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Corporations as Semi-States

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Articles

Corporations as Semi-States

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When Ebola came to West Africa in 2014, Liberia could not cope. The State's already fragile public health infrastructure was largely ineffective in responding to the illness and preventing its spread. And, the World Health Organization's support was slow and stilted. By contrast, Firestone, a tire company that operates a vast rubber plantation in Liberia and runs its own hospital for 80,000 employees, family dependents, and persons in neighboring localities, responded to the virus much more effectively.

This Article uses Firestone's Ebola response as an entry point to study a phenomenon too frequently overlooked. Many for-profit firms that maintain operations in failed and fragile States discharge significant quasi-governmental functions. They provide security, housing, food, water, transportation, infrastructure, and healthcare. And, they undertake such tasks not only for their employees but, sometimes, these businesses also reach beyond their own private domain to respond to challenges impacting the local community. Yet, legal scholarship on failed and fragile States largely ignores the provision of public goods by these business entities.

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This Article suggests that much work remains to be done to grapple with the implications of the various functions undertaken by these business entities. The Article first details instances of corporations acting as semi-States to add fresh nuance to the prevailing narrative concerning the role of business in failed and fragile States. It then marshals theoretical insights available at the intersection of corporate law and international law to suggest a more complex understanding of the behavior of profit-motivated actors in the State's absence.

The Article then applies this renovated model to question the appropriateness of laws that dissuade firms from operating in failed and fragile States. It flags and addresses reasons for caution but also considers alternative means through which the international community might better foster the socially beneficial potential of for-profit firms operating in failing States.

INTRODUCTION	223
I. THE BUSINESS OF STATE.....	230
A. Infrastructure and Logistics	232
B. Security	237
C. Other Quasi-Governmental Tasks	240
II. MISSED CONNECTIONS	246
A. Disciplinary Estrangement and the Long Shadow of Colonial Corporations.....	247
III. PUBLIC GOODS, PROFIT, AND SOVEREIGNTY	256
A. Decisionmaking in the Absence of External Constraint.....	257
B. Uncertainty, Trust, and Social Capital.....	264
C. Entrenchment and Illegitimacy	269
IV. LEGAL AND POLICY IMPLICATIONS.....	274
A. Anti-Corruption and Anti-Money Laundering	274
B. The New U.N. Draft Treaty on Business and Human Rights	277
C. Universal Health Coverage and the U.N.'s 2030 Development Goals.....	279
CONCLUSION	282

“[W]hen state functions collapse, citizens are often compelled to look elsewhere to fill the sovereignty gap . . .”¹

INTRODUCTION

When the Ebola virus swept through West Africa in 2014, the Liberian government could not cope.² Overwhelmed by the rapidly spreading contagion, mounting fatalities, and widespread social panic, the country’s already-fragile public health sector neared collapse.³ The U.N. Security Council declared the outbreak a “threat to international peace and security.”⁴ Yet, the Liberian government seemed powerless in the face of this historic pandemic, and the World Health Organization’s slow and stilted response in deploying support has since been the subject of widespread condemnation.⁵ Ultimately, Ebola claimed over 11,000 lives in the region, and Liberia recorded almost 5,000 fatalities, the highest of any country affected.⁶

Amidst this immense tragedy, however, there was a surprising outlier. With the onset of Ebola, Firestone quickly sprang into action. The company, an arm of the Japanese tire giant Bridgestone, has long run a vast rubber plantation, almost the size of Chicago, an hour’s drive from the Liberian capital of Monrovia.⁷ And, crucially,

1. Robert B. Zoellick, *Fragile States: Securing Development*, 50 SURVIVAL 67, 71 (2008) (writing as then-President of the World Bank).

2. See Joseph D. Forrester et al., *Assessment of Ebola Virus Disease, Health Care Infrastructure, and Preparedness—Four Counties, Southeastern Liberia, August 2014*, 63 MORBIDITY & MORTALITY WKLY. REP. 891, 891–93 (2014).

3. See U.N. SCOR, 69th Sess., 7260th mtg. at 2–4, U.N. Doc. S/PV/7260 (Sept. 9, 2014).

4. S.C. Res. 2176, U.N.Doc. S/RES/2176 (Sept. 15, 2014).

5. See WORLD HEALTH ORG. [“WHO”], REPORT OF THE EBOLA INTERIM ASSESSMENT PANEL 5 (July 2015), <http://www.who.int/csr/resources/publications/ebola/report-by-panel.pdf?ua=1> [<https://perma.cc/2HML-KNST>]; Suerie Moon et al., *Will Ebola Change the Game? Ten Essential Reforms Before the Next Pandemic. The Report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola*, 386 LANCET 2204 (2015). See also Matiangai Sirleaf, *Ebola Does Not Fall from the Sky: Global Structural Violence and International Responsibility*, 51 VAND. J. TRANSNAT’L L. 477, 516–26 (2018).

6. *Ebola Virus Disease*, WORLD HEALTH ORG. (Feb. 12, 2018), <http://www.who.int/mediacentre/factsheets/fs103/en/> [<https://perma.cc/7R47-6UEJ>]; *2014 Ebola Outbreak in West Africa—Case Counts*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 13, 2016), <https://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/case-counts.html> [<https://perma.cc/FFE7-G79G>].

7. T. Christian Miller & Jonathan Jones, *Firestone and the Warlord*, PROPUBLICA (Nov. 18, 2014), <https://www.propublica.org/article/firestone-and-the-warlord-intro> [<https://>]

it operated its own hospital and health clinics within its compound.⁸ These company facilities provided health coverage for Firestone's 8,500 employees but also served a patient pool of almost 80,000 employee dependents and Liberians from neighboring areas.⁹

Within ten days of its sentinel case, Firestone had established an Ebola Treatment Unit in its compound, and the company's health professionals implemented screening, isolation, education, and reintegration practices that have since been widely praised.¹⁰ As a result, the Firestone District reported no further Ebola cases for several months after its initial encounter.¹¹ And, even at the pandemic's height, the incidence rate of Ebola within Firestone District was less than half that of surrounding Margibi county.¹² Moreover, almost 40% of the Ebola patients treated at Firestone's hospital were not even employees or their dependents but were instead persons from neighboring locales who came seeking treatment.¹³ Asked later how Liberia's response to the Ebola outbreak might be improved, Dr. Brendan Flannery, head of the U.S. Centers for Disease Control and Prevention's medical team in the country, simply replied, "More Firestones."¹⁴

perma.cc/TT3Y-9Q6Z].

8. *Health Care at Firestone Liberia*, FIRESTONE NAT. RUBBER CO., <https://www.firestonenaturalrubber.com/healthcare/overview/> [https://perma.cc/LCN2-XA7M].

9. Erik J. Reaves et al., *Control of Ebola Virus Disease—Firestone District, Liberia, 2014*, 63 MORBIDITY & MORTALITY WKLY. REP. 959, 959–60 (2014).

10. See *id.* at 961; M. Allison Arwady et al., *Reintegration of Ebola Survivors into Their Communities—Firestone District, Liberia, 2014*, 63 MORBIDITY & MORTALITY WKLY. REP. 1207, 1207–08 (2014). See also Drew Hinshaw, *Liberian Rubber Farm Becomes Sanctuary Against Ebola*, WALL ST. J. (Oct. 6, 2014), <https://www.wsj.com/articles/liberian-rubber-farm-becomes-sanctuary-against-ebola-1412629331> [https://perma.cc/7K6K-2QF6]; *Beating Ebola: One Company's Fight in Liberia Shows How to Do It*, NBC NEWS (Oct. 22, 2014), <https://www.nbcnews.com/storyline/ebola-virus-outbreak/beating-ebola-one-companys-fight-liberia-shows-how-do-it-n230961> [https://perma.cc/K5YU-KQZB].

11. Reaves et al., *supra* note 9, at 961–62.

12. *Id.* at 963. See also WHO, WHO: EBOLA RESPONSE ROADMAP SITUATION REPORT 3, at 3 (Sept. 12, 2014), http://apps.who.int/iris/bitstream/10665/133073/1/roadmapsitre3_eng.pdf?ua=1 [https://perma.cc/P78N-BBPH] (observing that “[a]n increase in new cases has also been reported in districts throughout the country, including Bong, Bomi, Grand Bassa, Margibi and Nimba”); WHO, WHO: EBOLA RESPONSE ROADMAP SITUATION REPORT 3 (Oct. 1, 2014), http://apps.who.int/iris/bitstream/10665/135600/1/roadmapsitre3_1Oct2014_eng.pdf?ua=1 [https://perma.cc/8D6N-GDTV] (noting that “[t]he counties of Bong, Grand Bassa, Margibi and Nimba continue to report high numbers of new cases”).

13. Reaves et al., *supra* note 9, at 959–65.

14. Jason Beaubien, *Firestone Did What Governments Have Not: Stopped Ebola in Its Tracks*, NPR (Oct. 6, 2014), <https://www.npr.org/sections/goatsandsoda/2014/10/06/>

This Article uses Firestone’s Ebola response as a point of entry to examine an under-studied but important phenomenon. Many for-profit firms that maintain operations in failed and fragile States discharge significant quasi-governmental functions.¹⁵ They provide security, housing, food, water, transport, infrastructure, and healthcare. And, they undertake such tasks not only for their employees but, sometimes, also reach beyond their own private domain to respond to challenges impacting the local community.

Yet, legal scholarship on failed and fragile States often passes over the constructive potential of these business entities.¹⁶ Indeed, John Ruggie, the U.N. Secretary-General’s Special Representative for Business and Human Rights and author of the U.N.’s Principles on Business and Human Rights, summarized the prevailing perception of business in failing States by observing that weak, conflict-affected States “attract illicit and borderline enterprises because . . . in practice, they essentially function as ‘law-free’ zones in which even outright looting and pillaging are possible without fear of being

354054915/firestone-did-what-governments-have-not-stopped-ebola-in-its-tracks [https://perma.cc/7JQV-RJFL].

15. This Article draws on examples of companies operating in countries that the World Bank ranks among the most fragile and difficult for doing business. These metrics are imperfect, as others have argued. Yet, they are useful tools for focusing the current inquiry on States with severe governance challenges. The “failed” or “fragile” States moniker is not without controversy, but it is here used as a shorthand so as to engage the debate upon terms deployed by global policymakers. See WORLD BANK GRP., INFORMATION NOTE: THE WORLD BANK GROUP’S HARMONIZED LIST OF FRAGILE SITUATIONS, <http://pubdocs.worldbank.org/en/586581437416356109/FCS-List-FY16-Information-Note.pdf> [https://perma.cc/7J5F-JJLM]; WORLD BANK GRP., HARMONIZED LIST OF FRAGILE SITUATIONS FY 18, <http://pubdocs.worldbank.org/en/189701503418416651/FY18FCSLIST-Final-July-2017.pdf> [https://perma.cc/KLP4-B2EH]; WORLD BANK GRP., DOING BUSINESS 2017 (14th ed. 2017), <http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Report.pdf> [https://perma.cc/JDR2-A9UQ]. Critiquing concepts of good governance and failed States, see, e.g., B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L COMMUNITY L. REV. 3, 16 (2006); Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903, 963–71 (1997).

16. See, e.g., CHIARA GIORGETTI, A PRINCIPLED APPROACH TO STATE FAILURE: INTERNATIONAL COMMUNITY ACTIONS IN EMERGENCY SITUATIONS 38–39 (2010) (discussing the constructive role of States and international organizations, but examining business for just over a page and admitting that “[w]hile the international community stalled, Somalis’ entrepreneurship took control”); MARIO SILVA, STATE LEGITIMACY AND FAILURE IN INTERNATIONAL LAW 190–93 (2014); GERARD KREIJEN, STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS: LEGAL LESSONS FROM DECOLONIZATION OF SUB-SAHARAN AFRICA 308 (2004); Gerald B. Helman & Stephen R. Ratner, *Saving Failed States*, 89 FOREIGN POL’Y 3, 12–18 (1992) (advocating a system of UN conservatorship as a possible answer to address the problem of failed States).

sanctioned.”¹⁷ Failed and fragile States are thus regularly described as places of immense darkness, whose lack of a functioning government facilitates the rise of terrorist groups and criminal gangs.¹⁸ And, it is accordingly assumed that businesses that persist in such places are, by implication or association, opportunists that must be doing bad things.¹⁹

17. See JOHN GERARD RUGGIE, JUST BUSINESS 29 (2013). See also John Ruggie (Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Business and Human Rights in Conflict-Affected Regions: Challenges and Options Towards State Responses*, ¶ 5, U.N. Doc. A/HRC/17/32 (May 27, 2011) (observing that “[u]nsurprisingly, the most egregious business related human rights abuses also take place in such environments [conflict situations], where the human regime cannot be expected to function as intended.”).

