into account in their foreign policy, and the United Nations has other mechanisms (of varying degrees of effectiveness) for putting pressure on violators.\textsuperscript{130}

As we move from doctrine to the more important realm of the actions of global decisionmakers, the following developments evince a clear trend in favor of corporate duties.

A. The World War II Industrialist Cases

Although the universe of international criminal law does not reveal any prosecutions of corporations per se, an important precedent nonetheless shows the willingness of key legal actors to contemplate corporate responsibility at the international level. This episode concerns the trials of German industrialists by American courts sitting in occupied Germany in the so-called second Nuremberg trials under the Allied forces’ Control Council Law No. 10.\textsuperscript{131} In three cases, United States v. Flick, United States v. Krauch (the I.G. Farben Case), and United States v. Krupp, the leaders of large German industries were prosecuted for crimes against peace (i.e., initiating World War II), war crimes, and crimes against humanity.\textsuperscript{132} The charges stemmed from the active involvement of the defendants in Nazi practices such as slave labor and deportation. A British court also tried those manufacturing Zyklon B gas for complicity in war crimes.\textsuperscript{133}

Although in all these cases the courts were trying individuals, they nonetheless routinely spoke in terms of corporate responsibilities and obligations. For example, in the I.G. Farben Case, the court wrote:

With reference to the charges in the present indictment concerning Farben’s activities in Poland, Norway, Alsace-Lorraine, and France, we find that the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by Farben, and that these offenses were connected with, and an inextricable part of the German policy for occupied countries. . . . The action of Farben and its


\textsuperscript{131} Control Council Law No. 10 (Dec. 20, 1945), reprintedin 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, at xvi (photo. reprint 1998) (1949) [hereinafter CCL No. 10 TRIALS].

\textsuperscript{132} See generally CCL No. 10 TRIALS, supra note 131, vols. 6-9 (1950-1953).

\textsuperscript{133} The Zyklon B Case: Trial of Bruno Tesch and Two Others, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (1997) (Brit. Mil. Ct. 1946).
representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich. . . . Such action on the part of Farben constituted a violation of the Hague Regulations [on the conduct of warfare].  

The court used these various activities as a starting point for determining the guilt of the individuals based on their knowledge and participation. The courts’ focus on the role of the firms shows an acceptance that the corporations themselves had duties that they had breached.

B. International Labor Law

Second, states have promulgated a series of international labor conventions, recommendations, and other standards to promote the welfare of employees. In line with the traditional paradigm, governments and the International Labour Organization (ILO) view the standards as creating duties on states, and thus the focus of ILO and governmental attention is on the duties of states to implement them. But both the purpose of the conventions and their wording make clear that they do recognize duties on enterprises regarding their employees. For instance, one of the ILO’s so-called core conventions, the 1949 Convention Concerning the Application of the Principles of the Right To Organise and To Bargain Collectively, states simply, “Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.” While clearly an injunction to governments to enact legislation against certain behavior by industry, the obligation also entails, indeed presupposes, a duty on the

134. United States v. Krauch, 8 CCL No. 10 TRIALS, supra note 131, at 1081, 1140 (1952) (U.S. Mil. Trib. VI 1948); see also United States v. Krupp, 9 CCL No. 10 TRIALS, supra note 131, at 1327, 1352-53 (1950) (U.S. Mil. Trib. III 1948) (“[T]he confiscation of the Austin plant [a French tractor plant owned by the Rothschilds] . . . and its subsequent detention by the Krupp firm constitute a violation of Article 43 of the Hague Regulations . . . [and] the Krupp firm, through defendants[,] . . . voluntarily and without duress participated in these violations . . . .”).

135. United States v. Krauch, 8 CCL No. 10 TRIALS, supra note 131, at 1081, 1153 (1952) (U.S. Mil. Trib. VI 1948) (“[C]orporations act through individuals and, under the conception of personal individual guilt . . . the prosecution . . . must establish . . . that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.”); Matthew Lippman, War Crimes Trials of German Industrialists: The “Other Schindlers,” 9 TEMP. INT’L & COMP. L.J. 173 (1995).

