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## ARTICLE

# INCORPORATING RIGHTS: EMPIRE, GLOBAL ENTERPRISE, AND GLOBAL JUSTICE

ERIKA R. GEORGE\*

## ABSTRACT

*This Article traces the history and evolution of corporate responsibility under international law to contextualize the developing discourse on business and human rights. It explores the role of private industry in contributing to colonial expansion, slavery, and conflict, and examines the advocacy efforts of abolitionists, anti-imperialism activists, and peace movements to craft reforms and create norms to control corporate conduct. First, the Article outlines the challenge that regulating private commercial power presents for a system of public international law premised on the sovereign power of states. Then, using the example of colonial era European charter companies the Article offers a critical evaluation of the limitations of international law for defining the social role of a corporation in society and its broader responsibilities to the public in light of the legacy of empire and exploitation. Finally, the Article will explain how the contemporary movement to recognize a corporate responsibility to respect human rights under international law builds upon these precedents of post-colonial and post-conflict accountability efforts and competing concepts of international legal personality. This paper argues that the scope and nature of corporate human rights responsibilities must be proportionate and informed by an appreciation for the changing role of the place of private industry in international relations over the course of time.*

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*The function of international law is to provide a legal basis for the orderly management of international relations. The traditional nature of that law was keyed to the actualities of past centuries in which international relations were interstate relations. The actualities have changed . . . .<sup>1</sup>*

—Philip C. Jessup, American International Legal Scholar (1947)

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1. PHILIP C. JESSUP, A MODERN LAW OF NATIONS 16 (1948).

*The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state . . . .*<sup>2</sup>

—Adolf A. Berle, American Corporate Legal Scholar (1934)

#### INTRODUCTION: ACCESS TO JUSTICE FOR INJUSTICES ABROAD

Esther Kiobel's efforts to obtain compensation from corporations that were allegedly complicit in the demise of her late husband, an environmentalist working to oppose excesses of the extractives industry in Nigeria, ended when the United States Supreme Court declined to exercise jurisdiction over her claims.<sup>3</sup> Along with other Nigerian nationals, Kiobel sued the Dutch company Royal Dutch Petroleum Company, the English company Shell Transport and Trading Company, and their joint subsidiary Shell Petroleum Development Company of Nigeria.<sup>4</sup> She claimed that these corporations had "violated the law of nations by aiding and abetting the Nigerian Government in committing (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction."<sup>5</sup> She sought relief under customary international law for these violations and filed her suit in the United States.<sup>6</sup>

Kiobel was originally from Ogoniland, a small area in the oil rich Niger Delta region of Nigeria. The foreign corporations she sued were all engaged in oil exploration and production in the region at the time of her husband's death and the alleged abuses. Members of her Ogoni community, concerned about the environmental impacts of businesses operating in the region, protested the practices of the corporations by engaging in acts of civil disobedience and disrupting business. Resistance by the Ogoni community compromised the ability of businesses to conduct business. Businesses called on public authorities to put an end to community protests.

The Nigerian government, a military dictatorship at the time, obliged the interests of private industry and took action to restore order to the region. Later, investigations would reveal the government's actions were excessive.<sup>7</sup> Peaceful protests in Ogoniland were violently repressed by

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2. ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 357 (1934).

3. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

4. *Id.* at 1662.

5. *Id.* at 1663.

6. *Id.*

7. Paul Lewis, *Blood and Oil: A Special Report; After Nigeria Represses, Shell Defends Its Record*, N.Y. TIMES, Feb. 13, 1996 ("To crush the unrest by the Ogoni, who complained of environmental damage to their territories and demanded money for the oil extracted there, Nigeria sent its notoriously brutal 'mobile police' and mounted a campaign of repression that included laying waste to whole villages.").

Nigeria's military dictatorship.<sup>8</sup> The Nigerian government's retaliation caused great suffering and extended to several communities in Ogoniland.<sup>9</sup> Kiobel alleged "military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying or looting property."<sup>10</sup>

Kiobel claimed that the death of her husband and the atrocities suffered by residents of the region at the hands of Nigeria's military dictatorship were in fact aided and abetted by extractive industry corporations operating in Ogoniland. She alleged that the corporations named in her complaint supported the Nigerian government's violent suppression of protests by, among other things, allegedly providing "food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents' property as a staging ground for attacks."<sup>11</sup>

Kiobel escaped abuses in Nigeria. She sought and was granted political asylum in the United States.<sup>12</sup> Based on the past injustices she suffered, seeking access to justice in Nigeria was unappealing and unlikely. Instead, Kiobel, a foreign national, brought her suit against foreign companies for abuses that had occurred in a foreign country in the United States under the Alien Tort Statute (ATS).<sup>13</sup> Part of the Judiciary Act of 1789, the ATS provides: "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>14</sup>

The Second Circuit dismissed Kiobel's suit, reasoning that the law of nations does not recognize corporate liability.<sup>15</sup> The United States Supreme Court granted certiorari to consider that question. However, the Court also directed the parties to address an additional question: "whether and under

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8. *Id.*

9. Howard W. French, *Nigeria Executes Critic of Regime; Nations Protest*, N.Y. TIMES, Nov. 11, 1995 ("When the movement's members began to demonstrate for an end to oil spillages by Royal Dutch/Shell and for a share of the revenues from the oil pumped from their land, international human rights groups say, Nigerian troops began mounting a kind of scorched-earth campaign against the Ogoni, burning villages and committing murders and rapes.").

10. *Kiobel*, 133 S. Ct. at 1662.

11. *Id.* at 1663.

12. *Id.*

13. *Id.*

14. 28 U.S.C. § 1350 (2012). In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004), the Court determined that the ATS did not expressly provide for any causes of action but only granted jurisdiction. This jurisdiction is best understood as limited by common law to provide "a cause of action for the modest number of international law violations . . . ." *Id.* at 724. *Kiobel* places a further limit on the jurisdictional grant restricting to conduct on U.S. territory. In concurrence, Justice Breyer notes the presumption against extraterritoriality could potentially be overcome when conduct at issue "substantially and adversely affects an important American national interest . . . ." *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring). In Justice Breyer's view it is in the American national interest to "prevent[ ] the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind" and not allow such enemies to evade the risks of civil or criminal liability. *Id.*

15. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010).

what circumstances courts may recognize a cause of action under the [Alien Tort Statute], for violations of the law of nations occurring within the territory of a sovereign other than the United States.”<sup>16</sup>

The Court did not state a position on whether or not it would be possible for a corporation to violate the law of nations or to be liable for such violations. Rather, the Court concluded that the extension of jurisdiction over claims that occurred overseas, such as those made by Kiobel, would run counter to a longstanding and powerful presumption against extraterritorial application of U.S. laws.<sup>17</sup> The presumption operates to ensure the judiciary acts with caution where foreign policy concerns may be implicated were a court to craft a remedy. The presumption, as the Court explained, “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>18</sup> This strong historical presumption against the extraterritorial application of U.S. law compelled the Court to refuse to entertain Kiobel’s allegations of atrocities. Because the events occurred outside the United States, Kiobel’s allegations that private corporate actors were complicit in conduct in violation of the law of nations were deemed beyond the reach of U.S. court jurisdiction.<sup>19</sup> As the presumption against extraterritoriality articulated in the Kiobel decision stands, the principle further limits the forums available to victims of international human rights violations to access a remedy for abuses suffered by foreclosing the United States as a forum for seeking relief unless claims stated are deemed to sufficiently “touch and concern” the United States.

Kiobel’s case was but one of many filed in the United States that framed corporate actors as complicit in human rights abuses. In the past decade, human rights activists brought several ATS suits seeking remedy on behalf of victims for rights violations that occurred inside foreign countries. The countries that have attracted the attention of international human rights lawyers for alleged atrocities involving private corporate actors share strikingly common features: a brutal colonial past and a present plagued by corruption. Several of the most controversial ATS cases have involved major multinational corporations operating in developing countries that were previously governed under European colonial rule. Exxon Mobil was sued for abuses in Indonesia.<sup>20</sup> Dow Chemical Company was sued for injuries sustained by Vietnamese nationals in Vietnam.<sup>21</sup> Coca-Cola was sued for abuses in Columbia.<sup>22</sup> Del Monte was sued for abuses in Guatemala.<sup>23</sup> At

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16. *Kiobel*, 133 S. Ct. at 1660.

17. *Id.* at 1668.

18. *Id.* at 1661 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

19. *Id.* at 1669.

20. *See Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007).

21. *See Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008).

22. *See Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003).

various points throughout history large portions of Africa, Asia, and the Americas were under European colonial control.<sup>24</sup> Countries in Africa, Asia, and the Americas were often a source of ATS litigation activity.

Commerce played a central role in the colonial confrontation. Colonialism served to shape both the evolution of corporate structure and international legal standards. In today's global economy, the governance of corporations with global operations remains a central challenge due in significant part to structures and standards that have not adequately adapted to the realities of the current era of economic globalization. Indeed, some large multinational corporations possess a global influence to rival that of some countries.<sup>25</sup> Yet, global governance is lagging behind commercial developments. Conventional approaches to international law, the usual lens through which problems that cross borders are regarded, has so far been inadequate to address rights abuses where private commercial actors are implicated. Public international law has conventionally concerned issues that arise between different countries, not private commercial actors.

Given the global nature of commerce and the Supreme Court's current lack of enthusiasm for extending jurisdiction to adjudicate abuses that occur abroad, it is imperative that the role of private commercial actors in public international affairs be further examined and better understood. The law and economics of empire building and territorial expansion during the age of imperialism are instructive for understanding the contemporary context of the questions raised in ATS litigation and the answers now offered in developing international standards to guide business practices where human rights are placed at risk. At the core of cases brought against businesses for human rights violations are crucial substantive questions: What is the role of the corporation in international law? What is its relationship to the state? What are its obligations with respect to people on this planet?

This Article traces the development of the enterprise of empire building in the era of colonial expansion and tracks significant changes in corpo-

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23. See *Villeda Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283 (11th Cir. 2009).

24. For discussions of European colonial expansion in different parts of the globe, see generally NIALL FERGUSON, *CIVILIZATION: THE WEST AND THE REST* (2011); NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* (2004); ANTHONY PAGDEN, *PEOPLES AND EMPIRES: A SHORT HISTORY OF EUROPEAN MIGRATION, EXPLORATION, AND CONQUEST, FROM GREECE TO THE PRESENT* (2001); ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (1999) (discussing colonial control in the Belgian Congo). For discussions of the consequences of colonialism and the rise of objections to imperialism, see generally SANKAR MUTHU, *ENLIGHTENMENT AGAINST EMPIRE* (2003); EDWARD W. SAID, *ORIENTALISM* (1979); FRANZ FANON, *THE WRETCHED OF THE EARTH* (1963).

25. Several examples exist of large multinational corporations exhibiting power in the political arena. See, e.g., *In re Chiquita Brands Int'l, Inc.*, 792 F. Supp. 2d 1301 (S.D. Fla. 2011) (finding that Chiquita Banana, one of the largest banana producers worldwide, paid a Colombian paramilitary group for over seven years in order to gain security and control over banana-growing regions).



rate structure and the relationship of corporate power to state sovereignty. To show how attitudes toward the role of business in society have evolved, this Article also maps humanitarian social movements of the past as precursors to efforts to seek corporate accountability for rights abuses in the present day.

Part I examines the debates over legal personality in international law to enhance the evolving understanding of the nature and character of the corporate person and assess whether corporate persons can be said to possess rights and responsibilities comparable to that of a sovereign state. Part II explores the evolution of the corporate form through the business of empire building during the age of imperialism and the role of private commercial actors in creating core doctrines of international law. Finally, Part III explains the recent efforts to incorporate human rights into business practice. By drawing parallels between the impact of social protests to oppose corporate excesses in overseas territories and the ascendance of a humanitarian impulse to eradicate the trans-Atlantic trade of the past and efforts by activists to address labor rights abuses and the excesses that have come to be associated with economic globalization in the modern era. Ultimately, this Article posits that global business would be well served by incorporating rights concerns into the way commerce is conducted.

#### I. THE POSITION OF THE “PERSON” IN INTERNATIONAL LAW

International law, alternatively the law of nations, has conventionally been understood as the body of law that governs relations between nations. Now more than ever, however, relations between nations are also influenced by the actions of entities that are not nations—private citizens and private corporations. Relations across nations are not limited to interactions among governments and exchanges between the world capitals. Today, capital and information flow across borders and individuals cross borders seeking freedom and opportunity. Corporations and citizens are increasingly engaged in international relations. Core organizing concepts of the discipline make it difficult for international law to address these new non-state actors operating across nations because by definition the operative concepts of the law of nations does not appear to clearly capture entities that are not nations. The concepts of international legal personality and state sovereignty as they have come to inform understandings of which entities are proper subjects of international law are examined below.