18. See, e.g., Mario Silva, *Somalia: State Failure, Piracy, and the Challenge to International Law*, 50 VA. J. INT’L L. 553, 554 (2010) (“In Somalia the failure of the state to provide good governance, security, and respect for the rule of law is at the very heart of the country’s endemic conflict. These inabilities, in turn, have fueled piracy and provided a breeding ground for terrorist activity.”); Frédéric Gilles Sourgens, *The End of Law: The ISIL Case Study for a Comprehensive Theory of Lawlessness*, 39 FORDHAM INT’L L.J. 355, 362 (2015); Brian Finucane, *Fictitious States, Effective Control, and the Use of Force Against Non-State Actors*, 30 BERKELEY J. INT’L L. 35, 37–39 (2012); John Yoo, *Fixing Failed States*, 99 CAL. L. REV. 95, 96 (2011) (arguing that “[f]ailed states pose one of the deepest challenges to American national security and international peace and stability” because “[t]hey serve as an incubator for international terrorist groups” and “[t]heir lack of stable government authority allows them to become trans-shipment points of illicit drugs, human trafficking, or the proliferation of weapons of mass destruction”); Robert Gates, U.S. Sec’y of Def., Remarks Delivered at the Nixon Center (Feb. 24, 2010), <http://archive.defense.gov/Speeches/Speech.aspx?SpeechID=1425> [<https://perma.cc/EUW9-BHX8>] (arguing that “the most likely and lethal threats . . . will likely emanate from fractured or failing states” and labeling this “the ideological and security challenge of our time”); NAT’L SEC. COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 1 (2002), <http://www.state.gov/documents/organization/63562.pdf> [<https://perma.cc/5N8L-C6H8>] (“America is now threatened less by conquering states than we are by failing ones.”).

19. See, e.g., Beth Stephens, *The Amoral Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 48–49 (2002) (examining “the largely uncontrolled human rights danger posed by multinationals” and asserting “the harsh reality that corporations often profit from abusive behavior”); John Ruggie (Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Business and Human Rights in Conflict-Affected Regions: Challenges and Options Towards State Responses*, ¶¶ 5–6, U.N. Doc. A/HRC/17/32 (May 27, 2011), https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.32_en.pdf [<https://perma.cc/A2LV-WXUS>] (noting, without additional support, that “[u]nsurprisingly, the most egregious business-related human rights abuses also take place in such environments [conflict situations], where the human regime cannot be expected to function as intended” and calling on other States to restrain corporate actors when the “‘host’ State may be unable to protect human rights adequately owing to a lack of effective control”); Naomi Klein, *How Power Profits from Disaster*, GUARDIAN (July 6, 2017), <https://www.theguardian.com/us-news/2017/jul/06/naomi-klein-how-power-profits-from->

It is true that firms doing business in failed and fragile States are sometimes far from blameless. Scholars, advocates, and members of the local community have well-founded reasons to treat such business entities with suspicion. Some business actors have historically been and continue to be involved in abusive, coercive, interventionist, and imperialist conduct in such States.²⁰ Moreover, Firestone began operations in Liberia in 1926 because of an extended lease whose terms have been widely rebuked as exploitative, and Firestone has since been accused of a slew of human rights abuses.²¹

Yet, if we only castigate such firms and presume that their operations absent oversight by the government in whose territory they are functioning are likely to be pernicious, we might easily overlook their ability to respond positively to governance challenges in such areas of State fragility.

Nor, it must be said, have other actors that often receive more positive treatment concerning their governance functions in failed and fragile States been entirely blameless. United Nations peacekeepers introduced cholera to Haiti, causing almost 10,000 deaths, and the U.N. subsequently refused to pay compensation, claiming organizational immunity.²² The global charity Oxfam has also been

disaster [<https://perma.cc/6FTS-VA3W>].

20. See *infra* Section II. See also, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 324 (S.D.N.Y. 2003) (listing serious crimes allegedly committed by the Canadian oil company Talisman and observing that “[t]he Amended Complaint properly alleges that Talisman aided and abetted or conspired with Sudan to commit various violations of the law of nations”); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); 4 TRUTH & RECONCILIATION COMM’N OF S. AFR. REPORT 18–58 (1998), <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf> [<http://perma.cc/W88P-JJVF>].

21. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (2011); Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 725 n.124 (2012); Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT’L L. 456, 476 (2011); see also *Firestone and the Warlord*, Frontline, PBS (Nov. 18, 2014), <https://www.pbs.org/wgbh/frontline/film/firestone-and-the-warlord/> [<https://perma.cc/RR5H-PBR>]; T. Christian Miller & Jonathan Jones, *Firestone and the Warlord*, PROPUBLICA (Nov. 18, 2014), <https://www.propublica.org/article/firestone-and-the-warlord-intro> [<https://perma.cc/4EJU-33SX>].

22. Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights*, U.N. Doc. A/71/40823 (2016), <https://chrgj.org/wp-content/uploads/2017/06/ReportGA71st.pdf> [<https://perma.cc/5QQD-YC39>]; U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, HAITI CHOLERA FIGURES AS OF 27 APRIL 2018 (Apr. 27, 2018), https://reliefweb.int/sites/reliefweb.int/files/resources/ocha-hti-cholera-figures-20180427_en_0.pdf [<http://perma.cc/5QQD-YC39>]; Jonathan M. Katz, *U.N. Admits Role in Cholera Epidemic in Haiti*, N.Y.

accused of a range of violations and was recently expelled from Haiti.²³ In addition, non-governmental organizations (“NGOs”) and international organizations like the U.N., which are tasked with assisting weak States in the performance of essential State functions, rely on outside funding to sustain their operations at a time when certain States are seeking to reduce their international financial commitments.²⁴

International policymakers therefore face a significant dilemma. The World Bank estimates that two billion people live in States “where development outcomes are affected by fragility, conflict, and violence.”²⁵ However, ensuring the delivery of essential public services by building the capacity of such weak States has proven difficult, both in the sphere of healthcare and with regard to a range of other functions that people might ordinarily expect the government to discharge or guarantee.²⁶

TIMES (Aug. 17, 2016), <https://www.nytimes.com/2016/08/18/world/americas/united-nations-haiti-cholera.html> [<https://perma.cc/ZZG2-XK8D>]; Rick Gladstone, *U.N. Brought Cholera to Haiti. Now It Is Fumbling Its Effort to Atone*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/world/americas/cholera-haiti-united-nations-peacekeepers-yemen.html> [<https://perma.cc/D7RS-3KVG>].

23. *Oxfam GB Banned from Haiti After Sex Scandal*, BBC NEWS (June 13, 2018), <https://www.bbc.com/news/uk-44474211> [<https://perma.cc/CSE9-KLK8>]; *Haiti Shuts Down Oxfam GB over Prostitution Scandal*, GUARDIAN (June 14, 2018), <https://www.theguardian.com/world/2018/jun/14/haiti-shuts-down-oxfam-gb-over-prostitution-scandal> [<https://perma.cc/TF4T-T5L7>].

24. Carol Morello, *U.N. Budget Cuts Highlight New U.S. Approach*, WASH. POST (Dec. 26, 2017), https://www.washingtonpost.com/world/national-security/un-budget-cuts-highlight-new-us-approach/2017/12/26/6a313f42-ea69-11e7-9f92-10a2203f6c8d_story.html?utm_term=.1eaf9461df8d [<https://perma.cc/3SWV-QBBU>].

25. *See Fragility, Conflict and Violence: Overview*, WORLD BANK <http://www.worldbank.org/en/topic/fragilityconflictviolence/overview> [<https://perma.cc/V247-ZHR4>]. *See also* AFRICAN DEV. BANK GRP., AFRICAN DEVELOPMENT BANK GROUP STRATEGY FOR ADDRESSING FRAGILITY AND BUILDING RESILIENCE IN AFRICA 2014–2019, 16–17 (2015), https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Addressing_Fragility_and_Building_Resilience_in_Africa-The_AfDB_Group_Strategy_2014%E2%80%932019.pdf [<https://perma.cc/GKU8-TTUK>] (observing that “[r]ecent estimates show that more than one-third of African countries, with some 250 million people, are affected by various forms of fragility, and even more if one takes into account sub-national fragility”); Rosa Ehrenreich Brooks, *Failed States, or the State as Failure*, 72 U. CHI. L. REV. 1159, 1174 (2005) (arguing that “[w]eak, failing and failed states are not the exception in many parts of the world. They are the norm, and have been since their inception.”).

26. ORG. FOR ECON. CO-OPERATION AND DEV. [“OECD”], STATES OF FRAGILITY 2018, at 21–68, <http://www.oecd.org/dac/states-of-fragility-2018-9789264302075-en.htm> [<https://perma.cc/YF5Z-6KYX>].

This Article explores how decisionmakers might better deploy international law to align companies' profit-incentives with the discharge of quasi-State functions in settings of State fragility. The Article asserts that, when faced with second- and third-best choices, scholars and policymakers can no longer afford to overlook the full developmental capacity of business actors. It acknowledges and explores reasons for caution, but also suggests changes to the current legal and policy framework that may spur positive innovation.

To reach this destination, the Article proceeds along the following path. Part I introduces readers to corporations acting as semi-States, a term used to describe business entities that not only maintain operations in failed or fragile States but also themselves take on and discharge important quasi-State functions. States all over the world have privatized various functions once thought to be the province of public governance. But, what is described here is something slightly different. Instead, the section highlights companies that have themselves begun to discharge State-like, public functions not necessarily because the State has nominated these companies to undertake such tasks but because the State has effectively defaulted.

Part II offers some rationale for the absence of these actors from previous scholarly accounts of State fragility, rooting its explanation in the historical estrangement of international law from corporations and vice versa, as scholars traditionally embraced the State as the sole subject of the international legal system. Undoing that estrangement has occupied some scholars for the last few decades, but the State remains at the pinnacle of the international legal hierarchy. Indeed, even when legal scholars and policymakers confront situations of State failure, alternative forms of governance are usually neglected, and the prevailing assumption is that the State itself must be rebuilt.²⁷

27. See Brooks, *supra* note 25, at 1184–85; U.N. SEC'Y-GEN., *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 19, U.N. Doc. A/59/2005 (Mar. 21, 2005), <https://www.securitycouncilreport.org/wp-content/uploads/CPR%20A%2059%202005.pdf> [<https://perma.cc/GA4W-RPZC>] (“If States are fragile, the peoples of the world will not enjoy the security, development and justice that are their right. Therefore, one of the great challenges of the new millennium is to ensure that all States are strong enough to meet the many challenges they face.”). See also ZARYAB IQBAL, *STATE FAILURE IN THE MODERN WORLD* 125 (2015) (observing that “instead of limiting our attention to intervention efforts by the United Nations and regional institutions, we could turn to how private entities—such as multinational corporations—play [or might play] a role in keeping states from collapsing” but also admitting that “[i]n the absence of extant large-scale analyses, we are not in a position to assert whether the involvement of/with private entities would benefit a weak or failing state; we merely point to it as a future direction for further investigation of the concept and phenomenon of state failure”).

In unearthing the historical entanglement of business with the project of international law, however, Part II also grapples with the crucial role that for-profit firms have played in colonial and imperial projects. This quasi-imperial function served as the original form of companies acting as semi-States, and its legacy in the various places discussed lingers as a fundamental reason for suspicion of business enterprises seeming to act in place of the State. This section faces that history head-on and acknowledges the emphasis on corporate compliance with human rights norms that has come about as a result. Yet, it also contends that accountability should not be the sole focus of our analysis and that a more nuanced approach may prove fruitful.

Part III articulates the theoretical underpinnings and implications of the Article's account. It uses the designation of certain firms as semi-States as a conceptual tool to marshal theoretical insights available at the intersection of corporate law and international law. It seeks to explain and better predict when for-profit firms will voluntarily assume more significant governance tasks by conceptualizing the reputational gain derived from the discharge of such functions as a form of investment or insurance against market uncertainty in the absence of traditional governance institutions.

Part IV deploys these descriptive and theoretical insights toward normative and prescriptive applications. It uses the analysis in Parts I–III to suggest a different approach through which the international community may better foster, incentivize, and harness the socially beneficial potential of for-profit firms discharging quasi-governmental functions in settings of State failure and fragility.

The Article then concludes by proposing that when States collapse, rather than simply looking to rebuild public governance on the same terms, the international community ought also to engage more carefully with the possibility and potentiality of for-profit firms acting as semi-States.