136. See Constitution of the International Labour Organisation, adopted Oct. 9, 1946, pmbl., 15 U.N.T.S. 35, 40-42 (“[T]he failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”); see also NICOLAS VALTICOS, INTERNATIONAL LABOUR LAW 225-36 (1979) (focusing on state obligations).

corporation not to interfere with the ability of employees to form unions. In Raz’s conception, the rights to form a union and to strike are rights against the employer, even if the treaties themselves place the duties on the state.138 States preparing other conventions have, in fact, recognized this truism in textual terms. For example, the 1981 Occupational Safety and Health Convention contains six articles specifically obligating employers to attain certain standards.139

The labor rights treaties assume special significance with respect to the possibility of duties on corporations in the human rights area. They have a long historical pedigree, dating back to the 1920s, well before the development of most modern human rights law, and thereby they show that states have accepted the need to regulate corporate conduct through international law. Today, most states view labor rights as a subset of human rights and, in particular, of economic and social rights.140 This global recognition that the rights of employees create duties for corporations represents a stepping stone to an acceptance by states that the rights of the citizenry can create other duties for corporations.

C. International Environmental Law and Polluter Responsibility

Beyond labor law, decisionmakers prescribing international environmental law have gone even further in holding private enterprises liable for harms. Governments and environmentalists understand that state responsibility—even under a strict liability regime—may not work to provide appropriate reparation for the harm done.141 As a result, the “polluter pays” principle has exerted a strong impact on governmental policies toward prevention and responses to pollution, moving international

138. See supra text accompanying notes 82-84.
139. Convention Concerning Occupational Safety and Health and the Working Environment, adopted June 22, 1981, http://ilolex.ilo.ch:1567/english/convdisp2.htm; see, e.g., id. art. 16(1) (“Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.”); see also Convention Concerning Forced or Compulsory Labour, as Modified by the Final Articles Revision Convention of the International Labour Organisation, done Aug. 31, 1948, art. 25, 39 U.N.T.S. 55, 56-74 (obligating states to criminalize any forced labor, but not imposing such an obligation directly on corporations).
environmental law well beyond exclusive reliance on state responsibility.\textsuperscript{142} The principle in the abstract has been reiterated in various important, though nonbinding, instruments.\textsuperscript{143} More important, states have made it operational through an array of treaties that place liability directly upon polluters. These include the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy,\textsuperscript{144} the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships,\textsuperscript{145} the 1963 Vienna Convention on Civil Liability for Nuclear Damage,\textsuperscript{146} the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1984 Protocol thereto,\textsuperscript{147} the 1971 Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material,\textsuperscript{148} and the 1976 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources.\textsuperscript{149} For instance, the 1969 Brussels Convention states:

[T]he owner of a ship at the time of an accident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.\textsuperscript{150}

These treaties thus impose an international standard of liability on the corporation. Indeed, one key environmental treaty recognizes some pollution damage as a bona fide international crime. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous

\textsuperscript{142} PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 201 (1992).

\textsuperscript{150} 1969 Convention, \textit{supra} note 147, at 5.
Wastes and Their Disposal declares that “illegal traffic in hazardous wastes or other wastes is criminal” and requires all parties to introduce legislation to prevent and punish it.151

Although environmental treaties demonstrate a willingness of states to impose responsibility directly on corporations, they are still very much influenced by the traditional paradigm of international law. Thus, governments and commentators routinely refer to them as “civil liability” treaties, rather than corporate responsibility schemes, reflecting the extent to which the term “responsibility” is tied up with the idea of state responsibility.152 Indeed, scholars largely exclude these regimes from the ambit of public international law and instead regard them as private law regimes.153 Commentators use these terms because all the treaties above provide for implementation by national courts, wherein victims of the pollution may sue; they are thus merely, as Alan Boyle puts it, “transboundary civil litigation” regimes.154

But this once again confuses the existence of responsibility with the mode of implementing it. It suggests that international law does not itself impose liability on the corporations—even though this is the very language of some of the treaties—because the mechanism for enforcement is through a private lawsuit in one or more states. The treaties do impose responsibility upon the polluters, however; the use of domestic courts to implement this liability does not change this reality, just as the use of such courts to implement international criminal responsibility—through, for example, obligations on states to extradite or prosecute offenders—does not detract from the law’s imposition of individual responsibility.155


153. See Zemanek, supra note 152; see also Sean D. Murphy, Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes, 88 AM. J. INT’L L. 24, 48-56 (1994) (analyzing the “negotiated private law regime”).


