**The Enduring Charter: Corporations, States, and International Law**

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# I. Corporations, States, and the Question of Responsibility in International Law

## (1) Introduction

The corporation as a legal entity and a form of governance has no innate conceptual identity; rather, its legal identity is the product of historical developments. During the nineteenth century, a corporation came to be considered a private entity formed for the purpose of pursuing commercial ends. Prior to that time, the identity of corporations was less clearly defined, and they owed their existence to the governments that chartered them for the purpose of engaging in a variety of business ventures. They were frequently granted monopolistic privileges and tasked with building infrastructure projects, such as roads and canals. As noted by Philip Stern, during the early modern period “[i]ncorporation […] had nothing to do with the nature of the business at hand. It was a legal and political institution that allowed groups of students, merchants, townsmen, or monarchical subjects to make claims on property, rights, and privileges, and to pass these on to later generations in perpetuity.”[[2]](#footnote-2) Over the course of the nineteenth century, the corporation gradually came to be governed by private and contract law principles. The corporation was reconceived essentially as a fictitious person engaging in contractual relations.[[3]](#footnote-3)

In the context of international law, this transition would gain prominence in the latter part of nineteenth century in debates among scholars in the field about the involvement of chartered companies in the scramble for power and control in Africa. During this period, scholars of international law scrutinized the involvement of business corporations in Africa and ultimately criticized the use of the chartered company for colonial purposes. As the nineteenth century drew to an end, most chartered companies were dissolved.Consequently, the international legal debate over the legitimacy of using companies as governing authorities in Africa was put to rest. In the following decades, international legal scholars rarely considered the private business corporation an issue of concern or subject for examination in key treatises or other works; nor did any treaty, institution, or regulatory framework specifically address the responsibility of private business corporations in global affairs.

Yet, the *formal* dissolution of the charter hardly put an end to the close relationship between governments and corporations. That relationship continued to have far-reaching implications for international law with respect to corporations and the question of corporate responsibility. The formal dissolution of the charter has frequently been perceived as a *normative* dissolution of the dependence of private business corporations on governments in order to survive and thrive. That normative dissolution is a central feature of the legal rules of attribution on state responsibility. The following analysis reveals the gap between the legal assumption that corporations and governments are formally separated and the reality of deep interdependence between governments and corporations in colonial settings, analyzing how this situation provided private business corporations with the legal infrastructure they needed to leverage their position to thrive in the colonization of Africa. I then explore related doctrines of international law—diplomatic protection, human rights, and investment protection—as additional aspects of the international legal infrastructure that protected corporate actors from responsibilities while granting them significant benefits as individual rights bearers. This article argues that international legal scholars’ long-standing lack of attention to the conduct of corporate actors does not reflect the salience of international law to the regulation of corporations. The article also chronicles the lingering presence and influence of international law on the regulatory options available for corporations operating both within and outside state borders.

## (2) The Separate Spheres Presumption in the Articles on Responsibility of States for Internationally Wrongful Acts

The Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) are the primary source for defining the doctrine of attribution in international law. Of particular interest here is their definition of the circumstances under which “conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.”

As noted by the ILC commentaries, “*the conduct of private persons or entities is not attributable to the State under international law*.”[[4]](#footnote-4)While the ILC has presented rules for entities, or organizations,[[5]](#footnote-5) and international criminal law has developed rules for holding natural personals responsible,[[6]](#footnote-6) the responsibility of non-state actors in international law remains underdeveloped.[[7]](#footnote-7)

In the context of state responsibility, the circumstances for imputing the acts of corporate actors to a state are limited to situations in which the private corporation is operating *as a state* organ (Article 4), *like a state organ* (Article 5), or in cases when it is *directed or controlled by the state* (Article 8). This approach to attribution presumes a clear distinction between the private sphere of the corporation and the public sphere of the state as the underlying logic for defining the extent of state responsibility. As the ILC commentary explains:

In theory, the conduct of all human beings, corporations or collectivitieslinked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both *w*ith a view to limiting responsibility to conduct which engages the State as an organization, and also *so as*to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority.[[8]](#footnote-8)

In his article *The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective*, B.S. Chimni criticized the implications of this approach to postcolonial states. According to Chimni, by adopting this approach, the “ILC was able to ignore the history of the *symbiotic relationship between the corporation and the capitalist state*, including their role *in the shaping of particular international law obligations*.”[[9]](#footnote-9)

Indeed, the above paragraph from the ILC commentaries reiterates a prevailing international legal approach to the relationship between the corporation and the state, perceiving them as separate entities. As the following analysis suggests, the demise of the chartered company and the transition to privately incorporated business enterprises toward the end of the nineteenth century ushered in the end of the *recognized* symbiotic relationship between the state and the corporation and gave rise to the presumption of separate spheres between the public state and the privately incorporated corporation (hereinafter: the separate spheres presumption). Section II describes the early colonial corporations and Adam Smith’s eighteenth-century critique of the use of chartered companies for colonial ends. Smith’s influential analysis would have a lasting impact, as evident in the commentaries of the late-nineteenth-century legal sçholars’’ discussion on the chartered companies involved in the scramble for Africa, which are analyzed in Section III. Legal scholars condemned what they considered the illegitimate use of corporations for colonial ends and focused their attention on the charter as a prominent manifestation of that illicit relationship. Section IV is dedicated to the aftermath of the chartered company. I argue that the international legal approach to the corporation after the revocation of the charter, rather than putting an end to the close relationship between companies and states, actually contributed to its invisibility in ways that improved the position of corporations in colonial and postcolonial settings. Section V demonstrates how the *separate spheres presumption* shaped other facets in the meaning of attribution in international law in the context of diplomatic protection, human rights, and international investment law, and analyzes how these doctrinal developments contributed to the propensity of limiting corporate liability to that of no accountability in international law. Section VI concludes the article.

# II. The Colonial Corporations and Adam Smith’s Critique

## (1) Background: The Early Colonial Corporations

Before the nineteenth century, corporations were essentially operating as imperial authorities. The prerogatives of the United East India Company (VOC) to wage war and forge alliances with local leaders were meticulously documented and justified by renowned jurist Hugo Grotius (1583–1645).[[10]](#footnote-10) The VOC remained more successful than the contemporaneous English East India Company (EIC) for almost two hundred years after their parallel establishment.[[11]](#footnote-11) Like the early Dutch ventures, the first English trading companies enjoyed special relationships with the monarch, trade monopolies, and trading zones.[[12]](#footnote-12) While other monopoly-based companies declined between the 1630s and the Glorious Revolution (1688),[[13]](#footnote-13) The VOC was exceptional in its rise to prominence during this period. Philip Stern’s early history of the EIC, *The Company-State*,invites us to think of the EIC as a form of early modern government from its inception. During the second half of the seventeen century, the Company became a colonial proprietor, doing “what early modern governments did: erect and administer law; collect taxes; provide protection; inflict punishment; perform stateliness; regulate economic, religious and civic life; conduct diplomacy and wage war; make claims for jurisdiction over land and sea; cultivate authority over and obedience from those people subject to its command.”[[14]](#footnote-14) Surveying broader mercantilist practices, Stern observed how “English merchants routinely appealed to the sovereignty of the Crown and its infrastructure—courts, customs officials, diplomatic corps, naval power, among others—while also attempting with varying degree of success to keep the state from interfering too much in its affairs, especially overseas.”[[15]](#footnote-15)

The Glorious Revolution gradually challenged the legitimacy of a corporation that was constitutionally rooted in royal grants at home and provided with prerogatives abroad.[[16]](#footnote-16) During the eighteenth century, the EIC became a de facto sovereign power in India, with its administrative center in London and a complex management system for long-distance trade. The words of the eighteenth-century theorist Thomas Pownall—“The merchant is become the sovereign”—became a slogan frequently applied to the EIC’s activities.[[17]](#footnote-17) The Company’s growing involvement in armed conflicts and direct control of India was a subject of heated debate and criticism. Three conflicts of interests in the alliance between the company and the state were particularly troubling: the exercise of political influence by commercial agents, the affinity of such alliances to the Crown, and the monopolistic prerogatives granted by such relationships.

