War Profiteering and Armed Conflicts: Examining Applicable Aspects of International Law

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Abstract

The proliferation of armed conflicts is perhaps the biggest challenge of the 21st Century international system. These conflicts have become a monumental lucrative industry, where parties external to the fighting, i.e., third parties, smile to the bank, from proceeds made on major deals in defence contracts and arms sales. In the process, they leave behind a trail of civilian fatalities. Notwithstanding the extensive literature on armed conflicts, the scholarly focus on the accountability framework related to war profiteering remains limited. This article examines the applicability of certain aspects of international law, in particular, human rights and humanitarian law, to war profiteering and highlights the fact that the current framework doesn't sufficiently deal with the problem. It submits that the danger that war profiteering poses to world peace and security is one that must be taken seriously. In the absence of clear guidance under these regimes of international law, the article stresses the need to address the problem in a manner that responds adequately, especially with respect to determining a specific accountability framework.

I. Introduction

It is acknowledged that the post-World War II era has undergone profound change on an unprecedented scale, much of which has to do with the continued rise in armed conflicts. Until relatively recently, most of the major armed conflicts, were, to a great extent, limited to Europe, with both the first and second world wars, being relevant examples. However, the new wars are mainly in the developing countries of the world, usually spanning years, if not decades. This ratcheting up of conflicts, mostly in the second half of the 20th Century has eclipsed peace in these parts of the globe e.g., Africa, Asia, and Latin America.[1] Prominent among concerns emerging from these conflicts, is that as they become protracted, accounting for the death of thousands of combatants and civilians, a market is created alongside in which foreign actors such as arms corporations, sell weapons to states as well as non-state actors; weapons that end up inflicting suffering on people while the corporations reap massive profits. This implicates the phenomenon of 'War Profiteering', a concept derived from two words 'war' and 'profiteering'. While 'war' is generally viewed as an act of violence to compel our enemy to do our will,[2] as well as an active conflict in

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[1] Beatrice Heuser, 'Wars Since 1945: An Introduction' (2005) 2 Studies in Contemporary History 4, 11.

[2] Carl Von Clausewitz, *On War* (Michael Howard and Peter Paret eds, Princeton University Press 1976) 77.

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which more than 1, 000 lives have been lost,[3] 'profiteering' on the other hand, has been defined as 'a gain in economic well-being obtained as a result of military conflict'.[4] Simply put, it means the idea of an arms corporation making an unreasonable profit by simply cashing in on an ongoing war. United States (US) 31st President Herbert Hoover further describes such profit as 'any profit in excess of the normal pre-war average profit of that business and place where free, competitive conditions existed'.[5] Whereas, generally the activities of entities alleged of this practice are ordinarily legitimate and well within the legal framework in their domestic jurisdictions, their occurrence in the context of armed conflicts remain outside the scope of aspects of international law regimes such as International Human Rights Law (IHRL) and International Humanitarian Law (IHL), culminating in accountability asymmetries. War profiteering is controversial, as well interesting, because it deals with question of reconciling corporate aspirations in the light of international objectives. To put it in perspective, it exposes starkly the perennial tension between the goals of maximising the benefits of the IHRL/IHL framework, and the single-minded profit maximisation drive of corporations. This makes war profiteering a particularly promising area to explore the ideas of human rights.

The intersection of war profiteering and armed conflicts as well as the gap in accountability in the context of the applicability of IHRL and IHL, especially with regard to the violation of rights such as the right to life guaranteed under international law, raises difficult questions. Notwithstanding its very significant impact on rights protected under IHRL and IHL, war profiteering is relatively underexplored in legal scholarship. It is therefore important to examine ways in which this practice occurs in the context of IHRL and IHL, as well as possible human rights violations it engenders. In light of the fundamental concerns surrounding the practice, this article examines war profiteering as a concept and as an emerging challenge within the fields of IHRL and IHL. In particular, it engages three key questions. First, how is the activity of war profiteering in an armed conflict to be determined in a manner that would help shape accountability for human rights violations by corporations involved? Secondly, to what extent are the relevant regimes of international law, i.e., IHRL and IHL, applicable to the practice? Thirdly, what must be done to address likely shortcomings in the existing framework? This article aims to put the problem of war profiteering on the front row of global discourse to the end that a nuanced understanding of the frightening impact of this activity on human lives may, in fact, trigger international action, resulting in a broadening of the existing framework under international law.

II. Understanding War Profiteering

War Profiteering is a slippery concept. It lacks a clear narrative line and does not bear its own meaning. Generally, in the eye of many, it is viewed as making huge fortunes from an armed conflict situation, irrespective of whether such profit is legal or illegal, ethical or unethical. Though in most situations, the profits made, though astonishing, is money made through official means, such is still referred to as war profiteering activities. The reason is because most times, when war profiteering is defined by society, it is done through moral rather than legal lens. There is often limited comment on the legality of doing business in war; rather, what we have is an outpouring of opprobrium on acts considered as immoral sale of weapons leading to immoral gains. This moral characterisation of war profiteering

[3] Chris Hedges, 'What Every Person Should Know About War' (*The New York Times*, 6 July 2003) https://www.nytimes.com/2003/07/06/books/chapters/what-every-person-should-know-about-war.html accessed 9 December 2022.

[4] Stuart D Brandes, *Warhogs: A History of War Profits in America* (University Press of Kentucky 1997) 7.

[5] ibid) 8.

can be explained by the kinds of atrocities and humanitarian catastrophes associated with armed conflicts, such as the destruction of lives as well as the potential harm to the future of the unborn generation.

War profiteering is defined as 'excess profits derived from selling weapons and lethal aids to others'.[6] Leading anti-war Civil Society Organisations, i.e., War Resisters' International (WRI) describes it as 'all those who profit from war and militarisation and whose money makes war possible. That includes a complex network of companies, financial institutions, and individuals'.[7] According to the organisation, when war profiteering is mentioned, people simply think of arms corporations. However, the practice extends beyond these entities.[8] It involves banks and financial institutions that invest in arms corporations, civilian companies that profit from war and occupation, as well as extractive companies extracting natural resources, relying on the support of the military.[9] This WRI's conception depicts war profiteering as a complex system involving active corporate entities making a kill of wars, as well as passive collaborators whose action helps perpetuate wars. As noted by Turley, while perpetual wars represent perpetual loss and pain for thousands of families, it also means a perpetual flow of profits for many corporate entities.[10]

During wars, corporations profit through official government defence contracts, as well as illegal arms deals, black racketeering during wars, and private military contracts.[11] Such defence related contracting can be traced to recent activities of corporations who benefited from wars such as the 2003 US led military intervention in Iraq;[12] NATO's 2011 military intervention in Libya;[13] the 2013 authorisation of military aid in support of Syrian rebels against the regime of Bashir Al-Assad;[14] the desert war in Yemen;[15] and the US's 20

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[6] See Isaac Brown, '…Terrible Profitable: The Economics of War Profiteering in the Russia-Ukraine Conflict' (*UW Economics Society*, 16 November 2022) https://uweconsoc.com/terribly-profitable-the-economics-of-war-profiteering-in-the-russia-ukraine-conflict/ accessed 9 December 2022.

[7] 'War Profiteering and Conscientious Objection' (*WRI*, 6 September 2015) https://wri-irg.org/en/war-profiteering-and-co accessed 9 December 2022.

[8] ibid.

[9] ibid.

[10] See Jonathan Turley, 'Big Money Behind War: The Military-Industrial Complex' (*Aljazeera*, 11 January 2014) https://www.aljazeera.com/opinions/2014/1/11/big-money-behind-war-the-military-industrial-complex/ accessed 9 December 2022.

[11] See 'War Profiteering' (*Underground Network*) https://underground.net/birds-eye-view/war-profiteering/ accessed 9 December 2022.

[12] For a broad overview of the issues pertaining to the legality of the use of force in Iraq, see Joseph L Falvey Jr, 'Our Cause is Just: An Analysis of Operation Iraqi Freedom under International Law and the Just War Doctrine' (2004) 2 Ave Maria L Rev, 65; Gerry Simpson, 'The War in Iraq and International Law' (2005) 6 Melbourne Journal of International Law 167, 170; Ben Saul, 'The Legality of the Use of Force Against Iraq in 2003: Did the Coalition Defend or Defy the United Nations?' (2003) 8(2) UCLA Journal of International Law and Foreign Affairs 267, 268; Andreas Paulus, 'The War Against Iraq and the Future of International Law: Hegemony or Pluralism? (2004) 25(3) Michigan Journal of International Law 691, 697; Edieth Y Wu, 'Should the United States Intervene in International Conflicts: Why, When, and How?' (2013) 23(2) Ind Int'l & Comp L Rev 162, 169.