##### A. *Duality by Definition: Public Subjects and Private Objects*

As the influential international jurist Philip Jessup explained in his celebrated 1947 article, the *Subjects of a Modern Law of Nations*, “[i]nternational law is generally defined or described as law applicable to relations between states. States are said to be the subjects of international

law and individuals only its 'objects.'"<sup>26</sup> Public international law regulates the actions of the "subjects" of international law, those entities that possess "legal personality."<sup>27</sup> A subject "can affect and be affected by international law and can enforce international law by bringing at least some international claims."<sup>28</sup>

A subject of international law is defined as an entity that possesses international rights and international obligations.<sup>29</sup> A subject must also possess the capacity to protect its rights by bringing international claims against other subjects and the capacity to meet its international obligations.<sup>30</sup> Objects of international law, as distinct from subjects, exist and are acknowledged but do not enjoy the same powers of subjects or the same status as legal persons under international law.<sup>31</sup>

Historically, international law has drawn a sharp distinction between the subjects of international law with rights and responsibilities, and mere objects, presumably without rights or responsibilities. As Emeka Duruigbo has explained: "The object-subject distinction can be likened to the game of chess in which the objects are the chessmen on the chessboard and the subjects are the chess players."<sup>32</sup> Under this view, power resided with subjects while objects must submit to the power or will of the subject.

Sovereign states are "subjects" of international law and possess legal personality. However, the growing power and influence of corporate actors have caused some commentators to call into question the distinction between subjects and objects. The question asked, but left unanswered, by the Kiobel Court concerning whether corporations can be liable for violations of the law of nations is complicated by the doctrinal distinction between subjects and objects, sovereign and private power.

### *B. Legal Personality: Sovereign Powers and Privileges*

The sovereign state enjoys status as a "legal person" in international law.<sup>33</sup> As sovereigns, with legal personality, states have the power to enter into legal relationships and possess legal rights and duties. Enjoying status

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26. Philip C. Jessup, *The Subjects of a Modern Law of Nations*, 45 MICH. L. REV. 383, 383 (1947).

27. Jose E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1, 7 (2011).

28. *Id.* at 3.

29. IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 57 (5th ed. 1998).

30. *Id.*

31. *Id.* at 66–67; *see also* BARRY E. CARTER & ALLEN S. WEINER, *INTERNATIONAL LAW* 429–30 (6th ed. 2011).

32. Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. J. INT'L HUM. RTS. 222, 226 n.26 (2008) (citing Sigmund Timberg, *International Combines and National Sovereigns*, 95 U. PA. L. REV. 575, 576 n.4 (1947)).

33. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 (1987).

as a legal person entitles states to act with legal capacity and to take certain types of action in the international arena.<sup>34</sup> For example, as legal persons, states possess power to: (1) “own, acquire, and transfer property;” (2) “make contracts and enter into international agreements;” (3) “become a member of international organizations;” and (4) “to pursue, and be subject to, legal remedies.”<sup>35</sup>

In addition to the sovereign power to exercise authority over its territory and population, a state has the capacity to make international law in cooperation with other states either through entering into treaty agreements or through establishing patterns of practice over time that in turn form the body of customary international law.

### *1. States as Sole Subjects*

Under the conventional view the only subjects of international law are states. Because states alone had enjoyed the capacity to make claims and were granted privileges and immunities from other national jurisdictions, states alone merit recognition as subjects.

The constituent characteristics for formal recognition as a nation state as set forth in the Montevideo Convention on the Rights and Duties of States are: (1) a defined territory; (2) a permanent population; (3) a government; and (4) the capacity to conduct international relations.<sup>36</sup> For an entity to be eligible for recognition as a state by the international community it must meet the criteria set forth in the Convention. A state possesses both sovereignty and legal personality.

International law accords a partial legal personality to certain non-state entities such as international organizations and *in statu nascendi* aspirant states.<sup>37</sup> In 1949, the International Court of Justice recognized that an international organization could possess the requisite personality to be regarded a subject of international law.<sup>38</sup> To merit status, an international organization should be a permanent association created to attain certain specific objectives. It must have administrative organs that exercise power distinct from sovereign power of its member states. Finally, an organization must be able to operate on a level different and distinct from national systems of order.

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34. Mala Tabory, *The Legal Personality of the Palestinian Autonomy*, in NEW POLITICAL ENTITIES IN PUBLIC AND PRIVATE INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO THE PALESTINIAN ENTITY 139, 140 (Amos Shapira & Mala Tabory eds., 1999) (citing D.P. O'CONNELL, INTERNATIONAL LAW 8 (2d ed. 1970)).

35. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 (1987).

36. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19, 49 Stat. 3097.

37. Tabory, *supra* note 34.

38. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11) [hereinafter Reparation Case].

## 2. *Economic Enterprises as an Emerging “Other”*

Sovereign states are by definition the uncontested subjects of international law. Other entities that operate internationally are considered objects of international law. Private commercial enterprises are only objects, not subjects of international law. Yet, states are not the only actors in the international arena that place human rights at risk. The emergence of ATS actions against corporations demonstrates that certain kinds of corporate conduct that adversely impacts the enjoyment of internationally recognized human rights will attract the attention of rights activists and result in public condemnation.

Nearly half of the world's largest economic entities are corporations, not countries.<sup>39</sup> Today, only one thousand businesses constitute half of the total market value of the world's sixty thousand public companies.<sup>40</sup>

Commercial enterprises have relative clout in the international arena and revenues that often eclipse the GDPs of sovereign states in which they operate. Nevertheless, as Philip Jessup has observed: “International law . . . is accustomed to dealing with corporations as ‘citizens’ or ‘nationals’ of states in the same way in which it deals with natural persons. So long as national law creates these juristic persons, international law must deal with them as individuals.”<sup>41</sup>

However, conceptual complications arise when treating juristic persons and natural persons alike for the purpose of determining the presence or absence of international legal personality and delineating associated rights and responsibilities under international law. For example, “a corporation may be created under the law of State A, may have its principle place of business in State B, may have directors who are nationals of State C and stockholders who are nationals of State D.”<sup>42</sup> A natural person, in contrast, is usually present in one place at one time and might at most have dual citizenship.

### C. *Competing Accounts of Corporate Personhood and Power*

The growing power and influence of private actors operating internationally present a conceptual challenge for international law because the discipline does not have adequate concepts with which to regulate private

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39. *Corporate Clout 2013: Time for Responsible Capitalism*, GLOBAL TRENDS, <http://www.globaltrends.com/knowledge-center/features/shapers-and-influencers> (last visited Feb. 15, 2014).

40. Robert G. Eccles & George Serafeim, *The Performance Frontier: Innovating for a Sustainable Strategy*, HARV. BUS. REV., May 2013, at 50–60.

41. Jessup, *supra* note 26, at 387.

42. *Id.* at 387–88 (citing Sigmund Timberg, *Corporate Fictions: Logical, Social and International Implications*, 46 COLO. L. REV. 533, 572 (1946)); see also Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 741 (1970) (explaining with respect to multinational corporations that “the present legal framework has no comfortable, tidy receptacle for such an institution.”).

aggregations of power. Given the duality of the subject/object distinction no matter how powerful modern multinational corporations become they are by definition not states and therefore are not subject to the same legal obligations and duties of sovereign states. Increasingly, international legal academics are questioning the utility of the subject/object distinction and the limited definition of international legal personality.<sup>43</sup>

Opinion is divided over the nature of the personality of corporate entities for purposes of delineating what rights and responsibilities these non-state actors possess under public international law. Assessing the responsibilities of business enterprises with respect to international human rights arguably turns in some measure on a determination of legal personality. Jose Alvarez argues that the obsession over subjects and objects in international law has proved an impediment to “addressing the truly urgent questions raised by international corporate activity.”<sup>44</sup>

There are competing views on how to address the conceptual problems presented by offering an account of international legal personality. The subject/object distinction is increasingly difficult to navigate due to complications presented by the nature of the personality of the corporate person. The range of views in the literature on whether corporations possess the requisite international legal personality to assume responsibility for rights violations is varied. Legal positivists argue that corporations do not possess international legal personality while more progressive approaches assert that corporations do possess international legal personality by virtue of their position in the international arena. Both positions are explained below.

### 1. *The Positivist Perspective*

Positivist jurisprudence in international law is premised on the notion of primacy of the state. Despite later efforts to reform foundations of international law in the post-WWII period, the positivist position continues to operate. Positivism replaced naturalism as core of the discipline offering a new analytic with which to account for geopolitical events. Principally, positivism served to support universal application of law globally, primarily to introduce a consistent and predictable legal framework in unoccupied areas of Asia, Africa, and the Americas, thus easing the colonial enterprise.<sup>45</sup>

For a positivist, “the only real subjects or persons in international law are states and their creations, namely organizations consisting of states as members such as those of the U.N. system.”<sup>46</sup> Under the view that states are the only subjects of international law, “it is only through an exercise of

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43. See, e.g., Alvarez, *supra* note 27.

44. *Id.* at 31.

45. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005) (examining the different phases of colonialism and its impact on the formation of international law and sovereignty).

46. Alvarez, *supra* note 27, at 8.

[state] will, as expressed through treaty or agreement or as laid down by an international authority deriving its power from states that a rule of law becomes binding . . . .”<sup>47</sup>

For instance, some European commentators, such as James Crawford and Christopher Greenwood, have advanced the positivist position that because corporations have not generally been found liable under international law they are not therefore subject to it.<sup>48</sup> Similarly, Janet McLean has observed, “no matter how powerful transnational corporations may become, they are not states and should not be subjected to the same legal obligations and duties as states.”<sup>49</sup>

## 2. *The Pragmatist Perspective*

Early writers, critical of a positivist position, called into question creating a body of law that would be concerned primarily with the characteristics of the fictitious juridical person of the state and the dogma of the subject/object distinction drawn in international law. For example, Jessup points to the 1928 writings of Politis indicating an appreciation for the conceptual instability of a sovereignty assumed to encompass an all-powerful state as the only entity from which power could be granted to other entities:

Formerly the sovereign State was an iron cage for its citizens from which they were obliged to communicate with the outside world, in a legal sense, through very close-set bars. Yielding to the logic of events, the bars are beginning to open. The cage is becoming shaky and will finally collapse. Men will then be able to hold free and untrammelled communication with each other across their respective frontiers.<sup>50</sup>

More contemporary commentators unsatisfied with a positivist account of the proper subjects of international law have advanced the position that private actors should be seen as subjects.

In a departure from the positivist position articulated by Crawford, Greenwood, and others, American academics Dunoff, Ratner, and Wippman present the argument that it is unreasonable to exempt private commercial enterprise from an extension of legal personality.<sup>51</sup> They emphasize that since the days of the Dutch East India Company, corporations have operated beyond the borders of their states of incorporation and have influenced the substance of international law in the areas of trade, invest-

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47. JESSUP, *supra* note 1, at 17.

48. Alvarez, *supra* note 27, at 3.

49. Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 IND. L.J. 363, 363 (2004).

50. Jessup, *supra* note 26, at 383–84 (citing POLITIS, *THE NEW ASPECTS OF INTERNATIONAL LAW* 30–31 (1928)).

51. Alvarez, *supra* note 27, at 5.

ment, telecommunications, intellectual property, and antitrust.<sup>52</sup> Indeed, corporations have been “indirect claimants in the World Trade Organization (WTO) dispute settlement system and direct claimants in investor-state arbitration.”<sup>53</sup> State governments have included private commercial actors in state delegations to international organizations and forums that set global standards.<sup>54</sup> International organizations have included corporate participants.<sup>55</sup> The International Labor Organization has granted private commercial actors direct voting rights.<sup>56</sup> Corporations “have played standard-setting roles in other organizations like the International Telecommunications Union.”<sup>57</sup> International treaties regulating environmental protection and labor conditions encompass private commercial actors de facto, if not de jure.<sup>58</sup> Corporations have been regulated directly by United Nations Security Council decisions.<sup>59</sup> Sanctions regimes implicated private commercial actors.<sup>60</sup> Corporations have endorsed international codes of conduct to regulate industry.<sup>61</sup> Progressives look to the power exerted by an entity.

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52. *Id.*

53. *Id.*

54. For example, members of various industries have accompanied governments to United Nations assemblies. *See, e.g.*, Urmi A. Goswami, *12 companies designated as ‘Business Partners’ for UN Climate Summit*, THE ECON. TIMES, Sept. 21, 2013, [http://articles.economictimes.indiatimes.com/2013-09-21/news/42272647\\_1\\_climate-change-un-climate-summit-12-companies](http://articles.economictimes.indiatimes.com/2013-09-21/news/42272647_1_climate-change-un-climate-summit-12-companies) (discussing Poland’s partnership with various companies, including BMW and Polish Airlines, in organizing UN-sponsored climate change negotiations); Katy Bachman, *Google, Tech Companies Take Action to Preserve Internet at U.N. Treaty Talks*, ADWEEK, Nov. 27, 2012, <http://www.adweek.com/news/technology/google-tech-companies-take-action-preserve-internet-un-treaty-talks-145456> (listing internet and tech companies such as Google, Amazon, Microsoft, and Verizon, who joined U.S. delegation in Dubai for U.N. treaty talks).

55. This can be illustrated by looking to the Fair Labor Association’s Board of Directors. *Board of Directors*, FAIR LABOR ASSOCIATION, <http://www.fairlabor.org/about-us/board-directors> (last visited Feb. 17, 2014). About one-third of the board consists of corporate representatives.

