Cornell Journal of Law and Public Policy

Volume 19
Issue 2 *Spring 2010*

Article 5

Corporate Disconnect: The Blackwater Problem and the FCPA Solution

Andre M. Penalver

NOTE

CORPORATE DISCONNECT: THE BLACKWATER PROBLEM AND THE FCPA SOLUTION

*André M. Peñalver**

In the aftermath of the Nisour Square tragedy, in which seventeen Iraqi civilians died as a result of actions by Blackwater USA, a security contractor, the United States was confronted with a loophole in its criminal law. While the responsible Blackwater guards would face stiff penalties under the Foreign Corrupt Practices Act for any accounting fraud committed abroad, there was no obvious criminal statute that would cover the senseless act of violence in Nisour Square. With the growth of military contractors specifically and the spread of globalization generally, violent acts by corporations proliferate.

This Note aims to show that a criminal statute with extraterritorial jurisdiction is the proper solution to the Blackwater problem and the plague of corporate human rights abuses abroad. The Foreign Corrupt Practices Act (FCPA) already holds corporations criminally liable for accounting and bribery crimes committed overseas. Congress need only amend the FCPA to address a larger scope of crimes, including human rights abuses, to hold corporations such as Blackwater responsible for their actions. That our statutes make a crime of a corporation's overseas accounting fraud but not overseas murder is an absurdity that demands change.

This Note will explore a variety of legal regimes in search of a possible legal solution to the Blackwater problem. As all existing legal regimes are inadequate, this Note then looks to the FCPA, which has proven promisingly effective in addressing extraterritorial crimes. In order to understand why U.S. law does not already criminalize human rights abuses, the Note considers the historical relationship between corporations and government, beginning with the underpinnings of that relationship in Roman law and political theory. The Note will then examine the problems that arose from British joint-stock trading compa-

* A.B., Harvard University, 2006; J.D. Candidate, Cornell Law School, 2010. I would like to thank the staff of the *Cornell Journal of Law and Public Policy* for making this Note coherent, Professor Eric Nelson for introducing me to great ideas, some of which I tried to employ here, and my family for providing everything else.

nies and Gilded Age business corporations. Applying the solutions that the British and U.S. governments employed in the past, this Note will explain how expanding the FCPA by adopting new human rights provisions can address the Blackwater problem and many of the other human rights abuses that arise from globalization.

INTRODUCTION

On September 16, 2007, a bomb exploded a few hundred yards from a Baghdad compound in which American diplomats were meeting.[1] Guards working for Blackwater USA, a private military corporation under contract with the State Department, immediately assembled a convoy to transport the diplomats back to the Green Zone, the heavily fortified zone in central Baghdad.[2] Upon reaching Nisour Square, the guards halted traffic and took defensive positions around the intersection.[3] After securing the square, one of the Blackwater guards opened fire on a car,

[1] *See* James Glanz & Sabrina Tavernise, *Blackwater Role in Shooting Said to Include Chaos*, N.Y. TIMES, Sept. 28, 2007, at A1.

[2] *Id.*

[3] *Id.*

killing its driver and a female passenger who was clutching her infant.[4] Another guard allegedly fired a grenade into a girls' school nearby.[5] The ensuing chaos, resulting in seventeen civilian deaths and twenty civilians wounded, ended only after one Blackwater guard drew his weapon on another to force him to stop firing.[6] Although the guards claimed to have acted in self-defense, an F.B.I. investigation found that fourteen of the seventeen civilian deaths were unjustified;[7] both the dead and wounded were unarmed.[8]

While Nisour Square received more attention than most incidents involving military contractors, the problem is not a new one.[9] Since the end of the Cold War, the military's use of private soldiers has quadrupled.[10] "By 2008, the 'estimated 180,000 private contractors outnumber[ed] the 160,000 US. troops stationed in [Iraq].'"[11] With so many private contractors in such volatile locations, abuses such as the Nisour Square incident abound. On July 8, 2006, a military contractor intentionally fired into a moving taxi for amusement, after allegedly telling colleagues "I want to kill somebody today."[12] On December 24, 2006, a Blackwater guard who had been drinking heavily shot and killed a bodyguard of the Iraqi Vice President.[13] In 2007, the House Committee on Oversight and Government Reform found that Blackwater had been in-

---

4 *Id.*

5 *See* Del Quentin Wilber, *Contractors Charged in '07 Iraq Deaths*, WASH. POST, Dec. 9, 2008, at A2 (citing an indictment brought by federal prosecutors).

6 *See* Glanz & Tavernise, *supra* note 1, at A12 (quoting an American official stating that one guard "got on another one about the situation and supposedly pointed a weapon").

7 *See* David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1 (citing findings by FBI agents concluding that three of the seventeen deaths "may have been justified" because they may have resulted from a "perceived" threat—even if no threat actually existed).

8 *See* Jeremy Scahill, *Justice, of a Sort, for Blackwater*, THE NATION, Dec. 8, 2008, *available at* http://www.thenation.com/doc/20081222/scahill?rel=hp_picks [hereinafter Scahill, *Justice, of a Sort*]. As of the publication of this Note, a federal judge threw out the indictment against the four Blackwater guards responsible for the Nisour Square incident. *See* Charlie Savage, *Charges Voided for Contractors in Iraq Killings*, N.Y. TIMES, Jan. 1, 2010, at A1. The judge cited the government's "reckless violation of defendants' constitutional rights." *Id.* In addition, the judge's scathing and detailed review of the tainted evidence in the case makes either an appeal or a new prosecution unlikely.

9 *See* Robert Capps, *Crime without Punishment*, SALON, July 27, 2002, http://dir.salon.com/story/news/feature/2002/06/27/military/index.html; *see also* Phillip Carter, *Hired Guns*, SLATE, Apr. 9, 2004, http://www.slate.com/id/2098571.

10 Joshua S. Press, *Crying Havoc Over the Outsourcing of Soldiers and Democracy's Slipping Grip on the Dogs of War*, 103 Nw. U. L. REV. 109, 111 (2008).

11 *Id.* at 111 (quoting Tom Baldwin, *Blackwater Denies Rogue Mercenary Charge*, TIMES (London), Oct. 3, 2007, at 31).

12 Steve Fainaru, *Four Hired Guns in an Armored Truck, Bullets Flying, and a Pickup and a Taxi Brought to a Halt. Who Did the Shooting and Why?*, WASH. POST, Apr. 15, 2007, at A1 (reporting on abuses committed by a Triple Canopy employee).

13 John M. Broder, *Ex-Paratrooper Is Suspect In Drunken Killing of Iraqi*, N.Y. TIMES, Oct. 4, 2007, at A10.

volved in 195 "escalation of force" incidents since 2005.[14] More recently, reporters discovered that the CIA hired and trained Blackwater for an aborted plan to assassinate Al Qaeda leaders.[15] Above all, the U.S. government contributed to the problem by freeing such contractors from legal constraints: on June 28, 2004, as his last act before stepping down as head of Iraq's Coalition Provisional Authority, Paul Bremer issued Order 17, immunizing contractors in Iraq from prosecution in Iraqi courts.[16]

These incidents in Iraq have taken their toll on both relations with Iraqis and on the world's perception of the United States. Understandably, Iraqis have expressed outrage over the impunity with which Blackwater guards have killed innocent civilians.[17] Likewise, the question of contractor immunity "has become a key issue in negotiations" between U.S. and Iraqi diplomats.[18] The critical role private contractors played in the abuses at Abu Ghraib has further fed anti-American propaganda across the world.[19]

Of course, the issue of corporate human rights abuses is not limited to Iraq and Blackwater USA. In June 2009, Shell settled a federal suit in which Nigerian families sued the company for its alleged complicity in the execution of eight Nigerian activists, including Nobel Laureate Ken Saro-Wiwa.[20] In 2007, Yahoo settled a lawsuit brought by two Chinese journalists who claimed that Yahoo's disclosures to the Chinese govern-

---

14 *See* MAJ. STAFF OF MEMBERS ON THE COMM. ON OVERSIGHT AND GOV. REFORM, 110TH CONG., MEMORANDUM ON ADDITIONAL INFORMATION ABOUT BLACKWATER USA (Oct. 1, 2007).

15 *See* Mark Mazzetti, *Outsiders Hired As C.I.A. Planned To Kill Jihadists*, N.Y. TIMES, Aug. 21, 2009, at A1. Although this plan emerged in 2002, Congress did not learn about it until 2009. *See id.*

16 *See* JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY 163 (Nation Books 2007); *see also* Alissa J. Rubin & Paul von Zeilbauer, *The Judgment Gap: In a Case Like the Blackwater Shootings, There Are Many Laws but More Obstacles*, N.Y. TIMES, Oct. 11, 2007, at A1.

17 *See* Steve Fainaru, *Warnings Unheeded On Guards In Iraq*, WASH. POST, Dec. 24, 2007, at A1 (quoting a contractor as saying "[t]he Iraqis' fury grew as they realized that Blackwater was untouchable").

18 *See* Alexandra Zavis, *Army Interpreter Sentenced at Court-Martial*, L.A. TIMES, June 24, 2008, at A3.

19 *See* Deborah Hastings, *Contractors Incited Prison Abuse, Report Says*, HOUSTON CHRON., Oct. 24, 2004, at A12 ("CACI and Titan employees were key participants in the 'sadistic, blatant and wanton criminal abuses' at Abu Ghraib, said the Taguba report."); *see also* Tracie Rozhon, *6 Members of Elite Navy Force Sue News Agency Over Photos*, N.Y. TIMES, Dec. 29, 2004, at A16 ("Mr. Huston said the photos had appeared in Arab news media and on anti-American billboards in Cuba.").

20 *See* Jad Mouawad, *Shell Agrees to Settle Abuse Case for Millions*, N.Y. TIMES, Jun. 9, 2009, at B1 (stating that the settlement was "a striking sum given that the company has denied any wrongdoing").

ment of certain pro-democracy emails led to their arrest and torture.[21] In 2004, Unocal settled a lawsuit brought by fifteen Burmese refugees who accused the company of complicity in the murder, rape, and torture that accompanied the construction of its oil pipeline in Burma.[22] From the abuses of colonialism,[23] to the Holocaust,[24] to Apartheid,[25] the role of corporations in human rights abuses is all too common.

This Note aims to show that a criminal statute with extraterritorial jurisdiction is the proper remedy to this plague of corporate abuses abroad. The Foreign Corrupt Practices Act (FCPA) already holds corporations criminally liable for accounting and bribery crimes that they commit overseas.[26] Congress need only amend the FCPA to address a larger scope of crimes, including human rights abuses by corporations such as Blackwater or Unocal.[27] That our statutes make a crime of a corporation's overseas accounting fraud but not overseas murder is an absurdity that demands change.

Part I of this Note will examine some of the existing possible legal solutions to this "Blackwater problem." As all are inadequate, Part II looks to the FCPA, which has proven to be promisingly effective in addressing extraterritorial crimes by U.S. corporations.[28] In order to understand why U.S. law does not already criminalize human rights abuses, Part III looks to the historical relationship between corporations and government, beginning with the underpinnings of that relationship in Roman law and political theory. Part III will then examine the problems that arose from British joint-stock trading companies and American business corporations of the Gilded Age. Applying the solutions employed by the

---

21 Catherine Rampell, *Yahoo Settles with Chinese Families*, WASH. POST, Nov. 14, 2007, at D4.

22 *See* Lisa Girion, *Unocal to Settle Human Rights Lawsuit*, L.A. TIMES, Dec. 14, 2004, at A1; *see also* John Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *rev'd*, 395 F.3d 978 (9th Cir. 2003) (granting rehearing en banc).