I. THE BUSINESS OF STATE

When a State collapses due to war, civil strife, or cataclysmic disaster, the inclination of many for-profit firms present there is to leave or fold.²⁸ The conflagration not only increases physical danger

28. See, e.g., Lin Noueihed, *Exxon to Cut Back Libya Presence As Security Crumbles*, REUTERS (Sept. 17, 2013), <http://www.reuters.com/article/libya-exxonmobil-idUSL5N0HD1UM20130917> [<https://perma.cc/9JV9-ATVD>]; Vivienne Walt, *Big Oil Companies in the Cross Fire as Libyan Violence Erupts*, FORTUNE (Mar. 5, 2015), <http://fortune.com/2015/03/05/libya-oil-companies-isis-fighting/> [<https://perma.cc/R37L-QA7L>];

to the businesses' employees and assets, but maintaining operations in failed or failing States can risk reputational, financial, and legal harm to the enterprises involved.²⁹ A cloud of suspicion is often generated, and this in turn has the potential to increase the already-significant costs of doing business in such States.³⁰ As such, this risk of non-physical harm adds to the incentives for firms to exit at exactly the time when the country whose administration is disintegrating would seem to need functioning organizations the most.³¹

Denis Dumo, *South Sudan's Biggest Bank Shuts Branches As Hyperinflation Bites*, REUTERS (May 12, 2017), <http://www.reuters.com/article/southsudan-banking/south-sudans-biggest-bank-shuts-branches-as-hyperinflation-bites-idUSL4N1IA4H4> [<https://perma.cc/CJB3-YN26>]; *but cf.* Klein, *supra* note 19.

29. Corporations must also navigate a complicated thicket of sanctions that may be imposed against the collapsing State. *See* U.N. GLOB. COMPACT, GUIDANCE ON RESPONSIBLE BUSINESS IN CONFLICT-AFFECTED AND HIGH-RISK AREAS: A RESOURCE FOR COMPANIES AND INVESTORS 13 (2010), https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf [<https://perma.cc/7XVG-RPTL>] (outlining these sanctions and observing that “[c]ompanies may become implicated in abuses and allegations of complicity in human rights abuses,” so that “[s]uch accusations may be costly both reputationally and financially for a company and seriously affect the concerned communities”); OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH RISK AREAS 13, 20, 57–58, 89 (2016), <http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf> [<https://perma.cc/STB7-SACZ>] (urging companies to pay heed to U.N. and domestic sanctions as part of their internal due diligence process).

30. Dianna Games, *Doing Business in Post-Conflict and Fragile States: Challenges and Risks* 32 (Dev. Bank of S. Afr., Working Paper Series No. 23, 2011), <http://www.dbsa.org/EN/About-Us/Publications/Documents/DPD%20No23.%20Doing%20business%20in%20post-conflict%20and%20fragile%20states-%20Challenges%20and%20risks.pdf> [<https://perma.cc/5NQD-XE5F>] (observing that “[r]eputational risk is a significant potential problem for companies in conflict and even post-conflict areas, given the shadowy forces at large”); *Easy to Lose: Reputations are Precious—and Fragile*, ECONOMIST (Jan. 22, 2004), <https://www.economist.com/special-report/2004/01/22/easy-to-lose> [<http://perma.cc/5UQU-QK2T>] (noting the general perception that “[b]usinesses are now finding that, perhaps unfairly, they are being judged by the company they keep”).

31. Throughout the Article the terms, “business,” “company,” “corporation,” and “enterprise” are used interchangeably and in an inexact way to encapsulate private-sector entities driven by the pursuit of profit. The author is aware of the challenges in this respect, but seeks to forgo precision in favor of inclusiveness, so as to capture an area of inquiry largely neglected. The emphasis on transnational corporations is not intended to obscure the role of the local private sector, but merely serves to highlight the problematic incentives for business not otherwise affiliated with the fragile State to exit. On the challenges of definition with respect to transnational business entities, see PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 5–8 (2d ed. 2007). It may be that the use of these terms interchangeably makes little practical difference. *See* Margaret M. Blair & Lyn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249–50 (1999). Indeed, the U.N.’s Special Representative on the Issue of Human Rights and Transnational

Yet, some firms decide to stay. This section examines such business entities and frames the discussion according to the various quasi-governmental functions that they have been found to discharge.

A. Infrastructure and Logistics

In Haiti, the Bermuda-based cell phone company Digicel erects street signs on unmarked byways in its trademark bright red and white.³² After the 2010 earthquake wrought horrific devastation and severely limited government capacity in Haiti, Digicel undertook a range of community projects, rebuilding the iconic Marché de Fer (Iron Market) and constructing over 170 schools.³³ Indeed, for sev-

Corporations and Other Business Enterprises uses “corporations” and “business” interchangeably. See John Ruggie (Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

32. For an example of one of Digicel’s street signs, see *Haiti Project: Update 2*, CARTOON MOVEMENT (July 13, 2011, 9:08 PM), <https://blog.cartoonmovement.com/2011/07/haiti-project-update-2.html> [<https://perma.cc/ZM3K-VKGV>]. See also Garry Pierre-Pierre, *The Republic of Digicel*, HAITIAN TIMES (July 12, 2014), <http://haitiantimes.com/the-republic-of-digicel/> [<https://perma.cc/RWS3-8PXS>] (noting that “[s]treet signs in Petion Ville feature the Digicel blood red color”); Stephanie Strom, *A Billionaire Lends Haiti a Hand*, N.Y. TIMES (Jan. 6, 2012), <http://www.nytimes.com/2012/01/07/business/digicels-denis-obrien-helps-rebuild-haiti.html?mcubz=3> [<https://perma.cc/T6ET-K73D>] (reporting that “Digicel, for instance, has put up street signs in parts of Port-au-Prince, serving as reminders of the company’s role in public life as much as guides for navigating the city”).

33. U.N. Sec. Council, Rep. of the Sec’y-Gen. on the U.N. Stabilization Mission in Haiti, ¶¶ 2–3, U.N. Doc. S/2010/200 (2010) (stating that, due to the 2010 earthquake, “222,570 people were killed, many thousands were injured or permanently disabled and 1.5 million were left homeless”; and “[t]he capacity of the Haitian State was seriously affected,” such that “up to one third of the country’s 60,000 civil servants perished” and “[m]any government buildings were destroyed or badly damaged”); David Adams, *Irish Cellphone Entrepreneur Banks on a Smarter Haiti*, REUTERS (Jan. 16, 2013), <http://www.reuters.com/article/us-haiti-digicel-obrien/irish-cellphone-entrepreneur-banks-on-a-smarter-haiti-idUSBRE90F0AQ20130116> [<https://perma.cc/J5QN-7ENP>]; *Réalisations à date*, DIGICEL FOUND. HAITI, <http://www.digicelfoundation.org/haiti/fr/accueil/a-propos-de-nous/message-du-fondateur/enonce-de-notre-mission.html> [<https://perma.cc/CBY5-KES5>] (“173 écoles ont été construites à travers le pays desservent plus de 60,000 étudiants.”); *170 écoles construites par la Fondation Digicel à cette date*, LE NOUVELLISTE (Jan. 26, 2017), <http://www.lenouvelliste.com/article/167786/170-ecoles-construites-par-la-fondation-digicel-a-cette-date> [<https://perma.cc/YZM7-JHMJ>]; *La Fondation Digicel va inaugurer sa 171e école*, LE NOUVELLISTE (Jan. 30, 2017), <http://www.lenouvelliste.com/article/167862/la-fondation-digicel-va-inaugurer-sa-171e-ecole> [<https://perma.cc/2Z4U-2GAG>]; Digicel Grp. Ltd., Amendment No. 3 to Registration Statement (Form F-1) at 11

eral years after the earthquake, the company hosted the offices of the mayor of Port-au-Prince, with citizens seeking State action from the mayor lined up in front of Digicel's office block.³⁴ In addition to their social impact, these initiatives raised Digicel's brand profile, helping it to achieve a 70% market share by 2015.³⁵ Yet, these projects would seem, at least at first blush, to extend well beyond Digicel's primary business.

Digicel is not alone. Mobile phone companies often initiate and supervise extensive infrastructure upgrades in the States in which they operate.³⁶ These challenges are particularly significant in places impacted by weak State governance or conflict and require a significant degree of engagement with the local community.

In Afghanistan, for example, the mobile phone company Roshan sought to procure local buy-in for protecting company assets by paying tribes a bonus if the company's booster stations remained functional for a year.³⁷ The company has also long run a low-cost health clinic, dug wells that have provided water for over 100,000 people, and distributed 40,000 meals a month for internally displaced people, especially children.³⁸ Despite these significant outlays, in its

(Sept. 22, 2015), <https://www.sec.gov/Archives/edgar/data/1645826/000119312515324843/d946689df1a.htm> [<https://perma.cc/D983-6WHC>] (“The Digicel Foundations focus particularly on youth-oriented programs and projects that encourage self-sufficiency in the local community. To this end the Digicel Foundation in Haiti has built 150 schools across the country.”).

34. See Strom, *supra* note 32 (noting that “[m]ost mornings, people crowd around the reception desk of Digicel's office building, not to complain about the firm's services but to see the mayor and other city officials whose offices are on the sixth floor since the earthquake”).

35. Digicel Grp. Ltd., *supra* note 33, at 6 (noting Digicel's favorable market share in Haiti and observing that in Haiti “Digicel is one of the most recognized consumer brands, with a top of mind rating of over 80% compared to 15% for its main competitor”).

36. John Bray, *International Companies and Post-Conflict Reconstruction: Cross-Sectoral Comparisons* 12–22 (World Bank Conflict Prevention & Reconstruction, Paper No. 22, 2005), <http://documents.worldbank.org/curated/en/994031468752728929/pdf/31819.pdf> [<https://perma.cc/4YYR-HZEE>].

37. See Mary Porter Peschka, *The Role of the Private Sector in Fragile and Conflict-Affected States*, WORLD BANK DEV. REP. 2011 (Apr. 2011), at 55–57, <http://documents.worldbank.org/curated/en/887641468163482532/pdf/620590WP0The0R0BOX0361475B00PUBLIC0.pdf> [<https://perma.cc/H4JP-NVQ3>].

38. See *Our Projects: Health and Nutrition*, ROSHAN, <https://www.roshan.af/en/personal/community/our-projects/> [<https://perma.cc/HG5Q-WXMQ>]. See also Sameer A. Azizi, *Strategic CSR in Afghanistan: The Case of Roshan, An Afghan Telecommunication Company* 18–31 (Copenhagen Bus. Sch. Ctr. for Bus. & Dev. Studies, Working Paper No. 1, 2012), http://openarchive.cbs.dk/bitstream/handle/10398/8444/Azizi_CBDS_nr%20_1_2012.pdf?sequence=1 [<https://perma.cc/3ZCR-QZTU>].

first four years in operation the company grew the number of phone connections in the country from 20,000 land lines to a mobile subscriber base of over 3.5 million customers.³⁹ In addition, Roshan partnered with Vodafone to create M-PAISA, a mobile banking service that enabled its customers to freely transfer money, and has allowed 1.6 million customers thus far to access financial institutions without the need for a physical bank.⁴⁰ Thus, although Roshan invested in some initially unprofitable and high-risk areas of the country, it did so with the understanding that “providing telecommunications has been a catalyst in building civil society.”⁴¹

Similarly, the relatively well-functioning nature of the telecommunications sector in Somalia has been a persistent paradox for commentators and development analysts.⁴² Somalia has long been considered the world’s prototypical failed State, and yet various mobile phone companies have thrived, developing cell tower infrastructure that promotes connectivity and financial transactions through mobile banking. Indeed, 35% of adults in Somalia utilize mobile banking services, a percentage that ties much better functioning States in the region, like Tanzania and Uganda.⁴³ And, it has been suggested that the functionality of commercial operations relative to the State may provide the kernel for a model of State-building in the country more broadly.⁴⁴ Mo Ibrahim, founder of the trans-African

39. See Peschka, *supra* note 37, at 55.

40. See *id.* at 56; INT’L FIN. CORP., INCLUSIVE BUSINESS CASE STUDY: ROSHAN (2014), <https://www.ifc.org/wps/wcm/connect/2e30f3004439990d969ed62a3fbe5e0b/Roshan.pdf?MOD=AJPERES> [<https://perma.cc/6YUM-KQQL>].

41. Karim Khoja, *Connecting a Nation: Roshan Brings Communications Services to Afghanistan*, 4 INNOVATIONS 33, 38 (2009), <https://www.mitpressjournals.org/doi/pdf/10.1162/itgg.2009.4.1.33> [<https://perma.cc/93V9-YTX7>]. See also *Shining a Light*, ECONOMIST (Mar. 8, 2007), <http://www.economist.com/node/8810997> [<https://perma.cc/M2PN-N388>]; WORLD ECON. FORUM, RESPONSIBLE INVESTMENT IN FRAGILE CONTEXTS 11 (2016), http://www3.weforum.org/docs/GAC16_Responsible_Investment_Fragile_Context.pdf [<https://perma.cc/2FLB-HS9K>].

42. Agnieszka Konkel & Richard Heeks, *Challenging Conventional Views on Mobile-Telecommunications Investment: Evidence from Conflict Zones*, 19 DEV. PRAC. 414, 417 (2009); Joseph Winter, *Telecoms Thriving in Lawless Somalia*, BBC NEWS (Nov. 19, 2004), <http://news.bbc.co.uk/2/hi/africa/4020259.stm> [<https://perma.cc/9EK8-T66K>]; Abdi Sheikh & Ibrahim Mohamed, *Somali Mobile Phone Firms Thrive Despite Chaos*, REUTERS (Nov. 3, 2009), <https://uk.reuters.com/article/uk-somalia-telecoms/somali-mobile-phone-firms-thrive-despite-chaos-idUKTRE5A21OY20091103> [<https://perma.cc/ZP8A-X9TS>].