155. RATNER & ABRAMS, supra note 54, at 11-12. But see Bruno Simma & Andreas L. Paulus, The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, 93 AM. J. INT’L L. 302, 308 (1999) (distinguishing between delicta juris gentium and direct international responsibility, where the former applies to crimes in which states are authorized or required to prosecute and the latter to a smaller category of crimes).
D. Anti-Corruption Law

Beyond environmental treaties, states have developed international law creating binding obligations on corporations with respect to discrete economic activities. In 1997, the states in the OECD concluded under its auspices the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.156 The Convention requires state parties to criminalize bribery of foreign public officials, when committed in whole or in part in their territory.157 Moreover, the Convention makes clear that each party must ensure that such criminal liability extends to corporations.158 While adhering to the orthodox distinction between duties of governments under international law and duties of enterprises under domestic law, the treaty nonetheless makes clear that the responsibility of businesses is recognized and may be regulated by international law.159 The Organization of American States and the Council of Europe have similar treaties with provisions on enterprise liability.160 The United Nations, IMF, World Bank, and other organizations have also taken steps toward standards for corporations in this area.161

The Bribery Conventions are also an important precedent insofar as they do not aim simply to penalize corporate conduct that governments and their citizenry regard as illegitimate (namely, bribe-giving) or to avoid disadvantaging companies whose home states prohibit bribery (such as the United States). Rather, the states sought to create a process leading to the

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157. Id. arts. 1, 4.

158. Id. art. 2 (requiring parties to “establish the liability of legal persons”).

159. This treaty states that: The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party’s own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

160. See Inter-American Convention Against Corruption, done Mar. 29, 1996, art. VIII, 35 I.L.M. 724, 730 (stating that states must prohibit bribes by “businesses domiciled there”); Criminal Law Convention on Corruption, done Jan. 27, 1999, art. 18, 38 I.L.M. 505, 509 [hereinafter Council of Europe Corruption Convention] (requiring parties to legislate “to ensure that legal persons can be held liable” for various offenses); see also Second Protocol to the Convention on the Protection of the European Communities’ Financial Interests, 1997 O.J. (C 221) 12 (requiring members to hold legal persons liable for misuse of EU resources).

diminution of corruption in the target states.\textsuperscript{162} By recognizing that foreign individuals and companies are complicit—indeed an indispensable element—in the obnoxious behavior, the OECD hopes to cut off the resources for bribery and reduce the incidence of corrupt activities.\textsuperscript{163} One can thus ask why, if corporations can be regulated to reduce the incidence of corruption, they have not been regulated to reduce the incidence of human rights abuses. Possible reasons include the lack of the type of causal nexus between corporate behavior and governmental abuses that is present in cases of corruption, and the clear interest of corporations from states that banned bribery in creating an international regime that would eliminate their competitive disadvantage—a factor missing from the human rights dynamic.\textsuperscript{164}

E. \textit{United Nations Sanctions}

Haltingly during the Cold War and with increasing frequency thereafter, the members of the United Nations have used the General Assembly and the Security Council to recommend or impose economic sanctions against a variety of states, or, on occasion, insurgent groups.\textsuperscript{165} Such sanctions resolutions are, by their terms, formally directed at states. But their implementation requires the cooperation of private business as well, and both UN organs have at times recognized that, in the end, sanctions create a duty upon corporations. During its long efforts to isolate apartheid-era South Africa, the General Assembly repeatedly noted that private businesses have duties to respect the sanctions it had recommended.\textsuperscript{166} The Security Council, in creating a comprehensive
sanctions regime for Iraq following the conclusion of the 1991 Gulf War, endorsed a plan by the Secretary-General that placed strict requirements on corporations regarding their purchases of oil from Iraq.\textsuperscript{167} Indeed, in order to gain permission for trade with Iraq, the oil companies themselves must apply to the Council’s sanctions committee and comply with its directives.\textsuperscript{168} While it may appear that sanctions obligations are confined to UN member states, the reality has suggested otherwise.