56. Alvarez, *supra* note 27 at 5; *see also Advisory Committee*, BETTER WORK, [http://betterwork.org/global/?page\\_id=352](http://betterwork.org/global/?page_id=352) (last visited Feb. 17, 2014) (Better Work is a partnership program between the International Labour Organization (ILO) and International Finance Corporation (IFC) which works to improve compliance with labor standards and global supply chain competitiveness. Better Work provides a list of global advisory committee members from various enterprises and organizations who guide Better Work’s management group on “the overall Better Work effort, specifically with regard to strategic directions, strategic partnerships and key developments in the areas of global supply chain management and labour standards.”).

57. Alvarez, *supra* note 27, at 6.

58. *See, e.g.*, Katharina Kummer Peiry, *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, AUDIOVISUAL LIBR. OF INT’L L. 5, <http://legal.un.org/avl/ha/bcctmhwd/bcctmhwd.html> (last visited Feb. 21, 2014) (The Basel Protocol “regulates civil liability for damage resulting from the transboundary movement of hazardous wastes and other wastes, including incidents occurring as a result of illegal traffic.”).

59. *See* U.N. Security Council Report, *Special Research Report: UN Sanctions*, Nov. 25, 2013, <http://www.securitycouncilreport.org/special-research-report/un-sanctions.php>.

60. *Id.*

61. For example, Sunco became the first Fortune 500 company to sign on to the Ceres Principles thereby pledging to adopt environmentally sound practices. The Ceres Principles were developed in the aftermath of the Exxon Valdez oil spill. *See* Matthew L. Wald, *Company News: Corporate Green Warrior; Sun Oil Takes Environmental Pledge*, N.Y. TIMES, Feb. 11, 1993,

### 3. *Participants and Power*

The impasse between positivists and progressive positions on the question of corporate personality points to the importance of pursuing alternative ways of approaching the conceptual and concrete problems associated with aggregations of private power. All progressive attempts to impose binding legal obligations on private commercial actors at the international level have, to date, failed. The positivist position, to the extent that it supports the position that private commercial actors have no obligations under public international law, does little to address atrocities and provide those injured by private commercial actors with remedy. As a result, some scholars and jurists have called for international law to be re-conceptualized.

Early in the subject/object personality debates, Jessup proposed that international law be defined not only "as law applicable to states in their mutual relations and to individuals in their relations with states," but also extend "to certain interrelationships of individuals themselves, where such interrelationships involve matters of international concern."<sup>62</sup> Complementing Jessup's concerns, more recently Dame Rosalyn Higgins has urged international lawyers to reject their common conceptions of "subjects" and "objects," warning of the risks of constructing "an intellectual prison" that could come to serve as an "unalterable constraint."<sup>63</sup> Higgins would substitute "participants" for the "subjects" and "objects," a pragmatic approach that could potentially bypass the impasse.<sup>64</sup> Alvarez posits: "[c]alling a corporate entity a 'subject' or 'object' of international law confuses more than enlightens."<sup>65</sup> Indeed, newly adopted international norms (discussed *infra*) take a pragmatic approach that does not engage the subject/object discussion.

To clarify and enlighten understandings of subject/object duality in international law and how it serves to impact access to remedies for human rights violations and the development of ethical business cultures, it is instructive to review the evolution of the corporate form and the role of commerce in the international arena.

## II. EMPIRE AND THE EVOLUTION OF GLOBAL ENTERPRISE

There are competing accounts of when the antecedent to the modern multinational corporation first came into existence. Discussions of early corporate formations have taken one of two approaches, one emphasizing

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<http://www.nytimes.com/1993/02/11/business/company-news-corporate-green-warrior-sun-oil-takes-environmental-pledge.html>.

62. Jessup, *supra* note 26, at 385.

63. Alvarez, *supra* note 27, at 8 (citing ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 49 (1994)).

64. *Id.* (citing HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 50 (1994)).

65. Alvarez, *supra* note 27, at 8.



merchants engaged in trade and exchange, the second emphasizing merchants sharing and structuring profits and losses to regulate risk.

A. *Early Origins and the Evolution of the Multinational Corporation*

1. *The Ancient Era-Assyrian Exchange*

As far back as 3000 B.C., business transactions in Mesopotamia transcended simple bartering.<sup>66</sup> The Sumerian communities trading along the Tigris and Euphrates rivers had attempted to normalize property ownership through written contractual arrangements.<sup>67</sup> Then, religious institutions served as regulator and financier.<sup>68</sup> The temple served the function of both bank and state overseer.<sup>69</sup> As long ago as 2000–1800 B.C., the Assyrians pioneered partnership agreements for financing that possessed features common to the current structure of venture capital funds.<sup>70</sup>

As the Phoenicians and Athenians extended their trading efforts into maritime commerce around the Mediterranean Sea, formal trading arrangements became increasingly important.<sup>71</sup> In contrast to trade over land, the expense and uncertainty of overseas trading set a higher incentive for the creation of institutional structures to entice investment.<sup>72</sup> Because maritime commerce needed a way to overcome the “danger for investors and creditors alike, that a sea captain would simply disappear,” the Athenian model relied on rule of law to structure investment and remained small in scale.<sup>73</sup>

As the Roman Empire grew, so did societates. A “more ambitious” form of organization than the Athenian model, societates were created to facilitate the Empire’s ability to collect revenues.<sup>74</sup> The societates were entrusted to Roman knights in partnership with the nobility.<sup>75</sup> As the taxes levied across the realm became too much of an administrative burden for the nobility to manage alone, the societates served to aid the process.<sup>76</sup> These firms of nobles and knights played a central role as the “commercial arm of conquest, grinding out shields and swords for the legions.”<sup>77</sup> Beneath the nobility and knights on the Roman socioeconomic scale,

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66. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF REVOLUTIONARY IDEA* 3 (2003) (citing JONATHAN BARRON BASKIN & PAUL J. MIRANTI, *A HISTORY OF CORPORATE FINANCE* 29 (1997)).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (citing KARL MOORE & DAVID LEWIS, *FOUNDATIONS OF CORPORATE EMPIRE* 33 (2001)).

71. *Id.* at 3–4.

72. MICKLETHWAIT & WOOLDRIDGE, *supra* note 66, at 4.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* (citing KARL MOORE & DAVID LEWIS, *FOUNDATIONS OF CORPORATE EMPIRE* 97 (2001)).

merchants and craftsmen came together in *collegia* or *corpora*—a form of guild with the power to license members of a particular trade—the *corpora* elected its own management.<sup>78</sup>

William Blackstone, the renowned eighteenth-century jurist, credited the Roman Empire with inventing the basic corporate form.<sup>79</sup> Core concepts of corporate law that persist in the present find their roots in the Roman Empire. For example, the concept of collective identity distinct from constituent individual members was a feature of commercial enterprises operating during the Roman Empire.<sup>80</sup> “The Romans linked companies to the *familia*, the basic unit of society.”<sup>81</sup>

In addition to allowing for the existence of a distinct corporate identity, Roman forms of business organization also separated ownership from operations.<sup>82</sup> The partners, or *socii*, entrusted managerial decisions to a *magister*.<sup>83</sup> The *magister* directed operations, supervised agents and managed accounts keeping *tabulae accepti et expensi*.<sup>84</sup> Despite this relatively solid evolving structure, most contracts that were created were of only a short duration.<sup>85</sup> Most wealth remained concentrated in private estates or agriculture and was not jointly shared.<sup>86</sup>

After the fall of Rome, the East enjoyed commercial ascendance. Trade grew across the Islamic world, India, and China.<sup>87</sup> In 1066, “Chinese factories were producing 125,000 tons of iron a year—a figure Europe would not match for seven hundred years.”<sup>88</sup> The Chinese pioneered paper money to facilitate trade.<sup>89</sup> China reached the zenith of its economic imperialism in the fifteenth century, when the Ming Emperor Yung Lo’s fleet of ships dominated Asia.<sup>90</sup> After his death in 1424, China’s mercantilist exploration was abandoned by his successor.<sup>91</sup> Later emperors rebuilt trade relations but ambitions were limited and there was not much enthusiasm for trade with Europe.<sup>92</sup> One Chinese emperor reportedly sent a message to Britain’s George III in 1793: “‘As your ambassador can see, we possess all things . . . . There is therefore no need to import the manufactures of outside

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78. MICKLETHWAIT & WOOLDRIDGE, *supra* note 66, at 4 (citing A.H.M JONES, THE ROMAN ECONOMY: STUDIES IN ANCIENT ECONOMIC AND ADMINISTRATIVE HISTORY (1974)).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 4–5.

83. *Id.*

84. MICKLETHWAIT & WOOLDRIDGE, *supra* note 66, at 5.

85. *Id.*

86. *Id.* (citing RICHARD DUNCAN-JONES, THE ECONOMY OF THE ROMAN EMPIRE: QUANTITATIVE STUDIES 33 (1977)).

87. *Id.*

88. *Id.*

89. *Id.* at 5.

90. MICKLETHWAIT & WOOLDRIDGE, *supra* note 66, at 6–7.

91. *Id.* at 7.

92. *Id.*

barbarians in exchange for our own produce.’”<sup>93</sup> John Micklethwait and Adrian Wooldridge have argued that China’s fortunes changed with respect to its relative power in the region and the world because it failed to evolve or adopt the corporate form of business organization.<sup>94</sup>

## 2. *Medieval Merchants and Guilds*

Jurists of the Medieval Age interpreted Roman and Canon law to allow the recognition of “corporate persons”—associations of individuals who wished to be treated as collective entities. These early corporate persons were not limited to commercial enterprises. Rather, “[h]ouseholds, guilds, universities, Inns Of Court, convents, charitable foundations and cities were among the early medieval corporations.”<sup>95</sup> Scholars have traced the lineage of the corporation to Pope Innocent IV, a thirteenth-century canonist.<sup>96</sup> During this time “the corporate concept was in large measure the handmaiden of institutionalized religion.”<sup>97</sup> The corporation was most often used as a legal means by which small collectives of individuals committed to education, charity, or religious devotion, such as a university or an abbey could ensure continued existence and possession of property and legal rights after the death of its membership.<sup>98</sup> The Medieval Corporation essentially offered community and a protected procedural mechanism for the transmission of wealth and customs to future custodians of the collective.

The merchant empires of southern Europe and the guilds and state-chartered corporations of northern Europe were the dominant medieval corporate forms.<sup>99</sup>

In Southern Europe the *compagnia* evolved in twelfth century Florence from family firms sharing joint liability.<sup>100</sup> In Latin *compagnia* means “breaking bread together.”<sup>101</sup> Trust was at a premium among members of the firm because bankruptcy could be punished by imprisonment or indentured servitude.<sup>102</sup> Since liability was shared with partners responsible for one another’s debts, most were close knit and short term. Northern European merchants adopted several of the structures started by the Italians.<sup>103</sup>

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93. *Id.*

94. *Id.* at 6.

95. McLean, *supra* note 49, at 364.

96. Sigmund Timberg, *The Corporation as a Technique of International Administration*, 19 U. CHI. L. REV. 739, 739 (1951).

97. *Id.* at 739. See also John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 663–66 (1926) (discussing how the struggle between church and state affected perceptions of legal institutions such as corporations).

98. Timberg, *supra* note 96, at 739.

99. MICKLETHWAIT & WOOLDRIDGE, *supra* note 66, at 7.

100. *Id.* at 8.

101. *Id.* (internal quotation marks omitted).

102. *Id.*

103. *Id.* at 12.

The growing popularity of the corporate form in northern Europe did attract the attention and anxiety of the Crown. By virtue of enjoying an immortal status in law, corporate organizations presented a challenge: “[t]hey circumvented feudal fees by never dying, never coming of age, and never getting married.”<sup>104</sup> Edward I, King of England, acted to regulate corporations by limiting the amount of land permitted to pass to corporate bodies.<sup>105</sup> Nevertheless, corporations continued to grow in popularity.

The most significant form of commercial association in the medieval era, however, was the guild. Medieval guilds exercised a monopoly on trade within a city’s walls. The city sovereign received funds from guilds for granting trade monopolies. Because guilds operated without competition, some commentators have argued: “The guilds were often more like trade unions than companies, more interested in protecting their members’ interests than pursuing economic innovation.”<sup>106</sup>

Regulated companies of the period were associations of independent merchants that were granted monopolies of trade over foreign markets. They were similar to guilds in that they trained apprentices prior to membership and screened membership for quality. Regulated companies, unlike guilds, cooperated to negotiate better prices for raw materials.<sup>107</sup> Regulated companies’ profits were entangled with the interests of the sovereign. For example, the Staple of London, founded in 1248 acquired the right to collect customs on wool exports in exchange for financing Edward III’s French Wars.<sup>108</sup> Later, Henry VI granted the company authority over Calais.<sup>109</sup>

Medieval corporations were not the spontaneous, voluntary, aggregated natural persons that would later dominate the era of European expansion overseas. The form was not frequently used for business purposes. More favored were partnerships. It would be the overseas ambitions of the countries of northern Europe that would solidify the form as the colonial project was pursued for profit.

#### *B. Imperialist Expansion and the Charter Company*

The economics of empire building and territorial expansion further refined the structure of the corporate form. Commerce played a central role in the colonial confrontation. Colonialism played a significant role in shaping commerce through creating markets for shares and incentives to develop stable corporate governance. Not unlike the *societates* of the Roman Empire, charter corporations served as the “commercial arm of conquest.”<sup>110</sup>

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104. *Id.* at 12–13.