23 *See* discussion *infra* Part III.C.

24 *See* Sean D. Murphy, *Nazi-Era Claims Against German Companies*, 94 AM. J. INT'L L. 682 (2000). For details on the role of one American corporation, see EDWIN BLACK, IBM AND THE HOLOCAUST (2008).

25 *See* 6 TRUTH & RECONCILIATION COMM'N OF SOUTH AFRICA REPORT 156–71 (2003), *available at* http://www.info.gov.za/otherdocs/2003/trc/rep.pdf (explaining the role of business in supporting the Apartheid regime).

26 *See* Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m, 78dd-1, 78dd-2 (2006).

27 The proposition of using the FCPA as a basis for addressing human rights is not new. *See, e.g.*, Logan Michael Breed, Note, *Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 VA. J. INT'L L. 1005 (2002). This Note differs in its focus on the Blackwater problem and the historical context of corporate abuses.

28 This Note recommends that Congress amend the FCPA to cover crimes such as those that occurred at Nisour Square. Of course, due to ex post facto limitations, these amendments would only serve to prevent future crimes, not punish this individual crime. *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

British and U.S. governments during that time, Part IV will explain how expanding the FCPA by adopting new human rights provisions would address the Blackwater problem and many of the other human rights abuses that are likely to occur in the age of globalization.

I. THE AVAILABLE LEGAL SOLUTIONS

A. *Iraqi Law*

One obvious solution to the Blackwater[29] problem would be to eliminate the blanket immunity that the Provisional Authority granted in the first place. In fact, the U.S. and Iraqi governments have agreed to do just that.[30] Unfortunately, this approach creates as many problems as it solves. One barrier to relinquishing authority to Iraqi courts is that "there is little confidence that trials would be fair and defendants in those [Iraqi] courts have few of the legal protections that are mandatory in the United States."[31] The trial of Saddam Hussein displayed the shortcomings of the Iraqi judicial system to the world as Saddam's enemies intervened to ensure his conviction and eventual execution.[32] The lack of due process in the Hussein trial has led some to question the extent of the rule of law in Iraq.[33] These questions cast doubt on the possibility that Blackwater guards would get a fair trial in Iraq.

B. *International Law*

A second possible solution would be to address the Blackwater problem through international law. Professor Richard Morgan proposes using the Hague Conventions, Geneva Conventions, and Protocol I to hold military contractors responsible for their crimes.[34] He argues that the international nature of their acts and the possibility of a race to the bottom in domestic regulations call for a solution rooted in international law, a new treaty regime, or evolving customary international law.[35]

---

29 Blackwater has now renamed itself Xe. *See* The Associated Press, *Blackwater Changes Its Name to Xe*, N.Y. TIMES, Feb. 13, 2009, at A10. For simplicity, this Note will use the name Blackwater throughout.

30 *See* Sabrina Tavernise et al., *U.S. Concession on Immunity for Contractors*, N.Y. TIMES, July 2, 2008, at A11.

31 Rubin & von Zeilbauer, *supra* note 16, at A1.

32 *See* Neil Genzlinger, *The Backstage Intrigues at a Show Trial*, N.Y. TIMES, Oct. 11, 2008, at C11 ("The trial that resulted in Mr. Hussein's hanging in late 2006 did not conform to the American Way.") (reviewing *The Trial of Saddam Hussein* (PBS television broadcast Oct. 12, 2008)).

33 *See* John F. Burns, *Western Lawyers Say Iraq Discarded Due Process in Hussein Trial*, N.Y. TIMES, Sept. 25, 2008, at A17 (explaining how Prime Minister Maliki "forced the resignation of one" judge "to avert the possibility" of life imprisonment in place of execution).

34 *See* Richard Morgan, *Professional Military Firms under International Law*, 9 CHI. J. INT'L L. 213, 218 (2008).

35 *See id.* at 244–45.

Other scholars have come to similar conclusions regarding human rights abuses by corporations more generally. Professor Steven Ratner argues that, in light of the problems that emerge between corporations and states in the context of globalization—including the very erosion of state power[36]—"[a]ny answer not depending exclusively on diverse and possibly parochial national visions of human rights and enterprise responsibility must come from international law."[37] International law, Professor Ratner argues, would eliminate the uncertainty that comes from ad hoc responses by legislatures and international organizations.[38] The solution then would be a marriage between corporate law and international law, imposing certain obligations on corporations in order to protect human rights.[39]

Unfortunately, a solution rooted in international law is also problematic. First, there is the ongoing debate over whether international law really is law at all. International law lacks the backing of a legislature, an executive body, and a judiciary with compulsory jurisdiction.[40] These qualities have led some to conclude that international law is more 'positive morality' than law.[41] While Professor Ratner warns of the uncertainty that comes from ad hoc responses by different legislatures,[42] there is also an inherent uncertainty in trying to create law without any of the traditional lawmaking mechanisms.[43]

Second, even if international law is law, there is another concern in finding a forum to apply it. Even if Professor Morgan were right that international law provides all the necessary tools to address something like the Blackwater problem, he does not address whether the United States would ever subject itself or its citizens to such an international criminal trial.[44] To date, the United States has resolved not to let the International Criminal Court try its citizens.[45] In making its decision,

---

36 *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 447 (2001).

37 *Id.* at 448.

38 *Id.*

39 *Id.* at 449; *see also* ANDREW KUPER, DEMOCRACY BEYOND BORDERS: JUSTICE AND REPRESENTATION IN GLOBAL INSTITUTIONS 137–90 (Oxford Univ. Press 2004) (explaining the potential of United Nations institutions in promoting a new non-state democracy).

40 *See* JAVAID REHMAN, INTERNATIONAL HUMAN RIGHTS LAW: A PRACTICAL APPROACH 14–15 (Longman 2003).

41 *Id.* at 15; *see also* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 6 (Oxford Univ. Press 1990) ("Who would bother to inquire as to *why* a system of rules is obeyed when there is little evidence either of a system or of obedience?").

42 *See* Ratner, *supra* note 36, at 448.

43 *See* John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 308 (2006).

44 *See generally* Morgan, *supra* note 34.

45 *See* 22 U.S.C. § 7421(11) (2006) ("The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals.").

Congress cited the lack of constitutional protections available in the International Criminal Court.[46] This same concern would apply to any international tribunal; thus, one could conclude that the United States would not fully cooperate with any international criminal court.

The situation is little better in U.S. courts. In practice, American judges give short shrift to international law in their courtrooms. Using the many rules available under the doctrine of "judicial provincialism,"[47] judges may find ways to prevent a hearing on international law cases, to prevent international law from providing the rule of decision in a case, or to hinder the proper handling of international law.[48] Even if U.S. judges decide to use international law in their decisions, supplanting domestic law with international law raises yet another constitutional concern.[49]

These debates over the merits of international law are extensive, and their details are beyond the scope of this Note, but they do illustrate the overall concerns about international law's ability to protect human rights. For now, one can conclude that human rights require a more solid foundation than international law alone can provide.

C. *Domestic Law*

For lack of other options—if nothing else—U.S. domestic law provides the greatest potential for holding criminals such as the Blackwater guards liable. There are only a handful of U.S. statutes that have the extraterritorial reach to extend to Iraq. This Note will address three: the Military Extraterritorial Jurisdiction Act (MEJA), the Alien Tort Statute (ATS), and the Foreign Corrupt Practices Act (FCPA). This section examines MEJA and ATS, but concludes that both are inadequate solutions to the problem of holding corporations liable for crimes committed abroad.

Of these three laws, MEJA is seemingly the most on point.[50] The statute covers members of the Armed Forces or those accompanying the

---

[46] *See id.* § 7421(7).

[47] *See* Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 8–9 (1995). McFadden explains that judicial provincialism provides rules that judges may use to marginalize international law, including personal jurisdiction requirements, subject-matter jurisdiction requirements, foreign sovereign immunity, standing requirements, the political-question doctrine, the forum non conveniens doctrine, the lis alibi pendens doctrine, and the act of state doctrine as possible rules available for the purposes of judicial provincialism. *Id.* at 8–9.

[48] *Id.* at 8.

[49] *See* McGinnis, *supra* note 43, at 308 ("[U]nlike democratically made laws or constitutions, transnational legal materials currently do not derive from a process that gives us reason to believe that they are good enough to impeach the presumptive beneficence of our own democratic law.").

[50] *See* 18 U.S.C. §§ 3261–67 (2006).

Armed Forces,[51] a definition that would include military contractors.[52] In addition, MEJA applies to any serious criminal acts that occur outside of the United States,[53] allowing for prosecution under U.S. law for those acts.[54] Although MEJA offers a "significant expansion of American criminal law over crimes committed on foreign soil,"[55] and although the United States has attempted to indict the Blackwater guards under MEJA,[56] it is not a clear solution to the problem at hand for three reasons.

First, and most importantly, MEJA would only apply to the individual guards: Blackwater USA itself cannot be prosecuted under MEJA.[57] Second, it remains to be seen whether a conviction of the guards is even possible: the government's initial indictment under MEJA has been dismissed.[58] To date, there has been only one successful prosecution of a contractor under MEJA, and this involved child pornography.[59] Moreover, MEJA has never applied to contractors working for the State Department, as with the Blackwater guards at Nisour Square.[60] Third, a prosecution under MEJA will not likely clarify the law in the least. If there is a prosecution under MEJA, it will be by twisting the statute into a "an unprecedented use of the law," likely producing "protracted, technical arguments aimed at scuttling the case well before a jury has the opportunity to evaluate the guards' actions."[61] Criminal law deserves more clarity than this extension of MEJA can provide. Finally, setting aside this dubious application of MEJA, it would certainly not address any of the other human rights abuses that corporations commit overseas.[62]

An alternative to the Military Extraterritorial Jurisdiction Act is the Alien Tort Statute, which provides for original jurisdiction in federal district courts for "any civil action by an alien for a tort only, committed in

---

51 *See id.* § 3261.

52 *See id.* § 3267(1)(A)(ii)-(iii).

53 *See id.* § 3261.

54 *See id.* §§ 3261–62.

55 *See* K. Elizabeth Waits, Note, *Avoiding the "Legal Bermuda Triangle": The Military Extraterritorial Jurisdiction Act's Unprecedented Expansion of U.S. Criminal Jurisdiction Over Foreign Nationals*, 23 ARIZ. J. INT'L & COMP. L. 493, 497 (2006).

56 *See* Scahill, *Justice, of a Sort*, *supra* note 8; *see also* Savage, *supra* note 8, at A1.

57 *See* Scahill, *Justice, of a Sort*, *supra* note 8; *see also* 18 U.S.C. §§ 3261–67 (2006).

58 *See* Savage, *supra* note 8, at A1.

59 *See* Michael Hurst, *After Blackwater: A Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations*, 76 GEO. WASH. L. REV. 1308, 1316 & n.53 (2008).

60 *See id.* at 1315.

61 Ginger Thompson & James Risen, *Plea by Blackwater Guards Helps Indict 5 Others*, N.Y. TIMES, Dec. 9, 2008, at A12 (internal quotations omitted).

