-webcam-images-internet-yahoo

[58] See, for instance, D. Barboza, 'Worker Deaths Raise Questions at an Apple Contractor in China' (The New York Times, 10 December 2013) available at http://www.nytimes.com/2013/12/11/technology/worker-deathsraise-questions-at-an-apple-contractor-in-china.html.

In such a context, the risk of violating human rights affects both public, semi-public or private corporations exercising elements of governmental authority and whose acts are considered to be State's acts under international law, as well as private corporations acting on the instructions or under the direction or control of a State in carrying out the conduct. The above snapshot of some of the sectors in which these threats to human rights might be more evident may contextualize the magnitude of a legal problem that, despite its private elements, needs to be addressed from an international law perspective.

It follows that a full and well-grounded answer to this question requires the previous attainment of a series of middle term goals. Among these, the definition of the functional test, which looks into the role to be performed by the entity, as opposed to the structural test, which looks into the formal corporate structure as a criterion for the attribution of State responsibility within current international law, may be highlighted. The clarification of this matter calls for a multidisciplinary approach as it will necessarily rely on cross-referencing to other areas of law such as the principles of corporate law.

Furthermore, the extent to which an act committed by a corporation acting as a State's organ may give rise to State responsibility, when it exceeds in it authority or contravenes instructions, is another matter that falls within the lacunas identified within the ASR, that ultimately underlie the question here addressed[59]. The decision representing the turning point in this respect comes from the Inter-American Court of Human Rights, which, in the *Velásquez Rodríguez v. Honduras* case, acknowledged the responsibility of the State for the acts of its agents, even when they 'act outside the sphere of their authority[60]', thus setting an important precedent for the purpose of the definition of the concept "excess of authority or contravention of instructions'. Moreover, the inclusion of the lack due diligence as a factor triggering State responsibility, on the basis of the State's positive obligation to protect, that will be discussed in Q2, may also be highlighted here. In words of the Court,

An illegal act which violates human rights and which is initially not directly imputable[61] to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility

[59] Pursuant to art. 7 ASR, "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions".

[60] Inter-American Court of Human Rights, Case of *Velásquez Rodríguez v. Honduras,* Judgement of July 29, 1988, para. 170.

[61] In the sense of attributable.

of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention[62].

Three paragraphs later, after recognizing the impossibility of creating a list of the measures that should be adopted by a given State to prevent human rights violations, the Court offers a detailed definition of the scope and content of due diligence in respect of human rights violations linked to torture[63].

Another aspect conditioning the attribution of State responsibility for human rights violations perpetrated by corporations refers to the control theories previously discussed. Today, businesses activity worldwide is dominated by global value chains, that is, multi-tiered structures in which thousands of small, medium and big enterprises intermingle to lead to a final product. This has an effect of diluting responsibilities that ultimately may lead to impunity for serious violations of human rights perpetrated within their business activity[64], a fact which calls for the re-examination of effective and global control tests for the attribution of State responsibility pursuant to article 8 ASR, under the specific light of business operations.

B. State's positive obligation to protect human rights

The second part addresses issues affecting the attribution of State responsibility for non-compliance with the obligation of conduct to take all the necessary measures to prevent human rights violations within the context of the State's positive obligation to protect human rights from violations by non-State actors.

The proposed Q2 is thus formulated within the context of attribution of State responsibility for omission, that is, for failing to adopt all the necessary measures to prevent corporations from violating human rights. An exhaustive analysis of the vast topic of attribution through the theory of conduct obligations exceeds the scope of this paper. Consequently, focus will be put on one specific aspect of attribution of State responsibility for failure to comply with its positive obligation to protect human rights from acts of non-State actors: responsibility for failure to include a human rights clause in its public procurement contracts. By doing so, the ultimate goal of this section is to set the basis to clarify whether the current status of international law allows the establishment of a nexus between the States' decision not to take all necessary

[62] Ibid, para. 172. The Convention being the American Convention of Human Rights.
[63] Ibid, para. 175.
[64] For a thorough examination of this problem at a EU level see Opinion of the European Union Agency for Fundamental Rights, 'Improving Access to remedy in the area of business and human rights at the EU level', 1/2917. Available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf

measures to ensure that public procurement contracts are awarded to bidders that are committed to respecting human rights[65] and the attribution of State responsibility for an internationally wrongful act. To this purpose, light will be shed on the role of causation between harm and State's omissions, an aspect of positive obligations that 'has been hitherto largely neglected[66]'. Unquestionably, the conduct (or due diligence) obligation enjoys an extraterritorial scope, and the test regarding public procurement clauses would cover business activities developed in third countries through the application of business relationships and supply chain theories.

1. *The challenge of defining obligations of conduct: what is included in the notion 'all the necessary measures'?*

The following general comment on Article 2 of the International Covenant on Civil and Political Rights, adopted by the Human Rights Committee in 2004, touches upon one of the key issues to determine State responsibility for breaching the obligation to protect human rights from violations by non-State actors, i.e. the specific content of this positive obligation:

(…) the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' **permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm** caused by such acts by private persons or entities[67].