43. U.N. DEV. PROGRAM, HUMAN DEVELOPMENT REPORT 2016: HUMAN DEVELOPMENT FOR EVERYONE 107 (2016), http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf [<https://perma.cc/ZW3S-FR6L>].

44. See Bray, *supra* note 36, at 19–20.

mobile phone company Celtel has explained his company's commitment to doing business in various troubled settings by arguing that "[w]here you have good telecommunications you usually have democracy."⁴⁵

Infrastructure and logistics concerns are also pressing for companies in the agricultural and extractive sphere. Such businesses possess some commodity that they need to transport away from their production site, but transportation gaps and security issues pose significant problems.⁴⁶ These companies may not be oriented implicitly to the conscientious extension of the capacity of the State, but their business activities may align with such an objective.

Indeed, some companies specialize in overcoming the logistical challenges of working in fragile States and, in so doing, facilitate not only commerce but also the continued functionality of the State itself. Thus, for example, Bolloré Africa Logistics, a division of a large French logistics firm, invested substantially in the port infrastructure of Abidjan despite an ongoing civil war in Côte d'Ivoire. The company was thereby able to reduce the processing time for containers on the docks dramatically, and the African Development Bank ("AfDB") later argued that, by ensuring that cocoa exports continued to be shipped out, Bolloré had "helped keep the country from collapsing."⁴⁷ Indeed, the AfDB's High Level Panel on Fragile States subsequently praised Bolloré's efforts as illustrative of the company's "'Afro-optimism' and its policy of never withdrawing from countries in crisis."⁴⁸ Yet, despite the conflict, the company became "[t]he largest transporter and freight agent of Ivorian cocoa, transporting nearly 55% of the market . . ."⁴⁹

45. Peschka, *supra* note 37, at 54. See also Mo Ibrahim, *Celtel's Founder on Building a Business on the World's Poorest Continent*, HARV. BUS. REV. (Oct. 2012), <https://hbr.org/2012/10/celtels-founder-on-building-a-business-on-the-worlds-poorest-continent> [https://perma.cc/XD63-LNMV].

46. AFRICAN UNION, AFRICAN MINING VISION: FEBRUARY 2009, at 23 (2009), http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf [https://perma.cc/FWF4-NTT8] (observing significant infrastructure challenges in many States seeking to benefit from extractive industries activities).

47. AFRICAN DEV. BANK GRP., ENDING CONFLICT & BUILDING PEACE IN AFRICA: A CALL TO ACTION 19 (2014), https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Ending_Conflict_and_Building_Peace_in_Africa-_A_Call_to_Action.pdf [https://perma.cc/RP38-CZFE].

48. *Id.*

49. GLOBAL WITNESS, HOT CHOCOLATE: HOW COCOA FUELED THE CONFLICT IN CÔTE D'IVOIRE 18 (2007), <https://www.globalwitness.org/sites/default/files/pdfs/cotedivoire.pdf> [https://perma.cc/SZ86-MNTM].

However, other businesses prefer to address their own logistical concerns, building roads and airstrips to facilitate transport of both commodities and workers. For example, the Chinese National Petroleum Company has invested heavily in improving infrastructure in South Sudan.⁵⁰ A series of studies demonstrates that improved roads tend to lead to better development outcomes, particularly in terms of increasing access to healthcare and education.⁵¹ Yet, the benefit of improved transportation can also accrue in favor of nefarious actors. Indeed, it has been alleged that these improved transport networks in Sudan allowed government troops to range more freely in the campaign to perpetrate abuses against civilians during the country's civil war.⁵²

The relationship between business and the State in contexts of upheaval is certainly complex, but the preceding examples should begin to complicate the reflexive assumption that the performance of quasi-governmental functions by business actors will always accrue to the detriment of the State and its populace.

The next subsection points toward the illusory nature of the failed States' claim to a monopoly over the use of force. Rather than relying on the State, business actors in failed and fragile States often act instead to guarantee their own security. But, unlike the State, such companies ensure their own safety both through overt force and by negotiating arrangements with other rival groups present in the territory.

50. Wojtek Mackiewicz Wolfe & Annette S. Leung Evans, *China's Energy Investment and the Corporate Social Responsibility Imperative*, 6 J. INT'L L. & INT'L REL. 83, 86 (2011); GEORGE G. EBERLING, CHINA'S BILATERAL RELATIONS WITH ITS PRINCIPAL OIL SUPPLIERS 211 (2017).

51. Claudia N. Berg et al., *Transport Policies and Development* 18 (World Bank Grp., Pol'y Research Working Paper No. 7366, 2015), <http://documents.worldbank.org/curated/en/893851468188672137/pdf/WPS7366.pdf> [<https://perma.cc/5GK8-JS5M>]; Atushi Iimi et al., *Evaluating the Social and Economic Impacts of Rural Road Improvements in the State of Tocantins, Brazil* 7 (World Bank Grp., Working Paper No. 95574, 2015), <http://documents.worldbank.org/curated/en/109021467992478157/pdf/95574-WP-P121495-Box391433B-PUBLIC-Evaluating-the-Social-and-Economic-Impacts-of-Rural-Road-Improvements-in-the-State-of-Tocantins-Brazil.pdf> [<https://perma.cc/XA9L-NKFV>]; Shahidur Khandker et al., *The Poverty Impact of Rural Roads: Evidence from Bangladesh*, 57 ECON. DEV. & CULTURAL CHANGE 685, 696 (2009).

52. See Alexander Dziadosz, *Special Report: South Sudan's Chinese Oil Puzzle*, REUTERS (Nov. 14, 2012), <https://www.reuters.com/article/us-southsudan-chinese-oil/special-report-south-sudans-chinese-oil-puzzle-idUSBRE8AD0B520121114> [<https://perma.cc/6AYK-RL6T>]; CHRISTIAN AID, THE SCORCHED EARTH: OIL AND WAR IN SUDAN 6 (2001), <http://www.ecosonline.org/reports/2001/TheScorchedearth.pdf> [<https://perma.cc/DL56-VZBY>].

B. Security

When confronting situations of State fragility, corporations face a series of choices in terms of how they order their business operations. Sometimes the company finds itself in the midst of upheaval, having made its initial investment under conditions of peace and stability that have subsequently deteriorated. The business must then decide whether to stay or leave. Indeed, when internal revolution and foreign-backed regime change swept through Libya in 2011, the Italian energy company Eni had to make exactly this sort of choice. Eni had been present in Libya since 1959 and, despite the challenges that the upheaval represented and subsequent security setbacks, the company has maintained its Libyan operations through an increased security presence to ensure the safety of its equipment and employees.⁵³

In other cases, companies will enter difficult settings because they have calculated that the risk present is tolerable given the potential profit. Thus, for example, APR Energy not only entered enthusiastically into the Libyan market after the overthrow of Colonel Gaddafi, but also decided to expand its intended power output significantly in 2013.⁵⁴ Eventually the company was forced to aban-

53. See Eni SpA, Annual Report (S.E.C. Form 20-F) 16 (Mar. 22, 2017), https://www.eni.com/docs/en_IT/enicom/publications-archive/publications/reports/reports-2016/Annual-Report-On-Form-20-F-2016.pdf [<https://perma.cc/ZJK3-MKK9>] (“In 2011, Eni’s operations in Libya were materially affected by an internal revolution and a change of regime, which has led to a prolonged period of political and social instability characterized by acts of local conflict, social unrest, protests, strikes and other similar events. Those political developments forced Eni to temporarily interrupt or reduce its producing activities, negatively affecting Eni’s results of operations and cash flow until the situation began to stabilize. Although the Group’s production levels in Libya have returned to levels prior to the outbreak of the civil war, the geopolitical situation remains unstable and unpredictable. In 2016, Eni’s production in Libya was 346 kboe/day, the highest level since the outbreak of the civil war, which represented approximately 20% of the Group’s total production for the year.”).

54. See APR ENERGY, ANNUAL REPORT 2012, at 35, <http://quote.morningstar.com/stock-filing/Annual-Report/2012/12/31/t.aspx?t=:APRY&ft=&d=16bfe41a2f23e82e278d2854c217010e> [<https://perma.cc/MRT4-ABGL>] (“We exited 2012 strongly. . . . This momentum has continued into 2013, with the signing of three new contracts in Libya, Guatemala, and Indonesia. . . . The Libya win represents the largest single contract in APR Energy history.”); Esha Vaish, *APR Energy Quits Libya as Government Fails to Ratify Contract*, REUTERS (Jan. 26, 2015), <http://www.reuters.com/article/apr-energy-libya-idUSL6NOV51RK20150126> [<https://perma.cc/QX9D-6CW5>] (noting that “Libya accounted for about a quarter of the company’s total sales of \$308 million in 2013 and was instrumental in the company turning a profit that year. In June 2013, the size of the contract was increased to 450 megawatts from 250 megawatts” and that “Jacksonville, Florida-based APR’s focus on emerging markets has left it exposed to political risk in countries such as Libya, where rival governments vie for control of vast

don these plans and leave Libya, citing the deteriorating security situation and the impossibility of conducting audits on operations there.⁵⁵

If the business decides to stay, it must then ensure that its employees are safe and provide for their basic needs. Companies often contract with security firms (either based locally or from elsewhere) to guard their staff, compound, offices, and installations.⁵⁶ An industry has grown up around the provision of basic security for businesses operating in fragile situations where the State is unable to ensure safety.⁵⁷

It is unfortunate, but perhaps not surprising, that here one finds some of the most significant human rights concerns expressed with respect to corporations operating in fragile States. Yet, these concerns are often encountered and arguably inherent when violence is used to enforce some notion of order. Indeed, when the State deploys violence to ensure its hegemony and compel submission, the potential for human rights abuses increases even in the most developed countries.⁵⁸ However, the attention on corporations deploying

energy fields more than three years after veteran leader Muammar Gaddafi was overthrown.”).

55. See APR ENERGY, ANNUAL REPORT 2014, at 9–10, <http://quote.morningstar.com/stock-filing/Annual-Report/2014/12/31/t.aspx?t=:APRY&ft=&d=880e5c3aa8b54bf563c59cef76c6d936> [<https://perma.cc/EMX3-YDZ3>] (“Towards the end of 2014, we made the difficult decision to suspend operations in Libya, followed by our announcement in January of this year to exit the country. The withdrawal has had a significant, detrimental effect on the underlying profitability of our business. . . . Adding to this complexity, the security situation in Libya, as well as in Yemen, has prevented our auditors from physically verifying assets in these jurisdictions.” The Report also observes that “[a]t the time we entered Libya, it was a historic contract to win and a testament to our ability to deploy rapidly large blocks of power in an incredibly challenging operational environment. . . . From the time we won the contract, we began producing power in just 90 days. Also, it was an attractive contract that produced significant revenues, margin and cash flow for us, coupled with a customer who greatly valued the power we produced.”).

56. See HANNAH TONKIN, STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT 30–31 (2011); Kevin O’Brien, *What Should and What Should Not Be Regulated?*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 29, 37–41 (Simon Chesterman & Chia Lehnhardt eds., 2007).

57. See Ernest Harsch, *Building a State for the Congolese People*, AFR. RENEWAL (Jan. 2008), <http://www.un.org/africarenewal/magazine/january-2008/building-state-congolese-people> [<https://perma.cc/4L9S-GH43>] (noting that “private security outfits are common in the main cities of the Democratic Republic of the Congo [DRC], hired mostly by foreign and local businesses to protect their property and keep crime at bay” because “regular police forces . . . are not yet able to guarantee public safety”).

58. See generally PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017).

such violence seems to focus not only on the acts but also on the lack of legitimacy for such undertakings. Yet, one might easily question the legitimacy of a range of State uses of violence and, as such, these concerns are not necessarily unique to corporations.⁵⁹

Alternatively, or in parallel with hiring their own security contractors, companies sometimes simply pay whichever group controls the territory in which they operate (whether government or insurgent fighters) to buy protection for their employees and physical assets. Such payments often draw international ire and may render the corporation complicit in a range of abuses. For example, facing an ever-changing security landscape in Syria, the world's largest cement manufacturer, LaFarge, made financial payments to several different groups (including sanctioned entities) to protect the staff and assets at its concrete plant in the country.⁶⁰ The company subsequently apologized but noted that its local managers did what they could to ensure continuity and safety.⁶¹

Companies have also played an active role in ensuring compliance with international law by other actors in fragile States. In Myanmar, for example, the large transnational energy company Total E&P “took steps to make its Myanmar stakeholders more aware of the rules governing security and human rights in the regions where it is operating” and effectively “leveraged its relationship with the

59. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 722 (2d ed. 2006) (noting that “[a] further problem lies in the assumption that ‘State failure’ arises from weakness and anarchy rather than overweening strength” since “[t]he evils of the last century were overwhelmingly due to strong regimes, and to their aftermath when eventually they collapsed.”).