[13] Alan J Kuperman, 'A Model Humanitarian Intervention: Reassessing NATO's Libya Campaign' (2013) 38 International Security 105; Pierre Thielborger, 'The Status and Future of International Law after the Libya Intervention' (2012) 4 Goettingen Journal of International Law 1, 13; Olivier Corten and Vaios Koutroulis, 'The Illegality of Military Support to Rebels in the Libyan War: Aspects of Jus Contra Bellum and Jus in Bello' (2013) 18 Journal of Conflict & Security Law 59.

[14] Michael N Schmitt, 'Legitimacy versus Legality Redux: Arming the Syrian Rebels' (2014) 7 Journal of National Security Law and Policy 139.

[15] Oona A Hathaway and others, 'Yemen: Is the U.S. Breaking the Law?' (2019) 10 Harvard National Security Journal 1, 9–10.

years military engagement in Afghanistan.[16] While these wars have resulted in massive destabilisation and near disintegration of the above named countries, they have also multiplied the wealth of a number of arms corporations, who have all profited greatly from the market created by these conflicts through huge defence contracts.

As there are several ways to profit in an armed conflict, the act of war profiteering itself is not directly illegal unless the entities involved try to make money outside the contracts awarded to them or through outright illegal activities.[17] An example is the case of the American company Supreme Foodservice FZE, which between 2005 and 2009 devised means to overcharge the US government and make profits above that stated in the 8.8billion dollars Subsistence Prime Vendor (SPV) contract it was awarded; as a result, of which the government lost 48million.[18] Given that the act of war profiteering itself is not illegal, but only the means by which it is carried out, the US Department of Justice (DOJ) could only prosecute the company based on the False Claims Act.[19]

The above discussion highlights two classes of war profiteers, i.e., active war profiteers and passive war profiteers. Whereas active war profiteers are state and non-state actors, in a position to start a war and who indeed prolong wars in order to profit from it, passive war profiteers, on their part, simply make profits from wars without influencing the outbreak or its eventual outcome.[20] One can also speak of active war profiteers as made-up state actors as well as non-state actors, in this instance, powerful arms corporations, who wield great influence in government. Passive war profiteers include banks, financial institutions, energy companies, extractive companies, private military companies, etc., who all lobby to secure contracts during wars. This article's focus is active war profiteers, in particular arms corporations, especially as the activities of passive war profiteers appear far remote from the atrocities often committed in armed conflicts e.g., such as human rights violations, and thus, it is always insufficient enough to establish a link. Amongst active war profiteers, this article's focus is further narrowed to arms corporations and this is based on the fact that while a state can be involved in war profiteering, the fact that states' international obligation with respect to human rights protection appears sufficiently defined takes such inquiry outside the scope of this article. However, the lack of clarity with respect to the obligation of non-state actors, such as arms corporations, in matters of this nature makes their activities as possible war profiteers a matter worthy of more scholarly attention.

With respect to war profiteering, the traditional view is that the practice goes beyond the fact that a corporation simply makes abnormal profits in war; rather, such profit must be 'unreasonable' and 'unethical' and outside what obtains, i.e., the kind made by the same entity in pre-war conditions, when it is in competition with others. While it seems right that 'unreasonable' and 'unethical' profiteering from wars should infuriate anyone and everyone, in legal circles, the same enthusiasm isn't shared, especially given the concern about whether these words indeed have any legal relevance. Though it may be argued that what is unreasonable or unethical is, at best, a moral issue, an important area to draw insight on whether acts such as war profiteering can be engaged through a legal lens is the development of Excess Profits Tax legislations, in the war years of the early 90s.

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[16] Stephen Pomper, 'Human Rights Obligations, Armed Conflict and Afghanistan: Looking Back Before Looking Ahead' (2009) 85 International Law Studies 525, 527.

[17] Underground Network (n 11).

[18] ibid.

[19] ibid.

[20] See Michelle Maiese, 'Conflict Profiteers' (*Beyond Intractability*, September 2004) https://www.beyondintractability.org/essay/profiteers accessed 9 December 2022.

The introduction of Excess Profits Tax regimes was a remarkable innovation during the first and second world wars, producing large revenues and operating as a framework for regulating and curtailing what the state deemed to be abnormal profits by corporations.[21] This tax was imposed on windfall profit called 'unanticipated, fortuitous gains typically generated by exceptional unexpected events such as wars, natural disasters, or pandemics'.[22] It was designed to impose a tax on the portion of a corporation's profit that comes from an external event and not of the taxpayer's making.[23] Conceptually, such profit is considered to be a portion in excess of normal return, which for a corporation can be the entire excess profit or simply an aspect of it.[24] In the first world war, for example, about 22 countries introduced one type of excess profit tax legislation or the other.[25] Of key relevance is the US 'Excess Profits Tax' regimes,[26] in which this category of tax is laid upon trade, businesses, individuals as well as partnerships,[27] singling out a particular type of profit i.e., war and excess profits.[28] Importantly, Excess Profits Tax legislations were adopted by the US Congress to siphon off war profits.[29] In recent times, there has been a push to adopt the excess profits tax approach with respect to the COVID-19 pandemic and

[21] Robert M Haig, 'British Experience with Excess Profits Taxation' (1920) 10 American Economic Review 1.

[22] Shafik Hebous, Dinar Prihardini and Nate Vernon, 'Excess Profits Taxes: Historical Perspective and Contemporary Relevance' (2022) International Monetary Fund (IMF) Working Paper 2022/187 1, 7 https://www.imf.org/en/Publications/WP/Issues/2022/09/16/Excess-Profit-Taxes-Historical-Perspective-and-Contemporary-Relevance-523550 accessed 11 April 2023.

[23] Reuven S Avi-Yonah, 'Taxes in the Time of Coronavirus: Is It Time to Revive the Excess Profits Tax?' (2020) University of Michigan Law & Econ Research Paper 20-008, 170.

[24] Hebous, Prihardini and Vernon (n 22).

[25] Denmark and Sweden were the first to introduce an excess profit tax in 1915. Great Britain also introduced the 'excess profit duty' between 1918 and 1926 as 80% of the amount of profits above the pre-war standard of profits, which is defined as the average profit of any two of the last three years prior to World War I.

[26] The United States (US) passed its first excess profits tax on 3 March 1917, before entering in the first world war. Under this act, the US Congress imposed a tax of 8% upon the profits of corporations and partnerships in excess of $5,000, plus 8% of the capital actually invested. This act was later replaced by the Revenue Act of 3 October 1917. The first excess profits tax was that imposed by the Act of 3 October 1917 which taxed corporations, partnerships, and individuals on their profits arising after 1 January 1917. See Scott Hodge, 'The History of Excess Profits Taxes Not as Effective or Harmless as Today's Advocates Portray' (*Tax Foundation*, 2 July 2020) https://taxfoundation.org/excess-profits-tax-pandemic-profits-tax/ accessed 3 March 2023; George E Holmes, 'The Excess Profits Tax of 1917' (1918) 4 Bulletin of the National Tax Association 7. See similar acts e.g., Excess Profits Tax Act of 1950, Calendar No 2676 (US) https://www.finance.senate.gov/imo/media/doc/SRpt81-2679.pdf accessed 3 March 2023; Excess Profits Tax Act 1940 (4 GEO VI 1940 No 22) (New Zealand) http://www.nzlii.org/nz/legis/hist_act/epta19404gv1940n22308/ accessed 3 March 2023; The Excess Profits Tax Act, 1940 (Act No XV of 1940) (Bangladesh) http://bdlaws.minlaw.gov.bd/act-details-187.html accessed 3 March 2023; The Excess Profits Tax Act, 1940 (XV of 1940) (India) https://www.indiacode.nic.in/repealed-act/repealed_act_documents/A1940-15.pdf accessed 3 March 2023.

[27] T S Adams, 'Principles of Excess Profits Taxation' (1918) 75 The Annals of the American Academy of Political and Social Science 147, 148.