105. MICKLETHWAIT & WOOLDRIDGE, *supra* note 66, at 13.

106. *Id.*

107. *Id.* at 13–14.

108. *Id.* at 14.

109. *Id.*

110. *Id.* at 4, 17.

While some commentators point to the imperial period and the power private corporations assumed as anomalous,<sup>111</sup> it is an instructive era for understanding contemporary framing of the public/private divide as it informs the subject/object distinction that complicates the question of the application of the law of nations to corporations. The distinction drawn between public and private power has come to inform sovereignty doctrine and assessments of whether entities operating globally are properly viewed as subjects or objects of international law and the rights entities possess and the responsibilities entities must bear. The global commerce conducted by charter corporations during the Age of Empire can be understood as the antecedents of today's modern multinational. Conquest through commercial actors enriched Europe often at the expense of the populations of the foreign territories brought under the control of European sovereigns. The foreign territories that were under colonial control are now the developing nations of today's era of globalization. Many ATS actions involving alleged abuses by modern multinational actors originate in regions explored and exploited by charter companies. The legacy of the colonial charter corporations is therefore important to examine.

*1. Charter Companies, the Power of the Crown and Colonial Projects*

Charter corporations were enterprises operating with the express authority of the sovereign, the crown royalty. From the sixteenth to nineteenth century, the Crown exercised exclusive authority over incorporation.<sup>112</sup> Accordingly an explicit, ex ante, authorization from the Crown was required in order for an association of individuals to incorporate.<sup>113</sup> Authorization took the form of charters or letters of patent.<sup>114</sup> In rare instances, authorization was granted by parliamentary action with the consent of the Crown.<sup>115</sup>

A grant of the privilege of incorporation was premised on the condition that every aspirant to corporate status convince the Crown or Parliament that if awarded a charter the corporation would fulfill a "public purpose."<sup>116</sup> The late sixteenth century marked the first time "the corporate form was used in risky 'for profit' ventures."<sup>117</sup> In the same period, Europe was engaged in imperial expansion. European nations embarked upon converting the competitive advantage of their sea dominance and power to control shipping routes into profits for merchants and funding for ruling

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111. MICKLETHWAIT & WOOLDRIDGE, *supra* note 66, at 20–21.

112. RON HARRIS, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720-1844* 17–18 (2000).

113. *Id.* at 17.

114. *Id.*

115. *Id.*

116. McLean, *supra* note 49, at 375 (internal quotation marks omitted).

117. *Id.* at 365.

monarchy through various colonial projects. Commercial activities of charter corporations overseas advanced the public purpose of conquest and served to expand and strengthen European rule over large parts of the Americas, Asia, and Africa. McLean says, "[i]n the first two decades of the seventeenth century, some forty companies were granted trading monopolies by their respective governments over much of the known world."<sup>118</sup>

Until the late sixteenth century, businesses were mostly comprised of partnerships, but Europe's colonial expansion contributed to the elevation of the corporate form. In the enterprise of building Europe's empire the corporate form became preferable to partnership.<sup>119</sup> The corporate form proved the structure best suited for mediating the high risks associated with for-profit activities of the period primarily as overseas trade and exploration. Because the risks associated with foreign ventures were high, attracting investors required protection and incentives. The grant of monopoly provided some measure of protection.

Not only were early colonial era charter companies granted exclusive monopolies by their respective home countries over the country's trade in overseas territories, they also were vested with sovereign powers according to the terms of their charters which defined the scope of their operations.<sup>120</sup> The sovereign powers of a corporation could be altered or amended by application to the Crown.<sup>121</sup> McLean writes, "[t]he acquisition of an overseas territory by a trading corporation, vested with sovereign powers, automatically transferred feudal conceptions of ownership of land and governance over British subjects in that territory."<sup>122</sup>

These early global enterprises served the project of empire. Among the most powerful seventeenth-century charter corporations engaged in colonial projects were the Hudson's Bay Company, the London and Plymouth companies in the Americas, the Royal African Company on the African Continent, and the East India Company in Asia.<sup>123</sup>

The Hudson's Bay Company was granted a charter in 1670 to locate the northwest route to the Pacific, to occupy territory and to conduct any commerce viable in the terrain. The company engaged in the fur trade for the first two hundred years of its existence. It also engaged in armed conflict with French interests. The company lost its monopoly in 1859 and independent fur traders competed in the trade. In 1870 the company sold its territories, virtually all of present-day Canada to the Canadian government.

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118. *Id.*

119. *Id.*

120. *Id.* at 365–67.

121. *Id.* at 367.

122. McLean, *supra* note 116, at 367.

123. *Id.* at 365; S. R. H. Jones & Simon P. Ville, *Efficient Transactors or Rent-Seeking Monopolists? The Rationale for Early Chartered Trading Companies*, 56 J. ECON. HIST. 898, 898 (1996).

The Company received title to one-twentieth of the lands of western Canada along with mineral rights on the land. The Company still operates, active now in merchandising, real estate, and natural resources; it is the oldest incorporated joint-stock company in the English-speaking world.<sup>124</sup>

Created by the Charter of Virginia granted by King James I in 1606, the London and Plymouth companies enjoyed sovereign powers in the present-day United States.<sup>125</sup> The London Company also owned a larger portion of Atlantic and inland Canada.<sup>126</sup> The London Company was granted authority to create settlements in the Americas.<sup>127</sup> The Plymouth Company shared permission to settle the region as well.<sup>128</sup> The Crown set the condition that neither company would found a colony within one hundred miles of one another.<sup>129</sup>

Both the London and Plymouth companies were by charter “empowered to fortify territory, coin money, and impose customs duties.”<sup>130</sup> Settlers to territory without corporate consent could be expelled.<sup>131</sup> Pursuant to Charter terms, territory was held by the companies “of the king under the assumption that they formed part of an English manor.”<sup>132</sup> Private investors—also known as “adventurers”—purchased shares, which in turn fi-

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124. MICKLETHWAIT & WOOLDRIDGE, *supra* note 66, at 17; see “Hudson’s Bay Company,” ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/274735/Hudsons-Bay-Company> (last visited Feb. 5, 2014) (offering a brief history of the Hudson’s Bay Company); see also Alex Ross, *The Records of the Hudson’s Bay Company Land Department, 1879-1963*, 22 ARCHIVARIA 114 (1986) (evaluating the fate of the early Hudson’s Bay Company records as many were lost or had not been preserved); *Our History: Business: Fur Trade: The Deed of Surrender*, HBC, <http://www.hbcheritage.ca/hbcheritage/history/week/the-deed-of-surrender> (last visited Feb. 5, 2014) (reviewing how the Hudson’s Bay Company developed, specifically through the Deed of Surrender); *Our History: Overview*, HBC, <http://www.hbcheritage.ca/hbcheritage/history/overview.asp> (last visited Feb. 5, 2014) (providing an overview of the trading activities the Hudson’s Bay Company provided in the Great Lakes region and Canada); Ann M. Carlos & Stephen Nicholas, *Agency Problems in Early Chartered Companies: The Case of the Hudson’s Bay Company*, 50 J. ECON. HIST. 853, 860 (1990) (arguing the Hudson’s Bay Company overcame many problems other chartered companies faced by implementing strategies to encourage actions that served the company’s goals).

125. DARRELL J. KOZLOWSKI, KEY CONCEPTS IN AMERICAN HISTORY: COLONIALISM 40–41, 69–70 (Jennifer L. Weber ed.) (2010); Justin Corfield, *Company Profiles: North America*, in 1 ENCYCLOPEDIA OF BUSINESS IN TODAY’S WORLD 333, 333 (Charles Wankel ed., 2009).

126. EDWARD D. NEILL, HISTORY OF THE VIRGINIA COMPANY OF LONDON WITH LETTERS TO AND FROM THE FIRST COLONY NEVER BEFORE PRINTED 3–4 (1869) (“The company under charter was divided . . . the First Colony . . . [could] begin their first plantation at any point in Virginia between the thirty-fourth and forty-first degrees or north latitude, while . . . the Second Colony . . . [could] plant between the thirty-eighth and forty-fifth degrees of the same latitude”).

127. *Id.*

128. See *id.* (discussing the “Virginia Company,” collectively referring to London Company and Plymouth Company).

129. JOSEPH R. CONLIN, THE AMERICAN PAST: A SURVEY OF AMERICAN HISTORY 29–30 (8th ed. 2009).

130. McLean, *supra* note 49, at 366.

131. *Id.*

132. *Id.* at 366 (quoting M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 93 (1926)) (internal quotation marks omitted).

nanced overseas settlements. The enterprise possessed both public and private features. The Plymouth Company's fortunes fell after its settlement was abandoned. The Virginia Charter was later revised to grant the London Company exclusive rights.<sup>133</sup> The London Company would cultivate tobacco as a cash crop from 1612 until 1624, when the company lost its charter, and Virginia, the territory it settled, became a royal colony.<sup>134</sup>

King Charles issued a charter in 1660 that granted a monopoly over English trade with West Africa to the Company of Royal Adventurers Trading to Africa.<sup>135</sup> Initially authorized to mine and trade gold and other precious minerals, its successor enterprise would diversify into trading slaves.<sup>136</sup> The company incurred an unbearable debt burden after losing a war it instigated against the Netherlands when it waged an armed campaign against Dutch African trading posts.<sup>137</sup> The company restructured, becoming the Royal African Company in 1672.<sup>138</sup> Under the new charter, the company's powers were expanded. It was authorized to construct forts, to raise and maintain an armed military force and impose and enforce martial law to pursue trade in gold, silver, and slaves.<sup>139</sup> The new company would over the course of its monopoly over the slave trade make 249 trips transporting up to ninety thousand slaves between 1672 and 1689.<sup>140</sup> The slave trade proved profitable for England.<sup>141</sup> Other merchants challenged the company's monopoly and pressured Parliament to open trading to all in 1698.<sup>142</sup> After Parliament opened slave trading to all, the company eventu-

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133. 2 BENSON J. LOSSING, *HARPERS' POPULAR CYCLOPAEDIA OF UNITED STATES HISTORY FROM ABORIGINAL PERIOD TO 1876* 806 (1881).

134. Teresa Potter, *Relatedness and Mortality Among the Jamestown Colony Settlers* 16 (Aug. 2012) (unpublished Ph.D. dissertation, University of Utah) (on file with author); NEILL, *supra* note 126, at 416–419; *see also* LOSSING, *supra* note 133, at 805–06 (providing historical background of the Virginia Company governing the colonists where each had the right of certain property sections until the revocation of the charter).

135. K.G. DAVIES, *THE ROYAL AFRICAN COMPANY* 38, 97–101 (1957).

136. *Id.* at 98; McLean, *supra* note 49, at 365 n.8 (“it held a monopoly over the British slave trade between West Africa and the West Indies. ‘Free’ trade in slaves came in 1712 and from then until 1759 the company ran coastal forts for the British government.”).

137. GEORGE FREDERICK ZOOK, *THE COMPANY OF ROYAL ADVENTURERS TRADING INTO AFRICA* 20–21 (1919).

138. W. R. Scott, *The Constitution and Finance of the Royal African Company of England from Its Foundation Till 1720*, 8 AM. HIST. REV. 241, 244 (1903).

139. *Id.* at 244–45; FRANK KITSON, *PRINCE RUPERT: ADMIRAL AND GENERAL-AT-SEA* 237–38 (1998).

140. *London and Transatlantic Slave Trade*, PORT CITIES UK, <http://www.portcities.org.uk/london/server/show/ConNarrative.103/chapterId/2252/outputFormat/print/London-and-the-transatlantic-slave-trade.html> (last visited Feb. 5, 2014); *The Terrible Transformation: Royal African Company Established*, PBS, <https://www.pbs.org/wgbh/aia/part1/1p269.html> (last visited Feb. 6, 2014).

141. *See generally* Eric Williams, *Capitalism and Slavery*, in *RACE AND RACIALIZATION: ESSENTIAL READINGS* (Tania Das Gupta et al. eds., 2007).

142. Scott, *supra* note 138, at 247 (1903); Jones & Ville, *supra* note 123, at 903; *Royal African Company Established*, in *Africans in America*, PBS, <https://www.pbs.org/wgbh/aia/part1/1p269.html> (last visited Feb. 6, 2014).



ally abandoned slave trading in 1731 in favor of ivory and gold.<sup>143</sup> In 1752 the company dissolved to be succeeded by the African Company of Merchants.<sup>144</sup>

The East India Company was granted its charter from Queen Elizabeth I in 1600.<sup>145</sup> The charter awarded the company a monopoly over all British trade east of the Cape of Good Hope at the southernmost tip of Africa.<sup>146</sup> Initially formed to engage in the spice trade, it would end its days as an agent of British imperial power in India.<sup>147</sup> The company raised funding for each voyage east through selling shares in each particular voyage.<sup>148</sup> Later, it would fund the entire venture.<sup>149</sup> The early English East India Company, in existence from 1600 to 1708, encountered opposition to its monopoly from other merchants.<sup>150</sup> Monopoly opposition led to the establishment of a rival company.<sup>151</sup> The two companies were combined in 1708 to form the United Company of Merchants of England trading to the East Indies.<sup>152</sup> The new entity was organized into a body of twenty-four directors working through committees elected annually by the Court of Proprietors, or shareholders.<sup>153</sup>

Through a combination of commerce and conquest the combined company would come to rule over large portions of the Indian sub-continent recognized as “the richest jewel in the imperial crown.”<sup>154</sup> The company brought under British control wealth in excess of the colonial adventures of Spain and France combined.<sup>155</sup> Colonizing India through the company’s efforts, imperial Britain obtained control over twenty million new subjects

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143. Harvey M. Feinberg & Marion Johnson, *The West African Ivory Trade during the Eighteenth Century: The “. . . and Ivory” Complex*, 15 INT’L J. AFR. HIST. STUD. 435, 444 (1982).