F. European Union Practice

Alongside the foregoing attempts to create duties upon corporations through the paradigm of state duties, the states of the European Union have gone significantly further. Both the Treaty Establishing the European Community (i.e., the 1957 Treaty of Rome, as amended) and the binding decisions of the European Council and Commission have created a vast body of legal obligations which apply directly to corporate entities. For instance, Article 81 of the Treaty forbids anticompetitive behavior.\textsuperscript{169} Further, the Council and Commission have issued numerous regulations and directives with which private companies must comply, and the European Court of Justice has heard many cases in which one private party has sought to enforce the Treaty against another.\textsuperscript{170} As noted earlier, in a series of highly significant cases, the European Court of Justice directly imposed on companies not only legal duties, but also human rights duties regarding nondiscrimination. The Walrave and Koch and Defrenne cases rely upon the language of the Treaty of Rome, which does not distinguish between public and private entities in banning nationality- and gender-based discrimination. These decisions also emphasize the purpose of the European Community in promoting free movement (thus prohibiting


\textsuperscript{169} \textit{TREATY ESTABLISHING THE EUROPEAN COMMUNITY}, Nov. 10, 1997, art. 81, O.J. (C 340) 3 (1997) [hereinafter EC TREATY].

nationality-based discrimination) and social equality between the sexes (thereby barring gender-based discrimination).\textsuperscript{171}

That European Community law—a category of international law—provides both direct rights and duties on corporations (i.e., without the intervention of individual states) follows both from the language of the Treaty of Rome itself\textsuperscript{172} and from the acceptance of direct effect by both the European Court of Justice and the EU member states.\textsuperscript{173} Indeed, direct effect is now a cornerstone of the EU legal system.\textsuperscript{174} It might be argued that this “new legal order of international law” (to quote the ECJ in its key decision on direct effect\textsuperscript{175}) makes the EU unique and demonstrates that other, seemingly more ordinary treaty regimes can at best provide for the indirect sort of liability seen in the environmental or bribery conventions. Yet the European Community’s practice shows that states can conclude treaties providing for direct corporate responsibility and implement those treaties effectively. The leap of faith is one of political will; the legal doctrine follows inevitably.

G. Treaty Interpretation Bodies

Most of the standing expert bodies established under global human rights treaties have refrained from addressing corporate duties, although they have on occasion reinforced the view of the European and Inter-American courts that the state has a duty to prevent certain private abuses.\textsuperscript{176} It is worth noting, however, that in 1999, the Committee on Economic, Social, and Cultural Rights, which oversees implementation of the International Covenant on Economic, Social, and Cultural Rights, interpreted an individual’s right to food under Article 11 of that Covenant

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\textsuperscript{172} EC TREATY, supra note 169, art. 249 (establishing EU regulation as “binding in its entirety and directly applicable in all Member States”).

\textsuperscript{173} See Case 26/62, Van Gend en Loos v. Nederlandse Administratief Der Belastingen, 1963 E.C.R. 3, 12 (“[T]his Treaty is more than an agreement which merely creates mutual obligations between the contracting states... [T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals... Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”); Case 6/64, Costa v. Ente Nazionale per l’Energia Elettrica (Enel), 1964 E.C.R. 585; see also P.S.R.F. MATHUISEN, A GUIDE TO EUROPEAN UNION LAW 26-32, 41-45 (7th ed. 1999) (explaining the legal status of regulations and directives).

\textsuperscript{174} See J.H.H. Weiler, The Transformation of Europe, 100 YALE L.J. 2403, 2413-15 (1991) (describing the direct effect as key to the “constitutionalization” of EU law).

\textsuperscript{175} Van Gend en Loos, 1963 E.C.R. at 12.