[28] Carl C Plehn, 'War Profits and Excess Profits Tax' (1920) 10(2) The American Economic Review 283.

[29] Avi-Yonah (n 23).

the global energy crisis spawned by Russia's war in Ukraine.[30] Putting the operation of this tax in perspective, Plehn states that:

> This tax is levied on something conceived of as abnormal, and, in addition to the fiscal justification ever present in all taxes, there is a more or less distinct intent to give the public a share in the gains of profiteering as something transitory and abnormal as well as undesirable.[31]

To establish an Excess Profit Tax, there is always a need to determine a normal level of profit. Under this framework, normal profit is defined as the average profit of the two or three years before the beginning of war, while war profits are referred to as profits exceeding the average of the three preceding years.[32] The emphasis of this tax is war profits, with the base for computation of normal profit being profit from pre-war earnings.[33] The insight that can be drawn is that whereas war profiteering is ordinarily an unethical act, the development of Excess Profits Tax legislations did situate this practice in a legal framework such that the law can be appropriately deployed as a regulatory tool.

This article contend that the above explanation is sufficient justification to determine the legal relevance of war profiteering, with respect to the argument that corporations should be held to a standard of accountability for human rights violations linked to this practice. If governments can impose taxes on a practice that is ordinarily viewed as unethical, arguments can also be made for a form of human rights accountability for violations flowing from the same practice. This view is further strengthened by the fact that the significant impact of war profiteering on the human rights of people across the globe is today more pressing than ever before. This can be seen in the fact that the business activities of arms corporations, in particular, have enabled an environment suitable for human rights violations, even though such violations did not emanate directly from them.

As discussed above, excess profits are calculated by subtracting additional earnings from the normal profit of the corporation, which is the average profit of the two or three years before an unexpected event such as a war. With this in mind, to determine war profiteering in contemporary times, one way is to look at the overall earnings of some of the largest arm corporations, in addition to startling profits that accrued t them, profits which must have come from government war-related contracts they were awarded. Such earnings and profits must also be beyond what accrues to such corporations in the ordinary course of their business. Additionally, one can look at heavy bonuses paid to the top

[30] For instance, in a report for the European Union (EU) Parliament, it was estimated that large multinational corporations (MNC) made total excess profits of $447 billion in the year 2020 by reason of the COVID-19 pandemic (representing 14% of their total profit). The report showed that governments from the EU could earn $6 billion excess profits tax revenue with a 10% excess profit tax rate; $18 billion with a 30% excess profit tax rate; $30 billion with a 50% excess profit tax rate; and $43 billion with a 70% excess profit tax rate. See Evgeniya Dubinina, Javier Garcia-Bernado and Petr Janský, 'Excess Profits Tax: Estimating the Potential Tax Revenue Gains for the European Union' (2022) Charles University in Prague, Institute of Economic Studies (IES) Working Paper 13/2022 1, 5. Also, a report by OXFAM states that the US 25 top most profitable corporations are expected to make $80 billion in super-profits from the pandemic, compared to their earnings in the previous years. See 'Pandemic Profits Exposed' (*OXFAM America*, 22 July 2020) https://webassets.oxfamamerica.org/media/documents/Pandemic_Profiteers_Exposed.pdf accessed 3 March 2023; See also Susanne Wixforth and Kaoutar Haddouti, 'Profits Must be Shared' (*IPS*, 8 November 2022) https://www.ips-journal.eu/topics/economy-and-ecology/profits-must-be-shared-6301/ accessed 3 March 2023; Celine Azemar and others, 'Winners and Losers of the COVID-19 Pandemic: An Excess Profits Tax Proposal' (2022) 24(5) J of Public Econ Theory 1, 2–3.

[31] Plehn (n 28).

[32] Hebous, Prihardini, and Vernon (n 22) 8–9.

[33] Plehn (n 28) 286.

executives of such corporations, payments that wouldn't have taken place if the unexpected event, e.g. a war, had not occurred. An examination of reports on arms corporations across the globe concerning their recent earnings and profits will reveal some important statistics.

In 2011, the one hundred largest arms manufacturers in the world had earnings of about $410 billion,[34] and out of this number, the ten largest companies took home a revenue of around $208 billion.[35] These ten companies received the following amount in arms sales - Lockheed Martin ($36.3 billion); Boeing ($31.8 billion); BAE Systems ($29.2 billion); General Dynamics Corp. ($23.8 billion); Raytheon ($22.5 billion); Northrop Grumman Corp. ($21.4 billion); EADS ($16.4 billion); Finmeccanica ($14.6 billion); L-3 Communications ($12.5 billion); and United Technologies ($11.6 billion).[36] In 2012, arms sales earnings by the one hundred biggest arms producers in the world were $395 billion, out of which Lockheed Martin, the largest defence company in the US took home $36 billion.[37] In a detailed study carried out by the Stockholm International Peace Research Institute (SIPRI) for the year 2016, it noted that in that year alone, the total arms sales came to about $374. 8 billion, with the list actively dominated by arms corporations from the US, Western Europe, and Russia.[38]

Specifically, 63 US and European companies account for about 82.4 per cent of total arms sales, with the top ten companies coming from these same regions and accounting for about 52 per cent of the total arms sales.[39] A total of ten Russian companies made the 100 list with a combined sale of $26.6 billion, representing 3.8 per cent.[40] Apart from these three categories, companies from other countries earned $20.9 billion.[41] The top ten in the 2016 SIPRI ranking are Lockheed Martin, Boeing, Raytheon, BAE Systems, Northrop Grumman Corp., General Dynamics Corp., Airbus Group, L-3 Communications, Leonardo, and Thales.[42] Further in its research, the body reported that arms sales in 2017 totalled $398.2 billion, representing an increase of 2.5 per cent from 2016.[43] It also reported that the total arms sale of the top 100 companies in 2017 was 44 per cent higher than the 2002 figures.[44]

It is instructive to state that these earnings accrued from transactions that occurred in ways not in line with the regular course of business of these corporations. Whereas, in their regular business during peacetime, these corporations are essentially focused on arms production as well as needed accessories, in times of war, their operation is expanded to other areas outside their regular business. In the US, the convergence of corporate and political interests around defence contracting has ensured that arms corporations amass profits outside their normal course of business. For instance, in the wars in Iraq and Afghanistan, the US government relied on these corporations for virtually all aspects of war, supplying drones, helicopters, planes, trucks, weapons, etc., and also for providing

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[34] See Samuel Weigley, '10 Companies Profiting the Most From War' (*USA Today,* 10 March 2013) https://eu.usatoday.com/story/money/business/2013/03/10/10-companies-profiting-most-from-war/1970997/ accessed 9 December 2022.

[35] ibid.

[36] ibid.

[37] See Vince Calio and Alexander E M Hess, 'Here Are the Five Companies Making a Killing Off Wars Around the World' (*TIME,* 14 March 2014) https://time.com/24735/here-are-the-5-companies-making-a-killing-off-wars-around-the-world/ accessed 9 December 2022.

[38] See Aude Fleurant and others, 'The SIPRI Top 100 Arms-producing and Military Services Companies, 2016' (*SIPRI,* December 2017) 1–8.

[39] ibid.

[40] ibid.

[41] ibid.

[42] ibid.

[43] ibid.