60. See Media Release, LafargeHolcim, *LafargeHolcim Responds to Syria Review* (Mar. 2, 2017), <http://www.lafargeholcim.com/LafargeHolcim-responds-syria-review> [<https://perma.cc/24LH-R2L8>]; Media Release, LafargeHolcim, *LafargeHolcim Concludes Independent Investigation into Legacy Syria Operations and Issues Summary of Investigation Findings* (Apr. 24, 2017), <http://www.lafargeholcim.com/summary-syria-investigation-findings> [<https://perma.cc/9L5Y-6YDM>].

61. See Liz Alderman, *Lafarge Scandal Points to Difficulty for Businesses in War Zones*, N.Y. TIMES (Apr. 24, 2017), <https://www.nytimes.com/2017/04/24/business/lafarge-ceo-syria-cement.html> [<https://perma.cc/YM5K-V8ML>]; Dorothee Myriam Kellou, *Le jeu dangereux de LaFarge en Syrie*, LE MONDE (Nov. 12, 2016), http://www.lemonde.fr/international/article/2016/11/12/le-jeu-dangereux-de-lafarge-en-syrie_5030048_3210.html [<https://perma.cc/PL5K-EHM6>] (“Je pensais au début qu’il était tout à fait acceptable d’avoir des relations avec l’EIIL et d’autres groupes islamistes radicaux, car il nous fallait être en relation avec les groupes en situation de pouvoir.”). See also Dorothee Myriam Kellou et al., *Syrie: les troubles arrangements de Lafarge avec l’Etat islamique*, LE MONDE (June 21, 2016), http://www.lemonde.fr/syrie/article/2016/06/21/syrie-les-troubles-arrangements-de-lafarge-avec-l-etat-islamique_4955023_1618247.html [<https://perma.cc/E5N4-GWRN>].

Government” to convince the State to join the international Extractive Industry Transparency Initiative.⁶² Moreover, the company undertook “human rights training of its employees with the Danish Institute of Human Rights and the ILO [International Labour Organization] on good labour practices, with a focus on forced labour, to raise awareness of the population on their rights.”⁶³

Furthermore, because conflict is often tied either to economic deprivation or to disputes over the distribution of economic resources, the private sector plays an important role in reintegrating ex-soldiers by providing an alternative livelihood to conflict.⁶⁴ And, business actors have played a crucial role in negotiating an end to the civil wars in El Salvador and Guatemala and to a resolution to the ongoing State dysfunction in Somalia.⁶⁵

C. Other Quasi-Governmental Tasks

Ensuring security in times of upheaval is a particularly difficult objective for those companies that stay, but the discussion of the State-like functions of corporations ought not to stop there. Some companies do much more for their employees.

These enterprises also ensure housing, food, water, and access to healthcare for employees stationed in the compounds that the company maintains on their behalf, constructing an immediate world for their employees that is intended to be safe and relatively hospitable.

Thus, when the Florida-based electricity company APR Energy set out to construct and run electricity generation plants in remote areas of Libya after the fall of Colonel Gaddafi’s regime, it also established “man camps with living, eating, sleeping, bathing, and laundry facilities to house workers.”⁶⁶ Moreover, in its quest to exploit oil deposits in South Sudan, the China National Petroleum Corporation has built and provisioned similar compounds for its employ-

62. WORLD ECON. FORUM, *supra* note 41, at 20.

63. *Id.*

64. Allan Gerson, *Peace Building: The Private Sector’s Role*, 95 AM. J. INT’L L. 102, 105–07 (2001).

65. CANAN GUNDUZ, INT’L ALERT, LOCAL BUSINESS, LOCAL PEACE: THE PEACEBUILDING POTENTIAL OF THE DOMESTIC PRIVATE SECTOR 324–63, 469–503 (Jessica Banfield & Nick Killick eds., 2006), <http://www.international-alert.org/publications/local-business-local-peace> [<https://perma.cc/7MME-59ZL>].

66. TECH. REV. MID. EAST, ANNUAL POWER REVIEW 2014, at 26, https://issuu.com/alaincharles/docs/trme_power_2014_final [<https://perma.cc/Q7YL-7LU7>].

ees stationed in the country.⁶⁷ Indeed, many companies that do business in extractive industries are compelled to operate such camps for their employees because the deposits they seek are sometimes situated in fragile States and the exploration and infrastructure investments necessary to initiate such operations are deemed too valuable to abandon.⁶⁸

Moreover, in order to ensure that a particular locality prospers commercially, some companies will take on other governmental functions viewed as essential. Thus, for example, in the eastern part of the Democratic Republic of Congo, various business groups have joined together to build new roads and ensure their maintenance through the collection of local taxes.⁶⁹

Other businesses have exploited the absence of the State as the central part of their profit model. Thus, in Syria, DHL delivers parcels to areas of the conflict-wracked country where the official mail system cannot, exploiting opportunities for profit and providing a public service beyond the State's current capacity.⁷⁰ Similarly, in

67. See *China's Foreign Policy Experiment in South Sudan*, INT'L CRISIS GROUP (July 10, 2017), <https://www.crisisgroup.org/africa/horn-africa/south-sudan/288-china-s-foreign-policy-experiment-south-sudan> [<https://perma.cc/P92D-PNJT>]; *China's New Courtship in South Sudan*, INT'L CRISIS GROUP (Apr. 4, 2012), <https://www.crisisgroup.org/africa/horn-africa/south-sudan/china-s-new-courtship-south-sudan> [<https://perma.cc/RTU9-P643>]. See generally LUKE PATEY, *THE NEW KINGS OF CRUDE: CHINA, INDIA, AND THE GLOBAL STRUGGLE FOR OIL IN SUDAN AND SOUTH SUDAN* (2014); LAURA M. JAMES, *SMALL ARMS SURVEY, FIELDS OF CONTROL: OIL AND (IN)SECURITY IN SUDAN AND SOUTH SUDAN 19–24* (2015), <http://www.smallarmssurveysudan.org/fileadmin/docs/working-papers/HSBA-WP40-Oil.pdf> [<https://perma.cc/A5BP-9N6P>]; JILL SHANKLEMAN, U.S. INST. OF PEACE, *OIL AND STATE BUILDING IN SOUTH SUDAN* (2011), https://www.usip.org/sites/default/files/Oil_and_State_Building_South_Sudan.pdf [<https://perma.cc/RP9Q-NVCY>].

68. See PETER D. CAMERON & MICHAEL C. STANLEY, WORLD BANK GROUP, *OIL, GAS, AND MINING: A SOURCEBOOK FOR UNDERSTANDING THE EXTRACTIVE INDUSTRIES 242* (2017), <http://documents.worldbank.org/curated/en/222451496911224999/pdf/115792-PUB-PUBLIC-PUBDATE-6-6-17.pdf> [<https://perma.cc/SEE2-9BRL>] (noting that “extractives operations have all too often acquired an ‘enclave’ character.”).

69. E-mail from Nathan Smith, Anti-Corruption Project Manager, PricewaterhouseCoopers, Dem. Rep. Congo (Aug. 24, 2017) (on file with author).

70. See *DHL Express Import Guidelines: Syria*, DHL, http://www.dhl.com/sy/en/country_profile/import_guidelines_express.html [<https://perma.cc/73ML-WT5K>]; *What's the Story, Ms. Halaby?: Business as Unusual*, DELIVERED: THE GLOBAL LOGISTICS MAG., Nov. 2016, <http://www.delivered.dhl.com/en/articles/2016/11/whats-the-story-ms-halaby.html> [<https://perma.cc/REZ9-GS46>]; Alice Fordham, *Syrian President Issues New Stamps, But Can't Deliver the Mail*, NPR (July 24, 2014), <http://www.npr.org/sections/parallels/2014/07/24/332249724/syrian-president-issues-new-stamps-but-cant-deliver-the-mail> [<https://perma.cc/9GUR-5BZ2>]. For advisories from the U.S. and U.K. mail services advising on the lack of mail delivery in Syria, see *USPS Service Alerts*, U.S. POSTAL SERV., <https://about.usps.com/news/service-alerts/welcome.htm> [<https://perma.cc/6FXC-824M>];

Yemen, both FedEx and Western Union ensure the delivery of mail and the transfer of money through a local logistics firm, Griffin.⁷¹ And Aggreko, one of the largest sellers of power generators, maintains retail operations in settings of upheaval, including Somalia, Yemen, and Libya, so as to allow other businesses to continue operating in areas lacking stable electrical supplies.⁷²

Further, some firms assist States grappling with the consequences of regional instability, in a way helping to prevent these neighboring States from themselves collapsing. The Syrian Civil War, for example, has forced over 5.6 million people to flee to other countries in the region, principally Turkey, Lebanon, Jordan, Iraq, and Egypt.⁷³ These States have in turn voiced their concerns loudly as to the financial and systemic challenges of absorbing so many refugees and the politically destabilizing potential of such influxes.⁷⁴

In response, the Swedish-founded, Dutch-headquartered fur-

Personal Customers Help Centre, ROYAL MAIL, https://personal.help.royalmail.com/app/answers/detail/a_id/5317/~/-international-incidents-update [<https://perma.cc/8E85-8ES4>].

71. See *FedEx Services in Yemen*, GRIFFIN, http://www.griffin-ltd.com/griffin_fedex_yemen.html [<https://perma.cc/254E-SK9H>]; *Falcon Exchange Co. A Griffin Ltd. Company*, FALCON EXCH., <http://www.falcon-ex.com/about.html> [<https://perma.cc/95BF-4AH4>].

72. See Mark Leftly, *Aggreko Counts the Cost of Turmoil in Libya and Yemen*, EVENING STANDARD (May 14, 2015), <https://www.standard.co.uk/business/business-news/aggreko-counts-the-cost-of-turmoil-in-libya-and-yemen-10250479.html> [<https://perma.cc/YCH6-UALV>] (observing that “[s]ecurity threats in Libya and Yemen have hit trading at Aggreko, the company that hires out power generators and temperature-control equipment around the world has said”).

73. *Operational Portal Refugee Situations: Syrian Regional Response*, U.N. HIGH COMM’R FOR REFUGEES (June 24, 2018), <https://data2.unhcr.org/en/situations/syria> [<https://perma.cc/3RST-TYET>].

74. *Mulqi: Jordan’s Capacities Maxed Out on Syrian Refugee Crisis*, ALGHAD (Apr. 5, 2017), <http://www.alghad.com/articles/1535872-Mulqi-Jordan%E2%80%99s-Capacities-Maxed-Out-on-Syrian-Refugee-Crisis> [<https://perma.cc/M5HD-HKER>]; *Refugee Burden Has Exhausted Jordan—Judeh*, JORDAN TIMES (Oct. 28, 2014), <http://www.jordantimes.com/news/local/refugee-burden-has-exhausted-jordan-%E2%80%94-judeh> [<https://perma.cc/PP4W-2KJB>]; Stephen Brown, *Syria’s Neighbours Risk ‘Host-Country Fatigue,’ Conference Hears*, REUTERS (Oct. 28, 2014), <https://uk.reuters.com/article/uk-mideast-crisis-refugees/syrias-neighbours-risk-host-country-fatigue-conference-hears-idUKKBN0IH0WB20141028> [<https://perma.cc/77XG-GV2R>]; Missy Ryan, *Syria Refugee Crisis Poses Major Threat to Lebanese Stability: U.N.*, REUTERS (Mar. 27, 2014), <https://www.reuters.com/article/us-lebanon-usa/syria-refugee-crisis-poses-major-threat-to-lebanese-stability-u-n-idUSBREA2R02E20140328> [<https://perma.cc/3UJ9-EDL9>] (quoting Ninette Kelley, regional representative for Lebanon for the Office of the United Nations High Commissioner for Refugees, as stating that “[i]f this country is not bolstered, then the very real prospect of it collapsing and the conflict of Syria spreading full force to Lebanon becomes much more likely”).

niture company Ikea mobilized through its own foundation to assist the United Nations High Commissioner for Refugees (“UNHCR”) to support these displaced persons.⁷⁵ To be sure, Ikea has not always been a model of enlightened corporate conduct.⁷⁶ Yet, the company clearly recognized in the refugee crisis an opportunity for constructive intervention. Indeed, while also putting the company’s own branding on their efforts and continually emphasizing its mission to improve interior design the world over, Ikea has become UNHCR’s largest private sector partner.⁷⁷ The company has provided over 10,000 new, more durable shelter units for refugee families in the region, and these so-called “flat pack” shelters include innovations like a front door that locks and solar power to fuel the families’ electronics.⁷⁸ The shelters won the London Design Museum’s Beazley Design of the Year award, but had to be redesigned subsequently due to concerns over fire safety.⁷⁹

In spite of this significant challenge, Ikea has been at the fore-

75. U.N. HIGH COMM’R FOR REFUGEES, UNHCR CORPORATE PARTNERSHIPS PROGRAMME: IKEA FOUNDATION, <http://www.unhcr.org/partners/partners/54cb9e8f9/unhcr-ikea-foundation-partnership-fact-sheet.html> [<https://perma.cc/GW7Y-VADJ>].