\textsuperscript{176} See CLAPHAM, supra note 94, at 108-12.
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as giving rise to responsibilities by private actors. Nonetheless, the Committee’s interpretive comments, while often influential upon both governments and nonstate actors, are not binding, and it is hard to interpret that comment as more than aspirational. The UN Human Rights Commission’s Subcommission on the Promotion and Protection of Human Rights (which does not address a particular treaty but human rights observance generally) has established a panel to study and make proposals on the activities of TNEs, but its work is in an early stage.

H. Soft Law Statements of Direct Duties

Finally, governments have recognized duties of corporations through a number of significant soft law instruments. These documents result when governments wish to make authoritative statements about desired behavior; these statements typically correspond to the expectations of most states, even though states may not be prepared to state that such behavior is legally mandated. In the area of corporate responsibilities, two soft law instruments stand out. First, in 1977 the ILO adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. This instrument remains important insofar as it was adopted by the three component groups of the ILO’s governing body—governments, industry, and labor—and has been cited by governments and industry since that time as reflecting a fair balance among the interests of all three. The

177. International Covenant on Economic, Social, and Cultural Rights, adopted Dec. 16, 1966, art. 11, 993 U.N.T.S. 3, 7 [hereinafter ICESCR]; see General Comment No. 12, para. 20, in Report of the Committee on Economic, Social, and Cultural Rights, U.N. ESCOR, Supp. No. 2, at 102, 106, U.N. Doc. E/2000/22 (2000) (“While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society—individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities in the realization of the right to adequate food.’’)). For an argument that the Universal Declaration of Human Rights itself creates obligations on corporations, see INT’L COUNCIL ON HUMAN RIGHTS POLICY, supra note 101, paras. 94-106.


document contains a variety of principles for both governments and corporations. It urges corporations to cooperate with governmental development policies, to adopt a hiring policy favorable to local nationals, to look out for the employees’ health and safety, and to recognize the rights of workers to organize and bargain collectively.182 Most of these precepts restate various obligations on governments, but the reformulation of some as creating duties (albeit soft ones) on corporations is significant. Given the source of the instrument and its repeated recitation, it is not merely wishful thinking, but reflects a sense among those three constituencies that corporations have duties toward their employees.

Second, the OECD has developed various sets of guidelines for multinational enterprises. The first such guidelines, from 1976, contained rather anodyne statements regarding a corporation’s duties to follow the policies of the host country.183 In 2000, the OECD issued a long-awaited and far more detailed set of guidelines to respond to growing concerns by nongovernmental organizations about the power of TNEs.184 Though principally addressing business-related issues such as disclosure, employment practices, pollution, and bribery, the principles do cover human rights specifically. Among the general policies for corporations to follow, the OECD Guidelines state that corporations should “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”185 At the same time, the Guidelines go no further than this statement and give corporations no sense of what rights are included and how broadly the group of “those affected by their activities” extends. In addition to the ILO and the OECD, the European Community issued a set of nonbinding guidelines concerning business in apartheid-era South Africa and is, as noted, considering a broader code of conduct.186

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The overall picture thus far presented shows a somewhat inconsistent posture among decisionmakers over the role of corporations in the international legal order. On the one hand, they accept that business

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182. Tripartite Declaration, supra note 180, §§ 10, 16, 37, 41.


185. Id. § II.2.

enterprises have *rights* under international law, whether the economic right under investment treaties to receive nondiscriminatory treatment and to bring a state to international arbitration, or clearly recognizable political rights such as freedom of speech. Yet most governments appear to remain somewhat ambivalent about accepting corporate duties, and, in particular, duties that corporations might have toward individuals in states where they operate. They have, however, indirectly recognized duties upon corporations by prescribing international labor law, environmental law, anti-corruption law, and economic sanctions. And the European Union, through treaties, legislation, and decisions of the European Court of Justice, has gone further, directly placing duties on businesses. States have provided for enforcement of those duties through the civil liability regime of the environmental agreements, the criminal liability regime of the OECD Bribery Convention, and recourse to the European Court of Justice. The cumulative impact of this lawmaking and application suggests a recognition by many decisionmakers that corporate behavior is a fitting subject for international regulation.