[44] ibid.

support services such as catering, construction, information technology, logistics, etc.[45] In these two wars, the number of military contractors outnumbered that of troops, such that by 2020, there were 22, 562 of such contractors on ground, roughly double the number of US soldiers.[46] The entire war effort in these two countries was largely a privatised endeavour, with much of the $ 5 trillion spent by the US government transferred to military contractors.[47] Another pointer to the fact that these unprecedented earnings by corporations were not justified by their normal business is the fact that much of the contracts they won were budgeted and paid for by the government through emergency and contingency funding, which were accomplished by circumventing the usual budget process.[48] In the first decade of these wars, the US government used emergency appropriations, typically reserved for one-off crises such as floods and hurricanes.[49]

These unprecedented earnings and profits also triggered the payment of outrageous bonuses to top executives of some of these corporations. In the US, for instance, the pay check of the CEOs of top US arms corporations that were major military contractors skyrocketed after the occurrence of the 11 September 2001, terrorist attack.[50] Following the invasion of Iraq, particularly between 2001 and 2005, the pay of CEO of military contractors jumped on average by 108 per cent compared to 6 per cent for their counterparts in other US companies.[51] A study carried out by Sarah Anderson and other researchers at the Institute for Policy Studies and United for a Fair Economy, on the pay of CEOs of the 34 US defence contractors linked to the US war on terror reveals very staggering details.[52] The study shows that CEOs of these corporations have seen a meteoric rise in their income, which has resulted in a doubling of the amount they receive in the four years preceding the 9/11 attacks.[53] For instance, while their average compensation pre 9/11 was around $3.6 million, it jumped to $7.2 million in the post 9/11 era.[54] At the same time, in 2005 the pay check of these CEOs' $7.7 million dollars was 44 times more than that of a General who had served the military for 20 years which amounted to $174, 452, and 308 times that of an Army Private who earns $25, 085.[55] The highest amount paid to a CEO is that of Goerge David of United Technologies, who raked in more than $200 million between 2002 and 2005.[56]

Some sort of war profiteering has also been alleged in Russia's ongoing war in Ukraine. For instance, European Union (EU) officials have accused the US government

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[45] Linda J Bilmes, 'Where Did the $5Tn Spent on Afghanistan and Iraq Go? Here's Where' (*The Guardian,* 11 September 2021) https://www.theguardian.com/commentisfree/2021/sep/11/us-afghanistan-iraq-defense-spending accessed 3 March 2023

[46] ibid.

[47] See 'Ask Not What the War Cost the US, But Who Profited from the War' (*TRT World,* 19 August 2021) https://www.trtworld.com/magazine/ask-not-what-the-war-cost-the-us-but-who-profited-from-the-war-49318 accessed 3 March 2023.

[48] Bilmes (n 45).

[49] ibid.

[50] Sarah Anderson, 'War Profiteering Is Real: We Need to End It' (*Inequality,* 13 January 2020) https://inequality.org/great-divide/war-profiteering-iran/ accessed 9 December 2022.

[51] Anderson (n 50).

[52] Sarah Anderson and others, 'Executive Excess 2006: Défense and Oil Executives Cash on Conflict' (2006) Institute for Policy Studies 1 https://ips-dc.org/wp-content/uploads/2006/08/ExecutiveExcess2006.pdf accessed 9 March 2022.

[53] ibid.

[54] ibid.

[55] ibid.

[56] ibid.

of making a fortune from the war.[57] Within the same breath, leading arms corporations have been reaping a windfall from the conflict. For instance, the US government is sending to Ukraine, 6, 500 Javelin anti-tank missile systems designed by Lockheed Martin and Raytheon, with each of the missiles costing $70, 000 dollars and the reusable launchers costing $100, 000 each.[58] Raytheon has also been awarded a contract of $625 million to restock the government stock from which it intends to send 1, 400 Stinger anti-aircraft missile launchers to Ukraine.[59] The US government is also sending 50 billion rounds of ammunition to Ukraine, with the beneficiary being Olin, the US Army's largest supplier of small arms.[60] The United Kingdom is giving Ukraine 5,000 pieces of Next Generation Light Anti-Tank weapon, a shoulder-launched missile system lauded for blowing up Russian tanks.[61] This weapon is assembled by the UK based corporation Thales with each costing $30, 000. BAE Systems, which manufactures most of its small arms, is also set to replenish the 400, 000 already sent to Ukraine.[62] The result of these war windfalls has been a surge in the shares of these companies, with corporations such as Lockheed Martin, Thales, and BAE Systems all seeing record 14 per cent, 35 per cent, and 32 per cent increases, respectively.[63]

Also, after oil and gas giants ExxonMobil and Chevron declared enormous profits which came as a result of the war in Ukraine, current US President Joe Biden, accused the corporations of war profiteering, and asked them to use their excess profits to benefit the American people while also threatening to impose a windfall tax.[64] This followed ExxonMobil record quarterly net profit of $20 billion dollars as well as Chevron's $11.2 billion profit.[65] In Europe, legislators have equally slammed windfall taxes on companies in the sector.[66] Europe's leading oil producer Norway, expected to rake in astonishing oil revenue of $170 billion due to the war, appears concerned, as such vast revenue may point to some sort of war profiteering.[67]

With such hitherto unimaginable kind of profit-making, it would be unconscionable to think that corporations making such a kill from the misery of others, shouldn't bear a degree of obligation. Allowing corporations like this to walk away without culpability does not help the effort to protect human rights both in peacetime and in war situations. Corporate entities ought to be aware of the real purpose their products are serving in armed

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[57] Barbara Moens, Jakob Hanke Vela and Jacopo Barigazzi, 'Europe Accuses US of Profiting From War' (*Politico,* 24 November 2022) https://www.politico.eu/article/vladimir-putin-war-europe-ukraine-gas-inflation-reduction-act-ira-joe-biden-rift-west-eu-accuses-us-of-profiting-from-war/ accessed 9 December 2022.

[58] Alexa Phillips, 'Ukraine War: How Weapons Makers Are Profiting from the Conflict' (*Sky News,* 10 June 2022) https://news.sky.com/story/ukraine-war-how-weapons-makers-are-profiting-from-the-conflict-12624574 accessed 9 December 2022.

[59] ibid.

[60] ibid.

[61] ibid.

[62] ibid.

[63] ibid.

[64] Myles McCormick and James Politi, 'Biden Claims Oil Companies are "War Profiteering" as He Floats Windfall Tax' (*Financial Times,* 31 October 2022) https://www.ft.com/content/1f57f405-94c8-44cb-8fae-5f9e6390bf72 accessed 9 December 2022.

[65] ibid.

[66] Javier Blas, 'Commodities Traders Score Low-Tax Windfall From Putin's War' (*The Washington Post,* 8 December 2022) https://www.washingtonpost.com/business/energy/commodities-traders-score-low-tax-windfall-from-putins-war/2022/12/08/e8ebf160-7704-11ed-a199-927b334b939f_story.html accessed 9 December 2022.

[67] See Agence France-Presse, 'Ukraine War Profits Fuel Unease in Norway' (*Voice of America (VOA),* 17 March 2022) https://www.voanews.com/a/ukraine-war-profits-fuel-unease-in-norway/6489978.html accessed 9 December 2022.

conflicts and ought to act responsibly by not just being profit-driven. This takes us to the next section in this article, i.e., an examination of relevant regimes of international law that can be applied to address the problem of war profiteering towards determining whether and how some form of accountability framework can be established.

III. International Law And War Profiteering: An Analysis

War can bring benefits to legal and respectable businesses, but at the same time, there is the recognition that the act of doing business in war can end up in human rights violations.[68] While international law allows business in war, it imposes prohibition when it is used for schemes such as illegal arms manufacturing, servitude, and unlawful violence.[69] Even where such businesses do not fall within the prohibited framework, the promoters must still ensure that they are not carried out in violation of extant IHL rules.[70] It is within this framework of business in war that war profiteering comes into the picture. The biggest challenge that war profiteering poses to international law is the difficulty in determining the exact rules that apply, with respect to accountability, especially given that the practice straddles different regimes. This section of the article will make an attempt to unpack the relevant rules while also highlighting grey areas as well as clear deficiencies. Specifically, attention will be on the rules of IHRL and IHL.

A. International Human Rights Law (IHRL)

Generally, in armed conflict situations, two streams of international law are applicable, i.e., IHRL and IHL, with the two containing extensive protection for rights such as the right to life. Though the two regimes have distinct origins, they overlap in terms of practical application in armed conflict situations.[71] Developments in the practice of the International Court of Justice (ICJ), as well as the International Law Commission (ILC) have helped shape the application of both regimes, providing for an acceptable position.[72] Whereas in its earlier decision in the *Nuclear Weapons Advisory Opinion,* the ICJ's sentiments tended toward the fact that IHL was *lex specialis* somewhat displacing IHRL,[73] its later submission in the *Legal Consequences Advisory Opinion* did clarify the fact that IHRL is applicable in situations of armed conflict.[74] In addition, the application of human rights instruments in Non-International Armed Conflicts (NIACs) have featured in the concluding observations of UN Human Rights Monitoring Committee such as the Human Rights Committee

[68] Hugo Slim, 'Business Actors in Armed Conflict: Towards a New Humanitarian Agenda' (2012) 94 (887) International Review of the Red Cross 903, 905.