## (2) Adam Smith and the Critique of Colonial Corporations

Perhaps the most influential and memorable among the EIC’s critics was Adam Smith, as set forth in *An Inquiry into the Nature and Causes of the* *Wealth of Nations*.[[18]](#footnote-18)Smith considered mercantilism an assault on “the most sacred rights of mankind,”[[19]](#footnote-19) going on to explain why mercantilist policies were less profitable,[[20]](#footnote-20) doomed to failure, and highly disadvantageous to the interests of the colonies.[[21]](#footnote-21) Smith considered the merchant as the—highly problematic—navigator of the colonial system.[[22]](#footnote-22) Indeed, according to Smith’s view of joint-stock companies, the entire colonial project was essentially a corrupt endeavor, led by commercial agents for the sake of their advantage and commercial survival and contrary to the interests of colonial subjects:[[23]](#footnote-23)

To promote the little interest of one little order of men in one country, it hurts the interest of all other orders of men in that country, and of all men in all other countries.[[24]](#footnote-24)

Smith’s accused the joint-stock companies of subjecting the people in the colonies to great suffering and misfortune.[[25]](#footnote-25) “[A] company of merchants,” he wrote, “regard the character of the sovereign as but an appendix to that of the merchant, as something which ought to be made subservient to it.”[[26]](#footnote-26) The companies’ charters went so far as to grant them the right to possess forts and garrisons, enabling them to make peace and war in areas they controlled. “How unjustly, how capriciously, how cruelly they have commonly exercised it, is too well known from recent experience.”[[27]](#footnote-27) The local population, conscious of being robbed and ignored, expresses its resentment through violence and protests. In response, the company then exerts military and other measures of control. “Such a council [of merchants] can command obedience only by the military force with which they are accompanied, and their government is therefore necessarily military and despotical.”[[28]](#footnote-28)

As thoroughly analyzed by the political scientist Sankar Muthu,[[29]](#footnote-29) Smith also criticized colonial corporations for seizing control of imperial governments and compelling them to subsidize and secure global trade and pursue wasteful policies that were incompatible with national concerns, “raising the rate of profit both in the new market and in the new employment, draws produce from the old market and capital from the old employment.”[[30]](#footnote-30) Furthermore:

To found a great empire for the sole purpose of raising up a people of customers, may at first sight appear a project fit only for a nation of shopkeepers…It is, however, a project altogether unfit for a nation of shopkeepers; but extremely fit for a nation whose government is influenced by shopkeepers.[[31]](#footnote-31)

Smith further criticized companies’ limited liability. “This total exemption from trouble and risk [of the company proprietors], beyond a limited sum, encourages some people to become adventurers in joint stock companies, who would, upon no account, hazard their fortunes in any private country.”[[32]](#footnote-32) These shortcomings led companies to seek the help and favor of governmental benefits in the form of monopoly charters. “They have, accordingly, very seldom succeeded without an exclusive privilege; and frequently have not succeeded with one.”[[33]](#footnote-33)

As noted by H.V. Bowen, “[t]his strain of criticism endured for decades…there was a residual sense of unease about leaving an empire in the hands of traders.”[[34]](#footnote-34) While the phenomenon of chartered companies for the purpose of colonialism diminished, and despite the anti-corporate critique in Britain and the United States, the number of corporations increased. As noted by the historian Pauline Maier, “Americans in the 1780s and 1790s elaborated the ideals of the Revolution, and gathered them into what the political scientist Louis Hartz called ‘an anti charter doctrine.’ [yet…] the anticharter doctrine …persisted into the nineteenth century but failed to undercut American’s enthusiasm for corporations.”[[35]](#footnote-35) Corporations were conceived, like incorporated cities, as aristocratic and anti-republican because they gave privileges to the few at the cost of the many. “Critics also attacked the creation of business corporations, like that of municipal corporations, because it implied ‘granting… an inherent right of sovereignty to individuals and thus reduced the power of the people.’”[[36]](#footnote-36) This line of criticism would become quite relevant and influential in the work of legal scholars writing about the chartered company in the context of the scramble for Africa, and international legal criticism of the chartered company gained momentum toward the end of the nineteenth century. These scholars considered the corporation an inappropriate vehicle for the exercise of sovereign authority. Yet, their theoretical exclusion of the corporation from the realm of politics and their conceptualization of it as a vehicle suited for economic activity only ultimately insulated the corporation from legal and political scrutiny for years to come.

Legal scholars focused their attention on the harmful consequences of the charter device for the colonized as well as for the fate of the colonial project.[[37]](#footnote-37) However, notably absent from their discussions is Smith’s critique of the undue influence of trading companies on imperial governments’ colonial policies[[38]](#footnote-38) and how they used that influence to reduce their risks and enhance their position in colonial settings. In the post-charter era, legal scholars would show limited to no interest in scrutinizing the practices of privately incorporated companies. Yet, the contours of the international legal order that emerged in the aftermath of the chartered companies’ ascendancy was frequently be shaped by the influence of business interests and would prove beneficial for these companies continuing to flourish in colonial and postcolonial settings. The silence about and marginalization of this issue in international law should not be mistaken for its irrelevance. Rather, the key elements of the international legal architecture that would emerge in lieu of the chartered era imperial regime would be highly beneficial for corporate actors operating globally.

# III. Legal Scholars’ Critique of the Late-Nineteenth-Century Chartered Companies

## (1) The Late-Nineteenth-Century Modality of the Chartered Company

From 1879 to 1882 onward, European powers increasingly sought colonial control over Africa. Their colonial presence on the continent gradually evolved from that of a powerful influence primarily along the coast into full colonial governance within the hinterland. This transition was accompanied by mounting tensions among European powers, which formed the backdrop to the Berlin West Africa Conference of 1884–1885.[[39]](#footnote-39) Amid these tensions, most industrialist economies of the time—for example those of Great Britain, Germany, and Belgium—were reluctant to bear the financial burdens of establishing territorial authority on African soil. It is therefore not surprising that the parties to the Berlin Act that emerged from the conference opted for limited requirements for the establishment of sovereignty in Africa.[[40]](#footnote-40) Imperial powers applied the Berlin Act very loosely, claiming chartered companies with a limited administrative presence were sufficient to establish sovereignty claims. Furthermore, while the Berlin Act prohibited trade monopolies, these nevertheless remained pervasive. This conveniently loose interpretation is evident in King Leopold’s colonization of the Congo[[41]](#footnote-41) and Bismarck’s choice to use the charter model for his colonial endeavors in Africa.[[42]](#footnote-42) Both cases demonstrate the potential of using private entities to establish sovereign claims in Africa. To these we may add the specific British experience in establishing sovereignty based on a chartered company in North Borneo in 1881.[[43]](#footnote-43)

In the course of the nineteenth century, the joint-stock company re-emerged (initially with the charter) to carry out industrial projects, such as the construction of canals and railways.[[44]](#footnote-44) Unlike the Belgian and German precedents, the British chartered companies were initiated not by rulers but by British businessmen working in commerce.[[45]](#footnote-45) Free incorporation became a central feature of business organizations operating transnationally only toward the end of the nineteenth century and even later.[[46]](#footnote-46) This feature of the companies involved in the new charter deal proved important to their success in the aftermath of the dissolution of their original charters. The British revival of the chartered company began with the North Borneo Company in 1881.[[47]](#footnote-47) This precedent was soon followed in Africa with the Royal Niger Company (1886–1900), the Imperial British East African Company (1888–96), and Cecil Rhodes’s BSAC (1889–1923). From the 1890s, Portugal sought to control large parts of Mozambique through two chartered companies.[[48]](#footnote-48)

This new modality of the charter contained a peculiar blend of features from the early colonial company (reflectingthe territorial aspirations of these companies) without the formal monopoly or state funding that was characteristic of sixteenth- and seventeenth-century trade companies. The rationale for their introduction, however, was quite reminiscent of earlier British trading companies. The charters of earlier centuries were often justified in terms of efficiency (allocation of cost between the Crown and the merchant) and ideology (as epitomizers of a mercantilist order). Their late appearance in Africa was similarly related to the British government’s attempt to minimize the cost of colonization and the aspiration of businessmen to gain advantages over their competitors through benefits potentially derived from the charter. In terms of ideology, this later generation of chartered companies presented itself as compatible with contemporary sensibilities of free trade (the charters prohibited monopolies) and as bearers of the civilizing mission. As the debate among legal scholars of the time demonstrates, the practices of this new generation of chartered companies were fraught with tension and evoked public dismay virtually from their inception, and they failed to eradicate common associations of them with the notorious legacy of their sixteenth- and seventeen-century predecessors.