If states and international organizations can accept rights and duties of corporations in some areas, there is no theoretical bar to recognizing duties more broadly, including duties in the human rights area. The soft law instruments like the OECD Guidelines show that governments at least talk about duties upon corporations with respect to human rights, as does the UN’s current focus on illicit diamond trading, or the Human Rights Commission’s discussions of the issue. And even corporations themselves, while generally disdaining the idea of increased international regulation, have come to accept the idea of duties to protect human rights. Nonetheless, to move beyond the current stage and prescribe law in this area in a coherent fashion requires a theory of corporate responsibility for human rights under international law.


188. See Charney, *supra* note 61, at 767 (noting how the “nonstatus” of corporations allows them to enjoy rights but not duties and thus to “have it both ways”).

189. The operative paragraph of the Security Council’s resolution directed toward private entities is not worded in the form of an obligation, presumably because of a belief that the Council cannot place obligations on them. See S.C. Res. 1306, *supra* note 1, at 3 (encouraging “the International Diamond Manufacturers Association . . . to work with the Government of Sierra Leone”). But see *supra* notes 166-167 (citing UN resolutions on South Africa and Iraq).

190. See *supra* note 63 (noting statements of Enron).
IV. PRIMARY RULES AND SECONDARY RULES: INTERNATIONAL LAW’S DOCTRINAL STARTING POINT

Any theory of corporate responsibilities in the human rights area that seeks to gain some acceptance among international decisionmakers—whether states, international organizations, corporations, diverse nongovernmental organizations, or even academic advisers to these groups—must have some grounding in contemporary understandings about international law. In that regard, it becomes necessary to examine the law’s approach to liability—state and individual—and to inquire into its suitability for the new enterprise. This Part first outlines the basic doctrines of state and individual responsibility. It then appraises whether these principles can be transposed to a clearly different sort of entity—the transnational corporation.

A. The Responsibility of States: A Primer

The task of appraising the expectations of states and other decisionmakers regarding the contours of state responsibility benefits from the systematic study of the subject undertaken by the UN’s International Law Commission (ILC), a standing body of thirty-four independent experts. In 1949, the ILC decided to begin work on a project to draft a treaty on the responsibilities of states for injuries to aliens and their property. States have long agreed that, if one state harmed the citizens of another who might be traveling or setting up a business there, the host state was committing a harm against the home state. Such acts had been the subject of countless interstate disputes and numerous arbitrations, and the ILC and the UN’s members believed that elaboration of the duties of host states might prevent future incidents.191 By the early 1960s, however, the Commission was plagued by disagreements among its members as to the substance of those duties. A key divergence concerned the duties of states regarding the protection of alien property, the very issue that proved so divisive during the developing world’s efforts to construct a New International Economic Order.192

Stymied in its original mandate, the Commission made an explicit decision to refocus its project on developing a set of “principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States.”193 International law doctrine has

192. See supra text accompanying note 25.
come to accept this distinction by referring to both primary and secondary rules of state responsibility. Primary rules are the substantive obligations of states in the myriad subject areas of international law, from the law of the sea to jurisdiction to the use of force. Secondary rules are those, as stated by the ILC, that elaborate what it means for a state to be legally accountable for violations of these duties.\textsuperscript{194}

Thus, many secondary rules concern principles of attribution—namely, rules for determining the responsibility of the state or individuals for acts of agents or others. For example, the state is responsible for the acts of its organs, even if they act beyond their authority, for the acts of nongovernmental groups exercising governmental authority in the absence of the official government, for the conduct of others that it adopts after the fact, and for knowingly assisting another state in its illegal acts.\textsuperscript{195} Other rules concern circumstances that preclude a finding of wrongful conduct by the state despite a prima facie violation by the state of its duties; these rules include consent, lawful self-defense, lawful countermeasures, force majeure, distress, and a state of necessity.\textsuperscript{196} The ILC’s decades-long codification project has, as a result, sought to refrain—not always with complete success—from elaborating primary rules in international law. Those norms continue to proliferate as new subjects of international relations emerge and require regulation.\textsuperscript{197}

The ILC’s bifurcated approach to state responsibility reflects the practice of decisionmakers authorized to determine whether a state has breached its duties, insofar as they have addressed primary and secondary rules separately, analyzing both the content of a given norm and the links between the unlawful conduct and the state. The International Court of Justice, for instance, extensively addressed secondary rules in determining whether the acts of Iranian students in taking over the U.S. Embassy in


\textsuperscript{196} Id. pt. I, ch. 1, arts. 20-27.