76. Nicholas Kulish & Julia Werdigier, *Ikea Admits Forced Labor Was Used in 1980s*, N.Y. TIMES (Nov. 16, 2012), <https://www.nytimes.com/2012/11/17/business/global/ikea-to-report-on-allegations-of-using-forced-labor-during-cold-war.html> [<https://perma.cc/7RG4-WYEM>] (observing that Ikea had “admitted that political prisoners in the former East Germany provided some of the labor that helped it keep its prices so low”).

77. *Ikea Foundation*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/ikea-foundation.html> [<https://perma.cc/JSC8-GJXU>].

78. See Dan Howarth, *IKEA’s Flat-Pack Refugee Shelters Go into Production*, DEZEEN (Mar. 24, 2015), <https://www.dezeen.com/2015/03/24/ikea-flat-pack-refugee-shelters-go-into-production-better-shelter-unhcr/> [<https://perma.cc/UX6T-7LFV>]. Cf. Elizabeth Cullen Dunn, *Better Than a Tent, Worse Than a House: Ikea’s Flat-Pack Shelters for Refugees May Make Life More Comfortable. But They Won’t Solve Any Problems*, SLATE (Oct. 1, 2015), http://www.slate.com/articles/technology/future_tense/2015/10/ikea_gives_10_000_flat_pack_shelters_for_refugees.html [<https://perma.cc/K4FD-RKZH>].

79. Oliver Wainwright, *Why Ikea’s Flatpack Refugee Shelter Won Design of the Year*, GUARDIAN (Jan. 27, 2017), <https://www.theguardian.com/artanddesign/2017/jan/27/why-ikea-flatpack-refugee-shelter-won-design-of-the-year> [<https://perma.cc/XL67-4UJJ>]; Maya Rhodan, *Ikea Refugee Shelter Wins Design of the Year Award*, FORTUNE (Jan. 30, 2017), <http://fortune.com/2017/01/30/ikea-refugee-shelter-beazley/> [<https://perma.cc/6WDF-UDDA>]; Marcus Fairs, *Ikea Refugee Shelter to be Redesigned Following Safety Fears and Design Flaws*, DEZEEN (Apr. 27, 2017), <https://www.dezeen.com/2017/04/27/ikea-unhcr-refugee-better-shelter-redesign-safety-fears-flaws/> [<https://perma.cc/P225-2C6E>]; Marcus Fairs, *Ten Thousand IKEA Refugee Shelters Left Unused Over Fire Fears, United Nations Admits*, DEZEEN (Apr. 29, 2017), <https://www.dezeen.com/2017/04/29/united-nations-admits-10000-ikea-better-shelter-refugees-mothballed-fire-fears/> [<https://perma.cc/XGV2-KC5N>].

front of increasing awareness in the developed world concerning refugee issues, raising over thirty million euros for UNHCR through a campaign to donate one euro for each LED light sold in its stores, building the first renewable energy-powered refugee camp in Jordan and utilizing Syrian refugee workers in its supply chains so as to improve their employment opportunities.⁸⁰ Moreover, Ikea has also worked diligently to assist refugees outside Syria, partnering with the UNHCR in Libya, Chad, Burkina Faso, Ethiopia, and South Sudan to improve basic services and accommodations available in refugee camps.⁸¹ Further, in its latest initiative, the company has begun to hire hundreds (with plans to hire thousands) of Syrian refugees in Jordan to manufacture rugs.⁸² Other companies have followed suit, opening training classes in the IT sector to educate and eventually hire a new group of tech specialists from among the Syrian refugee population in Jordan.⁸³

There are also instances when a corporation exercises such complete control over an area of territory and its employees therein

80. *Brighter Lives for Refugees*, IKEA, <https://www.ikea.com/gb/en/this-is-ikea/people-planet/people-communities/good-cause-campaigns/brighter-lives-for-refugees/> [<https://perma.cc/K38Q-4TTP>]; Marcus Fairs, *IKEA Aims to Take 200,000 People Out of Poverty in Massive Social Sustainability Drive*, DEZEEN (Apr. 18, 2017), <https://www.dezeen.com/2017/04/18/ikea-massive-social-sustainability-drive-production-centres-refugee-camps-jordan/> [<https://perma.cc/7XJM-EKKX>]; *Azraq, the World's First Refugee Camp Powered by Renewable Energy*, Joint UNHCR/IKEA Found., U.N. HIGH COMM'R FOR REFUGEES (May 17, 2017), <http://www.unhcr.org/news/press/2017/5/591c079e4/azraq-worlds-first-refugee-camp-powered-renewable-energy.html> [<https://perma.cc/R967-8DET>]; Charlotte Edmon, *The World's First Refugee Camp Powered by Renewable Energy*, WORLD ECON. FORUM (June 13, 2017), <https://www.weforum.org/agenda/2017/06/the-world-s-first-solar-powered-refugee-camp/> [<https://perma.cc/W6E2-9BAG>]; Rachel England, *How Ikea Helped to Change Attitudes on Helping Refugees*, INDEPENDENT (May 28, 2017), <https://www.independent.co.uk/news/world/politics/ikea-refugees-help-shelters-attitude-europe-company-middle-east-syria-a7742576.html> [<https://perma.cc/8KDD-U89X>].

81. *UNHCR Corporate Partnerships Programme: IKEA Foundation*, U.N. HIGH COMM'R FOR REFUGEES, <http://www.unhcr.org/partners/partners/54cb9e8f9/unhcr-ikea-foundation-partnership-fact-sheet.html> [<https://perma.cc/VE4N-JBYW>]; Altaf Makhiawal, *Refugee Self-Reliance in Africa Boosted by IKEA Foundation Support: UNHCR's Largest Private Sector Partner Supports Refugee Families and Host Communities in Ethiopia and Burkina Faso*, U.N. HIGH COMM'R FOR REFUGEES (July 9, 2015), <http://www.unhcr.org/news/latest/2015/7/559e919f9/refugee-self-reliance-africa-boosted-ikea-foundation-support.html> [<https://perma.cc/DV8D-K3LK>].

82. John Reed & Richard Milne, *Ikea to Provide Jobs for Syrian Refugees in New Jordanian Project*, FIN. TIMES (Jan. 30, 2017), <https://www.ft.com/content/35cb00ce-e6ed-11e6-893c-082c54a7f539> [<https://perma.cc/8PAF-XM83>]; Fairs, *supra* note 80.

83. Venetia Rainey, *Coding Classes Open New Doors for Syrian Good Refugees*, AL JAZEERA (Oct. 22, 2016), <https://www.aljazeera.com/news/2016/10/coding-classes-open-doors-syrian-refugees-161022080625712.html> [<https://perma.cc/QB5F-RZQH>].

that the business may be understood as a sort of micro- or nascent State. Indeed, the popular press has consistently referred to Firestone's 220-square-mile rubber plantation in Liberia as a "State within a State."⁸⁴ Firestone runs its own schools for employees' families, operates several health clinics, runs its own hospital, employs its own security force, provides housing, clean water, and subsidized food, and has, at times, even run its own magistrate's court to administer justice.⁸⁵

Firestone is not alone. The steel giant ArcelorMittal has operated a similarly vast plant in Liberia for the last decade through which it has also had to provide for its thousands of employees as though they were its citizens.⁸⁶ And, like Firestone, ArcelorMittal deployed an advanced and rapid strategy to combat the growing threat of Ebola in the surrounding community.⁸⁷ Thus, though its principal iron ore mining concession is situated in one of the worst-impacted counties, the company suffered only one fatality during the entirety of the outbreak.⁸⁸

Despite a fizzle of publicity at the time of the Ebola outbreak, the activities of both Firestone and ArcelorMittal in combating this pandemic have gone largely unconsidered by scholars of international law. The next section considers the development of international legal scholarship concerning failed and fragile States, the conventional perception of the place of corporations, and the previous utilization of the corporate form in projects of colonial conquest and im-

84. See, e.g., Nicholas Jahr, *Workers Organize at Firestone, Liberia's 'State Within a State,'* THE NATION (July 8, 2010), <https://www.thenation.com/article/workers-organize-firestone-liberias-state-within-state/> [<https://perma.cc/CE83-LUQH>]; Dan Morgan, *Firestone Efficiency Shadows Liberian Problems,* WASH. POST (Mar. 7, 1979), https://www.washingtonpost.com/archive/politics/1979/03/07/firestone-efficiency-shadows-liberian-problems/4c547e5e-b372-490a-a5c3-c19717206492/?utm_term=.d17b36407a10 [<https://perma.cc/3WZK-JHU6>]. See also WILLIAM ROSENAU ET AL., RAND CORP., CORPORATIONS AND COUNTERINSURGENCY 17–23 (2009), https://www.rand.org/content/dam/rand/pubs/occasional_papers/2009/RAND_OP259.pdf [<https://perma.cc/D2U5-7MJQ>].

85. See ROSENAU, *supra* note 84, at 17–23; DANIEL E. LEE & ELIZABETH J. LEE, HUMAN RIGHTS AND THE ETHICS OF GLOBALIZATION 115–41 (2010); Morgan, *supra* note 84.

86. See GLOBAL WITNESS, HEAVY MITTAL?: A STATE WITHIN A STATE 52–55 (2006), https://www.globalwitness.org/documents/16825/mittal_steel_en_oct_2006_high_res.pdf [<https://perma.cc/4T2R-QBFW>].

87. Erika Fry, *Business in the Time of Ebola,* FORTUNE (Oct. 30, 2014), <http://fortune.com/2014/10/30/arcelormittal-business-liberia-ebola-outbreak/> [<https://perma.cc/PFQ5-6ML5>].

88. *Liberia: Responding to Ebola,* ARCELORMITTAL, <http://corporate.arcelormittal.com/sustainability/snapdown-hub/health-liberia-responding-to-ebola> [<https://perma.cc/TQ85-9FV3>].

perial exploitation as factors underlying that perception.

II. MISSED CONNECTIONS

Given the rich variation of commercial activity in fragile States discussed in Part I, it may be surprising that such activities are not more extensively publicized or written about. Yet, firms may be wary that their demonstrated capacity will eventually lead to the general imposition of legal obligations that would remove decision-making in such contexts from the sole purview of the company's management and instead entrust it to international officials or civil society activists.⁸⁹

Indeed, if it is generally known that Firestone was more effective in limiting the spread of Ebola than the Liberian State, it may be that popular calls will grow to ensure such outcomes going forward for the population at large. Activists might then also demand that corporations not merely respect the most basic guarantees of human rights law and refrain from violations but also ensure the provision of positive socio-economic rights to the communities where they operate.⁹⁰

Various business organizations have already issued statements rejecting the imposition of any direct, quasi-State obligations on corporations under international law. Indeed, when John Ruggie, the U.N. Secretary-General's Special Representative on the Issue of Human Rights, Transnational Corporations, and other Business Entities, first solicited business comment on his project to formulate guidelines with respect to business and human rights, the International Organization of Employers ("IOE") and the International Chamber of Commerce ("ICC") issued a statement reiterating that, with respect to human rights, "[g]overnments. . . are the primary duty bearers under international law" and that "[b]usiness can never be, nor should it be expected to become, a surrogate government."⁹¹

89. See INT'L CHAMBER OF COMMERCE, JOINT VIEWS OF THE IOE AND ICC ON THE DRAFT "NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS" (2004) (expressing concern at the possible imposition of international human rights obligations on business actors).

90. See Nien-hê Hsieh, *Should Business Have Human Rights Obligations?*, 14 J. HUM. RTS. 218, 223 (2015).

91. *Business and Human Rights: The Role of Business in Weak Governance Zones*, INT'L ORG. OF EMP'RS ¶ 9 (2006), <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf> [https://perma.cc/BB2K-K2VB].

Yet, despite the forcefulness of the IOE/ICC pronouncement, Part I illustrates that business sometimes stands in the gap in failing States, discharging public functions when the State cannot.

The section to come examines why legal scholars may not have more closely interrogated such business activities previously, particularly given the fairly voluminous literature regarding State-led humanitarian intervention and the security threat posed by fragile States more generally. This section suggests that the historically State-centric orientation of international law scholarship and the significant involvement of firms in now long-discredited colonial endeavors have contributed to the relative dearth of legal literature grappling with the potential of firms in failed States as constructive actors.

A. Disciplinary Estrangement and the Long Shadow of Colonial Corporations

Transnational corporations have historically posed a conundrum for international lawyers.⁹² These faceless entities, endowed with legal personality by the domestic law of their country of incorporation, have now come to possess greater wealth and power than many States.⁹³ Yet, only States have customarily been designated as

92. See Jenny S. Martinez, *New Territorialism and Old Territorialism*, 99 CORNELL L. REV. 1387, 1412 (2014) (arguing that “both public and private international law have not adequately grappled with the problem of transnational regulation of large multinational corporations, and that part of the reason for this failure is the heavy reliance of both fields on concepts of territoriality and state-centric sovereignty,” such that the issue “evades a completely satisfactory solution”); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT’L L. 801, 802–03 (2002) (observing the persistence of a “remarkable confusion” with respect to whether international human rights law applies to private corporations); John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 819 (2007) (“The state-based system of global governance has struggled for more than a generation to adjust to the expanding reach and growing influence of transnational corporations.”).