62 *See supra* notes 20–27 and accompanying text.

violation of the law of nations or a treaty of the United States."[63] Most promisingly, foreigners have used the ATS to sue corporations in federal court for breaches of customary international law with respect to human rights abuses.[64]

Nonetheless, enforcing human rights through the ATS is problematic, and thus far, no corporation has been held liable under the ATS.[65] First, the ATS's subject-matter jurisdiction is limited to breaches of the "law of nations," a term that courts have interpreted narrowly.[66] Second, as a private action, a party suing under the ATS must bear its own costs, a disincentive for victims, particularly if they still reside in a foreign country.[67] Finally, an ATS claim is a tort claim rather than a criminal action, and there is a difference between a "breach" and a "crime," between mere civil liability and the moral condemnation of breaking a criminal law.[68] Consequently, if the United States is serious about condemning the most heinous corporate abuses, it should look to the criminal law rather than tort law.

By process of elimination, one finds the traits necessary to address the Blackwater problem in particular and overseas corporate abuses in general: the United States needs a criminal statute with extraterritorial reach and a purpose broad enough to address a wide variety of corporate crimes. For that, one must turn to the Foreign Corrupt Practices Act.

---

63 28 U.S.C. § 1350 (2006); *see also* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that subject-matter jurisdiction exists in suit based on universally accepted norms of international law, regardless of party's nationality). *See generally* Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 116 (2004) ("*Filartiga* transformed the [Alien Tort Statute] into a tool for foreigners to seek redress in federal courts for a variety of abuses committed by governments around the world.").

64 *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 103–08 (2d Cir. 2000); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999); *see also* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 589 (2002) (noting the expansion of the ATS to suits against multinational corporations).

65 One law firm proclaims as much to its clients: "The good news is that no company—whether through trial or at some earlier stage—has yet to lose an [ATS] case." Kelley Drye & Warren LLP, *Alien Tort Claims Act: A Once Dormant Statute Resurrects with Implications and Potential Liability for Corporations*, http://www.kelleydrye.com/resource_center/global_litigation_usa/20090126/01 (last visited Jan. 15, 2010).

66 *See* Breed, *supra* note 27, at 1016.

67 *See* David A. Root, Note, *Attorney Fee-Shifting In America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"*, 15 IND. INT'L & COMP. L. REV. 583, 585 (2005) ("[T]he 'American rule' which has stood for over 200 years, is one in which each party must bear its own costs for litigation, regardless of the outcome.").

68 *See* Paul H. Robinson, *The Criminal-Civil Distinction and The Utility of Desert*, 76 B.U. L. REV. 201, 206 (1996) ("The shared quality—the defining characteristic—of all civil liability is that it is not criminal liability; it lacks the societal condemnation that criminal liability traditionally suggests.").

II. THE FCPA: PURPOSE AND STRUCTURE

A. *The Purpose of the FCPA*

In 1977, Congress enacted the Foreign Corrupt Practices Act (FCPA) in response to a series of foreign bribery scandals by a number of Fortune 500 companies.[69] Investigations by the Watergate Special Prosecutor and the Securities and Exchange Commission (SEC) revealed the existence of slush funds that corporate officials were using to finance contributions to the Nixon reelection campaign and other domestic political campaigns, as well as to bribe foreign officials.[70] Through the SEC's voluntary disclosure program, 400 companies disclosed overseas payments totaling in excess of $300 million.[71] "The revelations," Charles McManis wrote in 1976, "have shaken foreign governments, rocked American corporate management, and tarnished the image of American private enterprise both at home and abroad."[72]

In arriving at a legislative solution to these revelations, Congress invoked many of the same concerns as McManis: overseas bribery is unethical, unnecessary, erodes public confidence in the free market, and casts a shadow over all U.S. corporations.[73] In strong language, the House Report concluded that bribery "is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well."[74]

When President Carter signed the Act into law on December 20, 1977, he joined Congress in its concerns about corrupt practices.[75] "I share Congress'[s] belief," he stated, "that bribery is ethically repugnant and competitively unnecessary."[76] In addition, he spoke to diplomatic concerns: "Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries."[77] In keeping with this purpose, the

---

69 *See* H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239, 241–44 (2001).

70 *Id.* at 241.

71 *Id.* at 244. The chairperson of Lockheed Aircraft Corporation admitted to paying an estimated $22 million in overseas bribes between 1970 and 1975. Exxon admitted to contributing over $46 million in Italian political contributions alone. *Id.* at 241 n.15.

72 Charles R. McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 215 (1976).

73 H.R. Rep. No. 95-640, at 4–5 (1977).

74 *Id.*

75 *See* President's Statement on Signing S.305 Into Law, II PUB. PAPERS 2157 (Dec. 20, 1977).

76 *Id.*

77 *Id.*

FCPA provides tough criminal sanctions for U.S. issuers and other entities that commit bribery abroad.[78]

B. *The Provisions of the FCPA*

The FCPA both regulates accounting and prevents bribery by U.S. companies and issuers. On accounting, the FCPA requires issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[79] Issuers must also create a system of internal accounting controls that provide reasonable assurances that transactions have the authorization of management.[80] A person or corporation will be criminally liable under this statute if there is a knowing circumvention or failure to implement a system of internal accounting controls, or knowing falsification of any book, record, or account.[81]

In addition, the FCPA criminalizes the bribery of foreign officials.[82] For the purposes of the FCPA, the elements of bribery are that a U.S. issuer, domestic concern, or any legal person[83] makes use of the means of interstate commerce in furtherance of an offer, payment, promise to pay, or authorization to pay anything of value to any foreign official, foreign political party, or official thereof, or any candidate for foreign political office, or other person, knowing that the payment to that person would be passed on to a foreign official, political party, or candidate.[84] The crime must be for the purpose of corruptly influencing "any act or decision of a foreign official in his official capacity, inducing an action or omission to act in violation of a lawful duty, or securing any improper

---

78 An "issuer" is defined as any entity that issues a security registered pursuant to 15 U.S.C. § 78l under the Securities Exchange Act of 1934. *See* 15 U.S.C. §§ 78dd-1(a), 78m(a) (2006).

79 *Id.* at § 78m(b)(2)(A). The purpose of the accounting and bookkeeping provisions of the FCPA is to allow the SEC to better discover improprieties that would not be as apparent under existing accounting systems. *See* Ned Sebelius, *Foreign Corrupt Practices Act*, 45 AM. CRIM. L. REV. 579, 584 (2008).

80 *See* 15 U.S.C. § 78m(b)(2)(B)(iii).

81 *See id.* § 78m(b)(5). Violations of these accounting provisions can lead to a range of punishments for an employee, from a fine to a prohibition from serving as an officer or director of a public company. Sebelius, *supra* note 79, at 586.

82 15 U.S.C. §§ 78dd-1(a), 78dd(2)(a), 78dd(3)(a).

83 The FCPA's anti-bribery provisions are broader than its accounting provisions in that the anti-bribery provisions apply to issuers. *See* 15 U.S.C. § 78dd-1(a). The anti-bribery provisions also apply to domestic concerns. *See id.* § 78dd-2. A "domestic concern" is defined as "any individual who is a citizen, national, or resident of the United States; and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." *Id.* § 78dd-2(h)(1).

84 *See* 15 U.S.C. § 78dd-1 (2006) (issuers); *id.* § 78dd-2 (domestic concerns); *id.* § 78dd-3 (any person).

advantage."[85] Finally, an offense under the anti-bribery provisions has a knowledge standard: "Knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."[86]

The FCPA is unique in its extraterritorial jurisdiction. The FCPA applies to issuers, domestic concerns, and—since 1998—"any person."[87] As applied to U.S. issuers and persons, there is no requirement of a territorial nexus between the corrupt act and the United States.[88] The FCPA may reach foreign agents and employees who have little contact with the United States.[89] Likewise, the FCPA could create liability for a domestic concern through the actions of one of its foreign agents, even if that agent has no contact with the United States.[90]

The SEC and Department of Justice (DOJ) are responsible for the enforcement of and prosecution under the FCPA.[91] The maximum penalty for a natural person who violates the accounting provisions is a fine of $5,000,000 and imprisonment for up to twenty years.[92] An individual who willfully violates the bribery provisions may face a fine up to $100,000 and five years in prison.[93] The maximum penalty for a corporation for willful violations of the accounting provisions is a fine of $25,000,000.[94] The maximum penalty for a corporation for willful violation of the anti-bribery provisions is a fine of $2,000,000.[95]

C. *The Success of the FCPA*

The FCPA has proven effective in addressing bribery beyond the borders of the United States. Ten years after creating the FCPA, the Senate noted "the significant contribution Congress made in enacting the [statute]."[96] A decade later, President Clinton reaffirmed the importance

---

[85] *Id.* § 78dd-1(a)(1)(A)(i), (2)(A)(i), (3)(A)(i) (issuers); *id.* § 78dd-2(a)(1)(A)(i), (2)(A)(i), (3)(A)(i) (domestic concerns); *id.* § 78dd-3(a)(1)(A)(i), (2)(A)(i), (3)(A)(i) (any person).

[86] *Id.* § 78dd-1(f)(2)(B) (issuers); *id.* § 78dd-2(h)(3)(B) (domestic concerns); *id.* § 78dd-3(f)(3)(B) (any person).

[87] *See* Sebelius, *supra* note 79, at 588–90; *see also* 15 U.S.C. § 78dd-1 (issuers); *id.* § 78dd-2 (domestic concerns); *id.* § 78dd-3 ("any person").

[88] Sebelius, *supra* note 79, at 590.

[89] *Id.*

[90] *See id.* at 590 n.69; *see also* Lucinda A. Low & Timothy P. Trenkle, *U.S. Antibribery Law Goes Global: Standards Tightening Up*, BUS. L. TODAY, July-Aug. 1999, at 16–17 (noting the global expansion of the FCPA under its 1998 amendments).

[91] The SEC has jurisdiction over issuers under 15 U.S.C. § 78u-(a)(1) (2006). The Attorney General has jurisdiction over all other domestic concerns and persons. *See id.* §§ 78dd-2(d), 78dd-3(d).

[92] *Id.* § 78ff(a).

[93] *See* U.S. SENTENCING GUIDELINES MANUAL § 2B4.1 (2009).

[94] 15 U.S.C. § 78ff(a).

[95] *Id.* §§ 78dd-2(g)(1)(A) (domestic concerns), 78ff(c) (issuers).

[96] H.R. Rep. No. 100-576, pt. 1, at 916 (1988).

of the Act, declaring, "We will continue our leadership in the international fight against corruption."[97]

In sharp contrast to the Military Extraterritorial Jurisdiction Act,[98] the DOJ and the SEC have enforced the FCPA with frequency and severity.[99] In recent years, there has been an increase in the number of investigations by the SEC, and both the SEC and DOJ have sought larger penalties.[100] In 2004, for the first time, the SEC required a company to disgorge profits of unlawful FCPA activities; that practice is now routine.[101] More proactively, corporate self-monitoring to ensure FCPA compliance has increased, as has voluntary disclosure arising from corporations' internal investigations.[102] While the FCPA landscape continues to evolve, all signs point to heightened scrutiny and graver consequences for violators.[103]

More promising still, the FCPA has served as a model for both international law and the domestic laws of other nations. While Congress was working on the provisions of the FCPA, it called on U.S. negotiators to seek international cooperation in a variety of fora.[104] As early as 1975—two years before passing the FCPA—the United States was able to convince the Organization of American States to condemn bribery, though that resolution "provided no mechanism for enforcement."[105] In that same year, the United Nations General Assembly adopted a resolution against bribery, but its Economic and Social Council declined to outlaw corrupt payments in international trade.[106]

After the FCPA's passage, and through the efforts of the United States, the Ministerial Council of the Organization for Economic Cooperation and Development (OECD) passed a resolution against bribery, encouraging member countries to revise their laws and regulations to

---

97 Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, II PUB. PAPERS 2011 (Nov. 10, 1998).