## (2) International Legal Scholars Critique

International legal scholars devoted sections in their early treatises to the involvement of chartered companies in the scramble for Africa. Earlier accounts of the chartered companies in Africa appear in the works of Henry Maine and John Westlake, with Maine emphasizing the meaning of sovereignty as territoriality, and Westlake drawing on the distinction between public rule (imperium) and private property (dominium) to distinguish between the state and other actors. Their analyses provided the rationale for preferring formal state territorial control of imperial governments rather than control through chartered companies. In slightly later writings, Rolin-Jaequemyns and Lawrence would use these conceptual distinctions to develop an argument against colonial governance by chartered companies.

### (a) Sovereignty as Territoriality

In 1887, Henry Sumner Maine (1822–1888) delivered the Whewell lectures on international law at the University of Cambridge, which included one of the early international legal accounts of the revival of the chartered company.[[49]](#footnote-49) Maine dedicated his discussion to a shift from defining the sovereign as an individual to identifying sovereignty’s link to a specific territory as the defining feature of contemporary international law (from individuality to territoriality): “Sovereignty was not always territorial.” He concluded that, “Evidently the fundamental conception was that the territory belonged to the Tribe, and that the Sovereign was the Sovereign of the Tribe.”[[50]](#footnote-50) Only after feudalization of Europe had ended did it become possible to associate sovereignty with a defined portion of soil. Thus, sovereignty in its early form was associated with the individuals who exercised it. “[T]he result was extremely important to International Law, for the assumed individuality of sovereigns enabled its founders to regard states as moral beings bound by moral rules.” Maine relied on this shift to distinguish between the age of discovery during the seventeenth and eighteenth centuries and contemporary claims of colonial control. In the age of discovery,international law attributed “exaggerated importance to priority of discovery.” In current times, “some kind of formal annexation of new territory is now regarded as the best source of title…acts showing an intention to hold the country as your own, the most conclusive of these acts being the planting upon it some civil or military settlement.”[[51]](#footnote-51) This distinction and the emphasis on territoriality as a defining feature of sovereignty proved highly influential for future debates.

Maine’s analysis alluded to the growing preference for formal territorial control. An intriguing example of this trend is captured in the writings of John Westlake (1828–1913).[[52]](#footnote-52) Similarly, Westlake’s (1828–1913) distinction between *dominium* and *imperium* further crystallized the meaning of the transition from individuality to territoriality as representing a distinction between the private and the public in international law.[[53]](#footnote-53) Westlake conceived chartered companies as a bridgehead to formal colonial control,[[54]](#footnote-54) asserting that they held their acquired territories, while His interpretive framework took no note of the.

### (b) Against de facto Sovereign Authority of Companies: The Argument for Formal Control

The revival of the chartered company as a colonial vehicle constituted a very short episode in imperial history. With the exception of the British South African company, by 1900, none of the British chartered companies existed.[[55]](#footnote-61) Writing in 1889, Gustave Rolin-Jaequemyns (1835–1902) sought to explain the recent failures of the German and British chartered companies in Africa,[[56]](#footnote-62) Referring to a long passage from Montesquieu’s *Spirit of the Laws* to make his point. For Montesquieu writing in 1748, the use of chartered companies reflected a transition in the purpose of colonialism from conquest to commerce: “It has been established that only the mother country can trade with the colony, and this was done with very good reason, for the goal of the establishment was to extend commerce, not to found a town or a new empire.”[[57]](#footnote-63)

These lines, concluded Rolin-Jaequemyns, explain why the colonial system of the chartered companies was suited for earlier times but was no longer suitable. Today, he argued, we do not consider America, Africa, and Asia as mere instruments for the use of empire; nor do we any longer conceive of colonization without acknowledging duties toward indigenous peoples. For Rolin-Jaequemyns, the meaning of colonization had been transformed to include humanitarian tasks that the trading companies could not fulfil.[[58]](#footnote-64) The changing spirit of our times, he argued, alluding to the words of Montesquieu, renders the use of the chartered company *unwise* (“ne peut plus aujourd’hui être considéré comme un “act de sagesse”).[[59]](#footnote-65) For Rolin-Jaequemyns, the changing purpose of the colonial endeavor (its civilizing mission) created practical challenges for companies. Contemporary chartered companies were primarily interested in their profits, and their quest for profits-only-bias triggered the military resistance of the local community. Although the sovereign, or the empire, merely delegated its authority to the company and retains its *imperium,* the use of the chartered companies’ mechanism proved to be dangerous. Their biased considerations in favor of market interests and profit created serious difficulties. These, in turn, led empires to assume their formal responsibility.[[60]](#footnote-66)

Other legal scholars expressed similar critiques, emphasizing the tension between the companies’ commitment to profit maximization and the humanitarian obligations toward the local population. “Companies were always very influential,” concluded F.E. Smith, an Oxford professor writing in 1900, “[t]he temptation to employ chartered companies is obviously great.” We should nevertheless put an end to their problematic legacy. “The Administration of the East India Company was stained by much that was discreditable.” This suggestion of such a dramatic break from the past was based on normative considerations: “Government by chartered company necessarily subordinates the social organism of the district to trading considerations.” This “was not acceptable tor any branch of English public law. Even if “pioneer work of incalculable value” has been done by such companies in the past, “imperial and economical tastes are not gracefully associated and the era of chartered companies should at most be a phase in the work of reclamation.”[[61]](#footnote-67) The failure of the chartered companies required a clear statement on the question of responsibility. Smith, like Westlake, relied on the grant theory and concluded that “[a] nation cannot commit political functions to associations of its citizens and then disclaim responsibility for their abuse.”[[62]](#footnote-68)

During that same year, 1900, Thomas Joseph Lawrence (1849–1919) published his influential *Principles of International Law* and issued a fierce admonishment of corporate practices and influence. Lawrence’s initial discussion analyzed one of Westlake’s analytical biases: that of conceiving of all private matters as falling under the rubric of private *property*. Lawrence distinguished between corporations, which are considered owners of property and are therefore treated like individual subjects of international law, and the practices of chartered companies involved in colonial endeavors:

[W]e enter upon a sphere of great complexity when we endeavor to describe the international position of those great chartered companies called into existence within the last few years by some of the colonizing powers, especially Great Britain and Germany, to open up enormous territories recently brought within the sphere of their influence.[[63]](#footnote-69)

To illustrate his point, Lawrence chose the example of the British South Africa Company*.* He described its extensive rights: “[w]ithin this enormous territory the company possesses by royal grant the liberty to acquire by concession from the natives ‘any rights, interests, authorities, jurisdictions, and powers necessary for the purposes of government.’”[[64]](#footnote-70) This right was subject to the approval of the Secretary of State for the Colonies:

The company may establish a police force and use a distinctive flag indicating its British character. It is bound not to set up any monopoly of trade, not to allow the sale of intoxicants to the natives, nor to interfere with their religious rights except for purposes of humanity. It must establish courts for the administration of justice and pay regard therein to native laws and tribal customs. The discouragement and gradual abolition of the slave-trade and domestic servitude are made obligatory upon it.