[69] ibid.

[70] ibid.

[71] Severin Meier, 'Reconciling the Irreconcilable? – The Extraterritorial Application of the ECHR and its Interaction With IHL' (2019) 9(3) Goettingen Journal of International Law 395, 397.

[72] Jonathan Crowe, 'Coherence and Acceptance in International Law: Can Humanitarianism and Human Rights be Reconciled?' (2014) 35 Adelaide Law Review 251, 252.

[73] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 8 July 1996, [25].

[74] Noam Lubell, 'Challenges in Applying Human Rights Law in Armed Conflict' (2005) 87(860) International Review of the Red Cross 737, 738; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 9 July 2004.

(HRC),[75] Committee on Economic and Social Rights (CESR),[76] amongst others.[77] On this score, Heintze reiterates the fact that human rights instruments generally shows that human rights are an inherent part of the rules governing armed conflicts.[78]

What the above discussion shows is that both regimes of law intersect to the extent that, while IHL applies *solely* to armed conflicts governing the regulation of method and means of warfare by parties to an armed conflict as well as the protection of the civilian population, IHRL applies in both armed conflicts situations as well as in peacetime.[79] Compared to IHL, IHRL is more varied with its sources in a broad range of treaties, customary international law, as well as state practice.[80] IHRL governs interactions between the state and its citizens in which the state has obligations to protect human rights such as the right to life.[81] This obligation is for the benefit of the right holder and is essentially vertical in nature.[82] It is important to examine in brief how war profiteering intersects IHRL, before focusing on the framework under IHL. Generally, war profiteering violates human rights in different ways. However, given that a principal consequence of armed conflicts is often the high number of deaths, especially of civilians trapped in the conflict, the focus here would be on the right to life. This is especially so, given the primary nature of the right to life as a right is central to the enjoyment of other rights.

To start with, Article 3 of the Universal Declaration of Human Rights (UDHR)[83] states that 'everyone has a right to life, liberty and the security of person'.[84] The importance of the right to life is further demonstrated under International Covenant on Civil and Political Rights (ICCPR)[85] where a much more expanded provision is given. Article 6 of the ICCPR states that 'every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.[86] This prohibition against the taking of human life in an armed conflict situation is also recognised with respect to children, who have come to represent a significant population of war victims. This position

[75] See e.g., the following concluding observations: CCPR 'Concluding Observations of the Guman Rights Committee: Colombia' (26 May 2004) CCPR/CO/80/COL; CCPR 'Concluding Observations of the Human Rights Committee: Belgium' (12 August 2004) CCPR/CO/81/BEL; CCPR 'Concluding Observations of the Guman Rights Committee: Democratic Republic of Congo' (26 April 2006) CCPR/C/COD/CO/3.

[76] UN, 'Protection of Economic, Social, and Cultural Rights in Conflicts' *Report of the United Nations High Commissioner for Human Rights*, 1 – 22 at 4, https://www.ohchr.org/sites/default/files/Documents/Issues/ESCR/E-2015-59.pdf accessed 11 April 2023.

[77] Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Armed Conflicts' (2007) 40(2) Israel Law Review 310, 321.

[78] Hans-Joachim Heintze, 'On the Relationship Between Human Rights Law Protection and International Humanitarian Law' (2004) 86(856) International Review of the Red Cross 789, 791.

[79] Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism or Convergence?' (2008) 19 European Journal of International Law 161, 162; Annyssa Bellal and Stuart Casey-Maslen, 'Enhancing Compliance with International Law by Armed Non-State Actors' (2011) 3 Goettingen Journal of International Law 175, 185.

[80] Oona A Hathaway and others, 'Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law' (2012) 96 Minnesota Law Review 1883, 1891.

[81] William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16(4) European Journal of International Law 741, 743.

[82] Lottie Lane, 'Mitigating Humanitarian Crises During Non-International Armed Conflicts – The Role of Human Rights and Ceasefire Agreements' (2016) 1(2) Journal of International Humanitarian Action 1, 3.

[83] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

[84] UDHR art 3.

[85] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[86] ICCPR art 6.

is supported by Article 6 of the Convention on the Rights of the Child (CRC)[87] which provides that 'state parties recognise that every child has the inherent right to life. State parties shall ensure to the maximum extent possible the survival and development of the child'.[88] It is worth highlighting the fact that this provision notes that state parties have the responsibility to ensure that a child's right to life is protected, meaning that all state parties to the Convention are bound by this obligation, not just those directly involved in hostilities. Violation of the right to life is equally prohibited under relevant regional human rights treaties. For instance, Article 4 of the African Charter on Human and Peoples Rights (ACHPR)[89] states that 'human beings are inviolable. Every human being shall be entitled for respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'.[90] In the same manner, Article 2 of the European Convention on Human Rights ECHR[91] states that 'everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'.[92] Also, Article 4 of the American Convention on Human Rights (ACHR)[93] states that 'every person has a right to have his life respected. This right shall be protected by law, and in general, from the moment of conception. No one shall be arbitrarily deprived of his life'.[94]

Under the ICCPR, state parties are permitted to derogate from the obligation regarding certain rights 'in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed',[95] derogations are however prohibited with respect to rights such as the right to life,[96] except for permissible acts such as killing during wars. State parties to IHRL treaties are under an obligation to respect all rights codified in treaties to which they signatories.[97] While it may be argued that corporate entities such as arms corporations are business entities and do not have direct human rights obligations in an armed conflict situation, the point is that states have a duty to ensure that corporations operating within their border are not seen to be violating the host country's international obligations. To this end, the obligation to regulate war profiteering activities of corporations, as a means of complying with the obligation to protect the right to life, ought to be taken on by the state.

Aside from the direct obligation of states under relevant IHRL treaties to which they are signatories, business enterprises including arms corporations have a 'due diligence' obligation under the 2011 UN Guiding Principles on Business and Human Rights (Guiding Principles), to assess all human rights risks and abuses arising with respect

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[87] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).
[88] CRC art 6.
[89] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR).
[90] ACHPR art 4(1).
[91] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[92] ECHR art 2(1).
[93] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series 36 (ACHR).
[94] ACHR art 4(1).
[95] See ICCPR art 4(1).
[96] As a follow-up to article 4(1), article 4(2) of the ICCPR states that 'No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision'.
[97] Alberto Quintavalla and Klaus Heine, 'Priorities and Human Rights' (2019) 23(4) The International Journal of Human Rights 679, 680.

to their business operations.[98] This obligation is grounded in recognition of 'State's existing obligations to respect, protect, and fulfil human rights and fundamental freedoms' as well as 'the role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights'.[99] Article 11 of the Guiding Principles states that 'business enterprises should respect human rights',[100] while Article 12 adds that these rights refer to 'internationally recognised human rights – understood, at a minimum, as those expressed in the international bill of rights…'.[101] Additionally, Article 13 then states that the responsibility of business enterprises to protect human rights relates to:

> Avoid causing or contributing to adverse human rights impacts through their own activities and, and address such impact when they occur; seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships even if they have not contributed to those impacts.[102]

The above provisions clearly map out not just the nexus between the products of business enterprises and human rights but the additional obligation to prevent or mitigate such impact. As already established in this article, one right that war profiteering impacts directly is the right to life, and so any corporate entity dealing in products or services that arbitrarily take human life has an obligation in line with the Guiding Principles to be aware of the end purpose its product is put to, take steps to prevent and mitigate its impact in this respect. With specific reference to arms corporations, it means that they have an obligation to respect the right to life of all persons that their products, i.e., weapons and armament in general impact. To fulfil that obligation, they are under a duty to identify, prevent, and mitigate situations such as unconscionable lobbying for arms contracts, all to perpetuate war and reap excess profits. They also have an obligation to account for the human rights impact of the weapons they sell.[103] This means that, for instance, arms corporations whose weapons are heavily in use in ongoing armed conflicts have an obligation under international law to ensure that their business interest is not put before the protection of innocent lives in those conflicts, i.e., the goal of just making money. This is in line with the developing proposition that non-state actors such as corporations should bear human rights obligations.