93. See Erika R. George, *Incorporating Rights: Empire, Global Enterprise, and Global Justice*, 10 U. ST. THOMAS L.J. 917, 926 (2013) (noting that “[n]early half of the world’s largest economic entities are corporations, not countries” and that “[c]ommercial enterprises have relative clout in the international arena and revenues that often eclipse the GDPs of sovereign states in which they operate”); Erika R. George, *The Enterprise of Empire: Evolving Understandings of Corporate Identity and Responsibility*, in THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 19, 20 (Jena Martin & Karen E. Bravo eds., 2016) (observing that “some large multinational corporations possess a global influence to rival that of some countries”); Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 768 (declaring that “[n]ation-states aside, TNCs [transnational corporations] are the most

subjects of international law, with corporations regulated indirectly, by their home State.⁹⁴

However, corporations have been present and central since the birth of international law as a discipline.⁹⁵ Indeed, it has almost become commonplace to observe that Hugo Grotius, often regarded as the father of modern international law, was himself counsel to the Dutch East India Company.⁹⁶ And, in this role, his promotion of the principle of the freedom of the high seas was, in part, a self-interested exercise in order to ensure the security and efficacy of the company's trading routes.⁹⁷

Moreover, European States frequently deployed business organizations to extend State power and build out the province of empire.⁹⁸ The pursuit of trading opportunities (and thereby the initiation

powerful actors in the world today and to not recognize that power would be unrealistic”).

94. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 143 (7th ed. 2014) (noting that “[d]espite the increasing range of actors and participants in the international legal system, states remain by far the most important legal persons and despite the rise of globalisation and all that this entails, states retain their attraction as the primary focus for the social activity of humankind and thus for international law”); 2 HERSCH LAUTERPACHT, *INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 489 (Elihu Lauterpacht, ed., 1975); J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 37–38 (Sir Humphrey Waldock ed., 6th ed. 1963); José E. Alvarez, *Are Corporations “Subjects” of International Law?*, 9 *SANTA CLARA J. INT’L L.* 1 (2011); John H. Knox, *Horizontal Human Rights*, 102 *AM. J. INT’L L.* 1, 47 (2008); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L.J.* 443 (2001). *But see* Paul B. Stephan, *Privatizing International Law*, 97 *VA. L. REV.* 1573, 1574–75 (2011) (arguing that “[t]he old understanding of international law as something created solely by and for sovereigns is defunct” and that “[t]oday the production and enforcement of international law increasingly depends on private actors, not traditional political authorities. As with other public services that we used to take for granted—schools, prisons, energy utilities, and transportation and telecommunication networks—privatization has come to international law.”).

95. See José-Manuel Barreto, *Cerberus: Rethinking Grotius and the Westphalian System*, in *INTERNATIONAL LAW AND EMPIRE: HISTORICAL EXPLORATIONS* 149, 149 (Marti Koskeniemi et al. eds., 2017) (arguing that “international law does not only regulate the relations between nation states” but that “[s]ince its very inception, modern international law has regulated the dealings between states, empires and companies”); George, *Enterprise of Empire*, *supra* note 93, at 30–48.

96. See, e.g., MARTINE JULIA VAN ITTERSUM, *PROFIT AND PRINCIPLE: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER IN THE EAST INDIES (1595–1615)* (2006).

97. See, e.g., Antony Anghie, *The Grotius Lecture: International Law in a Time of Change: Should International Law Lead or Follow?*, 26 *AM. U. INT’L L. REV.* 1315, 1319 (2011); John T. Parry, *What is the Grotian Tradition in International Law?*, 35 *U. PA. J. INT’L L.* 299, 326–27, 337 (2013).

98. See Philip J. Stern, *The English East India Company and the Modern Corporation:*

of projects of human exploitation and resource plunder) motivated territorial expansion, but acting through corporate entities allowed the State a lower-risk and less-costly way of undertaking such endeavors.⁹⁹ Indeed, when the Western State lacked capacity, it turned to private actors to fill the gap.¹⁰⁰ Thus, the deployment of privateers, distinguished from pirates mainly by the letters of marque they carried and their commitment to attack only the vessels of certain States, was a common technique to extend State power.¹⁰¹ Similarly, American corporations operating in Latin America often enjoyed tacit and sometimes overt support from the U.S. government when these business actors would interfere in the governmental affairs of the States in which they conducted business.¹⁰²

Yet, by the twentieth century, the scholarly relationship between corporations and international law was as that of two old friends who had drifted apart.¹⁰³ International law had, by then, come to be understood as the exclusive province of the State, whereas corporations were still largely conceptualized as creatures of domestic law, neither bound directly by nor able themselves to create international legal obligations.¹⁰⁴ Accordingly, many treaties that set out obligations for corporate actors did so, and continue to do so, through the vehicle of indirect regulation undertaken by the corporation's home State.¹⁰⁵ The question of whether corporations are ap-

Legacies, Lessons, and Limitations, 39 SEATTLE U. L. REV. 423 (2016); A.J. GRANT ET AL., AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 90–91 (1916) (noting that “[i]n India, for example, the flag followed trade” and that “[i]nternal disorder in the country drove the Company [British East India Company] to protect itself by gradually developing a system of administration, the Company taking upon itself important functions of government and becoming a quasi-state”).

99. See STEPHEN TULLY, CORPORATIONS AND INTERNATIONAL LAWMAKING 33–37 (2007). See also MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 111–12, 116–21 (2001). See generally ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

100. See PHILIP J. STERN, THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA 7 (2011) (asserting that “[l]egally and conceptually speaking, the early modern national state and even the monarch herself were forms of corporation”).

101. See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 210 (2004).

102. See Martinez, *supra* note 92, at 1403–07.

103. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶¶ 37–38 (Feb. 5).

104. *Id.*

105. Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 930 (2005) (observing that

appropriately to be regarded as subjects of international law and thus bound by international legal obligations has triggered a long-running debate.¹⁰⁶

Over successive decades, transnational legal scholars like Philip Jessup,¹⁰⁷ Detlev Vagts,¹⁰⁸ Harold Koh,¹⁰⁹ and Anne-Marie Slaughter¹¹⁰ have drawn attention to international law's stultified focus on the State as the sole actor of import in the global community and critiqued this practice as artificial and false. As such, these scholars contributed substantially to the development of the field of International Business Transactions as an area of scholarly inquiry so as to engage with transnational interchange or global private ordering through and beyond the State.¹¹¹ However, even in some recent scholarship examining the role of corporate interests in the production of international law, a certain hostility to the engagement of

“[i]nternational law, as it exists today, includes norms that address the conduct of corporations and other non-state actors, but, with every few exceptions, the norms do so by imposing an obligation *on states* to regulate non-state actors,” such that “for the most part, international law regulates such non-state actors indirectly”). The tripartite structure of the International Labour Organization, which includes representatives of States, employers, and workers in its Governing Body is the rare exception to this rule. See INT’L LABOR ORG. CONSTITUTION, art. 7, https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A7 [<https://perma.cc/RA66-ZL33>].

106. See, e.g., MALCOLM N. SHAW, *INTERNATIONAL LAW* 182 (7th ed. 2014) (observing that “[t]he question of the international personality of transnational corporations remains an open one”); Rebecca M. Bratspies, “*Organs of Society*”: *A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities*, 13 MICH. ST. J. INT’L L. 9, 11 (2005) (noting that “[b]ecause TNEs [transnational business enterprises] operate across national borders, beyond the constraints of any one nation’s domestic law, their actions are too often viewed as beyond the reach of any law” and that “[t]his unique ability to elude national legal systems makes TNEs ripe for greater investigation under international law”).

107. See generally PHILLIP JESSUP, *TRANSNATIONAL LAW* (1956).

108. See Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 789–91 (1970).

109. See, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2624–29 (1997); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184–85 (1996); Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT’L L. REV. 745, 746 (2005).

110. See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 227–28 (1993). See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

111. See Mathias Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 PENN ST. INT’L L. REV. 397, 412–13 (2004). See also Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQUIRY 229, 233–35 (2012).

business actors is apparent.¹¹²

In line with this trajectory, the legacy of international law's statist focus is particularly palpable in the scholarship concerning failed and fragile States.¹¹³ Indeed, that literature largely excludes business actors. The prevailing scholarly approach seems instead to start from the premise that because State failure is a breakdown in the basic unit of international governance, it is for other actors in this category (States or groups of States, namely international organizations) to respond to such challenges. States fix broken States and so the possible constructive functions of corporations are minimized and obscured.¹¹⁴

International institutions have begun to take note of and build upon the quasi-State functions discharged by some of the businesses discussed in Part I,¹¹⁵ but most scholarship has lagged behind.¹¹⁶

112. See Melissa J. Durkhee, *Astroturf Activism*, 69 STAN. L. REV. 201 (2017). See also Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229 (2015).

113. See *supra* note 94; see also *supra* note 103.

114. John Yoo, *Fixing Failed States*, 99 CAL. L. REV. 95, 98 (2011) (“[N]ation-states remain the most important actors with the capacity to fix failed states. . . . Removing obstacles in international law and policy to intervention in failed state will more effectively allow nation-states to tackle the problem.”).

115. See U.N. GLOB. COMPACT, *supra* note 29, at 6 (observing that “[t]he primary responsibility for peace, security and development rests with governments, but the private sector can make a meaningful contribution to stability and security in conflict-affected and high-risk areas”); Peschka, *supra* note 37, at 3–7 (noting that “the private sector continues to operate even during the most violent situations” and that “in places like Somalia, Sudan, and Afghanistan, the lack of any effective central government presence may lead the local private sector to provide services normally expected from the government”); AFRICAN DEV. BANK GRP., *supra* note 25, at 22–25 (affirming that “[w]eak institutional capacity is a key feature of fragile situations and significantly impairs the state’s ability to deliver public goods and services. Along with efforts to strengthen public institutions, the Bank will provide greater support for the use of non-state actors, notably the private sector and civil society, in delivering the services within a public framework that places the state in a regulatory and commissioning role.”).

116. See ZACHARIAH CHERIAN MAMPILLY, *REBEL RULERS: INSURGENT GOVERNANCE AND CIVILIAN LIFE DURING WAR* 7 (2015) (describing the “state-centric tendency, especially visible within political science studies of governance” as “understandable though problematic, for it implies a basic Hobbesian conjecture—that is, if the state is not capable of exerting control, then chaos must ensue,” such that “scholars thus far have not adequately accounted for the performance of governmental functions by nonstate actors”). See also IQBAL & STARR, *supra* note 27, at 125 (observing that “instead of limiting our attention to intervention efforts by the United Nations and regional institutions, we could turn to how private entities—such as multinational corporations—play [or might play] a role in keeping states from collapsing: specifically, how that role could be better managed to have a positive influence on fragile states with high risk of failure, rather than merely subjecting these societies to the pernicious effects of the ‘dark side of globalization,’” but also admitting that

Some attention has been paid to private security firms and their actions in zones of weak governance, but little else is said of the potential of companies in shoring up the fragile State.¹¹⁷ Though some scholars have discussed the territorial administrative functions of international organizations with respect to States undergoing periods of transition and upheaval, few have focused on business actors that discharge similar tasks.¹¹⁸

In parallel, several scholars have begun to think through how other non-State actors, particularly rebel groups, perform State-like functions in settings of State fragility.¹¹⁹ But the objective of the actors at the core of these studies is to attain the status and power of the State. Indeed, for the law of international responsibility, if these non-State actors obtain State power, their actions become attributable to

“[i]n the absence of extant large-scale analyses, we are not in a position to assert whether the involvement of/with private entities would benefit a weak or failing state; we merely point to it as a future direction for further investigation of the concept and phenomenon of state failure.”).

117. See, e.g., LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS* (2011); Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability*, 47 WM. & MARY L. REV. 135 (2005); PETER SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003).

118. For notable exceptions, see Simon Chesterman, *Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones*, 11 CHI. J. INT'L L. 321, 324 (2010) (arguing that “the norms governing businesses in conflict zones are both understudied and undervalued—understudied because the focus is generally on human rights of universal application, rather than the narrower regime of international humanitarian law [IHL], and undervalued because IHL may provide a more certain foundation for real norms that can be applied to businesses and the individuals who control them”); Jide Nzelibe, *When the Multinational Meets the Patrimonial State: Prospects for Improving Transnational Liability*, 5 J. INT'L L. & PRAC. 417 (1996). On the phenomenon of territorial administration by international organizations, see RALPH WILDE, *INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY* (2008); ERIC DE BRABANDERE, *POST-CONFLICT ADMINISTRATIONS IN INTERNATIONAL LAW: INTERNATIONAL TERRITORIAL ADMINISTRATION, TRANSITIONAL AUTHORITY AND FOREIGN OCCUPATION IN THEORY AND PRACTICE* 99–100 (2009); GREGORY H. FOX, *HUMANITARIAN OCCUPATION* (2008); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580 (2006).