At the same time, “it is subject to comply with the suggestions of the Colonial Secretary, perform all obligations contracted by the Imperial governments. The Crown reserves a right to revoke its charter at any time.”[[65]](#footnote-71) For the natives, concluded Lawrence, the company “must be all-powerful. He [the Colonial Secretary] is thousands of miles from the scene of action…Practically the company rules its territories in so far as they are ruled at all. It legislates, it administers, it punishes, it negotiates, it makes war, and it concludes peace.”[[66]](#footnote-72) Like Janus, it had two faces: “On that which looks towards the native tribes all the lineaments and attributes of sovereignty are majestically outlined. On that which is turned towards the United Kingdom is written subordination and submission.”[[67]](#footnote-73) The problematic history of the East India Company, concluded Lawrence, “confirms in a striking manner this view of the position [in] International Law of its imitators and successors. They are altogether abnormal; and many complications are likely in future to arise from the peculiar conditions of their existence.”[[68]](#footnote-74) Control exercised over these companies by the “mother-country can hardly be very real or very continuous; and …in her effort to escape responsibility by throwing it upon the shoulders of an association, she may often involve herself in transactions more dubious in character and more burdensome in execution than would have been possible had her control been direct.”[[69]](#footnote-75)

Failure was a key element in the critique of legal scholars. The outbreak of “natives of the German sphere of influence in East Africa” who “attacked the stations of the German East Africa Company in 1889 and required the imperial government’s forceful intervention” was a case in point. Lawrence attributed the failings of the German East African Company to the reluctance of the German empire to bear the costs of administration.[[70]](#footnote-76) In the crisis of the British East Africa Company in Uganda the “[r]esponsibilities it [the British government] did not seek, but wished to avoid, have been thrust upon it.” He similarly described how the British South Africa Company’s involvement in the territory of the Transvaal Republic in 1895 led the British government into “a maze of complications and helped bring about the Boer War of 1899–1900.”[[71]](#footnote-77) “There is doubtless much fascination in the idea of opening up new territories to the commercial and political influence of a country,” concluded Lawrence, “and at the same time adding nothing to its financial burdens or international obligations. But experience shows that the glamour soon wears off, and the state which seeks to obtain power without responsibility obtains instead responsibility without power.”[[72]](#footnote-78) Chartered companies were criticized because they would not or could not provide order and stability.

### (c) Sovereign Authority Cannot Be Conferred on Private Corporations

The liberal French academic Gaston Jèze (1869–1953) shifted the criticism away from chartered companies to the imperial government that exercised its chartering authority. Jèze articulated a civic and constitutional argument against the possibility of conferring colonial authorities to private corporations. According to him, a state could not delegate its sovereign rights.[[73]](#footnote-79) Since the people of France were sovereign in a democratic regime with sole political power, the state could not delegate sovereignty to private entities.[[74]](#footnote-80) He further discussed economic and political arguments against full delegation of state power and the possibility of some limited form of delegation. Another French author, Charles Salomon (1862–1936) complemented Jèze’s normative challenge by describing the distinctive *private* character of the late-nineteenth-century chartered companies and the incompatibility between their profit-seeking nature and the colonial endeavor.[[75]](#footnote-81)

Gaston Jèze and Charles Salomon advocated moving beyond the limited requirement of effective and territorial control as a condition for sovereign authority to a constitutional conception of constrained, limited government that draws its authority from the people. “The people” in their analysis refers to the people of France. Legal scholars lawyers of the late-nineteenth century were critical of chartered companies exercising sovereign authority in Africa. The critique of Charles Salomon and Gaston Jèze went even further and argued that representative governments cannot delegate their authorities to private entities.

Legal scholars lawyers argued against the use and misuse of company charters for the pursuit of narrow economic interests without consideration of broader humanitarian concerns. But they also criticized imperial governments’ choice of the chartered company mechanism and the attempt to pursue colonial endeavors without bearing their costs. A recurring motif their arguments share with later historical accounts is the important role *failure* played in ushering chartered companies outside the colonial scene. [fill in why this is not about failure]

# IV. States and Corporations in the Post-Chartered Era

Eventually, the very same motives that drove the British government officials and businessmen to enter into the late-nineteenth-century charter deal—mounting costs and competition over trade and territories—ultimately led to its dissolution and shaped the alliance that eventually replaced it. Corporations of the post-chartered era enjoyed multiple advantages that enhanced their position and enabled them to amass great fortunes while exploiting the indigenous population. The contours of international legal scholars’ analysis focused their critique on these companies’ entanglement in public affairs through the vehicle of the charter. Their critique assumed that if only governments would exclude corporations from handling public affairs, the “problem” of the chartered company would be solved. Like Adam Smith, they objected to the *inherent conflict of interests* between the political commitment to the local population and the commercial interest of companies. For them, this conflict not only explained the companies’ failures, but also justified the companies’ departure from the colonial scene. Yet, their critique markedly ignored another aspect in Smith’s critique: the influence of commercial actors on imperial governments policies.[[76]](#footnote-82) As the following analysis suggests, that influence not only ushered in the chartered companies to Africa, but it also played an important role in the dissolution of the charter. While different commercial actors were interested in the demise of the charter device, the economic actors behind the chartered companies frequently enjoyed a privileged and close relationship with politicians in the corridors of power. These relationships could explain the beneficial arrangements some of them were granted after the revocation of the charter. Yet, beyond specific incidents of capture and corporate influence, the international legal architecture of the post-chartered era offered important advantages for corporations interested in commercial endeavors in colonial settings. In the following analysis, I highlight how the combination of free incorporation and the conception of the corporation as a commercial, private individual, together with the law of treaties, the status of concessionary agreements in international law, and developments in diplomatic protection constituted an international legal infrastructure with clear benefits for commercial corporate actors. The following section focuses on the case of the Royal Niger Company to illustrate the implication of the revocation of the charter for business corporations in Africa. I then turn to explain the legal architecture of the post-charter era in greater detail.

## (1) The Case of the Royal Niger Company

The history of the Royal Niger Company in Africa is a case in point. In June 1899, the Foreign Office initiated procedures to revoke the company’s charter. The company’s charter was formally revoked as of January 1, 1900, and the Royal Niger Company, Chartered and Limited, became the Niger Company, Limited. The government agreed to pay the company a half of all royalties on minerals produced in much of the former Niger territory for a period of ninety-nine years. The company was relieved of all its administrative powers and duties, and assigned the government all the benefits of its treaties, with the exception of “its plant and trading assets, and its stations and waterside depots, with customary rights of access, building, wharves, workshops and the sites thereof.”[[77]](#footnote-83)

The use of chartered companies in the colonization of Africa was harshly criticized by legal scholars and in parliamentary debates.[[78]](#footnote-84) Yet, while their emphasis on the failings of the charter attracted significant attention, the implications of the charters’ revocation were *not* addressed by legal scholars. As one could learn from parliamentary debates, the benefits of the charter’s revocation were quite evident to contemporary policymakers. In his concluding remarks in support of the Royal Niger Company Bill, the Conservative leader, James Edward Hubert Gascoyne-Cecil stated:

They [the Royal Niger Company] risked their money enormously, a mere accident might have destroyed it, and it was only fair that they should receive a handsome and sufficient price such as Parliament has given them…I think we cannot part with them without recognising the enormous benefit which the civilising of those countries has received from their exertions, exertions which did a work that no mere political reform could have done.[[79]](#footnote-85)

Indeed, the revocation of the charter was compatible with commercial interests, and, in the case of the Niger Company, Limited, actually proved favorable to its interests. “The terms of the charter’s revocation,” argued *The Economist* in 1899, reduced the company’s risks “by the certainty that if they fail the British Government will help them out of their scrape, and if they succeed will buy their possessions at twice the value of the capital invested.”[[80]](#footnote-86) Historian Scott Pearson describes how “[i]nstead of falling like a house of cards after 1900, the Niger Company turned advantages obtained and secured during the chartered period into a near monopolistic control of trade under early British colonial administration.”[[81]](#footnote-87) By contrast, the revocation had a detrimental effect on the coastal African brokers.[[82]](#footnote-88)

In the following years, the Niger Company flourished. Its business consisted of buying local produce (primarily palm oil and palm kernels) and importing whatever was demanded by local markets. It conducted its business from a growing number of trading stations, while production remained in the hands of local cultivators.[[83]](#footnote-89) It engaged in agreements, contracts, and negotiations with colonial governments and shippers to defend its monopoly over the river communications secured pre-1900.[[84]](#footnote-90) Its agents also expanded the geographical areas and commercial operations it was involved with (to include, inter alia, mining). In 1920, the company was taken over by the Lever brothers.[[85]](#footnote-91) In 1929, it was re-formed as the United African Company, a merger between the Niger Company and the African and Eastern Corporation, and became by far the largest single commercial organization in West and Equatorial Africa—and thus central to modern African economic history. It was later absorbed into the Unilever multi-national corporation.[[86]](#footnote-92)

## (2) Toward a Legal Architecture of the Post-Charter Era

By the end of the nineteenth century, Africa was partitioned by new political boundaries, which was mirrored by economic partition. The relationship between the two is mostly studied in key turning points, such as the shift from the slave trade to free trade or the failure of chartered companies in the scramble for Africa.[[87]](#footnote-93) The history of the rise and fall of the chartered company as told by legal scholars of this era is a history with a clear position: against the chartered company. It is also a history with a markedly positive trajectory toward a normative divide between politics (the sovereign) and the market (the corporation). While charters were dissolved and thus can be said to have failed, private business corporations continued to flourish without their charters in the forthcoming decades. The shift from chartered to private business corporations was not a transition from informal empire (through the chartered company) to formal empire (governmental colonial rule), but, rather, a transition to an informal and flexible alliance between governments and private corporations.