However, situations of armed conflicts in which weapons produced by corporations play a major role tell a different story. For instance, the Syrian Observatory for Human Rights in its estimate for March 2019 notes that more than 500, 000 lives have been lost to the Syrian war.[104] To show the unprecedented carnage caused by weapons in this conflict, as the war dragged on endlessly, monitoring groups stopped counting the number of

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[98] 'Arms Companies Failing to Address Human Rights Risks' (*Amnesty International,* 9 September 2019) https://www.amnesty.org/en/latest/news/2019/09/arms-companies-failing-to-address-human-rights-risks/ accessed 9 December 2022.

[99] UN OHCHR 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011), 1 https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf accessed 9 December 2022 (UN OHCHR 'Guiding Principles on Business and Human Rights).

[100] ibid, art 11.

[101] ibid, art 12.

[102] ibid, art 13.

[103] Amnesty International (n 98).

[104] Tucker Higgins, 'Trump Administration Takes Action Against an Accused War Profiteer with Ties to Syrian Dictator Bashar Assad' (*CNBC,* 11 June 2019) https://www.cnbc.com/2019/06/11/trump-takes-action-against-war-profiteer-tied-to-bashar-al-assad.html accessed 9 December 2022.

deaths.[105] In the Yemeni civil war, similarly high numbers have also been recorded. One report shows that between 10,000 to 70,000 lives have been lost to the conflict, with two-thirds of these deaths said to have come from Saudi-led coalition air strikes.[106] Further reports state that on 9 August 2018, the Saudi bombing of a School in Yemen left 44 Children dead and many others injured.[107] According to the Cable News Network (CNN), the bomb used in the attack was manufactured by US arms manufacturing giant Lockheed Martin.[108] The fragments of a Boeing's JDAM Bomb were found in the debris of a 2016 attack on a Yemeni market, which killed about 107 persons in the capital city of Sanaa,[109] the parts of a laser-guided missile system used by the Saudi military in Yemen in an attack on 13 September 2016, were said to bear the insignia EDO MBM Technology Ltd., a company based in Brighton, UK.[110] UN experts have concluded that the use of this weapon may have broken international law.[111] There have also been reports of French-made weapons being by the Saudi-led coalition in its war in Yemen.[112] From the above reports, the obligations under the Guiding Principles appear not to have enough hold on arms corporations, much of which can be tied to the lack of a binding standard. There is a developing proposition that due to veritable changes in the international world order in which non-state actors such as corporations wield great economic and political influence and power, they ought to bear direct international legal obligations for which they can be held accountable.[113] Even if this proposition were to sail through, it is problematic to see how it addresses the problem of war profiteering given the way and manner it is carried out, i.e., the fact that it is not about the direct activities of corporate entities. It, therefore, means that there is still a need for an appropriate response under international law.

B. International Humanitarian Law (IHL)

When it comes to IHL rules and war profiteering, there are important questions – for instance, why is it important for IHL to regulate business activities in war, and why should parties to an armed conflict be made to commit to a regulatory framework limiting their choice of arms? Rooted in the idea of what is morally right,[114] IHL's rules are contained in

[105] Megan Specia, 'How Syria's Death Toll Is Lost in the Fog of War' (*The New York Times,* 13 April 2018) https://www.nytimes.com/2018/04/13/world/middleeast/syria-death-toll.html accessed 9 December 2022.

[106] Frank Gardner, 'Yemen War: Has Anything Been Achieved?' (*BBC News,* 1 August 2019) https://www.bbc.co.uk/news/world-middle-east-49179146 accessed 9 December 2022.

[107] Medea Benjamin and Nicolas J S Davies, 'In Yemen and Beyond, U.S. Arms Manufacturers Are Abetting Crimes Against Humanity' (*Foreign Policy in Focus,* 26 September 2018) https://fpif.org/in-yemen-and-beyond-u-s-arms-manufacturers-are-abetting-crimes-against-humanity/ accessed 9 December 2022.

[108] ibid.

[109] ibid.

[110] 'UN Experts Identify British Weapon Components in Yemen' (*WRI,* 20 August 2019) https://wri-irg.org/en/story/2019/un-experts-identify-british-weapon-components-yemen accessed 9 December 2022.

[111] ibid.

[112] 'Leaked Report Details Saudi Use of French Weapons in Yemen' (*WRI,* 24 May 2019) https://wri-irg.org/en/story/2019/leaked-report-details-saudi-use-french-weapons-yemen accessed 9 December 2022.

[113] Wolfgang Kaleck and Miriam Saage-Maaß, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes' (2010) 8(3) Journal of International Criminal Justice 699, 720; Jonathan Kolieb, 'Advancing the Business and Human Rights Treaty Project Through International Criminal Law: Assessing the Options for Legally-Binding Corporate Human Rights Obligations' (2019) 50(4) Georgetown Journal of International Law 789, 790.

[114] Gabriella Blum, 'The Laws of War and the "Lesser Evil"' (2010) 35 Yale Law Journal 39.

the four Geneva Conventions,[115] two Additional Protocols,[116] as well as Customary International Humanitarian Law (CIHL) rules.[117] Its key objective is to balance the interests of parties in an armed conflict with that of the need to protect civilian lives through a reduction of humanitarian atrocities.[118] As per Tomuschat, the role of IHL is to 'ensure minimal protection even during the most profound catastrophe of the human society, namely war'.[119]

As the primary rule in armed conflicts, IHL operates on four cardinal principles, i.e., distinction, proportionality, humanity, and military necessity,[120] with the protection of life being a central theme.[121] It forbids the intentional killing of persons who aren't combatants or involved in direct participation in hostilities, as well as those *hors de combat*, affording them protected status. While the four principles above are all targeted at protecting human life, at the core of the protection regime is the principle of humanity, anchored on the need to uphold the sanctity of human life at all times. This principle of humanity prohibits death, destruction, or injury to persons that is totally unnecessary to achieving set military objectives. It frowns at wanton killings carried out in pursuit of unrestrained military gains. It stipulates that once the desired military objective has been achieved, going ahead to inflict further suffering is unnecessary, and weapons that can cause suffering in this respect be prohibited.[122]

In contrast to what obtains under IHRL, IHL obligations are owed by all parties to an armed conflict, acting as mutual beneficiaries,[123] and must ensure that persons acting

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[115] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva II); Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva III); Geneva Convention Relative to the Protection of Civilian Person in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva IV).

[116] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

[117] Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules, (Cambridge University Press & ICRC, 2005) 1 – 628 at 1; Diakonia, 'Accountability for Violations of International Humanitarian Law: An Introduction to the Legal Consequences Stemming from the Violation of International Humanitarian Law' *Diakonia International Humanitarian Law Resource Centre (October 2013),* 1 – 9 at 2, https://www.scribd.com/document/499850727/Accountability-Violations-of-International-Humanitarian-Law# accessed 11 April 2023.

[118] Nicolas Lamp, 'Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law' (2011) 16(2) Journal of Conflict and Security Law 225.

[119] Christian Tomuschat, 'Human Rights and International Humanitarian Law' (2010) 21 European Journal of International Law 15, 16.

[120] Vivek Sehrawat, 'Legal Status of Drones under LOAC and International Law' (2017) 5 Penn State Journal of Law and International Affairs 165, 175.

[121] For instance, article 12 of Geneva Convention I states that 'members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances". In the same light, article 48 of Protocol I states that "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives'.

[122] Laurie R Blank, 'After "Top Gun": How Drone Strikes Impact the Law of War' (2012) 33(3) University of Pennsylvania Journal of International Law 675, 682–683.

[123] Lane (n 82).

on their behalf comply accordingly.[124] This is rooted in the duty to respect and ensure respect for IHL, which is one of the most important legal obligations in any armed hostilities, and which itself is an extension of the duty to respect all international obligations to which a state has become a signatory.[125] Article 1 of the Geneva Conventions is central in this respect, as it does not just require that parties to armed conflicts respect the law. It additionally imposes an obligation on all 'high contracting parties' to ensure respect for the Geneva Conventions in all circumstances.[126] This idea of respect goes beyond just refraining from bad conduct but extends to parties taking positive steps to ensure compliance with IHL.[127] During hostilities and in peacetime, all states are required to work towards the implementation of IHL rules and also refrain from engaging in conducts likely to undermine its success. On this matter, the ICRC's approach is that just as it concerns the universality of human rights, the implementation of IHL is considered everybody's business. Therefore, it is not just parties directly involved in hostilities that are bound; rather all other states, i.e., third parties, have a shared responsibility to take steps to ensure compliance. At this juncture, it is important to ask whether IHL provides a regime of accountability with respect to third parties whose arms corporations make unreasonable profits by reason of profiteering activities in armed conflicts.