144. Matthew David Mitchell, “*Legitimate Commerce*” in the Eighteenth Century: *The Royal African Company of England Under the Duke of Chandos, 1720–1726*, 14 ENTER. & SOC’Y 544, 576 (2013).

145. Nick Robins, *Loot: In Search of the East India Company, the World’s First Transnational Corporation*, 14 ENV’T & URBAN., 79, 80 (2002).

146. *Id.* at 81; Emily Erikson & Peter Bearman, *Malfeasance and the Foundations for Global Trade: The Structure of English Trade in the East Indies, 1601–1833*, 112 AM. J. SOC. 195, 200 (2006).

147. Miles Ogborn, *Writing Travels: Power, Knowledge, and Ritual on the English East India Company’s Early Voyages*, 27 TRANSACTIONS OF THE INS. OF BRIT. GEOGRAPHERS 155, 158 (2002); H.V. BOWEN, *THE BUSINESS OF EMPIRE: THE EAST INDIA COMPANY AND IMPERIAL BRITAIN, 1756–1833*, 29–30 (2006); *see also* Gary M. Anderson & Robert D. Tollison, *Adam Smith’s Analysis of Joint-Stock Companies*, 90 J. POL. ECON. 1237, 1253 (1982).

148. LEWIS H. HANEY, *BUSINESS ORGANIZATION AND COMBINATION: AN ANALYSIS OF THE EVOLUTION AND NATURE OF BUSINESS ORGANIZATION IN THE UNITED STATES AND A TENTATIVE SOLUTION OF THE CORPORATION AND TRUST PROBLEMS* 43 (2003).

149. *Id.*

150. K.N. CHAUDHURI, *THE TRADING WORLD OF ASIA AND THE ENGLISH EAST INDIA COMPANY 1660–1760* 44 (1978).

151. *Id.*

152. *See* MICKLETHWAIT & WOOLDRIDGE, *supra* note 66.

153. *See id.* at 24.

154. BOWEN, *supra* note 147, at 1.

155. *Id.* at 5.

and their labor and seventy million acres of land, both cultivated and uncultivated.<sup>156</sup> With a population of approximately forty million, 65 percent of people in the British Empire were Indian.<sup>157</sup>

The Dutch East India Company secured a monopoly from the state in 1602 and became the model for all chartered firms.<sup>158</sup> In contrast to the English East India Company, which initially treated each voyage as a separate venture with different investors, the Dutch Company made all voyages part of a single venture over a term of years.<sup>159</sup> The Company's investors enjoyed limited liability.<sup>160</sup>

In operation, the charter authority exercised by these trading companies of adventurers and explorers carried forward a concept of sovereignty from the feudalism of the medieval era that did not have a developed distinction between public and private. This conceptual arrangement served both the Crown and commercial actors. The Crown could tap charter corporations as a source for public financing and raise revenue without Parliament. The Crown could extend its influence overseas with the costs of exploration, conquest and settlements funded by corporations. The corporation could enjoy monopoly power over the ability to profit from overseas exploration and exploitation. To fund exploration the corporation sold transferable shares, promising to divide profits among its shareholders.

## 2. *Managing the "Mediate Sovereigns"*

As European society changed from a feudal system, power dynamics in society changed. The role of the corporation and its relationship to the sovereign were also altered over the period of social transformation. Concepts antecedent to sovereignty evolved to serve alternatively the interests of the Crown and the interests of charter corporations as the relationship between public authority, private ownership, and profits was mediated between European centers of power. Attitudes towards power and which entities could exercise power evolved.

The imperial era charter corporations had a profit purpose but also performed public services in terms of financing the foreign policy interests of the Crown. Expansive authority granted by charter and a lack of division between sovereign power and private ownership meant that often "the costs of embassies, overseas representatives, fortifications, and sometimes, even wars, would be borne by the corporations themselves."<sup>161</sup> Charter compa-

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156. *Id.*

157. *Id.* (citing PATRICK COLQUHOUN, A TREATISE ON THE WEALTH, POWER, AND RESOURCES OF THE BRITISH EMPIRE . . . 7, 61 (2d ed., 1815)).

158. MICKLETHWAIT & WOOLDRIDGE, *supra* note 66, at 20.

159. *Id.*

160. *Id.*

161. McLean, *supra* note 49, at 365.

nies like Hudson Bay and London were important instruments in the British settlement and colonization of North America.<sup>162</sup>

The new territories settled by charter corporations were still, as in the medieval era, closely “identified with the private property of the monarch of the state.”<sup>163</sup> In medieval times, the rights of the people who lived and worked on the land were derived from the exclusive ownership of the Lord. This feudal framework laid the foundation for the concept that the Crown, through its agent the charter corporation, could acquire territory accompanied by sovereignty overseas.

The shared sovereignty arrangement was possible because the antecedent of the modern concept of sovereignty (*imperium*) and the antecedent of the modern concept of private ownership (*dominium*) were understood as combined.<sup>164</sup> *Imperium* entailed the exercise of authority over people.<sup>165</sup> The power of *imperium* was the power to control people and require their adherence to rules set by the ruling authority.<sup>166</sup> *Dominium* entailed the exercise of control over property.<sup>167</sup>

The business of building enterprise was based on the charter corporation’s exercise of the power of *imperium* on behalf of the Crown. British corporations were vested with sovereign powers to the extent set forth in their charters. Corporations could further expand their power and authority through application to the Crown. Applying the chess analogy offered by Timberg to determine on which side of the subject/object line in international law that an entity with global reach falls, charter corporations were more like chess players than chess pieces in the Age of Empire. Commercial actors assumed sovereign functions and exercised authority over those within the domain delineated by their charters.

This sovereign power sharing agreement was enforced by the risk that the Crown could revoke or refuse to renew a corporation’s charter.<sup>168</sup> The combination of the *imperium* and *dominium* concepts operated largely to the benefit of the Crown in the seventeenth century. The Crown was able to capture and settle territory through its corporate agents because the “acquisition of an overseas territory by a trading corporation, vested with sovereign powers, automatically transferred feudal conceptions of ownership of land and governance over British subjects in that territory.”<sup>169</sup> Feudal links extended to overseas territories. The settlements that were created by charter companies were deemed subject to the sovereign rule of the Crown.

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162. *Id.*

163. *Id.* at 366 (quoting 1 LASSA OPPENHEIM, INTERNATIONAL LAW 545 (H. Lauterpacht ed., 8th ed. 1955)).

164. *Id.* at 366.

165. *See id.*

166. *See id.*

167. McLean, *supra* note 49, at 366.

168. *Id.*

169. *Id.* at 367.

The delegation of authority from a European state sovereign made the difference between lawful and unlawful acts on the sea and overseas. Janet McLean offers the following analysis of piracy and the public-private divide that demonstrates this point:

Trade was closely connected to the law of the sea. . . . Pirates were unlawful, yet privateers were a lawful institution. The privateer was a commander of a private commercial ship who was authorized by the state to participate in “armed commercial ventures” by letters of marque from the King or Admiralty. Pirates were considered criminals or outlaws. Privateers, on the other hand, performed important public services when they intercepted ships, seized their cargos, and aided naval blockades.<sup>170</sup>

In the seventeenth century, the presence of delegated authority from the sovereign was the primary point of distinction between the lawful conduct of a privateer and the unlawful conduct of a pirate, even if actions were the same in kind. The eighteenth century saw a decoupling of imperium and dominium such that the symbiotic relationship between the Crown and charter companies as the overseas trade monopoly system declined.<sup>171</sup> Several of the early companies failed.<sup>172</sup> There were political struggles between the Crown and Parliament over authority to grant the privilege of incorporation.<sup>173</sup>

The nineteenth century brought a return to colonial expansion through the trading company form but with imperium and dominium increasingly divided conceptually. Charter corporations alternatively emphasized or downplayed the extent of sovereign status to avoid obligations and amass greater influence.<sup>174</sup> For example, the East India Company would emphasize its sovereign status to avoid contractual debts to local rulers abroad while in Britain relying on the advantage of the military power of the royal navy but resisting any recognition of the royal navy to the extent it would diminish perceptions of the company’s power by locals overseas.<sup>175</sup>

In light of this evolution in corporate identity and relationship to society, John Westlake, writing in the early twentieth century, has described the status of trading enterprises in the late nineteenth century as “mediate sovereigns.”<sup>176</sup> This ambiguity allowed the creation of informal empire instead of formal empire. As McLean has argued, the ambiguous status of the char-

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170. *Id.* at 366–67.

171. *Id.* at 367 (citing RON HARRIS, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION 1720–1844*, at 58 (2000)).

172. *Id.* at 368.

173. McLean, *supra* note 49, at 368.

174. *Id.* at 369.

175. *Id.*

176. *Id.* at 370 (quoting JOHN WESTLAKE, *THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 196–97* (L. Oppenheim ed., 1914)).

ter corporation continued to serve the interests of the chartering state.<sup>177</sup> Treating corporations as private entities possessing ownership privileges only “had the effect of portraying the colonial encounter as an encounter between ‘equals.’”<sup>178</sup> In this way, charter company trade in foreign territories became, “a pure and liberal endeavor as compared with the more expensive and already sometimes odious practices of colonization.<sup>179</sup> Consequently, informal empire was often preferred to formal empire.”<sup>180</sup>

The establishment of public imperium and private dominium as separate concepts in international law had implications for the legal personality of corporations. Now understood to be private actors possessing in law only powers associated with ownership and not those powers associated with imperium or sovereign rule, the colonial encounter was reconceived as not exchanges between nation states but rather interactions among private traders.<sup>181</sup> As a result, instead of international law applying to the conduct of commercial actors: “a separate flexible law of nations developed: not a universal law of nations but a separate French, English, or German colonial law” preventing the extension of the concept of sovereignty to colonial territories.<sup>182</sup>

The legal nature of corporations was not determined by international law. Instead, national law or colonial law governed the status of different corporations with varying results. French law, for instance, forbid the delegation of sovereignty to private entities, while other countries favored such delegation.<sup>183</sup> Although international lawyers of the period, like today’s progressive legal scholars, advanced the position that corporations should be treated as subjects of international law, ultimately the positivist position that corporations were agents of their state of incorporation prevailed.<sup>184</sup> Inconsistencies between the law of nations and the local corporations law has left a legacy that continues to confound today, as demonstrated by federal court decisions that split between positivists and progressive approaches in answering the question of whether corporations can be liable for violations of the law of nations.<sup>185</sup> Power asymmetries persist between

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177. *Id.*

178. *Id.*

179. McLean, *supra* note 49, at 370–71.

180. *Id.* at 371.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. For examples of more positivist approaches, see *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011) (affirming dismissal of ATS action); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011) (holding that while ATS does allow claims over corporations, plaintiffs did not satisfy the requirements that violations have occurred); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (affirming motion to dismiss claims under ATS); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) *aff’d*, 133 S. Ct. 1659 (2013) (concluding that customary international law rejects corporate liability); *Abagninin v. AMVAC Chem. Corp.*, 545

developing countries and the foreign companies active in emerging market economies.

C. *The Evils of Colonialism, the End of Empire, and the Rise of Social Expectations*

As the dominant form of organization for building empire, the charter corporation flourished. As the power of charter corporations grew and their interests appeared to come into conflict with those of the Crown, the fortunes of charter corporations changed. Various actors in society questioned the growing dominance of the charter corporation and challenged the increasing influence of the newly affluent class of colonial merchants. The way in which the English East India Company used and abused its power raised questions and eventually attracted public outcry. Often credited as the “mother of the modern corporation,” the East India Company over its 274 years in existence managed to “[bridge] the mercantilist world of chartered monopolies and the industrial age of corporations accountable solely to shareholders.”<sup>186</sup> Therefore, it provides an interesting and important example for examining the role of private commercial actors in a global economy in an international order organized around the sanctity of the sovereignty of the nation state.

Questions over the proper role of charter corporations increased as they prospered economically and exerted greater political influence. Public debates over the power exercised by the English East India Company captured the changing attitudes in society towards charter corporations, and to a lesser degree, the colonial project. Not unlike the opposition large corporations like Wal-Mart encounter today, in Imperial England there were concerns over how the manner in which a large commercial actor conducted business would affect society. Nick Robins offers an apt summation of how the East India Company was situated in British society at the zenith of its power: “East India House lay at the heart of both the economy and govern-

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F.3d 733 (9th Cir. 2008) (finding that a chemical manufacturer was not a state actor or a state-like organization for purposes of international law or crimes against humanity under ATS). For examples of more progressive approaches, see *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (establishing that corporations are not immune from liability under the ATS); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748 (9th Cir. 2011) (en banc) *cert. granted, judgment vacated sub nom.* *Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (2013) (“We therefore address the scope of liability for private actors, including corporate liability, with respect to those claims we conclude can allege a violation of a sufficiently established international norm. There is no legitimate basis for Rio Tinto’s position that the statute itself is a complete bar to corporate liability.”); *Baloco ex rel. Tapia v. Drummond Co., Inc.*, 640 F.3d 1338 (11th Cir. 2011) (finding plaintiffs had “adequately pled a cause of action cognizable under the ATS.”); *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 956 (9th Cir. 2009) *on reh’g en banc*, 614 F.3d 1070 (9th Cir. 2010) (holding that ATS claims were valid despite defense relying on state secrets doctrine).