98 *See* Hurst, *supra* note 59, at 1316 & n.53 (discussing the lack of enforcement of MEJA).

99 *See* Danforth Newcomb, *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977 (as of June 26, 2007)*, *in* THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH HEIGHTENED ENFORCEMENT RISKS: FALL 2007 at 385–94 (PLI Corp. L. & Prac. Course Handbook Series No. 1619, 2007) (providing summary of foreign bribery prosecutions under FCPA).

100 *See id.* at 388–89.

101 *Id.* at 388.

102 *Id.* at 392–93.

103 *Id.* at 394.

104 *See* Brown, *supra* note 69, at 259–62.

105 *Id.* at 262.

106 *Id.* at 262–63.

discourage bribery.[107] The OECD's Committee on International Investment and Multinational Enterprises issued a list of recommendations that set forth "concrete and meaningful steps" to address bribery.[108] The OECD adopted those recommendations and established mechanisms for monitoring compliance and for enforcement; it also encouraged its members to "assert aggressively their territorial jurisdiction and nationality jurisdiction to better combat bribery."[109] This position marked a "sweeping change in the way the industrialized countries of Europe regarded international bribery."[110] Since then, there has been "a decade of remarkable international activity aimed at combating official corruption."[111] Much of this international activity arises from the efforts of American corporations, which have found an incentive in leveling the regulatory playing field worldwide: the FCPA has thus leveraged American corporations on the side of fighting bribery. In all, the difference in treatment of anti-bribery agreements before the FCPA and after could not be starker.

Although many scholars have doubted the future positive impact of the Foreign Corrupt Practices Act,[112] the Act's history has proven its effectiveness. By matching anti-corruption aspirations with the hard enforcement power of a state, the FCPA has created a snowball effect of anti-corruption measures around the world.[113] Once Congress enacted the FCPA and made it a focus of international relations, the OECD was willing to take a hard stance on the issue; the OECD position further encouraged other nations to craft domestic laws against bribery; this in turn has led to a proliferation of anti-corruption treaties.[114] By enacting the FCPA, Congress created a global dialogue on corruption that is leading to hard legal mechanisms around the world.[115] The success of the FCPA on the global stage provides yet another rebuttal to Professor Ratner's argument for an international solution to corporate abuses: international law only becomes effective after lawmakers codify it into do-

---

107 *See id.* at 264–67; *see also* Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, 102 Stat. 1121, 1988 U.S.C.C.A.N. 1424–25 (codified as amended at 19 U.S.C. §§ 2901–06 (2006)) (urging the President to pursue an agreement with members of OECD).

108 Brown, *supra* note 69, at 265 (internal citation omitted).

109 *Id.* at 265, 268.

110 *Id* at 268.

111 Cecil Hunt, *Recent Multilateral Measures to Combat Corruption*, SN056 ALI-ABA 227, 232 (2008).

112 *See, e.g.*, Christopher L. Hall, *Foreign Corrupt Practices Act: A Competitive Disadvantage, But for How Long?*, 2 TUL. J. INT'L & COMP. L. 289, 303–06 (1994) (summarizing criticisms that the FCPA has imposed a competitive disadvantage on U.S. firms). *But see id.* at 302 (noting that "[i]t is impossible to know with certainty the effects of the FCPA on United States business abroad").

113 *Id.* at 311.

114 *See* Hunt, *supra* note 111.

115 *See* Hall, *supra* note 112, at 312.

mestic law. To legislate through international law alone would only lead to ineffective resolutions without any enforcement mechanisms of their own.

III. THE FCPA DISCONNECT: THEORY AND HISTORY

A. *The Theoretical Disconnect*

For all the FCPA's success in combating bribery, it is also the source of a conundrum. Although Congress enacted the FCPA to prevent "ethically repugnant" behavior by corporations, the Act ignores human rights abuses while throwing the book at corporate fraud. Had Blackwater officials knowingly changed the figures in its accounting books, the corporation would face a fine of up to $25,000,000 and its employees could spend up to twenty years in jail.[116] But as it happens, because Blackwater guards wrongfully killed seventeen civilians and undermined U.S. interests in Iraq, they and their corporation find themselves in a legal loophole with no certain criminal liability.[117] It is not hard to see that there is a disconnect in the extraterritorial law of the United States. While U.S. law severely punishes the relatively harmless act of accounting fraud, it offers no remedy for a corporation's acts of brutal violence. This part will explain the origins of this disconnect.

From the beginning of corporations under Roman law to the rise of the nation-state, there has been a tension between business corporations and the government. Through a series of conflicts with corporations, nations such as Britain and the United States have managed to curtail the power of corporations within their own borders. They have so managed their corporations that their corporate laws are more concerned with accounting fraud than with murder. Problems ensue when, in the context of globalization, corporations creep into countries unaccustomed to the tensions between corporations and government—or at least with corporations of such magnitude—and those problems manifest themselves in ways like the Blackwater problem. Fortunately, the history of the relationship between corporations and government provides a key to solving these more recent problems.

---

116 *See* discussion *supra* Part II.C.

117 *See* discussion *supra* Part I. The irony is that Blackwater may eventually face charges for the bribery that it allegedly committed in the aftermath of Nisour Square. *See* Mark Mazzetti & James Risen, *Blackwater Said to Pursue Bribes to Iraq After 17 Died*, N.Y. TIMES, Nov. 11, 2009, at A1.

B. *The Historical Conundrum*

Much of the tension between corporations and government derives from their common origin in Roman law.[118] One finds the first examples of non-human entities entitled to certain rights in Ancient Rome. Although many of these early corporations were private groups such as trade guilds and burial societies, they also included civic institutions, such as municipalities and even the Senate and the People of Rome.[119] In all cases, these entities had many of the privileges of a real person: they could own property, inherit legacies, and appear in legal proceedings.[120] They thus prove to be the forerunner of the modern corporation—both the corporation for business and that for government.

The common history of corporations and government leads to a conundrum. On the one hand, the state has the power to make laws and punish criminals—it is a very real force in the civic world.[121] On the other, it is a legal artifice—a fiction—and is no different in substance from the many corporations that it regulates.[122] Thomas Hobbes, who perhaps more than anyone else sought to explain the power of the state, helps answer this conundrum by identifying the process of authorization that places the state over all other corporations.[123] Professor Quentin Skinner explains that, for Hobbes, a person is no different from an actor in his ability to stand in for another: "As Hobbes's theory continually reminds us, *persona* is, in Latin, the ordinary word for a theatrical mask."[124] As such, a natural person can authorize someone else to represent him.[125] Hobbes writes that "a *person*, is the same that an *actor* is, both on the stage and in common conversation; and to *personate* is to *act*, or *represent* himself, or another; and he that acteth another, is said to bear his person, or act in his name . . . ."[126] Hobbes applied this idea of representation to the concept of state power.[127]

---

118 Blackstone writes that the credit of inventing the corporation "entirely belongs to the Romans." F.W. MAITLAND, STATE, TRUST AND CORPORATION 10 (David Runciman & Magnus Ryan eds., Cambridge Univ. Press 2003) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES 469).

119 *See* ANDREW BORKOWSKI, TEXTBOOK ON ROMAN LAW 76–78 (1994).

120 *See id.*

121 *Id.*

122 *Id.*

123 *See* 3 QUENTIN SKINNER, VISIONS OF POLITICS: HOBBES AND CIVIL SCIENCE 182 (Cambridge Univ. Press 2002).

124 *Id.* at 182.

125 *See id.* at 181–83.

126 THOMAS HOBBES, LEVIATHAN 106–07 (J.C.A. Gaskin ed., Oxford Univ. Press 1998) (1651).

127 *See id.* at 111–15; *see also* SKINNER, *supra* note 123, at 201–03.

Once someone authorizes another to act for him, he gives up his rights to that representative.[128] For Hobbes, there is no equivocating on this point: "When a man hath in either manner abandoned, or granted away his right; then he is said to be OBLIGED, or BOUND, not to hinder those, to whom such right is granted, or abandoned, from the benefit of it . . . ."[129]

Such absolute rule through representation is necessary to avoid the natural divisions present in mankind, "[f]or it is the *unity* of the representer, not the *unity* of the represented, that maketh the person *one*."[130] It is thus by authorizing the state to rule over them that citizens place all persons, real and artificial, under the state's absolute rule.[131]

C. *The Age of the Trading Companies*[132]

Since the state has become the dominant force in the modern era, it is easy to forget that it is merely one of several types of corporations. For all its power, the state remains a distant relative of the business corporation, or as F.W. Maitland puts it, "a genus of which State and Corporation are species."[133] There have been times that states have been so weak, or business corporations have been so strong, that such corporations have supplanted the state altogether.[134] Not long after Hobbes articulated the source of a state's power, private corporations posed their first challenge to state authority.[135] Beginning in the seventeenth century, European trading monopolies operating in India, North America, and Africa formed the foundations of private empires.[136] Although the British Crown chartered many such trading companies with an aim of facilitating colonialism, these corporations often operated with a will of their own.[137] Left to themselves in distant outposts, they took on all the

---

128 *See* HOBBES, *supra* note 126, at 88.

129 *Id.* Skinner explains that once you have formed a covenant with another, "you must leave it to your representative, who is now in possession of your right of action, to exercise it at his discretion when acting in your name." SKINNER, *supra* note 123, at 186.

130 HOBBES, *supra* note 126, at 109. The natural state of man without this powerful representative is, of course, "solitary, poor, nasty, brutish and short." *Id.* at 84.

131 *See* SKINNER, *supra* note 123, at 198–203.

132 The joint-stock trading company is a useful example because it is in many ways the model for the modern multinational. *See* NICK ROBINS, THE CORPORATION THAT CHANGED THE WORLD: HOW THE EAST INDIA COMPANY SHAPED THE MODERN MULTINATIONAL 22 (Pluto Press 2006); *see also id.* at 18 ("If we are to fully understand our corporate present, then we must understand our corporate past . . . .").

133 MAITLAND, *supra* note 118, at 1.

134 *See, e.g.*, PHILIP LAWSON, THE EAST INDIA COMPANY: A HISTORY 86–102 (Longman 1993).

135 *See* ROBINS, *supra* note 132, at 23; *see also* J.R. SEELEY, THE EXPANSION OF ENGLAND, 165–70 (John Gross ed., Univ. of Chicago Press 1971) (1883).

136 *See* ROBINS, *supra* note 132, at 23.

137 *See* SEELEY, *supra* note 135, at 168.

trappings of a proper state, more closely resembling the governments that purportedly regulated them than an ordinary business corporation.[138]

In understanding the role of the trading companies in their respective territories, it is important to consider what qualifies as state action. Under the traditional sociological definition—a definition of particular significance for the Blackwater problem—a state is that "which holds a '*monopoly of legitimate physical violence* within a certain territory.'"[139] The history of the most famous trading companies proves that they were more than mere businesses, but were closer to actual quasi-states that held a monopoly of legitimate physical violence as well as many of the other characteristics of a state.