Under the IHL, Article 47 of Additional Protocol I to the Geneva Convention of 1949 (Protocol I) deals with the use of mercenaries in war.[128] The application of this protocol has been further enhanced by two other international law documents, ie, the International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries ('UN Convention on Mercenaries'),[129] and the Convention on the Elimination of Mercenarism in Africa ('OAU Convention').[130] At the time of crafting the definitions under Article 47 of Additional Protocol I, as well as that of the UN Convention, the drafters had specific situations in mind, i.e., conflicts associated with the post-colonial rule in Africa.[131] It is important to know whether understanding the term 'mercenary' under these conventions, captures today's idea of war profiteers. Where this determination is made, it will help show if war profiteers can be held accountable under this regime of international law.

The development of the law of armed conflicts and the need to clarify what a 'mercenary' means, resulted in Article 47 (2) of Protocol I.[132] It defines a mercenary as anyone who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a party to the conflict, material

[124] Anne-Marie La Rosa and Carolin Wuerzner, 'Armed Groups, Sanctions and the Implementation of International Humanitarian Law' (2008) 90(870) International Review of the Red Cross 327, 328.
[125] Diakonia (n 117).
[126] ibid.
[127] ibid.
[128] Protocol I art 47.
[129] International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries (adopted 4 December 1989, entered into force 20 October 2001) 2163 UNTS 75 (UN Convention on Mercenaries).
[130] Convention on the Elimination of Mercenarism in Africa (adopted 3 July 1977, entered into force 22 April 1985) CM/817 (XXIX) Annex II Rev 3 (OAU Convention).
[131] Michael Scheimer, 'Separating Private Military Companies From Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support the Reflects Customary International Law' (2009) 24(3) American University International Law Review 609, 617.
[132] Protocol I art 47(2).

compensation substantially in excess of that promised or paid to the combatant of similar ranks and functions in the armed forces of that party;

(d) is neither a national of a party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[133]

It should be noted that the effect of Article 47 of Additional Protocol I is to categorise mercenaries as unlawful combatants, having the same rights and obligations as that of civilians who take part in hostilities.[134] What this means is that given their 'civilian status', such persons do not have a right to participate in hostilities, and in the event that they do and are captured, they cannot be granted prisoner of war (POW) status.[135] It must be clarified that Article 47 does not forbid states from granting mercenaries POW status; the difference is that they cannot assert it as a matter of right, such as members of the regular armed forces would do.[136] Under IHL, only members of the armed forces of a state party are deemed as combatants.[137] It, therefore, means that for any member of staff of an arms corporation to come under this definition, such must have been recruited by a state party.[138] Where an individual, not being a member of a state's regular armed forces, is recruited *tempore* to fight, such an individual will qualify as both a mercenary and a combatant for the purpose of determining his status. The context here refers to soldiers of fortune that countries hire from time to time to fight on their behalf. Covering those to be accorded POW status, Article 4 (4) of the Third Geneva Convention provides that:

> Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or services responsible for the welfare of the armed forces, provided that they have received authorisation from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.[139]

This provision affords protection for this class of persons when captured by providing that 'provided they have received authorisation from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model'.[140] The implication of this provision is that IHL had all along recognised the role of certain forms of military contractors as necessary parts of the machinery of warfare. The challenge, however is that war profiteering outstrips this position of IHL. The OAU and UN Convention, both provide for a much wider scope that extends beyond armed conflicts. Article 2 of the UN Convention provides for a framework dealing with the prosecution of anyone who recruits, trains, or finances mercenaries,[141] meaning that state parties accused of sponsoring mercenaries can be prosecuted. It also extends to non-state

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[133] Protocol I art 47(2).

[134] Emanuela-Chiara Gillard, 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88(863) International Review of the Red Cross 525, 562.

[135] ibid.

[136] ibid.

[137] ibid.

[138] ibid.

[139] Geneva III art 4(4).

[140] ibid.

[141] Lindsey Cameron, 'Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation' (2006) 88(863) International Review of the Red Cross 573, 580.

actors who may be engaged in this act. Additionally, Article 1 (3) of the OAU Convention[142] and Article 3 of the UN Convention[143] provides that individuals who satisfy the definition of being a mercenary and take direct part in hostilities are liable to prosecution. Accordingly, state parties that have enacted implementing legislations can prosecute anyone who fulfils the above conditions for the crime of being a mercenary.[144] It means that clear cases of mercenaries' engagement towards war profiteering in an armed conflict can be prosecuted. The situation is however different under the rules of IHL. As established earlier, such an individual cannot be charged with a crime; rather the individual cannot assert POW status.

It is also important to ask whether members of staff of an alleged war profiteering arms corporation can be held accountable as a mercenary. This remains difficult to see. One must start by saying that the definitions in both Article 47 (2), and the two mercenaries Convention recognises them, given that it focuses on natural persons and not legal entities such as corporations.[145] One can therefore say that while these corporations lack status or obligations under international law, their employees certainly don't.[146] Thus, most discussions around military corporations making profits from armed conflicts usually start and end with the issue of whether their employees can be classified as mercenaries. It means that even if one were to demand any kind of accountability from war profiteers under the present IHL rules, such may only be demanded from employees of the corporation, who are meant to fulfil the conditions in Article 47 and not the corporation as an actor in an armed conflict.[147]

However, a bigger challenge lies in the fact that it remains debatable whether the employees of such alleged war profiteering corporations can indeed be held accountable. The lack of clarity in the definition of a mercenary in Article 47 (2) of Protocol I makes it possible for countries whose corporations are engaging in war profiteering to escape accountability. The matter is further worsened when one considers that the same definition of a mercenary in use in the OAU is also the same in the UN Convention.[148] This definition requires that all the conditions are fulfilled cumulatively, meaning that for a person to be indeed categorised as a 'mercenary', the requirements of subsections a – f must be fulfilled together.[149] It is worth stating, however that notwithstanding its inherent shortcomings, the definition in Article 47 (2) of Protocol I is still the most widely accepted definition of a mercenary in legal literature.[150] A careful examination of the definition will reveal that the drafters had in mind the mercenaries of the 20th and 21st Centuries engaged in fighting on behalf of countries. From the definition, certain clauses stand out, which include that such a person 'must not be a member of the regular armed forces'; 'must have been specially recruited to fight'; 'his motivation is desire for private gain'; and 'there must be a direct participation in hostilities'.[151] Given the tenuous conditions reflected in these clauses,

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[142] OAU Convention art 1(3).
[143] UN Convention on Mercenaries, art 3.
[144] Cameron (n 141)
[145] Gillard (n 134*)*.
[146] ibid.
[147] ibid.
[148] ibid.
[149] Marie-France Major, 'Mercenaries and International Law' (1992) 22 Georgia Journal of International and Comparative Law 103, 110.
[150] Edward Kwakwa, 'The Current Status of Mercenaries in the Law of Amed Conflict' (1990) 14 Hastings International and Comparative Law Review 67, 74.
[151] Protocol I art 47(2).

scholars have described the conditions as impracticable.[152] One, therefore, wonders how employees of alleged war profiteering corporations can be brought to account, given the vacuum that this framework creates.

Another important consideration is that respect for the above rules holds sway only when state parties choose to do so, a matter that has been made difficult by the continuously changing nature of the use of private force. Though IHL rules are one of the most accepted in treaty law, with all 196 countries having ratified the Geneva Conventions, the much-needed respect has remained elusive, with the development of IHL given different meanings by different actors.[153] To the detriment of earlier international efforts in this regard, powerful nations remain busy exploring the grey areas in the international system to expand their agenda of business in war.

VI. The Need for Concerted International Action

It is evident that the existing regime under international law does not sufficiently deal with the problem of war profiteering. It is also clear that there is also a lack of regulation at regional and domestic levels. The US House of Representatives did attempt a move at regulating the phenomenon of war profiteering when in 2007 by a vote of 375 – 3 it passed the War Profiteering Act.[154] It amended the federal criminal code by prohibiting profiteering and fraudulent activities involving a contract in connection with a mission of the US government overseas.[155] It imposes a fine of $1 million and/or a prison term of not more than 20 years for knowingly defrauding the US government; a fine of $1 million and/or a prison term of up to 10 years for falsification or concealment, false documents, or false statements in connection with such contracts.[156] It also grants extraterritorial federal jurisdiction over the act and allows criminal forfeiture of any property obtained from the act.[157] However, the bill never saw the light of day, as it was not passed into law.