As the nineteenth century came to a close, governments were using the mechanism of the inter-sovereign treaty more frequently to divide territorial control and coordinate trade in Africa. Imperial governments’ introduction of an extensive network of inter-imperial treaties facilitated the allocation of cost away from commercial agents and to imperial governments. Concession agreements between imperial governments and companies were used to grant land and resources to the post-chartered companies and other economic agents. The recognition of inter-imperial treaties as valid sources of international law, combined with the nonrecognition of concession agreements with indigenous communities and companies, created a legal space that frequently favored commercial interests. This legal space emerged from the real-life, practical concerns of interest groups operating in Britain and in Africa. These groups pressured the British government to assume control over the territories previously controlled by the chartered companies and coordinate trade relations to avoid continuing clashes between competing commercial and political actors.[[88]](#footnote-94)

# V. The Positivist Turn in Corporate Responsibility and the Separate Spheres Presumption

The international law of the post-chartered era not only leveraged the commercial interests of business corporations; it also further contributed to the insulation of corporations from legal scrutiny when they operated in colonial settings. Once the charters of these companies were revoked, they were legally considered as private corporations. As the last vestiges of the chartered corporation disappeared, corporations, as such, would no longer be subjects of international legal scrutiny. The classic public–private distinction situated corporations on the private side of that divide. The fact that at this point (the 1880s onward), corporations could be freely incorporated made this transition from chartered to private companies relatively easy, with little or no negative impact on the businesses or the businessmen involved.

In an interstate legal order, concerns over corporate involvement in dubious practices translated to positivist concerns over the obligation of the state to regulate such practices. But the demand that powerful imperial governments assume control over their territories did not result in an attempt to regulate the conduct of corporations. Almost to the contrary, historical accounts of this period in the African context document how the close collaboration between colonial officials and African authorities “formed a patriarchal alliance to bolster their respective power and control over younger men, women and children.”[[89]](#footnote-95)

Amid the end of imperial governments’ control over foreign territories, the involvement of corporations in the exploitation of labor and resources, as well as their destabilizing effect on political communities in postcolonial settings remained invisible to international legal scrutiny for decades to come. Until recently, even though the home state of transnational corporations usually had the regulatory capacity to hold such corporate actors accountable, it could only be held *internationally responsible* in the exceptional circumstances of effective control over the territory in which the corporation operates. States had no international responsibility to regulate corporate actors operating outside their national territory, even in situations where the corporate actor had the nationality of the state concerned.[[90]](#footnote-96) As noted by Cristina Lafont:

[T]he “veil of sovereignty” gives rise to the “veil of ignorance” that allows other states to single-mindedly protect and promote the interests and rights of those under their jurisdiction while disclaiming that they have any obligation to be aware of, let alone to take into account, the impact that their actions might have upon the human rights of those outside their jurisdiction. Such impacts are simply conceptualized as someone else’s responsibility.[[91]](#footnote-97)

While home states were conceived as having limited to no responsibility to regulate the conduct of corporations beyond their borders,governments of host states are often unwilling or unable to provide their citizens with access to remedies for international legal violations caused by corporations (either as direct perpetrators or as possible accomplices to such violations).[[92]](#footnote-98) The regulatory weakness of host states and limited to no regulatory responsibility of home states is often viewed as a governance gap.[[93]](#footnote-99) Indeed, applying the nineteenth-century shift to territoriality as a defining feature of sovereignty in a world of uneven regulatory capacities proved particularly consequential in the context of private corporations. Global value chains enable corporations to coordinate production across national borders while maintaining their high-value activities in affluent countries.[[94]](#footnote-100) Since the early 2000s, a series of gradual legal developments has challenged theselimitations on the responsibility of the home state for the conduct of private corporations beyond its borders.[[95]](#footnote-101) Cases such as *[Vedanta v. Lungowe](http://opiniojuris.org/2019/04/26/vedanta-v-lungowe-symposium-foreign-direct-liability-cases-in-england-after-vedanta/" \o "Vedanta v. Lungowe Symposium: Foreign Direct Liability Cases in England After Vedanta)* suggest the tide may be changing toward a greater recognition of the relationship between the home state and the corporation in establishing international responsibility.[[96]](#footnote-102)

Legal scholars opposition to the legitimacy of corporate actors exercising sovereign authority continues to shape the law on state responsibility and human rights. Ultimately, the post-chartered freely incorporated corporations were conceived as nationals and could use the doctrine of diplomatic protection to call upon their incorporating (powerful) governments to protect their interests if such were undermined by, frequently, less powerful governments.[[97]](#footnote-103) Yet, as noted in the landmark 1970 *Barcelona Traction* decision, the incorporation of the corporate actor by the same (powerful) government “was not sufficient as a basis for the attribution to the state of the subsequent conduct of that entity.”[[98]](#footnote-104) Thus, while a corporation could be protected as a national of a particular state under the doctrine of diplomatic protection, and later, under the regulatory umbrella of bilateral investment treaties, that nexus of nationality was not asufficient basis for state responsibility. At the same time, corporations could be conceived as individual right bearers in international human rights and international investment law.[[99]](#footnote-105)

Another aspect of corporate behavior that blurs the public–private line in the post-charter era is corporations’ influence on governmental lawmaking and their prominent role as regulators and lawmakers in global governance. As noted earlier, legal scholars ignored Adam Smith’s critique of the influence of chartered companies as interest groups who shaped governmental positions to advance their limited interests. Even in later periods, long after the revocation of the charter, scholars continue to criticize the failure to regulate the significant role of corporations as inhibitors or influential interest groups in international lawmaking processes.[[100]](#footnote-106) Corporations not only exercise their influence on global regulation as lobbyists and interest groups. They also exercise regulatory functions themselves. The literature on global private authority, transnational private regulation, voluntary sustainability standards, and corporate social responsibility offers different measures for their regulatory influence.[[101]](#footnote-107) Beyond the new governance context, corporations could be conceived as lawmakers in the context of concessionary agreements and international investment law.[[102]](#footnote-108) Such non-statist regulatory perspective on the role and influence of corporations undermines the presumption of separateness between the public and the private and marks a transition to a theory of international legal ordering in which the state is but one regulator among others.[[103]](#footnote-109)

# VI. Conclusion

This article sought to offer an alternative to the conventional history positing the irrelevance of international law to the question of business corporations in the aftermath of the charter’s dissolution with a history of its facilitative role in constituting a post-charter economic order that proved highly beneficial to corporate interests. Indeed, the legitimacy crisis over the use and misuse of the chartered companies for the colonization of Africa probably conveyed the genuine approbation of legal scholars over the private exercise of colonial authority. Yet, reading the commentaries of these legal scholars along with the experience of the post-charter legal order exposes how the presumption of separate spheres between the public (authority of governments) and the private (authority of firms) did not necessarily result in the resumption of responsible governance on the part of the imperial state. Nor did business enterprises make a radical shift away from the practices associated with the charter era. Rather, during the post-charter era, the international legal doctrines of state responsibility, diplomatic protection, human rights, and investment law frequently crafted a veil that concealed much of the activities of corporations from legal scrutiny and nurtured the alliance between powerful governments and commercial corporations.