This reasoning, though not being conclusive, reveals one of the key problems affecting the topic here addressed, that is, the complexity of identifying the elements enabling the definition of the "all the necessary measures" standard, cornerstone for attribution of responsibility.

[65] Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, UN doc. A/HRC/RES/26/9 (29 September 2017), at 6.
[66] V. Stoyanova, 'Causation between State omission and harm within the framework of positive obligations under the European Convention on Human Rights' (2018), in *Human Rights Law Review*, vol. 18, at 310. The author presents interesting findings with respect to the establishment of causation within the case law of the European Court of Human Rights.
[67] United Nations Human Rights Committee, 'General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13.

2. *Public Procurement.*

Public procurement, which is the process by which governments and State-owned enterprises purchase goods, services and works from the market, amounts to the 12% of the gross domestic product in the countries of the Organization for the Economic Co-operation and Development (hereafter, OECD)[68]. This means that, within OECD countries, public procurement contracts move annually more than 5,000 billion euros[69]. The size of this market evidences the strong bargaining power of public administrations and explains why, historically, the inclusion of social conditionality and the respect for human rights and labour rights has always been a dimension of the use of public procurement regulation[70].

A glimpse of the international (Decision on the outcomes of the Global Procurement Agreement negotiations under Article XXIV:7 within the World Trade Organization[71] and General Comment 24 of the United Nations Committee on Economic Social and Cultural Rights[72]), regional (2014 Public Procurement Directives[73]) and domestic developments[74] towards the inclusion of mandatory human rights clauses within public procurement contracts reflect a global tendency towards

[68] OECD, 'Public Procurement', online resource available at http://www.oecd.org/governance/public-procurement/.

[69] OECD, 'Government at a Glance- 2017 edition: Public procurement', online source available at https://stats.oecd.org/Index.aspx?QueryId=78413.

[70] M.A. Corvaglia and K. Li, 'Extraterritoriality and public procurement regulation in the context of global supply chains' governance' (2018) in *Europe and the world: A law review*, vol. 16, at 6.

[71] World Trade Organization, 'Decision of the Committee on Government Procurement, Government Procurement Agreement 113' (2 April 2012) available at https://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm. As a result, the work programme on sustainable development has led to comparative analysis of the key practices for incorporating social clauses at different stages of public procurement procedures.

[72] United Nations, 'General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of Business Activities', (10 August 2017) UN Doc E/C.12/GC/24, para. 33.

[73] In particular, see the general "social clause" enshrined in art. 30.3 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, on the award of concession contracts, OJ L 94, 28.3.2014, 1–64, as well as art. 18.2 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, OJ L 94, 28.3.2014, 65–242.

[74] Opinion of the European Union Agency for Fundamental Rights, (n 64) at 77-78. For developments on mandatory human rights due diligence legislation see, among others, the 2017 French *devoir du vigilance* law concerning the duty of vigilance of parent companies and ordering companies, the UK 2015 Modern Slavery Act, and the US Dodd Franck Act, under which businesses are required to report on due diligence measure adopted 'on the source and chain of custody' of certain minerals, in order to avoid the financing of illegal armed groups through their commercial activity. See also European Coalition for Corporate Justice, 'Evidence for mandatory HRDD legislation, Background note', (September 2018) available at http://corporatejustice.org/policy-evidence-mhrdd-september-2018-final.pdf .

recognizing this area of law as a potential game-changer within the scope of business and human rights – an idea that may be confirmed by crescent scholarly attention to the topic[75].

At the global level, the United Nations 2030 Agenda for Sustainable Development, in its Goal 12.7, calls on States to 'promote public procurement practices that are sustainable, in accordance with national policies and priorities[76]'.

More interestingly, the most recent soft law instrument addressing the relationship between human rights protection and the development of business activities, the United Nations Guiding Principles on Business and Human Rights, do not only acknowledge the importance of the State's commitment with human rights obligations in procurement activities, but also set out the basis for the attribution of State responsibility for failing to comply with the obligation of preventing human rights violations by corporations:

States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights. Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself[77].

The hypothesis which served as a starting point for Q2 has been wisely summarised by Russo, who states that 'in the context of procurement law, direct responsibility may be ascribed when a State fails to insert social clauses into public

[75] C. Methven O'Brien, 'The home State duty to regulate the human rights impacts of TNCs abroad: a rebuttal' (2018) in *Business and Human Rights Journal,* vol. 3, 47-73; L. Seck, 'Conceptualizing the home State duty to protect', in K. Buhman, L. Roseberry and M. Morsing (eds.), *Corporate social and human rights responsibilities. Global, legal and management perspectives* (Palgrave Macmillan, 2011) and O. Martin-Ortega, 'Public procurement as a tool for the protection and promotion of human rights: a study of collaboration, due diligence and leverage in the electronics industry' (2018*)* in *Business and Human Rights Journal,* vol. 3, 75-95.