1. The Honourable East India Company

The most famous of the giant trading companies, the Honourable East India Company (HEIC), began in 1600, at the end of Elizabeth I's reign.[140] At its foundation, the HEIC was a joint-stock company whose purpose was to trade English goods and gold for spices from the East Indies.[141] After nearly two centuries of such a trade, the HEIC had transformed itself into a political and territorial power of its own.[142]

Left to itself in India, the HEIC created an environment suited to its trade. More than anything else, such an environment required security, and in the face of aggressive French rivals and Mogul rulers, this required troops and diplomacy.[143] For troops, the HEIC recruited locally, and by 1765, the Company had an army of 9,000 Indians, grouped into at least seven battalions, led by English and Indian officers.[144] One historian has identified the source of the Company's dominance in India—echoing Max Weber—as its "exclusive right to violence."[145]

---

138 *See* LAWSON, *supra* note 134, at 104–06; *see also* SEELEY, *supra* note 135, at 168–69.

139 MAX WEBER, POLITICAL WRITINGS 310–11 (Peter Lassman & Ronald Speirs eds., Cambridge Univ. Press 1994). In his lecture on "The Profession and Vocation of Politics," Max Weber set out his enduring sociological definition of the state, a definition that he approaches from the perspective of means (*Mittel*). *Id.* at 310. "Violence," Weber argues, "is, of course, not the normal or sole means used by the state. There is no question of that. But it is the means *specific* to the state." *Id.*; *see also* James Q. Whitman, *Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence*, 39 TULSA L. REV. 901, 920 (2004) (noting that Weber wrote this in the context of associations competing with the state).

140 *See* LAWSON, *supra* note 134, at 5.

141 *Id.* at 20.

142 *Id.* at 86.

143 *See id.* at 89–93; ROBINS, *supra* note 132.

144 STEPHEN P. COHEN, THE INDIAN ARMY 8 (Univ. of Cal. Press 1971); *see also* SEEMA ALAVI, THE SEPOYS AND THE COMPANY: TRADITION AND TRANSITION IN NORTHERN INDIA, 1770–1830 43–44 (Oxford Univ. Press 1995) (describing the popularity of the payment and pension structure of the Company army).

145 ALAVI, *supra* note 144, at 3 (internal citation omitted).

In tandem with its military force, the HEIC employed a heavy amount of diplomacy, often inserting itself into the Mogul power structure.[146] Robert Clive, the HEIC's Commander-in-Chief in India,[147] took the position of a *jagirdar*, a military command rank that came with a small territory and its tax revenues.[148] Eventually, through Clive's skillful use of his army and his Mogul allies, the Company took control of three imperial provinces, including Bengal.[149] As one contemporary noted, "This Empire has been acquired by a Company of Merchants . . . ."[150]

Not surprisingly, the British Parliament was wary of "a great empire being created and ruled by Britons independent of the authority of the British cabinet."[151] One nineteenth century historian wondered: "May we not feel tempted to exclaim that it was an evil hour for England when the daring genius of Clive turned a trading company into a political Power, and inaugurated a hundred years of continuous conquest?"[152] Thus, between 1773 and 1858, Parliament set about taking back some of that political power,[153] finally determining where "Company responsibilities ended and those of the British government began."[154]

To assert itself against the HEIC, Parliament introduced a number of bills regulating practices in India itself.[155] First, Prime Minister Pitt passed the India Act of 1784, which allowed the King to appoint a Board of Control that would supervise the civil and military government of the HEIC.[156] The Act thus subordinated any political conduct of the Company to the national government.[157] Subsequent acts in 1813[158] and 1833[159] generally boosted the role of the British government at the expense of the Company. Finally, in 1858, in response to the Company's inadequate response to India's Great Rebellion, the Crown took control of governing India once and for all.[160]

At the same time that Parliament was stripping the HEIC of most of its political power, the British courts struck a blow of their own at the

---

146 *See* LAWSON, *supra* note 134, at 105–08.
147 *Id.* at 105.
148 *Id.* at 93.
149 *Id.* at 106.
150 *Id.*
151 C.H. PHILIPS, THE EAST INDIA COMPANY: 1784–1834 23 (2d ed., Oxford Univ. Press 1961).
152 SEELEY, *supra* note 135, at 153.
153 *See* LAWSON, *supra* note 134, at 120–25.
154 *Id.* at 117.
155 *Id.* at 120; *see also* PHILIPS, *supra* note 151, at 33–34.
156 PHILIPS, *supra* note 151, at 33–34.
157 *See id.*
158 *See id.* at 195.
159 *See* LAWSON, *supra* note 134, at 159.
160 *See id.* at 160–62.

political power of corporations: in 1846, the courts first applied the ultra vires doctrine.[161] The doctrine limited corporations to the enumerated activities that their charters laid out for them; outside of those activities, the corporations were literally powerless.[162] Justice Brandeis later explained, in relation to American corporations, that by restricting corporations to certain enumerated activities, the state could limit corporations' economic power and societal influence.[163] The ultra vires doctrine thus reflected "society's wariness of large aggregations of economic power," and it served the state's interest in keeping each corporation "within the narrow bounds of specific activity."[164]

2. The Hudson's Bay Company

In the same century that Elizabeth I chartered the Honourable East India Company, Charles II chartered the Hudson's Bay Company (HBC) and made its first directors "true lords and proprietors" of all the sea and lands of Hudson Bay in present day Canada.[165] Like the East India Company, the HBC formed an empire out of its holdings and its fur trade.[166] Also like the East India Company, the HBC founded its empire on security,[167] designing its settlements on a defensive model, complete with redoubts, parapets, and cannons.[168] Within the walls of these forts, and under the HBC flag, the Company maintained a martial spirit based

---

161 *See* Colman v. E. Counties Ry. Co., (1846), 10 Beav. 1, 50 Eng. Rep. 481, 486 (Rolls Ct.); *see also* Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1302–03 (2001) (discussing the history and significance of the ultra vires doctrine).

162 *See* Stephen J. Leacock, *The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience Over Logic*, 5 DEPAUL BUS. & COM. L.J. 67, 76 & n.52 (2006); *see also* Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 799 (2005) ("The *ultra vires* doctrine represented the ability of the state to require corporations to adhere to their charter . . . .").

163 *See* Greenfield, *supra* note 161, at 1302; *see also* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 549 (Brandeis, J., dissenting) ("There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.").

164 Greenfield, *supra* note 161, at 1302–03.

165 1 PETER C. NEWMAN, COMPANY OF ADVENTURERS 84 (Penguin Books 1985) [hereinafter NEWMAN, ADVENTURERS] (quoting the HBC charter of 1670).

166 *Id.* at 2.

167 *See* RAYMOND CALLAHAN, THE EAST INDIA COMPANY AND ARMY REFORM, 1783–1798 39 (Harv. Univ. Press 1972) ("[T]he Company's power rested upon its army."). For a general discussion of the East India Company's reliance on this private army, see *id.* at 1-13. *See also* Carl T. Bogus, *Rescuing Burke*, 72 Mo. L. Rev. 387, 435–36 (2007) (explaining that, by the late eighteenth century, the army had grown to 60,000 soldiers).

168 *See* NEWMAN, ADVENTURERS, *supra* note 165, at 167 (noting also that despite the HBC's militaristic objectives, its forts were often poorly designed to deflect enemy attack. One fort boasted a moat with a fixed bridge running over it, while in others firewood was stacked close to wooden walls that could be easily set ablaze).

on practices taken from the Royal Navy.[169] So complete was the HBC's hold over its men that it maintained its own calendar, based on its inception in 1670, rather than the birth of Jesus of Nazareth.[170]

With these forts as its base, the HBC routinely dealt in violence within its territories. Following a bloody skirmish,[171] it waged a war against its chief rival, the Montreal-based Northwest Company,[172] a war that included code[173] and mercenaries.[174] The prolonged guerilla warfare was so violent and unrestrained that on May 1, 1817, the Governor-in-Chief of Canada issued a royal proclamation against "open warfare in the Indian Territories."[175]

Although the war with its corporate rival was fierce, the HBC's use of violence against the local tribes was fiercer still. In one telling incident, in 1828, certain Puget Sound natives killed an HBC employee.[176] The local HBC officer, Dr. John McLoughlin, sent a party by boat and another by land to attack the natives' village.[177] Together, the two parties burnt the village and killed twenty-one natives; the families of those killed executed the murderers themselves in order to placate the HBC's death squads.[178] In all, McLoughlin writes, "the whole expedition was most judiciously conducted . . . ."[179] This incident was not unique. It

---

169 *See id.* at 169–73. Unfortunately, the HBC's success in conditioning militancy in its employees fared no better than its construction of forts; participation in drills depended largely on local conditions and the militancy of the local officers. *Id.* at 167. True *espirit de corps* existed among only "the best Bay men." *Id.* at 169. To encourage appropriate militancy in its remaining employees, the HBC awarded cash payouts to those injured in battle: £30 was paid for any employee who lost an arm or a leg in defense of a fort. *Id.* at 167.

170 See *id.* at 172 n.2.

171 *See* 2 PETER NEWMAN, CAESARS OF THE WILDERNESS 174–75 (Penguin Books 1987) [hereinafter NEWMAN, CAESARS].

172 *See id.* at 175–76.

173 *Id.* at 184.

174 *Id.* at 176–77.

175 *Id.* at 176. Not surprisingly, the war ended with the merger of the two companies in 1821. *Id.* at 207.

176 *See id.* at 285–87.

177 *Id.*, *see also* Letter from John McLoughlin to Governor, Deputy Governor, and Committee of the Hudson's Bay Company (July 10, 1828), *in* 4 JOHN MCLOUGHLIN, THE LETTERS OF JOHN MCLOUGHLIN FROM FORT VANCOUVER TO THE GOVERNOR AND COMMITTEE, FIRST SERIES, 1825–38 57–58 (E. E. Rich ed., 1941) ("[I]t is for our personal security that we should be respected by them [the natives], & nothing could make us more contemptible in their eyes than allowing such a cold blooded assassination of our People to pass unpunished . . . .").

178 NEWMAN, CAESARS, *supra* note 171, at 285–87. For a full explanation of the exploit, see Letter from John McLoughlin to Governor, Deputy Governor, and Committee of the Hudson's Bay Company (undated), *in* LETTERS OF JOHN MCLOUGHLIN, *supra* note 177, at 63–66 [hereinafter MCLOUGHLIN, Undated Letter].

179 MCLOUGHLIN, Undated Letter, *supra* note 178, at 65.

was through such acts as this that Hudson's Bay Company officials established their brand of justice throughout their territories.[180]

At the same time that the HBC was establishing its control over the tribes of the Pacific Northwest, the territory itself had become a source of conflict between British and American diplomats.[181] The Americans claimed ownership of the Oregon Country through first discovery and settlement; the British countered by asserting, among other things, the right of occupancy, pointing to the presence of the HBC, a British company.[182] Stuck in a stalemate, in 1827, the two countries agreed to renew the Joint Occupancy Treaty of 1818.[183]

Sharing the land between these two powers, however, could not last. For British diplomats, the aim in any treaty negotiation was to hold on to as much territory as possible.[184] Fittingly, the British foreign secretary from 1822–1827 was George Canning, "a true disciple of Pitt, an intense nationalist and imperialist."[185] It is no surprise then that, on the Oregon Question, Canning advocated for "the undisputed Possession of the whole Country on the Right Bank of the Upper Columbia, and a free issue for its Produce by the Channel of that River."[186]

The HBC was of no help to the British in furthering such ambitions. Against British interests, the HBC advanced American claims to the area by directly aiding American settlers and explorers in the greater North-

---

180 *See, e.g.*, NEWMAN, CAESARS, *supra* note 171, at 285–87 (describing a deadly "melee" that followed McLoughlin's dispatch of an armed schooner to meet a Clatsop chief who had refused to cooperate with recovery of goods from a shipwreck).