1. \* Associate Professor at Tel Aviv University, Buchmann Faculty of Law. [↑](#footnote-ref-1)
2. Philip J. Stern, *The Corporation in History*, *in* The Corporation: A Critical, Multi-Disciplinary Handbook 21, 24 (Grietje Baars & Andre Spicer eds., 2017). For further discussion on the history and theory of corporate–state relations, see David Ciepley, *Beyond the Public and Private: Toward a Political Theory of the Corporation*, 107 Am. Pol. Sci. Rev. (2013). [↑](#footnote-ref-2)
3. Ron Harris, *Spread of Legal Innovations Defining Private and Public Domains*, *in* The Cambridge History of Capitalism Volume 2: The Spread of Capitalism: From 1848 to the Present, 127, 142–43 (Larry Neal & Jeffrey G. Williamson eds., 2014); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 Chi. L. Rev. 1441 (1987); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 Stan. L. Rev. 1471 (1989); Ron Harris, *The Transplantation of a Legal Discourse: Corporate Personality* *Theories from German Codification to British Political Pluralism and American Big Business*, 63 Wash. & Lee L. Rev. 1421 (2006); S.K. Ripken, Corporate Personhood (2019); D. Millon, *Theories of the Corporation*, 39 Duke L. J. 201, 205–40 (1990); S.K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Person Puzzle*, 15 Fordham J. Corp. & Fin. L. 97, 107 (2009); E. Pollman, *Reconceiving Corporate Personhood*, 2011 Utah L. Rev. 1629, 1660 (2011). [↑](#footnote-ref-3)
4. [add reference to page 47 of the ILC commentary on state responsibility] [↑](#footnote-ref-4)
5. ILC Draft Articles on the Responsibility of International Organizations, with Commentaries, 63rd Sess. (A/66/10) (2011). [↑](#footnote-ref-5)
6. [reference to the ICC Statute] [↑](#footnote-ref-6)
7. For an elaborate discussion on the deficiencies in the current responsibility regime in international law, see Boon [add ref when available] [↑](#footnote-ref-7)
8. ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UNGA 53rd Sess., U.N. Doc. A/56/10 (2001), at 38 (emphasis added), https://bit.ly/39T3EHB. [↑](#footnote-ref-8)
9. B.S. Chimni, *The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective*, 31 EJIL, no. 4, 2020, 1211–21 [↑](#footnote-ref-9)
10. Hugo Grotius, Commentary on the Law of Prize and Booty (edited with an introduction by Martine Julia van Ittersum, 2006) [hereinafter *De Jure Praedae* or *DJP*]. [↑](#footnote-ref-10)
11. The VOC was a limited liability company, but the meaning of this feature wasn’t clear in its founding. For further discussion, see Jan de Vries and Ad van der Woude, The First Modern Economy: Success, Failure, and Perseverance of the Dutch Economy, 1500–1815 (1997); Julia Adams, *Principals and Agents Colonialists and Company Men: The Decay of Colonial Control* *in the Dutch East Indies*, 61 Am. Soc. Rev. 12 (1996); Femme S. Gaastra, Competition or Collaboration? Relations between the Dutch East India Company and Indian Merchants around 1680 Merchants, Companies and Trade: Europe and Asia in the Early Modern Era 189 (Suchil Chaundhury and Michel Morineau eds., 1999); Ron Harris, Law Finance and the First Corporations in Global Perspectives on the Rule of Law )James J. Heckman et al. eds., 2009). [↑](#footnote-ref-11)
12. These early corporations were granted monopolistic privileges in return for payments to the Crown. Whether the colonial corporation which settled Virginia, Massachusetts, and other areas in North America should be regarded as part of the history of the business corporation is yet unresolved; *see* Ron Harris, Industrializing English Law 25–43 (2000); Fernand Braudel, the Wheels of Commerce 445–47 (1982); Ann M. Carlos and Stephen Nicholas, *Agency Problems in Early Chartered Companies: The Case of the Hudson’s Bay Company*, 50 J. Econ. Hist. 853, 854–56 (1990); Ann M. Carlos and Stephen Nicholas, *Theory and History: Seventeenth Century Joint-Stock Chartered Trading Companies*, 56 J. Econ. Hist, 916 (1996); Nicholas Canny, The Origins of Empire (1998). [↑](#footnote-ref-12)
13. Harris, *supra* note 11, at 50. [↑](#footnote-ref-13)
14. Philip Stern, The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India 3 (2011). [↑](#footnote-ref-14)
15. Philip Stern, *Companies: Monopoly, Sovereignty and the East India*, in Mercantilism Reimagined: Political Economy in Early Modern Britain and its Empire 177–181 (Philip Stern & Carl Wennerlind eds., 2014). [↑](#footnote-ref-15)
16. Stern, *supra* note 13, at 143. Stern explained that the company had strong relations to the Crown (King James was invested in the Company) but it was not institutionally tied to the Crown. [↑](#footnote-ref-16)
17. Thomas Pownall, The Right, Interest and the Duty of Government, as Concerned in the Affairs of the East Indies 3, 26–27 (rev. ed. 1781). [↑](#footnote-ref-17)
18. Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, IV.iii.C.2; 489 (R.H. Campbell & A.S. Skinner eds., textual ed., W.B Todd, Oxford Univ. Press 1976) [hereinafter, WN]. [↑](#footnote-ref-18)
19. *Id*. at vii.b.44/582. [↑](#footnote-ref-19)
20. *See, e.g.*, Smith’s discussion of trade restrictions in the context of the American colonies; *id*. at IV.vii.c.9/592. [↑](#footnote-ref-20)
21. *Id*. at IV.vii.c.80/626. [↑](#footnote-ref-21)
22. *Id*. at IV.vii.b 49/584. [↑](#footnote-ref-22)
23. *Id*. Furthermore, “[a]ll the original sources of revenue, the wages of labour, the rent of land, and the profits of stock, the monopoly renders much less abundant than they otherwise would be. To promote the little interest of one little order of men in one country, it hurts the interest of all other orders of men in that country, and of all men in all other countries” (*id*. at IV.vii.c. 60/612). [↑](#footnote-ref-23)
24. *Id*. [↑](#footnote-ref-24)
25. *Id*. at WN, IV.vii.c.104/638. In a later passage Smith vividly described the indifference of the company managers to the fate of the colonies (*id*. at IV.vii.c.106/640). He further conceded that on some occasions managers of such companies acted honorably, but this was not expected of those “who have been bred to professions very different from war and politicks” (*id*. at IV.vii.c.107/641). [↑](#footnote-ref-25)
26. *Id*. at IV.vii.c.103/637 [↑](#footnote-ref-26)
27. *Id*. at V.i.e.29/754. [↑](#footnote-ref-27)
28. *Id*. at IV.vii.c.104/638 [↑](#footnote-ref-28)
29. Sankar Muthu, *Adam Smith’s Critique of International Trading Companies: Theorizing Globalization in the Age of Enlightenment*, 36 Pol. Theory 185 (2008). [↑](#footnote-ref-29)
30. WN, IV.vii.c.49/608. See Muthu, *supra* note 28, at 196–98 for further discussion of this aspect. [↑](#footnote-ref-30)
31. WN, IV.vii.c. 63/613. [↑](#footnote-ref-31)
32. *Id*. at V.i.e.18/741. [↑](#footnote-ref-32)
33. *Id*. In the following passages, Smith described in some detail the failing experiences of the Royal African Company, the Hudson Bay Company, the South Sea Company, and the English East India Company. [↑](#footnote-ref-33)
34. H.V. Bowen, The Business of Empire 14 (Cambridge Univ. Press, 2006). [↑](#footnote-ref-34)
35. Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 Wm. & Mary Q. 51, 52 (1993). [↑](#footnote-ref-35)
36. *Id.* at 68. [↑](#footnote-ref-36)
37. [references to the following section] [↑](#footnote-ref-37)
38. For example, “particular companies of merchants have had the address to persuade the legislature to entrust to them the performance of this part of the duty of the sovereign, together with all the powers which are necessarily connected with it” (WN, II, 733).  [↑](#footnote-ref-38)