1979 were attributable to Iran, and whether the acts of the Contras against Nicaragua were acts of the United States. The primary rules in those two cases concerned, respectively, the law of diplomatic immunity and the law on the use of force.) The Inter-American Commission and Court of Human Rights, as well as the European Commission and Court of Human Rights, have repeatedly engaged in this process as well. Beyond these bodies, arbitral tribunals, UN committees that oversee implementation of human rights treaties, and other decisionmakers routinely make reference to concepts of state responsibility, at times quoting the ILC’s Draft Articles as if they were a restatement of customary international law.

Thus an examination of corporate responsibility must begin with these two sets of norms and consider their applicability to companies. For our purposes here, the primary rules at issue are those in the law of human rights. A number of secondary rules will prove pertinent, particularly with regard to attribution of and complicity in wrongful conduct.

B. The Responsibility of Individuals: A (Shorter) Primer

International law approaches to individual responsibility have not benefited from the sort of systematic, academic examination provided by the International Law Commission with respect to state responsibility. Nonetheless, a clear set of primary and secondary norms has emerged since the days of the International Military Tribunal through international criminal law treaties, domestic statutes, state practice, and important domestic and international court decisions (most recently those of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda).

For individual accountability, the primary rules are human rights protections that recognize various offenses, such as genocide, war crimes, crimes against humanity, and torture. They define a set of acts that give rise to individual criminal responsibility. As discussed above, the corpus of primary rules of individual responsibility is quite limited compared to the primary rules of state responsibility.


201. See supra text accompanying notes 80-82.
The secondary rules of individual (criminal) responsibility, often termed the general principles of criminal law, essentially concern attribution of conduct to the individual, defenses, and other principles such as *nullum crimen sine lege.* Derived from principles of criminal law common to many states, decisionmakers have recognized secondary rules widely through treaties and international court judgments. Among the most significant attribution rules are complicity and conspiracy, which hold that an individual may be guilty for aiding and abetting an offense that he did not directly commit; and command responsibility, which attributes certain acts of subordinates to the superior. Among the critical defenses recognized in international criminal law are coercion (or duress) and mental incapacity. The law has also sharply limited one commonly asserted defense, namely, following orders.

C. The Corporate Parallel

Looking at this rich doctrine, one is naturally inclined to ask if it can address the problem of determining the scope of corporate duties. In a word, can decisionmakers transpose the primary rules of international human rights law and the secondary rules of state and individual responsibility onto corporations? If corporations are such significant actors in international relations and law, then can they not assume the obligations currently placed on states or individuals, based on those sets of rules of responsibility? I consider the challenges to applying primary and secondary rules in turn.

1. The Barriers to Transposing Primary Rules

Any decision to extend primary human rights rules to corporations faces several problems. With respect to those human rights norms binding on states (the larger category), if, for the moment, we confine their scope to the provisions of the International Covenant on Civil and Political Rights, then some of the obligations specified therein are obviously not within the province of corporate activity. As an obvious example, the ICCPR grants criminal defendants numerous rights, such as the presumption of innocence, a speedy and fair trial, free counsel, the ban on self-incrimination, and

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202. For one useful grouping of these principles, see ICC Statute, supra note 80, pt. 3.
203. Id. arts. 25, 28, 31; RATNER & ABRAMS, supra note 54, at 129-42.
204. See, e.g., ICC Statute, supra note 80, art. 33 (permitting the defense only if the defendant can show a legal obligation to obey the order and excluding its application to genocide and crimes against humanity on the theory that such orders are manifestly unlawful).