181 *See* 1 CHARLES HENRY CAREY, HISTORY OF OREGON 455–56, 467–75 (Pioneer Historical Publ'g Co. 1922). The prior settlement by treaty of Spanish and Russian claims had, by 1825, given rise to America and Great Britain's territorial dispute over rights to the land west of the Rocky Mountains. The British also contested the American theory of title by prior discovery, claiming that it was based on the "casual voyage of a trading vessel." *See id.* at 472.

182 *See id.* at 470–72.

183 *See id.* at 478.

184 For example, during negotiation of the Treaty of Ryswick (1697), British and French diplomats agreed to uphold the doctrine of *ubi possidetis*, or "the territory remains with the possessor at the end of the conflict." *See* TRAVERS TWISS, OREGON TERRITORY, ITS HISTORY AND DISCOVERY 150 (D. Appleton & Co. 1846).

185 FREDERICK MERK, ALBERT GALLATIN AND THE OREGON PROBLEM: A STUDY IN ANGLO-AMERICAN DIPLOMACY (Harv. Univ. Press, 1950), *reprinted in* THE OREGON QUESTION: ESSAYS IN ANGLO-AMERICAN DIPLOMACY AND POLITICS 99, 155 (Am. Hist. Ass'n 1967). The London *Times* described Canning as "an eloquent expounder and advocate of that policy which fixed a lever on every foreign soil whereby to raise the British empire to honour and prosperity." *Id.* (quoting TIMES (London), Oct. 16, 1827, at 3).

186 JOHN S. GALBRAITH, THE HUDSON'S BAY COMPANY AS AN IMPERIAL FACTOR 180 (Univ. of Cal. Press 1957) [hereinafter GALBRAITH, HUDSON'S BAY COMPANY] (quoting letter from Canning to British Commissioners, May 31, 1924). Canning and the HBC agreed that the territory between the Columbia River and the forty-ninth parallel, as well as access to the river, were critical to the British fur trade and communication between posts. *Id.*

west, albeit in exchange for a healthy profit.[187] Trading posts such as Idaho's Fort Hall provided settlers with necessary food and supplies.[188] In its Pacific Northwest post of Fort Vancouver, the HBC set up sawmills, flourmills, and farms.[189] Stories abound of Oregon settlers expressing debts of gratitude for these amenities.[190] Of course, the HBC was motivated by the business that these new settlers offered the outpost.[191] At Fort Hall, for example, the fort's Chief Trader realized the potential business from those crossing the Oregon Trail.[192] Between 1842 and 1851, the post recorded sizeable profits in the sale of flour, rice, coffee, sugar, and other staples to these American immigrants.[193] For Dr. McLoughlin, Chief Factor of Fort Vancouver, it was certain "that the Company's future would be best served by his sometimes costly efforts to treat the growing influx of settlers as potential customers rather than unwanted pests."[194] Although this reasoning may have helped the Company's balance sheets, it did not serve the British government's attempt to hold on to its territory in the Oregon Country.[195]

By facilitating the American settlement of Oregon, the Hudson's Bay Company dealt a mortal blow to Britain's claim to the territory. Around the 1840s, Americans began to make up a sizeable presence in

---

187 *See* 2 E. E. RICH, HUDSON'S BAY COMPANY: 1670–1870 171 (Macmillan 1959) ("[B]y 1844 [McLoughlin] had lent goods and seed to the amount of over six thousand pounds upon very little security."); NATHANIEL J. WYETH, THE JOURNALS OF CAPTAIN NATHANIEL J. WYETH 22 (Ye Galleon Press 1969) (1899) ("[S]topped at a saw mill belonging to the H. B. Co. . . . . [W]e were treated by [the company director] with the greatest kindness. He gave us moc[c]asins and food in plenty.").

188 *See* GALBRAITH, HUDSON'S BAY COMPANY, *supra* note 186, at 108 (describing HBC profits from the sale of basic supplies to American settlers at Fort Hall).

189 NEWMAN, CAESARS, *supra* note 171, at 285.

190 *See, e.g.*, WYETH, *supra* note 187, at 22 ("I was received with the utmost kindness and Hospitality by Doct. McLauchland [McLoughlin] the acting Gov. of the place. . . . Our people were supplied with food and shelter from the rain . . . .").

191 GALBRAITH, HUDSON'S BAY COMPANY, *supra* note 186, at 108.

192 *Id.*

193 *Id.*

194 NEWMAN, CAESARS, *supra* note 171, at 289–90. There is some disagreement as to McLoughlin's motives for dealing with the American settlers. One view portrays him as an administrator more concerned with "acting according to the dictates of his conscience" than "fattening the Company's balance sheets." *Id.* He did violate HBC policy by extending credit to needy Americans, however, McLoughlin's aid to Americans can also be seen in an economic or pragmatic light. *See, e.g.*, RICH, *supra* note 187, at 717; Frederick Merk, *The Oregon Pioneers and the Boundary*, *in* AMERICAN HISTORICAL REVIEW XXIX (July 1924), *reprinted in* THE OREGON QUESTION, *supra* note 185, at 235, 247–48 [hereinafter Merk, *Pioneers*] (suggesting McLoughlin provided American parties with resources primarily to prevent ill-will that could lead to hostile, even violent interactions with the HBC); *see also* GALBRAITH, HUDSON'S BAY COMPANY, *supra* 186, at 190 ("McLoughlin's preoccupation was with trade . . . . He was devoted to the enlargement of profits for his Company and himself, and his actions in Oregon were dominated by a mercantile motivation.").

195 *See* RICH, *supra* note 187, at 737–38.

the Oregon Country, particularly south of the Columbia River.[196] Their growing presence tipped the diplomatic scales sufficiently that the United States had a solid claim to the entire Oregon Country, aiding the government in its boundary dispute with the British.[197] By June 15, 1846, both governments agreed to a border on the forty-ninth parallel, thus leaving the United States with all of modern-day Oregon and Washington.[198] In aiding the aggressive American settlement of Oregon, the HBC helped the United States acquire all of the Oregon Country, far more territory than the British had been willing to cede in previous diplomatic negotiations.[199]

As American pioneers built up their own settlements and institutions, the HBC lost much of its advantage in the area.[200] Shortly after the 1846 treaty, the U.S. government extinguished all the private property rights of the Hudson's Bay Company and its subsidiaries.[201] In British Columbia, however, the Company still maintained its position as the

---

196 *See* Merk, *Pioneers*, *supra* note 194, at 236 (stating that 5,000 Americans had settled in the Oregon Country by 1846); RICH, *supra* note 187 at 717 (noting large immigrations in 1843–45 and the subsequent influx of American traders). It would be difficult for the HBC to claim ignorance that aiding American settlers would in turn advance American claims to the region. Prior to the War of Spanish Succession, the HBC had challenged French claims in Canada on the grounds that the French had acquiesced on their title by discovery because they had not properly settled the territory. *See* TWISS, *supra* note 184, at 125. As such, the 1713 Treaty of Utrecht ceded all French claims to the Company's territory. *See id.* at 148–49.

197 *See* GALBRAITH, HUDSON'S BAY COMPANY, *supra* note 186, at 177 ("The influx of [American] settlers was certainly a factor in the final decision [to accept the United States' demands in the boundary dispute]."). The presence of American settlers cannot alone account for this territorial acquisition. *See, e.g.*, RICH, *supra* note 187, at 717 ("It has been maintained, probably with justification, that the Oregon frontier was settled by the climate of American politics, not by the number of immigrants."). However, a long-standing view, and certainly the one advanced by the Oregon settlers themselves, was that American possession of the territory shaped the final settlement with the British. *See* Merk, *Pioneers*, *supra* note 185, at 234 ("It is a truism in American history that the success of the United States in the Oregon boundary negotiations was due in considerable measure to the Oregon pioneers. They brought pressure to bear on the British government during the final stages of the Oregon negotiations, and this was a factor in winning for their country the empire of the Pacific Northwest.").

198 *See* CAREY, *supra* note 181, at 495. While a mainland border along the forty ninth parallel was agreed to in 1846, the British and Americans continued to dispute sovereignty over the channel islands lying between the mainland and Vancouver Island. This dispute was not resolved until 1872, when an arbitrator ruled that several islands occupied by British military forces should be ceded to the United States. *See id.* at 494–96.

199 *See, e.g.*, GALBRAITH, HUDSON'S BAY COMPANY *supra* note 186, at 177–91; Merk, *Pioneers*, *supra* note 185, at 234–44; NEWMAN, CAESARS, *supra* note 171, at 287. *See generally* CAREY, *supra* note 181, at 454–57 (detailing Britain's wish to maintain a border on the Columbia River).

200 GALBRAITH, HUDSON'S BAY COMPANY, *supra* note 186, at 226–29.

201 In 1869, the U.S. government determined that an award of $650,000 was proper for extinguishing the private property rights of the HBC and its subsidiaries after the Treaty of 1846. *See* CAREY, *supra* note 181, at 279.

ultimate authority.[202] In 1849, the HBC acquired a lease to all of Vancouver Island, and in 1851, the British government appointed an HBC officer, James Douglas, as the governor of Victoria.[203]

The HBC had managed Vancouver Island for a little less than a decade when a gold rush in 1858 dramatically increased British interest in the region. In that year, 30,000 prospectors passed through British Columbia.[204] Governor Douglas' monopolistic control over the miners' transportation and goods, under color of law, confirmed British suspicions that Douglas was a Company man first, and for the first time, the British government no longer considered HBC rule adequate for the administration of the territory.[205] Shortly thereafter, on August 2, 1858, the House of Commons named British Columbia a Crown colony, ending the HBC's exclusive trading rights in the area.[206] Parliament presented the local HBC governor with the provincial governorship on the condition that he organize a council, eventually hold elections for an assembly, and relinquish his position in the HBC.[207] In place of perpetual Company rule, Vancouver had its first democratic institutions; meanwhile, the HBC gradually gave up its strong-armed politics for a chain of Canadian retail stores.[208]

3. The British South Africa Company

After the sun finally set on HBC's empire, Cecil Rhodes introduced its same principles of governing to southern Africa in the form of the British South Africa Company (BSAC).[209] In its business operations, the BSAC operated as a giant concessionaire, producing little on its own and deriving work and profits from subcontractors.[210] In this business, the

---

202 *See* NEWMAN, CAESARS, *supra* note 171, at 309; *see also* RICH, *supra* note 187, at 787–96 (describing the Company's relationship with the British government).

203 RICH, *supra* note 187, at 762 (explaining that rather than the result of an alliance between the British government and the Hudson's Bay Company, the appointment of James Douglas was primarily an act of desperation: "Douglas' interests were, at this stage, unmistakably those of the Company, of the fur trade, and of Victoria as a port and depot rather than the broader aspects of settling the whole island. The basic fact was that no-one but the Company would undertake the commitment.").