39. For general accounts of the conference, see J. Keltie, The Partition of Africa (1893); S.E. Crowe, The Berlin West Africa Conference, 1884–85 (1942); R. Gavin & J. Betley, The Scramble for Africa: Documents on the Berlin West Africa Conference and Related Subjects 1884/1885 (1973); R. Robinson, J. Gallagher & A. Denny, Africa and the Victorians: The Official Mind of the Victorians (2015); Stig Förster, Wolfgang J. Mommsen & Ronald Robinson (eds.), Bismarck, Europe and Africa: The Berlin Africa Conference 1884–1885 and the Onset of Partition (1988); Thomas Pakenham, The Scramble for Africa: White man’s conquest of the dark continent from 1876 to 1912 (1991); M. Ewans, European Atrocity, African Catastrophe: Leopold II, the Congo Free State and Its Aftermath (2002); R. Louis, Ends of British Imperialism, 26–77 (2007); Matthew Craven, *Between Law and History: The Berlin Conference of 1884–1885 and the Logic of Free Trade*, London Review of International Law no. 3, 2015, 31. [↑](#footnote-ref-39)
40. Berlin Act, arts. 34–35. For further discussion, see J.D. Hargreaves, *The Berlin Conference, West African Boundaries, and the Eventual Partition, in* Bismarck, Europe and Africa, *supra* note 38. On the ways in which the instability and open-endedness of the categories in arts. 34–35 for sovereignty structured the architecture of Africa’s partition, see Craven, *supra* note 38, at 44–46; Andrew Fitzmaurice, *The Genealogy of* Terra Nullius, 129 Austl. Hist. Stud. 1, 10–11 (2001); M. Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960 150–51 (2010); Andrew Fitzmaurice, Sovereignty, Property and Empire 1500–2000 285–90 (2015). [↑](#footnote-ref-40)
41. The AIC was an offshoot of the Comité d’études du Haut-Congo*,* the executive arm of a syndicate set up by Leopold in 1878, financed by private subscription, which included William Mackinnon, the later founder of the Imperial British East Africa Company. For an elaborate discussion, see Andrew Fitzmaurice, *The Justification of King Leopold II’s Congo Enterprise by Sir Travers Twiss*, *in* Law and Politics in British Colonial Thought: Transition of Empire 109 (Shaunnagh Dorsett & Ian Hunter eds., 2010); Adam Hochshild, King Leopold’s Ghost 75–82 (1998); Pakenham, *supra* note 38, at 11–29, 239–255; Stengers, “Leopold II and the Association Internationale,” 44–229. [↑](#footnote-ref-41)
42. On February 27, 1885, one day after the Berlin West Africa Conference ended, Bismarck wrote a *Schutzbrief* (royal charter) for the Gesellschaft für Deutsche Kolonisation (GfdK) East African possessions. The charter enabled Bismarck to recognize an area in East Africa as a German protectorate, and to grant its administration to the German East Africa Company (Deutsch-Ostafrikanische Gesellschaft, DOAG). K.J. Bade, *Imperial Germany and West Africa: Colonial Movement, Business Interests, and Bismarck’s “Colonial Policies,”* in Bismarck, Europe and Africa, *supra* note 38, at 124–25; *see also* Sebastian Conrad, Globalization and the Nation in Imperial Germany 119–24 (2006). [↑](#footnote-ref-42)
43. The North Borneo Charter did not grant governmental powers to the company, and prohibited a trading monopoly. Like the African chartered company, the North Borneo Company was incorporated under the Companies Act and could have operated in North Borneo independently of the royal charter. John Galbraith described how the British government used the charter as “an effective means of fencing off North Borneo from the intrusion of other powers without itself accepting direct responsibility, and the Company enabled it to do so.” John S. Galbraith, *The Chartering of the North Borneo Company*, 4 J. Brit. Stud., May 1965, 102–26, 125. Galbraith further argues that while the founders of the British African chartered companies cited the North Borneo Company as a precedent, the company’s charter conferred no governmental powers, and was therefore an unsatisfactory precedent. “Its main significance was as a forerunner” to the chartered companies in Africa. *Id*. at 125. [↑](#footnote-ref-43)
44. For a discussion of the British context, see Harris, *supra* note 11, at 217–93. For a classic discussion of the American context, see James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (1956); *see also* Lawrence Friedman, A History of American Law 390–403 (2005); William G. Roy, Socializing Capital: the Rise of the Large Industrial Corporation in America 42–77 (1997). [↑](#footnote-ref-44)
45. John Flint, *Chartered Companies and the Transition from Informal Sway to Colonial Rule in Africa*, *in* Bismarck, Europe and Africa, *supra* note 38. [↑](#footnote-ref-45)
46. The period between 1870 and 1914 saw particularly rapid levels of business creation. From the 1880s, the numbers and scale of multinationals grew rapidly. European companies dominated the world stage during this period. For an overview of this period, see Geoffrey Jones, Multinationals and Global Capitalism: From the Nineteenth Century to the Twenty-First Century 18–29 (2005). Jones draws attention to the limited reliable data on this period. [↑](#footnote-ref-46)
47. See note 51 above. [↑](#footnote-ref-47)
48. Leroy Vail, *Mozambique’s Chartered Companies: The Rule of the Feeble*, 17 J. Afr. Hist. 389 (1976). [↑](#footnote-ref-48)
49. Henry Sumner Maine, International Law (Lectures delivered before the University of Cambridge, 1887). For further discussion on Maine’s work, see Karuna Mantena, Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism 56–88 (2009). [↑](#footnote-ref-49)
50. Maine, *supra* note 48, at 56. [↑](#footnote-ref-50)
51. *Id*. at 66–67. [↑](#footnote-ref-51)
52. On Westlake, *see* *In Memoriam: Professor John Westlake (1828–1913)* 7 Am. J. Int’l L. no. 3, 1913, 582–84 [↑](#footnote-ref-52)
53. Collected Papers of John Westlake on Public International Law 135–38 (Lassa Oppenheim ed., Cambridge Univ. Press 1914). [↑](#footnote-ref-53)
54. *Id*. at 159. [↑](#footnote-ref-54)
55. [During that very same period the publicity over atrocities in the Congo; Conard and Casement]. [↑](#footnote-ref-61)
56. Gustave Rolin-Jaequemyns, *L’année 1888 au point de vue de la paix et du droit international*, 31 Revue Droit International, 189–190 (1889). [↑](#footnote-ref-62)
57. Rolin-Jaequemyns quoted from the French edition; I use here the translated quote from Montesquieu, The Spirit of the Laws, bk. XXI, ch. 21, 391 (Cambridge Univ. Press 1989). [↑](#footnote-ref-63)
58. Rolin-Jaequemyns, *supra* note 57, at 190–91 [my translation]. [↑](#footnote-ref-64)
59. *Id*. at 191. [↑](#footnote-ref-65)
60. *Id*. at 192. [↑](#footnote-ref-66)
61. F.E. Smith, International Law 37 (1900). [↑](#footnote-ref-67)
62. This view was codified in Article IV of the Brussels Act (1890): “The Signatory Powers, however, emphasized the principle of international law that a state is responsible for its own acts and cannot contract itself out of its engagements by delegating its authority to any corporate body.” General Act of the Brussels Conference relative to the African Slave Trade, July 2, 1890 [further archival work]. [↑](#footnote-ref-68)
63. T.J. Lawrence, The Principles of International Law 79 (1900). [↑](#footnote-ref-69)
64. *Id*. at 80. [↑](#footnote-ref-70)
65. *Id*. at 80–81. [↑](#footnote-ref-71)
66. *Id*. at 81. [↑](#footnote-ref-72)
67. *Id*. at 82. [↑](#footnote-ref-73)
68. *Id*. [↑](#footnote-ref-74)
69. *Id*. at 166. [↑](#footnote-ref-75)
70. *Id*. at 166–67. [↑](#footnote-ref-76)
71. *Id*. at 167. [↑](#footnote-ref-77)