186. NICK ROBINS, *THE CORPORATION THAT CHANGED THE WORLD: HOW THE EAST INDIA COMPANY SHAPED THE MODERN MULTINATIONAL* 5 (2006) [hereinafter *THE CORPORATION*].

ance of Britain, a monstrous combination of trader, banker, conqueror and power broker."<sup>187</sup>

The proper mix of functions for the colonial era charter companies was contested from the early days of the form. Adam Smith in *The Wealth of Nations* argued that the role of trader and sovereign were incompatible.<sup>188</sup> It was for a time presumed that commercial actors were traders first, with responsibility for territorial rule a distant second.<sup>189</sup> After some time and the revelation of atrocities, excesses and corrupt conduct it became increasingly difficult to deny that East India Company employees were no longer mere merchants but rather had become de facto emperors of Britain's extended reign over the far reaches of the realm.<sup>190</sup>

As its influence over the Indian subcontinent grew, criticism of the East India Company's inability to act in a manner befitting sovereign power also increased. As early as 1615, British commentators expressed concern as the Company had to be reminded of its obligations to comport with the aspirations of the nation.<sup>191</sup> At the height of its power the British East India Company "ruled over one-fifth of the world's people, generated a revenue greater than the whole of Britain and commanded a private army a quarter of a million strong."<sup>192</sup> The Company enriched Britain but impoverished India.<sup>193</sup> The Company's excesses in India in no small part contributed to the ultimate demise of the enterprise and of Britain's ability to exercise imperial power.

In 1757 the Company acquired Bengal through the efforts of a small private army led by Robert Clive who defeated the Nawab of Bengal in the Battle of Plassey near the trading base of Calcutta (Kolkata).<sup>194</sup> After the victory, the company installed a puppet government and systematically looted the treasury of Bengal.<sup>195</sup> By 1778 the Company dominated European trade with Asia, displacing the Dutch.<sup>196</sup> The Company's profits soared.<sup>197</sup> When the Company assumed authority over the Diwani, a tax

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187. Robins, *supra* note 145, at 83.

188. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 343–44 (Edwin Cannan ed., 1977) ("No two characters seem more inconsistent than those of trader and sovereign. If the trading spirit of the English East India Company renders them very bad sovereigns, the spirit of sovereignty seems to have rendered them equally bad traders. While they were traders only, they managed their trade successfully . . . . Since they became sovereigns . . . they have been obliged to beg the extraordinary assistance of government in order to avoid immediate bankruptcy.").

189. McLean, *supra* note 49, at 368.

190. Bowen, *supra* note 147, at 3, 9–10.

191. McLean, *supra* note 49, at 368–69 (citing THEODORE K. RABB, *ENTERPRISE AND EMPIRE, MERCHANT AND GENTRY INVESTMENT IN THE EXPANSION OF ENGLAND* 39–40 (1967)).

192. Robins, *supra* note 145, at 79.

193. *Id.*

194. Bowen, *supra* note 147, at 3; THE CORPORATION, *supra* note 186, at 2–3.

195. Bowen, *supra* note 147, at 3–4; THE CORPORATION, *supra* note 186, at 3.

196. THE CORPORATION, *supra* note 186, at 2–3.

197. *Id.*

collected from the ten million residents of Bengal, it essentially came to control the entire public financing of an overseas territory.<sup>198</sup>

What followed the Company's conquest of Bengal was the oppression of local residents and labor. During periods of drought and famine, the Company profiteered on food prices.<sup>199</sup> By some estimates, between one and ten million inhabitants of the area perished from starvation.<sup>200</sup>

The Company's activities in India had influence on trade across the British Empire. For example, "A terrible triangle was formed with African slaves being purchased in part with Indian cotton goods, then being sold in the Americas for new-mined gold and silver, which in turn found its way via London to India where it procured more textiles."<sup>201</sup> The money made in Bengal enabled the company to triple the funding devoted to its tea trade in China as tea consumption in Britain increased.<sup>202</sup> As demand for tea increased so did the desire to trade with China.<sup>203</sup> The Company facilitated the export of opium produced in Bengal to China and later financed the Opium Wars precipitated by China's efforts to reject opium.<sup>204</sup> The Company's tea trade would also come to symbolize oppression in America. The Boston Tea Party, the symbolic start to America's Revolutionary War, was a protest over the influence the East India Company exercised.<sup>205</sup>

Back home on British soil, the corrosive effects of the East India Company continued as the wealth obtained by company members found its way into politics. The newly wealthy as a result of the Company's exploits in India created a new class called "Nabobs" (an uncomplimentary derivation from the Hindi word *nawab*).<sup>206</sup> Nabobs drew scorn from the existing aristocracy for purchasing places in society.<sup>207</sup> The Nabobs would come to hold one-tenth of the seats in Parliament.<sup>208</sup> Accordingly, attempts to intervene in the Company's affairs could cause the fall of governments because the Company enjoyed significant influence in the Parliament. It was not until broader public sentiment turned against the Nabobs as "unease about events in India interacted with concerns about recurring financial crisis to cause reform, regulation and control" that the Company's power in the government began to wane.<sup>209</sup>

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198. BOWEN, *supra* note 147, at 3–4, 10.

199. Robins, *supra* note 145, at 84.

200. *Id.*

201. *Id.* at 80–81.

202. THE CORPORATION, *supra* note 186, at 3–4.

203. Robins, *supra* note 145, at 81.

204. *Id.*

205. *Id.* at 82.

206. *Id.* at 83.

207. *Id.*

208. *Id.*

209. BOWEN, *supra* note 147, at 1.



Nabob excesses also drew scrutiny outside of an envious aristocracy. Members of the faith-based community, such as the Quaker William Tuke, drew attention to the Company's abuses in India and the humanitarian consequences of the way the Company conducted business.<sup>210</sup> By the 1790s it was feared that allegations of corruption and greed against company servants would besmirch the national character of the British as Nabobs, who had become known as ruthless profiteers.<sup>211</sup> Nabobs were satirized as vulgar *nouveaux riches* with ill-gotten gains that they expended on tasteless consumption and accumulation.<sup>212</sup> During this same period the Company became embroiled in debates over slavery when Elizabeth Heyrick launched the first consumer boycott against the Company.<sup>213</sup> She persuaded her fellow citizens in Leicester to stop buying "blood-stained" sugar from the West Indies.<sup>214</sup> Because of the boycott, the Company was eventually forced to get its sugar from sugar producers in Bengal.<sup>215</sup>

Pamphleteers of the 1830s denounced British politicians who allowed "a gigantic power to exist in opposition to the welfare of the Kingdom."<sup>216</sup> It became increasingly clear to observers from the scale of the Company's corruption that the government exercised only "feeble and indirect control."<sup>217</sup> As one commentator warned: "Were it not, indeed, that the locality of its wealth is at so remote a distance, the very existence of [such] a body would be so dangerous, not merely to the liberty of the subject, but to the stability of the state."<sup>218</sup>

Efforts to regulate the Company's excesses were eventually successful, culminating in the India Act of 1784. The Act transferred management of the Company's Indian affairs to a Control Board required to report to Parliament.<sup>219</sup> The legal reforms led to the creation of a new governance structure.

### III. INCORPORATING RIGHTS

In the transition from the Age of Imperialism to the Industrial Age, the shared sovereignty arrangement between the Crown and corporate actors that accelerated global economic expansion changed. Concerned segments of society on both sides of the Atlantic opposed the public-private partnership between the Crown and charter corporations to enrich the nation at the expense of oppression, particularly the oppression and abuses associated

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210. Robins, *supra* note 145, at 83.

211. BOWEN, *supra* note 147, at 15.

212. *Id.*

213. MICKLETHWAIT & WOOLDRIDGE, *supra* note 66, at 27.

214. *Id.*

215. *Id.*

216. BOWEN, *supra* note 147, at 16 (internal citation omitted).

217. *Id.*

218. *Id.* at 17 (quoting Anon., *The session of Parliament for MDCCCXXV* 42 (1825)).

219. *Id.* at 73.

with the trade in African slaves.<sup>220</sup> In the economic globalization of the present era, as was the case during the Age of Empire, the perceived excesses of industry and association of commercial activity with rights abuses has led to pressure for change. Today, large multinationals like Wal-Mart confront criticisms not unlike those leveled against the East India Company of a bygone era. Understanding the abolitionist advocacy of the past era is important for appreciating the business and human rights initiatives in operation today and the social movements seeking to create a more ethical business culture that are generating new norms for corporate conduct.

A. *Social Pressure and Social Change: From the Abolitionist Example to Building Safety in Bangladesh*

Scholars Margaret Keck and Kathryn Sikkink have explored the impact of advocacy networks on international politics, and they argue that transnational networks have in fact influenced international relations.<sup>221</sup> According to Keck a “transnational advocacy network” is “a set of relevant organizations working internationally with shared values, a common discourse, and dense exchanges of information.”<sup>222</sup>

The effort to end the transatlantic slave trade provides an instructive case in point of a transnational advocacy network that succeeded in its aim by using strategies that remain effective and in use in modern social movements. Human rights activists and socially responsible investors, in coalition with communities affected by alleged abuses involving corporate conduct in developing countries, have deployed some of the same strategies used by the abolitionist movement to confront entrenched economic interests and end slavery.

The success of the abolitionist movement and the short duration of the effort relative to the long-standing social institution it aimed to end are often underappreciated. Historian Eric Fogel has argued: “It is remarkable how rapidly, by historical standards, the institution of slavery gave way before the abolitionist onslaught, once the ideological campaign gained momentum.” Indeed, due in significant part to the efforts of a transnational advocacy movement opposed to slavery and the slave trade, “‘within the span of little more than a century, a system that had stood above criticism for 3,000 years was outlawed everywhere in the Western world.’”<sup>223</sup>

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220. JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* 17 (2012); *see also* MICHAEL CRATON, *SINEWS OF EMPIRE: A SHORT HISTORY OF BRITISH SLAVERY* 247–60 (1974) (summarizing the opposition to the slave trade and events leading up to abolition).

221. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

222. *Id.* at 46.

223. *Id.* at 41 (quoting ROBERT WILLIAM FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* 204–05 (1989)).

Historians, political scientists, and economists have debated whether the end of slavery was due to economic or moral pressure. More recent research has concluded that economic factors alone do not explain the demise of slavery.<sup>224</sup> For instance, Fogel has established that the economics of slavery show it was “‘profitable, efficient, and economically viable in both the U.S. and the West Indies when it was destroyed.’”<sup>225</sup> He argues that the end of the trans-Atlantic slave trade was nothing short of “an act of ‘economicscide.’”<sup>226</sup> How was eradication of the trade and emancipation of slaves accomplished?

More recent research findings suggest that “the impetus behind abolition was primarily religious and humanitarian” rather than economic pressure that forced change.<sup>227</sup> According to Fogel, the death of slavery was “a political execution of an immoral system at its peak of economic success, incited by men ablaze with moral fervor.”<sup>228</sup>

The antislavery movement started with efforts to abolish the slave trade before seeking emancipation for the enslaved.<sup>229</sup> Quakers in Pennsylvania were the first to organize opposition to slavery as a social institution in the 1680s.<sup>230</sup> The first real sustained movement against the practice started in 1787 when British abolitionists launched a public campaign against the slave trade.<sup>231</sup> The movement was maintained until the emancipation of slaves in Brazil in the 1880s.<sup>232</sup>

British merchants and capital were heavily involved in the slave trade. Abolitionists therefore began to challenge commercial actors at the origin of the movement.<sup>233</sup> Working to oppose entrenched and powerful economic interests required that abolitionists devise strategies to raise consciousness and create concern over the slave trade among a significant portion of the British public. Abolitionists waged their campaign to end the trade on multiple fronts. According to Keck and Sikkink, the single most important tactic of the abolitionist movement was its adept deployment of “information politics.”<sup>234</sup>

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224. *Id.* at 42.

225. *Id.* (quoting ROBERT WILLIAM FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* 410 (1989)).

226. *Id.*

227. KECK & SIKKINK, *supra* note 221, at 42.

228. *Id.* (quoting ROBERT WILLIAM FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* 410 (1989)).

229. *Id.* at 41.

230. *Id.* at 41 n.3 (citing ROBERT WILLIAM FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* 205 (1989)).

231. *Id.* at 41.

232. *Id.* (citing ROBERT WILLIAM FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* 204–05 (1989)).

233. KECK & SIKKINK, *supra* note 221, at 41

234. *Id.* at 45.