204 NEWMAN, CAESARS, *supra* note 171, at 308–10.

205 "The last straw," one historian writes, "was when Douglas ordered the seizure of any ships selling non-HBC goods." *Id.* at 312.

206 *See* GALBRAITH, HUDSON'S BAY COMPANY, *supra* note 186, at 305; NEWMAN, CAESARS, *supra* note 171, at 308–12.

207 NEWMAN, CAESARS, *supra* note 171, at 312–13.

208 3 PETER C. NEWMAN, MERCHANT PRINCES 156 (Viking 1991).

209 *Compare* JOHN S. GALBRAITH, CROWN AND CHARTER: THE EARLY YEARS OF THE BRITISH SOUTH AFRICA COMPANY 106–27 (Univ. of Cal. Press 1974) [hereinafter GALBRAITH, CROWN AND CHARTER] (describing the administration of the British South Africa Company) *with* NEWMAN, CAESARS, *supra* note 171, at 193–315 (1987) (examining the HBC at the height of its power).

210 *See* GALBRAITH, CROWN AND CHARTER, *supra* note 209, at 122.

BSAC faced little regulation from the British government and had a free hand in its dealings with African peoples.[211]

Although the ultra vires doctrine had changed the law for joint-stock companies,[212] the BSAC established its presence in southern Africa through the same use of violence that characterized the East India and Hudson's Bay Companies.[213] The BSAC established the British South Africa Police, which was, in actuality, the company's standing army.[214] With this army at its disposal—and the revolutionary new Maxim gun[215]—the BSAC could intervene in local tribal disputes to maintain order and legitimize its authority, much as the Hudson's Bay Company did in the Pacific Northwest.[216] From time to time, the Company could even invade neighboring territories, as it did in Mashonaland[217] and Matabeland.[218]

Initially, the British government supported the BSAC's role in managing southern Africa. In Galbraith's words, this policy was "Imperialism on the cheap"[219] because it furthered "the imperial government's desire . . . to lay claim to territories without accepting the financial burdens of administration."[220] In time, however, tensions grew between the economic interests of the Company and the political objectives of the British Colonial Office.[221] Access to resources and a labor force often dominated BSAC policy, driving it to invade new territories.[222] By contrast, the British government did not appreciate the BSAC's frequent use

---

211 *See id.*

212 *See* Greenfield, *supra* note 161, at 1302.

213 How the BSAC escaped the limits of the ultra vires doctrine is unknown to this author. It may be that the British government turned a blind eye to the practices of the company to suit its own agenda in southern Africa. *See, e.g.*, GALBRAITH, CROWN AND CHARTER, *supra* note 209, at 310. If this is the case, this willful ignorance certainly backfired on the government. *See id.* at 310–39.

214 GALBRAITH, CROWN AND CHARTER, *supra* note 209, at 256. In 1889, this force numbered 480 men, in addition to the cavalry support of Ngwato allies. *See id.* at 143–44.

215 *Id.* at 147; *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1477 n.142 (2009) (touching on the history and revolutionary nature of the Maxim gun).

216 *See* GALBRAITH, CROWN AND CHARTER, *supra* note 209, at 290–92 (explaining the use of summary justice "to overawe a vastly more numerous African population"). Upon killing twenty-one Africans in response to a trade dispute, one commander reported, "I am sure a very wholesome lesson has been given to all the chiefs of the district." *Id.* at 292.

217 *Id.* at 128–53.

218 *Id.* at 287–309. The BSAC began this war because the military system of the Ndebele in Matabeland was "incompatible with the economic objectives of the company." *Id.* at 287.

219 *Id.* at 310. This expression itself indicates that neither the practice of outsourcing nor its problems are anything new in the western world.

220 *Id.* at 311.

221 *See id.* at 310–39.

222 *See id.* at 288 (discussing the Company's search for wealth in both Mashonaland and Matabeleland).

of force.[223] Most importantly, the Colonial Office understood that from an African's perspective, an Englishman who served in the BSAC and an Englishman who did not were indistinguishable.[224] Thus, any brutality or militancy by the BSAC necessarily affected and bound the British government.[225]

As a result of these tensions, the British government finally took control of the colony in 1923, thus eliminating the BSAC's reign that so often conflicted with the government's interests.[226] To replace the unrepresentative and unpopular administration of the British South Africa Company, the settlers created a government of their own in Southern Rhodesia.[227] Although the subsequent history of Rhodesia and Zimbabwe has been far from ideal, the decline of the British South Africa Company did lead to self-rule, democratic institutions, a progressive constitution,[228] and perhaps the nation's best chance at a stable and accountable government.

D. *The Interstate Corporation and the American Solution*

In the early twentieth century, the United States confronted domestically what the British Empire had confronted globally: large, interstate corporations that presented a challenge to the interests of government.[229] Against this new economic reality, the old rural toryism—promoting a return to pre-Civil War economic agrarianism as America's economic ideal—was inadequate.[230] Just as with the relationship between the British Empire and its joint-stock companies, the relationship between the national government and big business of the Progressive Era teaches a valuable lesson in regulation: the state can only preserve the place of its

---

223 *See, e.g.*, GALBRAITH, CROWN AND CHARTER, *supra* note 209, at 182–83 (describing Rhodes's refusal to end aggressive action against the Portuguese, despite the Foreign Office's acknowledgement of the Portuguese claim); *id.* at 292 (discussing government displeasure with the disproportionate violence used by the BSAC against Africans); *id.* at 302–04 (noting the general ineffectiveness of British officials in restraining the BSAC during the Matabele War).

224 *See id.* at 303.

225 *See id.* In much the same way, India's Great Rebellion against the HEIC turned into a race war in which Indian forces tried to wipe out all Europeans. *See* LAWSON, *supra* note 134, at 161. Thus, decisions by the HEIC affected not only the British government, but Europe as a whole.

226 *See* ALAN MEGAHEY, HUMPHREY GIBBS: BELEAGUERED GOVERNOR 19 (Oxford Univ. Press 1998).

227 LAWRENCE VAMBE, AN ILL-FATED PEOPLE: ZIMBABWE BEFORE AND AFTER RHODES 160–61 (Heinemann 1972).

228 *See id.* at 164.

229 *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 211, 217 (Harv. Univ. Press 1998).

230 *See id.*

democratic institutions against new concentrations of private power by growing its own state power.

The first great chapter in the history of American corporations is the end of the Civil War, when "[a] lively, even a frenzied, outburst of industrial, commercial, and speculative activity followed hard upon the restoration of peace."[231] Although these changes brought the benefits of modernization to America, they also brought its many problems.[232]

In such economic growth, there is what Herbert Croly called "an entangling alliance between a wholesome and a baleful tendency."[233] Out of these conditions emerged new political forces that promoted corruption and social disintegration.[234] New characters such as the industrialist millionaire, the urban party "Boss," the union laborer, and the lawyer "all [took] advantage of the loose American political organization to promote somewhat unscrupulously their own interests, and to obtain special sources of power and profit at the expense of a wholesome national balance."[235]

Faced with such a situation, the United States could not rely on its familiar Jeffersonian philosophy of asserting the freedom of its institutions against the new domination of private interests.[236] By leaving each American to his own liberty, the prevalent philosophy of individualism and self-reliance had neglected to protect the public interest from the forces of industrialization.[237] Reformers such as Croly could "no longer expect the American ship of state by virtue of its own righteous framework to sail away to a safe harbor in the Promised Land."[238]

In place of this drift, the United States needed a new political efficiency that would look out for the people's interests while also respecting democratic rule.[239] Applying this new philosophy, the solution was to grow the national government so that it could properly preserve democracy—more attention to "[f]ederal responsibilities and the increase of their number and scope, is the natural consequence of the increasing concentration of American industrial, political, and social life."[240] Following what Hobbes theorized and what Croly observed, one might con-

---

231 HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 101 (Arthur M. Schlesinger, Jr. ed., Harv. Univ. Press 1965) (1909).

232 *See id.* at 110–26.

233 *Id.* at 114–16.

234 *See id.* at 138.

235 *Id.*

236 *Id.* at 152–54.

237 *See id.* (arguing for the Hamiltonian principle of national political responsibility over the then-prevalent Jeffersonian principle of individualism).

238 *Id.* at 152–53.

239 *See id.* at 153–44.

240 *Id.* at 274.

clude that a large state presence would be necessary to defend the public interest from more dangerous private forces.[241]

The political figure who most took Croly's nationalist philosophy to heart was Theodore Roosevelt. Roosevelt set out his position in his "New Nationalism" speech, which he delivered on August 31, 1910, in Osawatomie, Kansas.[242] Echoing Croly's words, Roosevelt declared, "Our country—this great republic—means nothing unless it means the triumph of a real democracy, the triumph of popular government . . . ."[243] Roosevelt identified the danger of the "sinister influence or control of special interests"[244] to such a government. Here, Roosevelt focused on the possibility that private corporations might interfere with the nation's democratic institutions.[245] "The citizens of the United States," he went on, "must effectively control the mighty commercial forces which they have themselves called into being."[246]

Assuming big business was to be a permanent fixture in modern America,[247] only the federal government could leverage the proper amount of external control on these new interstate corporations.[248] Just as corporations had centralized their activity, Roosevelt argued, so should the government.[249]

---

241 *See id.* (defending the growth of the federal government to match the growth of other forces in the country); *see also* HOBBES, *supra* note 126, at 84 (explaining that without the state's powerful representation, life would be "solitary, poor, nasty, brutish and short").

242 *See* THEODORE ROOSEVELT, THE NEW NATIONALISM 21–39 (William E. Leuchtenburg ed., Prentice-Hall 1961) (1910) [hereinafter ROOSEVELT, THE NEW NATIONALISM]; CROLY, *supra* note 231, at 167–71.

243 ROOSEVELT, THE NEW NATIONALISM, *supra* note 242, at 21.

244 *Id.* at 27.

245 *See id.*

246 *Id.*

247 *See* 1 THEODORE ROOSEVELT, THE ROOSEVELT POLICY: SPEECHES, LETTERS AND STATE PAPERS RELATING TO CORPORATE WEALTH AND CLOSELY ALLIED TOPICS 34 (The Current Literature Pub'g Co. 1908) [hereinafter ROOSEVELT, THE ROOSEVELT POLICY]. "Under present-day conditions," Roosevelt stated, "it is as necessary to have corporations in the business world as it is to have organizations, unions, among wage-workers. We have a right to ask in each case only this: that good, and not harm, shall follow." *Id.*

248 *See id.* at 232–39. Roosevelt's concerns that state governments could not preserve their democratic institutions against large interstate corporations were not just fanciful musings. For example, in Pullman, Illinois, George Pullman operated a company town fully under his control for nearly twenty years. *Harper's Monthly* described the town as "un-American [sic] . . . benevolent, well-wishing feudalism." MICHAEL WALZER, SPHERES OF JUSTICE 295–303 (Basic Books 1983) (quoting Richard Ely, *Pullman: A Social Study*, HARPER'S, Feb. 1885, at 452–66).

249 ROOSEVELT, THE NEW NATIONALISM, *supra* note 242, at 53 ("Big business has become nationalized, and the only effective way of controlling and directing it and preventing the abuses in connection with it is by having the people nationalize the governmental control in order to meet the nationalization of the big business itself.").