The impact of war profiteering in different armed conflict zones across the world where heavy humanitarian atrocities are ongoing makes this matter more pressing at this time. War profiteers deal in weapons, and weapons kill people. Not only should the production and transfer of such weapons be regulated, but importantly there must be a legal framework that connects the doing of business in arms to humanitarian atrocities committed in armed conflict in a manner that corporations involved can be held accountable. War profiteers cannot continue to hide behind the excuse that this is purely business; so long as their business destroys human lives and also threatens global peace and security, it becomes a matter deserving of international regulation.

This necessarily shifts attention to the United Nations (UN), the body with the primary mandate to design appropriate legal tools to deal with this problem. There must be a consensus in the UN community accepting that war profiteering represents a clear shift from the hitherto simple problem of mercenaries, but more of a commercialisation of armed conflicts, having a nexus with humanitarian atrocities. The UN must recognise that the existing international law responses discussed above are generally insufficient in dealing with the problem and move from its position of placation to action. It must draw

[152] Françoise Hampson, 'Mercenaries: Diagnosis Before Prescription' (1991) 3 Netherlands Yearbook of International Law 4, 14.
[153] Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26 European Journal of International Law 109, 132, 134 – 135.
[154] See, 'H.R. 400 – War Profiteering Prevention Act of 2007' Congrees.Gov. https://www.congress.gov/bill/110th-congress/house-bill/400 accessed 11 April 2023.
[155] ibid.
[156] ibid.
[157] ibid.

a parallel between war profiteering and other acts that threaten international peace and security and see a basis to act. The UN Secretary-General General Antonio Guterres in his 2020 Report on Protection of Civilians in Armed Conflicts submitted to the UNSC,[158] called on parties to armed conflicts to move beyond rhetoric and make civilian protection a reality.[159] However, it is important to say that the key solution is to design regulations that will define clear accountability mechanisms with regard to the inflow of weapons into conflict zones, especially with respect to alleged war profiteering corporations.

The mandate of the UN in this respect is unmistakable. Circumscribing its core mandate, Article 1 of the UN Charter provides for the mandate of the organisation, which is to**:**

> To maintain international peace and security and to that end; to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which may lead a breach of the peace.[160]

The expression 'to take effective collective measures for the prevention and removal of threats to the peace' is spot on when it comes to the problem of war profiteering. In taking this 'collective measure', two organs of the UN are instructive i.e., the UNSC and the General Assembly. As part of its functions, the UNSC is obligated to maintain international peace and security in accordance with the principles and purposes of the United Nations.[161] Whereas the UNSC isn't a law-making organ but an enforcer of the UN's core mandate,[162] in recent times it has made far-reaching resolutions, which in their own right, have been quite impactful. A good example is resolution 1373 of 2001[163] in which the UNSC in line with its powers under Chapter VII of the UN Charter and in a bid to respond to the 9/11 attacks, mandated state members of the UN to enact domestic counterterrorism legislations or face international action.[164] It was on this basis that quite a number of countries battling domestic terrorism, such as Nigeria, enacted their counterterrorism law.[165]

The argument here is that just as it happened with resolution 1373, the UNSC can deploy its power of resolution-making in urging state members of the UN to enact domestic legislations that will criminalise war profiteering or they risk international action. Making a point in this respect, Benowitz and Caccanese note that the UNSC 'has a responsibility not only to sanction those directly responsible for unlawful conduct in hostilities but also

[158] UNSC, 'Protection of Civilians in Armed Conflicts – Report of the Secretary General' (6 May 2020) UN Doc S/2020/366.

[159] Simon Bagshaw, 'Time to Move Beyond the Rhetoric of Protecting Civilians in Armed Conflicts' (*Just Security,* 26 May 2020) https://www.justsecurity.org/70388/time-to-move-beyond-the-rhetoric-of-protecting-civilians-in-conflict/ accessed 9 December 2022.

[160] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 1(1).

[161] UN Charter art 23(1).

[162] José E Alvarez, 'Contemporary International Law: An "Empire of Law" or the "Law of Empire"' (2009) 24(5) American University International Law Review 811, 825.

[163] UNSC Res. 1373 (28 September 2001) UN Doc S/RES/1373.

[164] Olusola B Adegbite, 'Weaponisation of the War on Terror and the Sidestepping of Human Rights Norms: Seeking a Balance Between the Terrorism (Prevention) (Amendment) Act 2013 and Nigeria's Obligation under International Human Rights Law' (2021) 1 UCC Faculty of Law Journal 107, 114.

[165] ibid 115.

cut off support to perpetrators from supplier states…'.[166] However, as it has been appropriately noted, the council is severely hindered by the fact that its five permanent members are the world's leading arms-exporting countries, who, between 2014 and 2018, accounted for 73 per cent of exports of major weapons.[167]

It is however worth noting that for this much-desired objective to be achieved, the international community must reach that tipping point where it has had enough of war profiteering activities. It doesn't appear the world is at that place yet; however, it can *actually* be forced to the discussion table, where important stakeholders also play their part. In this respect, the role of International Non-Governmental Organisations (NGOs) comes into the picture. As a part of the international system, international NGOs have a role to play in stepping up advocacy against war profiteering at this time. They must begin to convincingly present before the global community, the nexus between this heinous act and widespread humanitarian atrocities. As international NGOs have done in times past regarding other acts engendering human suffering, they must advocate for a process of international law-making, which will result in a specific treaty document regulating war profiteering. For instance, their role in the international law-making efforts that culminated in the drafting of the 2007 Convention on the Prohibition of the Use, Stockpiling, Production, Transfer, of Anti-Personnel Landmines and on their Destruction, i.e. the Ottawa Convention is a reference point.[168] If the same civil society advocacy energy is deployed, the same result can be replicated with the problem of war profiteering.

V. Conclusion

This article has examined the problem of war profiteering within the context of applicable regimes of international law. It has addressed the point that the current framework is insufficient in dealing with the human rights issues generated by arms corporations alleged of being involved in these activities. Clearly, not all involvements of arms corporations in an armed conflict would amount to war profiteering, however, as this article has established, once it can be established that the entity in question has made excess profits linked to war, profits which would not have happened if the war had not occurred, such ought to qualify as war profiteering. It has further noted the fact that a case for war profiteering is strengthened when it can be shown that the business activities of such corporations fetching excess profits has created an environment suitable for human rights violations, even when such violations did not come from the direct acts of the firms.

The essence of this article is to prompt fresh debates on this issue, with the hope that such discourse would attract international action and result in a more progressive accountability framework. There must be an agreement that war profiteering is a challenge to the current international law framework particularly the aspects bordering on human rights protection in armed conflicts. That the regimes of IHRL and IHL are inapplicable to this problem reflects the need to develop a framework potent enough to combat this act. One must warn, that for corporations making a ton of fortune from war profiteering, binding them to a specific accountability regime is likely to be dauntlessly resisted, especially with the degree of political and economic influence wielded by such entities. The value placed on addressing this problem, would ultimately reflect either condonation or condemnation. But as an issue that borders on human rights protection, there is the

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[166] Brittany Benowitz and Alicia Ceccanese, 'How the UN Can Help Prevent the Spread of Proxy Conflicts' (*Just Security,* 27 May 2020) https://www.justsecurity.org/70369/how-the-u-n-can-help-prevent-the-spread-of-proxy-conflicts/ accessed 9 December 2022.

[167] ibid.

[168] Olusola B Adegbite, 'Decimating the Enemy Below: Ottawa Convention and the Realisation of Landmine Ban in International Law' (2021) 21(2) Makerere Law Journal 238, 246.

likelihood that it would continue to attract increased attention, which is good for efforts towards an accountability framework. While the challenge of limited academic inquiry remains, the analysis provided in this article has indeed set the tone for which future research in this area. The expectation is that with increased scholarly focus, particularly from legal researchers, brighter ideas toward realising this accountability would see the light of day.

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