Information politics was the deliberate practice of sharing stories and stating the facts concerning the human costs incurred by those enslaved. The contribution of the transnational abolitionist movement's use of information politics in its campaign to end the slave trade was its ability to provide a 'language of politics.' The language of information politics developed by abolitionists provided organizational structures and a tactical playbook for allied campaigns in other nations.<sup>235</sup> For example, abolitionists in Britain and the United States created networks of local, regional, and national antislavery organizations.<sup>236</sup> These organizations "frequently exchanged letters, publications, and visits."<sup>237</sup> Over time a transnational advocacy network emerged and profited from the exchange of information:

Antislavery groups in the US and Britain borrowed tactics, organizational forms, research, and language from each other. They used the tactics of the petition, boycotts of slave-produced goods, and hired itinerant speakers very successfully on both sides of the Atlantic. Many of these tactics originated in Britain and the transnational network served as a vehicle for diffusing tactical recipes and collective action repertoires from one domestic social movement to another.<sup>238</sup>

First abolitionists exposed the atrocities associated with the trade through fact reporting. The publication of *American Slavery As It Is: Testimony of a Thousand Witnesses* would make salient the suffering of slaves and the evils of the institution of slavery.<sup>239</sup> The book was compiled from testimonials and contained extensive clippings from Southern newspapers. *As It Is* is an early example of the enduring method still used by the human rights and other social movements of "reporting facts and dramatic use of personal testimony to give facts meaning and motivate action."<sup>240</sup> Cultivating awareness of the atrocities associated with slavery through arts and literature would eventually reach a wider audience. Harriet Beecher Stowe's then popular and now classic novel *Uncle Tom's Cabin* relied on *As It Is*.<sup>241</sup> In 1853 Stowe published a defense of *Uncle Tom's* authenticity as a work of fiction based in fact—the facts and information available in the publications of earlier abolitionists that documented abuses.<sup>242</sup>

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235. *Id.* at 43.

236. *Id.* at 44.

237. *Id.* (citing ROBERT WILLIAM FOGEL, WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY 212, 217, 227 (1989)).

238. *Id.* at 45.

239. KECK & SIKKINK, *supra* note 221, at 45; THEODORE DWIGHT WELD, AMERICAN SLAVERY AS IT IS: TESTIMONY OF A THOUSAND WITNESSES (1839).

240. KECK & SIKKINK, *supra* note 221, at 45.

241. *Id.* at 47; HARRIET BEECHER STOWE, UNCLE TOM'S CABIN (1852).

242. KECK & SIKKINK, *supra* note 221, at 47.

The abolition movement also made use of petitions.<sup>243</sup> In Britain, approximately four hundred thousand individuals signed petitions opposing the nation's involvement in the slave trade.<sup>244</sup> In 1791 and 1792, one out of every eleven adults had signed a petition opposing the trade.<sup>245</sup> By 1814 one of every eight adults had signed an anti-slavery petition. In 1833 one of every seven adults—twice the number of voters in British elections—had signed petitions in favor of the emancipation of slaves.<sup>246</sup> The movement managed to shift public perceptions of the slave trade and slavery.<sup>247</sup>

Abolitionists also gathered to organize and share information with one another. There were world antislavery conferences in London in 1840 and 1843. Technological advances of the era enabled activists to spread their message to allies across the sea more quickly. Activists in the abolitionist movement shared strategies and even speakers. Transportation allowed greater exchange. For the British abolitionists intent on eradicating the practice, “America was no longer a distant land: it was only two weeks away.”<sup>248</sup>

According to Keck and Sikkink, British campaigns to end slavery and the slave trade shaped the politics of the Civil War.<sup>249</sup> The movement mobilized British public opinion against slavery and prevented the British government from recognizing the rebel South. Abolitionist opposition to slavery in the United States also informed the British government's decision to refrain from intervening in the conflict between the North and the South.<sup>250</sup> British intervention could easily have swayed the war outcome to the advantage of the South.<sup>251</sup> However, “[t]he Emancipation Society's campaign helped mobilize British public opinion in favor of the North, convincing leaders that any policy that appeared to favor the slave states would

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243. Some current day examples of activist movements and petitions resisting corporate power include Occupy Wall Street, *see, e.g.*, OCCUPY WALL STREET, <http://occupywallst.org> (last visited Feb. 21, 2014) (“fighting back against the corrosive power of major banks and multinational corporations”); anti-tobacco campaigns, *see, e.g.*, *Challenge Big Tobacco*, CORPORATE ACCOUNTABILITY INTERNATIONAL, <http://www.stopcorporateabuse.org/campaigns/challenge-big-tobacco> (last visited Feb. 21, 2014) (supporting the “unanimous adoption of the global tobacco treaty, the first global public health and corporate accountability treaty.”); and a current petition against Samsung and its connection to Chinese labor practices, *see Samsung: stop exploiting child labor*, CHANGE.ORG, <http://www.change.org/petitions/samsung-stop-exploiting-child-laborers> (last visited Feb. 21, 2014) (calling on Samsung to stop exploiting child laborers through its Chinese employers).

244. KECK & SIKKINK, *supra* note 221, at 44.

245. *Id.*

246. *Id.* (citing ROBERT WILLIAM FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* 212, 217, 227 (1989)).

247. *Id.*

248. *Id.* (citing DOUGLAS CHARLES STANGE, *BRITISH UNITARIANS AGAINST AMERICAN SLAVERY 1833-65* 96 (1984)).

249. *Id.* at 51.

250. KECK & SIKKINK, *supra* note 221, at 51.

251. *Id.*

be divisive and unpopular.”<sup>252</sup> Even though British economic interests were more aligned with the South and “Southern leaders believed that the British textile mills’ dependence on Southern cotton would force the British government to recognize and support the Confederacy,” the British remained out of the conflict.<sup>253</sup>

Arguments against British “intervention” in U.S. affairs were advanced on the other side of the Atlantic as well. American commentators argued that because the British did not understand the domestic institutions of the United States, therefore the British should not intervene in American affairs. American pro-slavery commentators contested British opposition to slavery as an unwarranted attack on practices and customs of the country particularly as other abuses elsewhere in other countries were being overlooked by the British such as polygamy in Turkey.<sup>254</sup> It was also argued that Britain would do well to look within its own borders for abuses against the poor. Indeed, pro-slavery forces in the United States argued also that the condition of the lower classes in England was “far inferior to that of American slaves.”<sup>255</sup>

The politics of the movement did at times appear inconsistent. For example, “[a]bolitionists in Britain often combined antislavery principles with support for British imperialism. They believed that imperialism would spread Christianity, Westernization, and the benefits of trade, and ingenuously saw no contradiction among these principles.”<sup>256</sup>

Moreover, “[m]ost antislavery activists were not willing to extend their efforts to the cause of ‘wage slavery’ in either country.”<sup>257</sup> Indeed, Garrison maintained it was “an abuse of language to talk of the slavery of wages” for in effect it would equate bondage with liberty: “to say that it is worse for a man to be free, than to be a slave, worse to work for whom he pleases, when he pleases, and where he pleases.”<sup>258</sup> Accordingly, “[b]y focusing on power only in this juridical form, however, as a system of restraints and restrictions, antislavery discourse naturalized or made unproblematic ‘free’ labor, ignoring the role of power in market and labor relations.”<sup>259</sup>

Although abolitionists did not draw a connection between poor labor conditions and slave or forced labor, some governments and social activists

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252. *Id.*

253. *Id.* at 50. *See also*, BRIAN JENKINS, *BRITAIN AND THE WAR FOR THE UNION* 5 (1974).

254. KECK & SIKKINK, *supra* note 221, at 42 (citing DOUGLAS CHARLES STANGE, *BRITISH UNITARIANS AGAINST AMERICAN SLAVERY 1833-65* 63, 73, 84 (1984)).

255. *Id.*

256. *Id.* at 77 (citing MICHAEL CRATON, *SINEWS OF EMPIRE: A SHORT HISTORY OF BRITISH SLAVERY* 293 (1974); ROBERT WILLIAM FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* 388 (1989)).

257. KECK & SIKKINK, *supra* note 221, at 77.

258. *Id.*

259. *Id.* (citing ERIC FONER, *POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR* 70 (1981)).

today oppose human trafficking for the purpose of forced labor as a form of modern day slavery.<sup>260</sup> Information politics is being used to elevate consumer and investor consciousness about weak links in the global supply chains where rights violations are rife. As their predecessors in the abolitionist movement, contemporary human rights activists also use strategies calculated to raise awareness about abuse by reporting facts and documenting violations. Today religious and humanitarian groups are engaged in shareholder and other activism against abuse by businesses of human rights. With the benefit of more advanced technologies of information exchange such as the Internet and the information communications technology of social media, social movements are able to reach more people more rapidly.

The recent deaths of thousands of Bangladeshi workers in multiple factory fires and the collapse of the Rana Plaza manufacturing complex offer a contemporary example of cultivating consciousness of the human costs of consumer goods to create change and promote corporate social responsibility.<sup>261</sup> Arguably, failure to respect the rights of workers to associate and organize contributed to the unsafe working conditions that allowed the tragedies to occur. Transnational advocacy networks coordinated to articulate and amplify demands for better working conditions.<sup>262</sup> Non-governmental organizations in the United States and Europe mobilized to raise awareness of the tragedy and staged protests outside of popular consumer

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260. See, e.g., U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 7* (2013) (quoting President Barack Obama on human trafficking: "It ought to concern every person, because it's a debasement of our common humanity . . . the outrage, of human trafficking, which must be called by its true name – modern slavery."); the organization Anti-Slavery International works to eliminate slavery around the world and considers trafficking for the purpose of forced labor a form a modern slavery, see *What is Modern Slavery?*, ANTI-SLAVERY, [http://www.antislavery.org/english/slavery\\_today/what\\_is\\_modern\\_slavery.aspx](http://www.antislavery.org/english/slavery_today/what_is_modern_slavery.aspx) (last visited Feb. 21, 2014); the Polaris Project, named after the North Star "Polaris" used as a guide by slaves escaping slavery in the Southern United States to travel North along the Underground Railroad, works to end human trafficking and modern day slavery through advocacy and education, see *Human Trafficking*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/overview> (last visited Feb. 4, 2014).

261. See, Julfikar Ali Manik, Steven Greenhouse & Jim Yardley, *Western Firms Feel Pressure as Toll Rises in Bangladesh*, N.Y. TIMES, Apr. 25, 2013, <http://www.nytimes.com/2013/04/26/world/asia/bangladeshi-collapse-kills-many-garment-workers.html?pagewanted=all>; Steven Greenhouse, *Some Retailers Rethink Role in Bangladesh*, N.Y. TIMES, May 1, 2013, <http://www.nytimes.com/2013/05/02/business/some-retailers-rethink-their-role-in-bangladesh.html>; but see, Jim Yardley, *Clothing Brands Sidestep Blame for Safety Lapses*, N.Y. TIMES, Dec. 20, 2013, <http://www.nytimes.com/2013/12/31/world/asia/garment-makers-stumble-on-call-for-accountability.html>; Steven Greenhouse & Jim Yardley, *As Walmart Makes Safety Vows, It's Seen as Obstacle to Change*, N.Y. TIMES, Dec. 28, 2012, <http://www.nytimes.com/2012/12/29/world/asia/despite-vows-for-safety-walmart-seen-as-obstacle-to-change.html?pagewanted=all>; Editorial, *Bangladesh's Clothing Industry: Bursting at the Seams*, N.Y. TIMES, Oct. 26, 2013, <http://www.economist.com/news/business/21588393-workers-continue-die-unsafe-factories-industry-keeps-booming-bursting-seams>.

262. Syed Zain Al-Mahmood & Christina Passariello, *Bangladesh Victims Demand Payback*, WALL ST. J., Oct. 24, 2013, <http://online.wsj.com/news/articles/SB10001424052702304069604579153553776683312>.

clothing brands that sourced from Bangladesh.<sup>263</sup> The news media published accounts and images of the tragedy that were widely disseminated through social media.<sup>264</sup> In response to public outcry, coalitions of private corporations (primarily large popular retail brands sourcing from the country) created compensation funds and codes of conduct to regulate safety standards in the local companies manufacturing goods for export to western markets.<sup>265</sup> The United States government threatened to withdraw trading privileges enjoyed by Bangladesh.<sup>266</sup> Recently, Bangladesh announced reforms to its labor law that will allow workers to organize.<sup>267</sup>

### B. *International Initiatives to Address Alleged Rights Abuses by Business Enterprises*

It was the work of civil society movements that placed business and human rights on the global policy agenda. Non-governmental human rights and faith-based organizations in cooperation with affected communities

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263. See, e.g., Editorial, *Bangladesh's Workers Deserve Better*, N.Y. TIMES, Aug. 18, 2013, <http://www.nytimes.com/2013/08/19/opinion/bangladeshs-workers-deserve-better.html> (reporting on meetings convened by labor unions and anti-sweatshop organizations); Editorial, *Fed Up in Bangladesh*, N.Y. TIMES, Sept. 25, 2013, [http://www.nytimes.com/2013/09/26/opinion/fed-up-in-bangladesh.html?\\_r=0](http://www.nytimes.com/2013/09/26/opinion/fed-up-in-bangladesh.html?_r=0) (reporting on worker street protests in Bangladesh).