Roosevelt's prolific rhetoric led to the creation of new divisions within the national government to deal with corporations.[250] In 1903, at the behest of Roosevelt, Congress established the Department of Commerce and Labor, which operated the Bureau of Corporations.[251] In Roosevelt's words, the Bureau would administer the law "with the firm purpose not to hurt any corporation doing a legitimate business—on the contrary to help it—and, on the other hand, not to spare any corporation which may be guilty of illegal practices, or the methods of which may make it a menace to the public welfare."[252]

Following Theodore Roosevelt's administration, the ideas of New Nationalism remained influential in national politics. From New Nationalism to Franklin Roosevelt's New Deal[253] and from the New Deal to Johnson's Great Society,[254] Theodore Roosevelt and Herbert Croly permanently transformed the United States into a regulatory state. Thus, even as business corporations have grown in size and complexity since 1903, the federal government has grown in tandem, continuing the counterbalancing that Roosevelt envisioned.[255]

The history of the British joint-stock companies and Roosevelt's New Nationalism leads to certain conclusions about the relationship between corporations and government. First, it points to the tensions inherent in that relationship. While the state is the strongest of corporations, it sometimes confronts strong business corporations resembling a state of their own. This Note's brief historical overview demonstrates that this type of confrontation is not rare. Second, the government only rises above these business corporations by exerting a concrete power of its own, whether that is through legislative reform from as with the British Parliament, through judicial restraints such as the ultra vires doctrine, or—in the case of the United States—through an expansive federal government. Third, the triumph of government over corporations strongly correlates with the triumph of democratic institutions. Though almost too obvious to point out, businesses exist to maximize wealth, and are thus rarely accountable to the interests of anyone but their shareholders.

---

250 *See* RICHARD L. WATSON, JR., THE DEVELOPMENT OF NATIONAL POWER: THE UNITED STATES, 1900–1919 107–10 (Houghton Mifflin 1976).

251 *Id.*

252 ROOSEVELT, THE ROOSEVELT POLICY, *supra* note 247, at 113.

253 *See, e.g.*, WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–1940 34 (Henry Steele Commager & Richard Brandon Morris eds., Harper & Row 1963) (asserting that the New Nationalism theorists, including Theodore Roosevelt, had the most influence on the New Deal policy makers).

254 *See* THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM 9–11 (Sidney M. Milkis & Jerome M. Mileur eds., Univ. of Mass. 2005) (noting that New Deal ideas influenced Lyndon Johnson and Great Society policies).

255 It would be unnecessary to lay out a list of Securities Exchange Act provisions to show that business corporations in the United States answer to the government in the end.

While Britain's colonial governments were not perfect, they often replaced the rule of joint-stock trading companies with a more prudent, and somewhat more democratic, colonial administration.[256] In the United States, through Progressive-era movements such as New Nationalism, the government preserved existing democratic institutions from the threat that large corporations posed to small government.[257] Together, these lessons are critical in understanding the next chapter in the relationship between corporations and government: globalization.

IV. AMENDING THE FCPA TO ADDRESS THE BLACKWATER PROBLEM

A. *The Challenges of Globalization*

The power of private corporations that governments have wrestled with for centuries takes on new importance in the context of globalization. While powerful governments such as the United States have learned to manage the world's largest corporations, globalization puts giant interstate corporations into contact with relatively weaker states that have little experience in dealing with the accompanying problems. Professor Dan Danielsen explains that as a result of such contact, "we begin to loosen our customary view that states 'act' and corporations 'react.'"[258] Whenever these corporations "create or shape the content, interpretation, efficacy, or enforcement of legal regimes, and in so doing, produce effects on social welfare similar to the effects resulting from rulemaking and enforcement by governments," then, Professor Danielsen concludes, "corporate actors are engaged in governance."[259] Andrew Kuper points out that in the face of a new international economy, "citizens of states, especially those in smaller and developing states, have little or no control over factors that impact greatly on their lives but over which their particular state has no authority or sway."[260] For these citizens, a corporation "insulated from public participation, engagement, or scrutiny" has supplanted a legitimate government.[261] It is not too much to say that transnational corporations "have become this generation's surrogate of a dominant world power."[262]

Although the resulting problems are extensive and unlikely to disappear any time soon, there is some hope in that the problems arising from globalization are nothing new. As with the United States at the turn of

---

256 *See supra* part III.C.

257 *See* WATSON, *supra* note 250, at 107–10.

258 Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT'L L.J. 411, 413 (2005).

259 *Id.* at 412.

260 KUPER, *supra* note 39, at 125.

261 Danielsen, *supra* note 258, at 424.

262 Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 WIS. INT'L L.J. 89, 89 (2001).

the twentieth century, small states around the world now confront large multinational corporations that may have greater reach and more resources than the state itself. In some cases, states cooperate with the goals of the corporations, whatever they may be.[263] But all too often, the corporation pursues its goals without answering to any state. One example of that is Blackwater's behavior in Iraq. The solution, as British and U.S. history illustrates, is to authorize the state to grow in proportion to the corporations it is responsible for regulating. Such growth is possible through greater extraterritorial jurisdiction, specifically by expanding the scope of the Foreign Corrupt Practices Act.

B. *The FCPA Solution*

Considering the effectiveness of the FCPA, all that is presently necessary to address human rights abuses by corporations such as Blackwater is political will: Congress must expand the provisions of the FCPA to address additional crimes besides bribery and accounting fraud. As this Note explained in Part III, the FCPA suffers from a disconnect between the mild crimes that it addresses and the more heinous crimes that it ignores. This disconnect is primarily a factor of history: while the United States has so managed corporations within its borders that it need only fear business-like crimes such as bribery or fraud, outside the United States, business corporations may still wield all the power—particularly the monopoly on violence—of a proper state. Congress could remedy the problem by expanding the scope of the FCPA.

In expanding the FCPA, much of the necessary language may come from existing domestic and international legal concepts. Substantively, Congress could seek to create criminal liability for corporations that aid and abet or perpetrate a crime against peace, a war crime, or a crime against humanity.[264] Congress could define such terms by looking to the language of international law, particularly the Nuremberg Principles. First, *crimes against peace* are the "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; or participation in a common plan or conspiracy for the accomplishment" of any of the same.[265] Second, *war crimes* are "violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of the civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas,

---

263 *See, e.g.*, Girion, *supra* note 22, at A1.

264 *See* Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, [1950] 1 Y.B. Int'l L. Comm'n 191, U.N. Doc. A/CN.4/SER.A/1950.

265 *Id.*, at principle IV.

killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity."[266] Third, *crimes against humanity* are "murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial, or religious grounds, when such acts occur in execution of or in connection with any crime against peace or any war crime."[267]

While this Note has spoken to the shortcomings of international law, this is not to say that international law cannot inform domestic law. As the FCPA has proven, international law works best in tandem with domestic law, serving as a medium for countries to develop effective domestic legal regimes.[268] In addition, by codifying international law into U.S. law, a lawmaker avoids the judicial provincialism that usually hamstrings international law in U.S. courts.[269] As a result, U.S. law would provide these international legal principles with the teeth of a domestic regime; at the same time, the United States would promote a dialogue between countries through international law.

Ideally, a revised FCPA would also include a special provision that would apply exclusively to defense contractors. With the understanding that these particular corporations intend to use force, this special provision could look to the standards for "excessive force" in the police context. In excessive-force cases, courts have held individual police officers liable for unreasonable acts of force,[270] using the Fourth Amendment's reasonableness standard to determine whether a police officer's use of force is excessive.[271] In addition to imposing liability on individual police officers, some jurisdictions have also imposed vicarious liability on municipal corporations.[272] Using analogous reasoning, the FCPA should allow for criminal liability for individual defense contractors who use excessive force, and it should impose vicarious liability on the employer corporation.

---

266 *Id.*

267 *Id.*

268 *See supra* Part II.

269 See discussion *supra* Part I.

270 *See, e.g.*, Bouggess v. Mattingly, 482 F.3d 886 (6th Cir. 2007) (holding that there is no qualified immunity from civil damages for a police officer who uses excessive force); Davis v. City of Las Vegas, 478 F.3d 1048 (9th Cir. 2007) (setting aside qualified immunity for police officers who use excessive force).

271 *See* Graham v. Connor, 490 U.S. 386, 395 (1989) ("[A]*ll* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach.").

272 *See, e.g.*, Matczak v. Mathews, 265 Wis. 1, 60 N.W.2d 352 (1953) (allowing for claim against city for excessive force by police officer); McCarthy v. City of Saratoga Springs, 56 N.Y.S.2d 600 (N.Y. App. Div. 3d Dep't 1945) (imposing liability on city for excessive force by police officer).

To establish liability under these expanded provisions, the FCPA should incorporate the Model Penal Code's "purpose test," that

> a person acts purposely with respect to a material element of an offense when (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.[273]

Likewise, a person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of the offense, such person aids or agrees or attempts to aid such other person in planning or committing it.[274]

Jurisdiction for these provisions should follow that of the existing FCPA. Thus, they would apply to any issuer,[275] any domestic concern,[276] or for any other person who is in the United States.[277] In addition, the acts of a foreign agent or employee would create liability for a U.S. company, and vice versa.[278]

Finally, the statute must also prohibit private rights of action.[279] Such a limit would be necessary to avoid the challenges present in ATS cases,[280] and ensure that these provisions are used to promote U.S. interests abroad, rather than private interests pushed through U.S. courts. This limit should also appeal to corporations, as it would allow them to avoid the uncertainty present in private rights of action.[281]

CONCLUSION

During the 1970s, a series of corporate scandals led to the enactment of the Foreign Corrupt Practices Act. Today, in the midst of a

---

273 MODEL PENAL CODE § 2.02 (1962).

274 *Id.* § 2.06. The Model Penal Code's purpose test is particularly attractive because the International Criminal Court has already borrowed its language for itself. *See* United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, *Rome Statute of the International Criminal Court*, art. 25.3(c), U.N. Doc. A/CONF.183/9, 21 (1998) (establishing criminal liability by the "*purpose* of facilitating the commission of such a crime"); *see also* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304, at ¶¶ 24–42 (2008) (noting that the ICC borrowed its language from the Model Penal Code).

275 *See* 15 U.S.C. 78dd-1 (2006).

276 *See id.* § 78dd-2.

277 *See id.* § 78dd-3.

278 *See* discussion *supra* Part II.B.

279 *See* Breed, *supra* note 27, at 1033–34.

280 *See* discussion *supra* Part I.C.

281 *See* Breed, *supra* note 27, at 1034.

scourge of corporate abuses, the United States requires an expansion of that Act. The Blackwater problem poignantly displays what happens when corporations can act with impunity: such abuses hurt not only innocent civilians, but also U.S. interests and its credibility as a nation. This situation demands a real legal response, not in international law or in an occasionally questionable foreign law, but in the criminal law of the United States, a legal regime with the teeth to carry out justice, but also with the constitutional protections to ensure a fair trial. For historical reasons, U.S. law has not had to deal with corporate abuses on the scale found in other countries, and so the FCPA currently addresses financial crimes such as bribery while ignoring the most heinous human rights abuses. Globalization has revealed the shortcomings of the FCPA: while the Act has proven itself more than adequate in small matters, its success calls for bigger things.