[76] 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc. A/RES/70/1.

[77] United Nations, Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights' (16 June 2011). Principle 5 states that 'States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights'.

contracts, in violation of specific obligations such as those provided by the ILO Public Contracts Convention[78]'.

It follows that key questions arising in this section are to be addressed within the framework provided for by the ILC's ASR articles 5 and 8. The latter provision, by regulating the circumstances under which the conduct of a person or group of persons shall be considered as an act of a State, provides the basis for the establishment of an indirect responsibility, according to which a State may be held accountable for the failure to adopt appropriate measures to prevent human rights violations by private corporations acting on the instructions or under the direction or control of that State. In the same way, under article 5, State responsibility may be inferred from human rights violations perpetrated by persons or entities exercising elements of governmental authority when the State's failure to adopt the necessary measures to prevent the abuse may be attributed to the State pursuant its positive obligation to protect human rights. Despite the valuable contribution of scholarly writings to this area of law still under cons an area of law still under development[79], the extent to which the lack of social clauses in public contracts may amount to an infringement of a 'necessary measure' to prevent human rights violations by the corporation at issue, remains unanswered.

Ultimately, by focusing on a specific aspect of the State's positive obligation to protect human rights, i.e. the inclusion of a human rights requirement clause within the public procurement regime regulating its contractual relationships with private corporations, this section sets the basis for a structured approach to the broader question hereby identified: can the concept and scope of "due diligence" as a standard of proof to attribute responsibility for human rights violations be defined under the current status of international law?

III. CONCLUSION AND CLOSING REMARKS.

[78] D. Russo, 'The duty to protect in public procurement. Towards a mandatory human rights clause?' in A. Bonfanti (ed.), *Business and human rights in Europe: international law challenges* (Routledge, 2018), at 61.

[79] See, among others, O. Martin-Ortega, O. Outhwaite and W. Rook, 'Buying power and human rights in the supply chain: legal options for socially responsible public procurement of electronic goods' (2015) in *International Journal of Human Rights*, vol. 19, 354-361; R. McCorquodale, 'Corporate Social Responsibility and International Human Rights Law' (2009) in *Journal of Business Ethics,* vol. 87, at 392; and O. Martin-Ortega, 'Human rights due diligence for corporations: from voluntary standards to hard law at last?'(2014) in *Netherlands Quarterly of Human Rights,* vol. 32, at 49-50.

The attribution of State responsibility for an internationally wrongful act triggers two types of secondary obligations for the responsible State: the obligation of putting an end to the illegal situation and the obligation to make full reparation for the injury caused by the internationally wrongful act. The possibility of this being asserted within the scope of State responsibility for acts committed by corporations, as suggested in this paper, puts on the table a series of classical deficiencies affecting the law of State responsibility that may create new avenues for further research[80].

In short, this paper has intended to make a modest contribution to the need of clarification in this area through a revision of the state of the art in order to identify the common standards and principles applicable, under the law of State responsibility, to human rights violations perpetrated by business enterprises. To this end, by introducing a two-fold perspective approach to the problem, particular attention has been paid to the existing lacunas within the State's positive obligations to protect human rights. The findings reveal the need to direct research efforts towards the definition of due diligence as a key notion for the attribution of State responsibility, both in the general context of the State's obligations of conduct and in the specific context of Public Procurement Law.

At a time in which negotiations at the United Nations on the topic seem to be getting closer to a new binding instrument that would elevate to treaty law State responsibility for human rights violations committed by business enterprises, answering the questions raised in the present contribution becomes an imperative. At a EU level, the recent official commitment by EU Commissioner for Justice, Didier Reynders, to an EU initiative on mandatory Human Rights and Environmental Due Diligence[81] to be adopted in 2021, represents the latest confirmation of a tendency towards a new threshold: binding regulation of conduct obligations, with due diligence at its core. Against this background, the need to fully understand the role to be played by the Law of State Responsibility for effective attribution[82] (and eventual enforcement) of international responsibility for human rights violations committed by corporations, becomes clear.

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[80] P.M. Dupuy, 'The deficiencies of the law of State responsibility relating to breaches of "obligations owed to the international community as a whole": suggestions for avoiding the obsolescence of aggravated responsibility' in A. Cassese (ed.), *Realizing utopia, the future of international law* (Oxford University Press, 2012) at 210.

[81] ECCJ, 'Commissioner Reynders announces EU corporate due diligence legislation', (30 April 2020). Available at https://corporatejustice.org/news/16806-commissioner-reynders-announces-eu-corporate-due-diligence-legislation

[82] The question builds on one of the most essential assumptions within the law of State responsibility, i.e, 'the rules of attribution are (…) an implicit basis of all international obligations so far as the state is concerned', J. Crawford, 'The ILC's articles on responsibility of States for internationally wrongful acts: a retrospect (2002) in *American Journal of International Law*, vol. 96, at 879.