72. *Id*. at [xx]. [↑](#footnote-ref-78)
73. Gaston Jèze, Étude théorique et pratique sur l’occupation: comme mode d’acquérir les territoires en droit international 342–87 (1896). [↑](#footnote-ref-79)
74. *Id.* at 354. [↑](#footnote-ref-80)
75. Charles Salomon, L’Occupation des territoires sans maître 128–88 (1889). [↑](#footnote-ref-81)
76. It should be noted that Adam Smith acknowledged the importance of such companies in the early stages of colonialism [ref] and was also somewhat optimistic that such companies could be efficient once they departed from a charter device that grants them sovereign and monopolistic privileges [ref]. [Collins has the references] [↑](#footnote-ref-82)
77. Bill to make provision for Payments in Connection with Revocation of Charter of Royal Niger Company (H.C.), 1899, 260. [↑](#footnote-ref-83)
78. Parl Deb HL (4th ser.) (1899) 73, cols. 1389–1401 (UK); Parl Deb HL (4th ser.) (1899) 74, cols. 861–63 (UK); Parl Deb HC (4th ser.) (1899) 74, cols. 1269–1344 (UK); Parl Deb HC (4th ser.) (1899) 75, cols. 365–432 (UK); Parl Deb HL (4th ser.) (1899), 75, cols. 965–1013 (UK). [↑](#footnote-ref-84)
79. Parl Deb HL (4th ser.) (1899) 75, cols. 965–1013 (UK). [↑](#footnote-ref-85)
80. *Nigeria*, The Economist, July 8, 1899. [↑](#footnote-ref-86)
81. Scott R. Pearson, *The Economic Imperialism of the Royal Niger Company*, 10 Food Res. Inst. Stud. 69–88 (1971). [↑](#footnote-ref-87)
82. M. Lynn, Commerce and Economic Change in West Africa: The Palm Oil Trade in the Nineteenth Century 187 (1997). [↑](#footnote-ref-88)
83. Hopkins, Imperial Business, 277; Jones, *supra* note 45, at 77. [↑](#footnote-ref-89)
84. Colin Newbury, *Trade and Technology in West Africa: The Case of the Niger Company 1900–1920*, 19 J. Afr. Hist. 551 (1978). [↑](#footnote-ref-90)
85. Newbury attributes this development to slow organizational adjustments. *Id*., 551, 553. [↑](#footnote-ref-91)
86. For a comprehensive study, see Dav*id.* K. Fieldhouse, Merchant Capital and Economic Decolonization: The United Africa Company 1929–1987 (1994). [↑](#footnote-ref-92)
87. On the two partitions and the studies related to their relationship, see A.G. Hopkins, *Big Business in African Studies* 28 J. Afr. Hist. 119, 129–33 (1987). [↑](#footnote-ref-93)
88. For further discussion, see Doreen Lustig, From Chartered to Privately Incorporated Companies in International Law (on file with author). [↑](#footnote-ref-94)
89. Sacha Hepburn & April Jackson, *Colonial Exceptions: The International Labour Organization and Child Labour in British Africa, c.1919–1940*, 1 J. Contemp. Hist. 6 (2021). [↑](#footnote-ref-95)
90. For a comprehensive analysis, see Olivier de Schutter, 188 [↑](#footnote-ref-96)
91. Cristina Lafont, Sovereignty and the International Protection of Human Rights 427, 437–38 (2015) [↑](#footnote-ref-97)
92. A. Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon—An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 Berkeley J. Int’l L. 91, 92 (2002); A. Clapham & S. Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 Hastings Int’l & Comp. L. Rev. 339, 341 (2001). [↑](#footnote-ref-98)
93. *See* Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights (U.N. Doc. A/HRC/8/5, 7 Apr. 2008) para 3; Florian Wettstein, *The History of “Business and Human Rights” and Its Relationship with “Corporate Social Responsibility,”* in Research Handbook on Human Rights and Business (Surya Deva ed., 2020). [↑](#footnote-ref-99)
94. G. Gereffi, J. Humphrey & T. Sturgeon, *The Governance of Global Value Chains*, 12 Rev. Int’l Pol. Econ. 78–104 (2005); G. Gereffi & J. Lee, *Why the World Suddenly Cares about Global Supply Chains*, 48 J. Supply Chain Mgm’t 24–32 (2012); L. Seabrooke & D. Wigan 2017. [add more] [↑](#footnote-ref-100)
95. *See, e.g*., General Comment No. 14 (2000) The Right to the Highest Attainable Standard of Health (International Covenant on Economic, Social and Cultural Rights, art. 12), E/C. 12/2000/4 (2000), para. 39; General Comment No. 15 (2002), The Right to Water (International Covenant on Economic, Social and Cultural Rights, arts. 11–12), E/C. 12/2002/11 (Nov. 26, 2002), para. 31. Statement on the Obligations regarding the Corporate Sector and economic, Social and Cultural Rights, E/C.12/2011 (May 20, 2011), para. 5. In September 2011 a range of experts and organizations endorsed the Maastricht Principles on Extraterritorial Obligations of States in the area of economic, social, and cultural rights, which are an attempt to systematize the case law of human rights courts and treaty bodies in this area. *See* 34 Hum. Rts. Q., 1084–171 (2012), for a reproduction of the text. [↑](#footnote-ref-101)
96. For a survey of the cases, see Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries (authored by Dr. Axel Marx, Dr. Claire Bright, Prof. Dr. Jan Wouters, Ms. Nina Pineau, Mr. Brecht Lein, Mr. Torbjörn Schiebe, Ms. Johanna Wagner, Ms. Evelien Wauter)https://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO\_STU(2019)603475. [↑](#footnote-ref-102)
97. Christopher A. Casey, Nationals Abroad: Globalization, Individual Rights, and the Making of Modern International Law (2020). [↑](#footnote-ref-103)
98. Belgium v. Spain—Barcelona Traction, Light and Power Company, Limited (New Application: 1962)—Judgment of 5 February 1970—Second Phase—Judgments [1970] ICJ 1; ICJ Rep. 1970, 3; [1970] ICJ Rep. 3 (Feb. 5, 1970). [↑](#footnote-ref-104)
99. Silvia Steininger & Jochen von Bernstorff, *Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate “Human” Rights in International Law*, *in* Contingency in International Law: On the Possibility of Different Legal Histories 280, 290 (Ingo Venzke & Kevin Jon Heller eds., 2021); *see also* M. Emberland, The Human Rights of Companies: Exploring the Structure of ECHR Protection (2006); P.J. Oliver, The Fundamental Rights of Companies: EU, US and International Law Compared (2017); A. Grear, *Challenging Corporate “Humanity”: Legal Disembodiment, Embodiment and Human Rights*, 7 Hum. Rts. L. Rev. 511 (2007); A. Grear, Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity (2010); Andreas Kulick, *Corporate Human Rights*?, 27 EJIL, no. 1, 2021; Jose Alvarez, *Are Corporations Subjects of International Law?*, 9 Santa Clara J. Int’l L. 1 (2011); Roland Portmann, Legal Personality in International Law (2010). [↑](#footnote-ref-105)
100. *See* Melissa J. Durkee, The Business of Treaties, 63 UCLA L. Rev. 264, 268 (2016); *also* International Lobbying Law, 127 Yale L.J. 1742 (2018); Astroturf Activism, 97 Stan. L. Rev. 201 (2017). [↑](#footnote-ref-106)
101. Bartley surveys this literature; Neli Frost EJIL article [↑](#footnote-ref-107)
102. Julian Arato argues that since states and corporations “share authority over the contract’s disposition, and the state cannot unilaterally terminate or vitiate the agreement without committing an internationally wrongful act” [corporations impose] “an enormous hindrance on the capacity of the state party to govern, they affect the rights and capacities of the citizenry as a whole” and should therefore be conceived as lawmakers; *see* Julian Arato, *Corporations as Lawmakers*, 56 Harv. Int’l L. J. 229, 241 (2015). [↑](#footnote-ref-108)
103. C. Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, *in* The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance 145, 145 (J. Jordana & D. Levi-Faur eds., 2004); Tim Büthe & Walter Mattli, The New Global Rulers: The Privatization of Regulation in the World Economy (2011). [↑](#footnote-ref-109)