264. Stories about the factory conditions in Bangladesh in the aftermath of the fires and building collapse were published in multiple major international media outlets with links to social media sharing sites including Facebook, Twitter, LinkedIn and Pinterest. See, e.g., Syed Zain Al-Mahmood, *Bangladesh Factory Fire Puts Renewed Pressure on Clothing Firms*, THE GUARDIAN, May 10, 2013, <http://www.theguardian.com/world/2013/may/09/bangladesh-factory-fire-clothing-firms> (British news report).

265. See Katerina Sokou, *Major U.S. Retailers Work Jointly to Improve Factory Safety in Bangladesh*, WASH. POST, July 10, 2013, [http://www.washingtonpost.com/business/economy/major-us-retailers-join-to-improve-factory-safety-in-bangladesh/2013/07/10/350d0690-e977-11e2-aa9f-c03a72e2d342\\_story.html](http://www.washingtonpost.com/business/economy/major-us-retailers-join-to-improve-factory-safety-in-bangladesh/2013/07/10/350d0690-e977-11e2-aa9f-c03a72e2d342_story.html); Steven Greenhouse, *\$40 Million in Aid Set for Bangladesh Garment Workers*, N.Y. TIMES, Dec. 23, 2013, <http://www.nytimes.com/2013/12/24/business/international/40-million-in-aid-set-for-bangladesh-garment-workers.html>; Steven Greenhouse & Stephanie Clifford, *U.S. Retailers Offer Plan for Safety at Factories*, N.Y. TIMES, July 10, 2013, <http://www.nytimes.com/2013/07/11/business/global/us-retailers-offer-safety-plan-for-bangladeshi-factories.html>; Steven Greenhouse, *Major Retailers Agree to Inspection Standards in Bangladesh*, N.Y. TIMES, Nov. 20, 2013, <http://www.nytimes.com/2013/11/21/business/international/major-retailers-agree-to-inspection-standards-in-bangladesh.html>; Shelly Banjo, *Wal-Mart, Gap Press for Safety in Bangladesh*, WALL ST. J., Oct. 23, 2013, <http://online.wsj.com/news/articles/SB10001424052702304402104579151942188514188>.

266. See Steven Greenhouse, *Obama to Suspend Trade Privileges with Bangladesh*, N.Y. TIMES, June 27, 2013, <http://www.nytimes.com/2013/06/28/business/us-to-suspend-trade-privileges-with-bangladesh-officials-say.html?pagewanted=all>; Steven Greenhouse, *U.S., Urging Worker Safety Outlines Steps for Bangladesh to Regain its Trade Privileges*, N.Y. TIMES, July 19, 2013, <http://www.nytimes.com/2013/07/20/business/global/us-urging-worker-safety-outlines-steps-for-bangladesh-to-regain-its-trade-privileges.html>.

267. See, e.g., Agence France-Presse, *Bangladesh Plans Stronger Labor Reforms After U.S. Move*, INDUSTRY WEEK, July 7, 2013, <http://www.industryweek.com/trade/bangladesh-plans-stronger-labor-reforms-after-us-move>; Maya Saini, *Headway Seen in Bangladesh on Safety Reform*, WOMEN'S WEAR DAILY, May 7, 2013; Editorial, *Halfhearted Labor Reform in Bangladesh*, N.Y. TIMES, July 17, 2013, <http://www.nytimes.com/2013/07/18/opinion/halfhearted-labor-reform-in-bangladesh.html>.



have worked to increase awareness of the impact of business on human rights.<sup>268</sup> Their efforts have attracted the attention of global policy makers and have contributed to the creation of new principles to inform business practices that impact human rights.

The Special Representative of the United Nations Secretary General for Business and Human Rights crafted Guiding Principles for the Implementation of the U.N. “Protect, Respect and Remedy Framework” after consultation with a broad range of stakeholders in civil society.<sup>269</sup> The Guiding Principles offer prescriptive guidance to States and businesses, and clarify the roles and responsibilities of each as to three core principles: (1) the duty of states to protect against human rights abuses by third parties, including business enterprises; (2) the duty of corporations to respect human rights by avoiding infringing on others’ rights and to redressing adverse impacts; and (3) access to judicial and non-judicial remedies for victims.<sup>270</sup> The Guiding Principles offer both foundational and operational guidance to corporations concerning human rights duties.<sup>271</sup>

Taken together the foundational principles and the operational principles contained in the Guiding Principles articulate the obligations corporations have to respect human rights and how to fulfill them.<sup>272</sup> The responsibility to respect as a matter of foundational principle further requires that corporations “seek to prevent or mitigate adverse impacts that are directly linked to their operations, products, or services by their business relationships, even if they have not contributed to those impacts.”<sup>273</sup> A corporation’s “business relationships” extends to associations with partners whether non-state or state. Indeed, much of the litigation against corpora-

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268. See, e.g., *Bylaws*, INTERFAITH CENTER ON CORPORATE RESPONSIBILITY June 23, 2010, <http://www.iccr.org/about/By-LawsFINAL062310.pdf> (providing the organization’s purpose “to further the mission of religious organizations in the areas of corporate responsibility, social responsibility in investment and social and economic policy, and to further interfaith cooperation in these areas.”); *Business and Human Rights*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/business-and-human-rights> (last visited Feb. 21, 2014) (“Through research and analysis, Amnesty International aims to highlight human rights abuses in which companies are implicated and how governments fail to prevent these abuses or hold companies to account when they occur.”); *About*, HUMAN RIGHTS ACTION CENTER, <http://www.humanrightSACTIONcenter.org/dyr/about/> (last visited Feb. 21, 2014); *Mission Statement*, HUMAN RIGHTS WATCH, <http://www.hrw.org/about> (“Human Rights Watch is dedicated to protecting the human rights of people around the world. . . . We challenge governments and those who hold power to end abusive practices and respect international human rights law.”).

269. Rep. of the Special Representative of the Sec’y Gen., *Protect, Respect, and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (April 7, 2008), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

270. *Id.*

271. *Id.*

272. See Rep. of the Special Representative of the Sec’y-Gen., *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 13–22, U.N. Doc. A/HRC/17/31 (March 21, 2011), available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

273. *Id.* at 14.

tions concern claims of complicity or aiding and abetting and involves acts that could be attributed to a corporation's partners or issues that flow from particular business relationships.

In addition to setting forth these foundational norms, the Guiding Principles also offer operational guidance for business enterprises on how to fulfill their responsibility to respect human rights.<sup>274</sup> In order to prevent, mitigate, and address human rights impacts the Guiding Principles state that corporations should establish a human rights due diligence process to assess their actual and potential effects to operationalize the responsibility to respect human rights.<sup>275</sup>

The U.N. Framework provides a relatively clear explanation of what it expects companies to do for due diligence. It explains that corporations must "consider three sets of factors" when doing their due diligence: (1) corporations must "highlight any specific challenges they may pose" in the countries where they have business activities; (2) corporations must determine the "human rights impact" of their own activities; and (3) corporations must determine "whether they might contribute to abuse through the relationships connected to their activities," such as partners, suppliers, and state agencies.<sup>276</sup> The U.N. Framework lists basic components that a human rights due diligence process should contain. These basic components include policy implementation, impact assessment, policy integration, and performance tracking.<sup>277</sup> Additionally, the Guiding Principles elaborate on specific procedures that companies can follow to satisfy their due diligence responsibility.<sup>278</sup>

Some human rights campaign groups have expressed disappointment that the Framework and Guiding Principles did not go further in creating binding obligations for corporations and regret that the international community has failed to produce a legally binding framework for ensuring accountability.<sup>279</sup> Proponents of the process that generated the Framework and Guiding Principles point out that industry's involvement indicates that it is a pragmatic way of addressing the problems that concern campaign-

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274. *Id.* at 15.

275. *Id.*

276. Special Representative of the Sec'y-Gen., *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 57, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter UN Framework].

277. *Id.* at ¶¶ 60–64.

278. Special Rep. of the Sec'y-Gen., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, ¶¶ 16–21, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UN Guiding Principles].

279. See, e.g., *Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights*, FIDH, <http://www.fidh.org/Joint-Civil-Society-Statement-on,9066> (last updated on March 3, 2011).

ers.<sup>280</sup> While it is early to assess the likelihood of its success, the Framework and Guiding Principles provide a salient starting point from which to advance human rights and to put the issue of business practices that impair the enjoyment of human rights on the public agenda.

### C. *Evolving Accounts of Corporate Identity and Responsibility*

At the heart of questions concerning corporate identity and responsibility is power: how it is exercised and for what purpose. The demise of the East India Company was due in part to perceptions concerning misuse and abuse of power as it obtained more influence in society. Indeed, as Antony Anghie has observed, “imperial projects inevitably provoke rebellion and opposition.”<sup>281</sup> The power of private commercial actors is similarly under scrutiny. In international relations it is appreciated that “power may be overcome by superior power or checked by an equivalence of power.”<sup>282</sup> While transnational advocacy networks have nowhere near the same power or wealth of major multinational corporations, they do have the potential to change perceptions.

In today’s global economy there are increasingly multiple independent and competing centers of influence. History teaches that in the future it will be increasingly important to be flexible in fixing the legal personhood of the corporation in international law but firm when the risk of abuse is high and when harms happen.

The power to shift perception should not be underestimated by modern multinational corporations as the success of the abolitionist movement shows. Increasingly, when denounced by activists, multinational corporations distance themselves from association with violations.<sup>283</sup> Having clarified that states have the responsibility to protect human rights while commercial actors also must respect those rights, new international normative regimes require corporations to be proactive in their business practices to avoid directly or indirectly engaging in abuses.

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280. See, e.g., John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 838–39 (2007) (explaining efforts to increase the effectiveness of the international human rights regime in addressing issues associated with a global economy).

281. ANGHIE, *supra* note 45, at 312.

282. JESSUP, *supra* note 1, at 18.

283. Many examples exist of corporations changing practices or distancing themselves from violations in light of public fire. See, e.g., BUSINESS LEADERS INITIATIVE ON HUMAN RIGHTS, THE MILLENNIUM DEVELOPMENT GOALS AND HUMAN RIGHTS: COMPANIES TAKING A RIGHTS-AWARE APPROACH TO DEVELOPMENT, available at [http://www.ihrb.org/pdf/BLIHR\\_Human\\_Rights\\_and\\_MDGs.pdf](http://www.ihrb.org/pdf/BLIHR_Human_Rights_and_MDGs.pdf) (providing examples of various companies, including General Electric [changing its after public criticism due to use of their ultrasound equipment in India to facilitate female infanticide], and Coca-Cola [identifying potential responses to concerns of child labor during sugar cane harvesting in El Salvador and supporting local solutions]). Another recent example is Apple joining the Fair Labor Association, and attempting to resolve concerns over labor violations by some of its factories in China. See, Sophia Yang, *Apple Faces New China Labor Allegations*, CNN (Sept. 6, 2013), <http://money.cnn.com/2013/09/06/technology/apple-china-labor/>.

In some ways the new norms of business responsibility to respect human rights is parallel to the past requirements imposed by the Crown as a condition of granting the privilege of incorporation—that the corporation serves a public purpose. Today all that is required to obtain a corporate identity is to meet registration requirements in a given jurisdiction, yet modern multinational corporations have broad impacts across multiple jurisdictions. Individuals concerned about or affected by corporate misconduct are increasingly well positioned to demand change through the creation of transnational networks. While a corporation may no longer be required to make a compelling case to the Crown, increasingly a case must be made to the community of stakeholders within its sphere of influence.

#### IV. CONCLUSION: EVOLVING CORPORATE OBLIGATIONS: FROM THE CROWN TO THE COMMUNITY

This Article has explored how the history of colonialism has informed the changing concepts of sovereignty and legal personality in ways that could influence the performance of corporate responsibility and governance. While the Supreme Court's decision in *Kiobel* signals that ATS litigation will likely no longer present the risks and costs it once did to corporations with operations overseas, the social license to operate remains a concern. Corporations should seriously consider what responsible conduct must entail in different areas. While the role of the corporation in the international arena has increased, so also has social transformation from the industrial age to the age of information promoted greater transparency. As social transformation from the industrial age to the age of information has promoted and permitted greater transparency, it is increasingly important to understand the external impacts of conducting business in developing country economies where rights abuses or corruption are common features. Greater transparency will make it more difficult for business enterprises to conceal the negative external impacts of conducting business in challenging contexts.

Anxieties over corporate power are not new but rather persist. This Article has attempted to draw a line from past concerns to present ones as pertains to the exercise of commercial power. As a practical matter, corporate social responsibility in the eyes of the public, if not the law, will be treated as proportionate to the perceived power a corporate entity possesses. Perhaps more than changes in law, whether sovereignty or shareholder primacy are challenged, it could be changes in society that create incentives for more ethical business cultures to emerge and inform future regulatory efforts.

As demonstrated by the response of brand dependent businesses to the public relations crisis that can result from the failure to avoid environmental damage and involvement in rights abuses, consumer preference can be a

powerful force. Consumer choices can change the way business is done. Changing consumer choices will require social consciousness, access to information, and encouraging behavior that is consistent with social commitments a class of consumers claim to hold. Transnational advocacy networks could advance in the future, as did the abolitionist movement of the past. Indeed, it could become the case that the stakeholder community of consumers, social investors, and affected communities will in effect become the new Crown, instead of a charter, issuing the social license to operate.

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## Corporate Citizenship: Goal or Fear?

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