119. See ZACHARIAH CHERIAN MAMPILLY, *REBEL RULERS: INSURGENT GOVERNANCE AND CIVILIAN LIFE DURING WAR* (2011); José Ciro Martínez & Brent Eng, *Struggling to Perform the State: The Politics of Bread in the Syrian Civil War*, 11 INT'L POL. SOC. 130 (2017) (describing the performance of the State through the provision of bread to civilians); *Double-Edged Sword: Vigilantes in African Counter-Insurgencies*, INT'L CRISIS GROUP (Sept. 7, 2017), <https://www.crisisgroup.org/africa/west-africa/sierra-leone/251-double-edged-sword-vigilantes-african-counter-insurgencies> [<https://perma.cc/U6F7-WK5P>].

the State itself.¹²⁰

Relatedly, the drive to treat corporations as subjects of international law amenable to suit for violations of international law is premised on the belief that some governmental actor or source of public authority must restrain business. Corporations, so this narrative proceeds with respect to fragile States, are often at least as powerful as the States in which they operate and so must be held accountable through international law when their actions cause harm because of their tendency to do social harm when not restrained by some governmental apparatus.¹²¹

Thus, some scholars have argued as an alternative that corporations should be treated as subjects of international law (thereby accountable for violations of that body of law) when they act like the State.¹²² Still others have argued that corporations ought to be amenable to suit for violations of international law merely by virtue of their wealth and influence, regardless of whether they are undertaking State-like or purely private tasks.¹²³

Yet, the common thread throughout this line of thinking is the emphasis on the necessity of an accountability paradigm in framing the interconnectedness of corporations, international law, and fragile States. If national authorities either in the corporation's home State or in the territory of operation are unwilling or unable to hold the corporation to account, it is for the superstructure of international law to facilitate the enforcement of such legal sanctions.¹²⁴

120. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10 art. 10(1) (Sept. 6, 2001) [hereinafter ARSIWA] ("The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.").

121. Austen L. Parrish, *Rehabilitating Territoriality in Human Rights*, 32 CARDOZO L. REV. 1099, 1128 (2011) (arguing that "[s]trong territorial states are essential for effective enforcement of human rights norms against multi-national and transnational corporations").

122. See FLORIAN WETTSTEIN, *MULTINATIONAL CORPORATIONS AND GLOBAL JUSTICE: HUMAN RIGHTS OBLIGATIONS OF A QUASI-GOVERNMENTAL INSTITUTION* (2009); Ratner, *supra* note 94, 497–506.

123. See MARKOS KARAVIAS, *CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW* 2–3 (2013); David Weissbrodt & Maria Kruger, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 901 (2003) (arguing that "[w]ith power should come responsibility").

124. Anita Ramasastry, *Corporation 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, 118 (2002) (arguing that "[t]he issue of MNC [multinational corporation] culpability should be assessed in terms of the level, degree and duration of complicity, and the context in which that complicity occurs," such that "MNCs that work with repressive regimes today arguably present a stronger case for the imposition

In contrast, the literature on corporate social responsibility seeks to cultivate a consciousness of social reputation to motivate business actors to do good through the pressure of consumer choice and civil society activism.¹²⁵ Corporate social responsibility emphasizes the social reasons, particularly social pressure from consumers and decisionmakers in more lucrative markets, for corporations to contribute to economic development and the expansion of infrastructure and services in the places in which they operate. Yet, here again an understanding of the necessity of an external constraint on the pursuit of profit (here, social pressure rather than legal sanction) is present.¹²⁶ This Article may be understood as an application of corporate social responsibility, but, as the analysis to come will seek to demonstrate, the Article seeks to extend those insights further by examining situations where such external constraint has been largely absent.

As a consequence of these parallel trends emphasizing legal and social constraints on the private sector and the concomitant communal pressure, business actors have agreed to join a variety of codes of conduct and reporting mechanisms that represent understandings of international best practices in the area.¹²⁷ But here

of liability” because “such MNCs are acting purely for profit rather than out of the national interest”).

125. See, e.g., Erika R. George & Scarlet R. Smith, *In Good Company: How Corporate Social Responsibility Can Protect Rights and Aid Efforts to End Child Sex Trafficking and Modern Slavery*, 46 N.Y.U. J. INT’L L. & POL. 55, 58 (2013) (asserting that “corporate social responsibility is becoming a competitive imperative as it informs the consumers’ decisions to patronize an establishment and the investors’ decision to purchase shares in a particular corporation” such that “conduct consistent with emerging global norms on the responsibility of business to respect human rights is advisable”).

126. See, e.g., MUCHLINSKI, *supra* note 31, at 100–01 (noting that “[t]he ‘international corporate social responsibility’ [ICSR] of MNEs [Multinational Enterprises] can be seen as a response to popular perceptions concerning the loss of corporate accountability as an effect of economic globalization”).

127. See, e.g., U.N. OFF. OF THE HIGH COMM’R FOR HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [<https://perma.cc/N62V-ZLW4>]; OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), <http://mneguidelines.oecd.org/guidelines/> [<https://perma.cc/L7VB-M3Y5>]; INT’L LABOUR ORG., TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (5th ed. 2017), http://www.ilo.org/wcmsp5/groups/public/—ed_emp/—emp_ent/—multi/documents/publication/wcms_094386.pdf [<https://perma.cc/ZC3X-K3TM>]. See also Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT’L L. 389, 403–20 (2005); August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS 37, 43–46 (Philip Alston ed., 2005).

again, one may observe the influence of the premise that some external surveillance (here, transnational codes and transparency initiatives in the corporation's State of nationality) is required to ensure that a business acts in an ethical way.

Yet, it should also be noted that given the historical record of for-profit firms operating in some of the countries we now regard as failed or fragile States, the dearth of extended analyses of their socially constructive capacity might be regarded as reasonable. Indeed, for-profit firms have been harnessed by imperial States for their colonial projects over the centuries.¹²⁸ Joint-stock corporations have been particularly important vehicles for territorial expansion and administration of foreign peoples when the mother country either lacked the institutional capacity or the financial resolve to undertake such projects directly.¹²⁹ But, imperial States like England, France, Spain, the Netherlands, and Belgium also governed lands and peoples overseas through the colonial corporate form to ensure maximum profit with minimal social investment.¹³⁰ In addition, scholars have increasingly brought to the fore the imperial underpinning of the modern United States and the significant role of business interests in this country's breathtaking geographic expansion over the course of the eighteenth and nineteenth centuries.¹³¹

Of course, many of these projects were undertaken at the direction or encouragement of States. The corporate form merely provided a convenient legal vehicle for the structuring of the governance project and so this might be an important distinction to draw between these earlier highly problematic endeavors and those highlighted in Part I.

Another important distinction relates to the general legal

128. See generally Jeffrey Herbst, *STATES AND POWER IN AFRICA: COMPARATIVE LESSONS IN AUTHORITY AND CONTROL* (2000); Miguel A. Centeno, *BLOOD AND DEBT: WAR AND STATEMAKING IN LATIN AMERICA* (2002).

129. See generally H.V. Bowen, *THE BUSINESS OF EMPIRE: THE EAST INDIA COMPANY AND IMPERIAL BRITAIN, 1756–1833* (2008).

130. Steven Press, *ROGUE EMPIRES: CONTRACTS AND CONMEN IN EUROPE'S SCRAMBLE FOR AFRICA* (2017); Julia Adams & Steven Pincus, *Imperial States in the Age of Discovery*, in *THE MANY HANDS OF THE STATE: THEORIZING POLITICAL AUTHORITY AND SOCIAL CONTROL* 333 (Kimberly J. Morgan & Ann Shola Orloff eds., 2017); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *HARV. INT'L L.J.* 1, 37 (1999) (observing that administrative problems associated with colonial governance through corporations flowed naturally from the fact that "the territories were administered simply for profit").

131. Paul Frymer, *BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION* 42–43 (2017); Jack P. Greene, *CREATING THE BRITISH ATLANTIC: ESSAYS ON TRANSPLANTATION, ADAPTATION, AND CONTINUITY* 102–12 (2013).

backdrop currently and that prevailing during these colonial and quasi-colonial enterprises. Indeed, though the effectiveness of international law may be underplayed by some, we must acknowledge a prevailing, even if imperfectly executed, understanding today that various acts—slavery, genocide, conquest of the territory of another State—are generally impermissible and reprehensible. And the effect of these norms on business conduct too provides a distinction between now and earlier eras when such understandings were not generally shared. The impact of these developments may be seen in the voluntary subscription of business actors to a variety of corporate codes of conduct discussed above that articulate these norms in greater detail.

Given this history, however, foreign business activity in fragile States will surely raise the specter of past colonial projects. However, this concern is not unique to the private sector. Various humanitarian intervention missions conducted by foreign States and international organizations have been criticized in this way. The objective of this Article is to acknowledge that past and ensure that it is not replicated, but also encourage the international community to think in ways that transcend the bounds of that colonial paradigm so as to better harness and facilitate the socially constructive capacities of for-profit firms. It is toward a better understanding of that task that the next section now turns.

III. PUBLIC GOODS, PROFIT, AND SOVEREIGNTY

This section builds a model to explain when for-profit firms are more likely to provide public goods by discharging the kinds of quasi-governmental functions outlined in Part I. It utilizes the conceptualization of these firms as semi-States in order to draw from international law theory and understandings of State behavior rooted therein to construct a more capacious theory of profit and its compatibility with social gain. This section then deploys economic and organizational theory concerning firm behavior generally, and more specifically firm behavior in the context of fragile States, to show that firms operating in such environments often perform quasi-governmental tasks to enhance a sort of reputation-based social capital that facilitates market functionality in the short-term and also enhances their long-term outlook.

This section posits that a firm will perform State functions or provide public goods when it is able to capture a sufficiently large portion of the benefit so as to justify the marginal cost of providing the good or service. However, it suggests that benefit ought to be

construed broadly so as to make clear that, in the fragile State context, firms often operate in a manner that defies simple accounting and instead pursue long-term gain through reputation-building projects that allow them to amass social capital. However, that reputation gain may be diminished and the provision of public goods may be dissuaded by laws that discourage or actively punish operating in the territory and also by social perceptions that such operations are somehow illegitimate because they take place in areas of limited statehood. This last set of concerns is addressed in Part IV.

This section then considers the normative desirability of these activities. In doing so, it also squarely faces an oft-heard critique: that firms will more often than not “put profits over people” and accordingly act in a manner that is deleterious to the local population when not restrained by State actors.¹³² At its most extreme, that position may seem something of a straw man, perhaps, but it also operates as an important perception shading the choices of decisionmakers and those seeking to write, implement, and deploy law in this area, and so it must be addressed here. Given the significance of that perception and its historical groundings in the utilization of colonial corporations by States outlined in Part II, it is important to have an understanding of when firms acting independently will engage in socially constructive behavior. But, this section also explores reasons for hesitation and concern rooted in alternative conceptualizations of State sovereignty.

A. Decisionmaking in the Absence of External Constraint

For-profit firms performing State-like functions in areas of limited statehood are not States. However, they sometimes operate as so-called “functional equivalents” to the State, filling gaps in the

132. See, e.g., Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 48–49 (2002) (examining “the largely uncontrolled human rights danger posed by multinationals” and asserting “the harsh reality that corporations often profit from abusive behavior”); OXFAM, UNIVERSAL HEALTH COVERAGE: WHY HEALTH INSURANCE SCHEMES ARE LEAVING THE POOR BEHIND 15 (2013), https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp176-universal-health-coverage-091013-en_3.pdf [<https://perma.cc/X8ZU-VZ65>] (arguing that “health care providers and insurance companies are maximizing profits by gaming the system”). See also Jessica Glenza, *Ban Ki-Moon Urges US to Shun ‘Powerful Interests’ and Adopt Universal Healthcare*, GUARDIAN (Nov. 9, 2017), <https://www.theguardian.com/us-news/2017/nov/09/ban-ki-moon-us-universal-healthcare> [<https://perma.cc/PRX8-EY8B>] (quoting former U.N. Secretary-General Ban Ki-Moon as observing that “you simply cannot reach universal health coverage if your health system is dominated by private financing” because such actors “prioritize profit over care”).

provision of public services or exercising a degree of authority or territorial control ordinarily associated with government actors.¹³³ This subsection highlights parallels between these firms and States so as to predict the operation of firms in areas lacking effective State oversight by applying insights derived from the behavior of States in the international community.¹³⁴

States often make decisions and take action without fear of immediate external sanction.¹³⁵ The international system lacks a central legislature or executive, and, with a very limited set of exceptions, its principal judicial bodies only take jurisdiction if the State subject to the potential adjudication of the dispute consents. Enforcement is, thus, one of the critical challenges of international law.

Scholars have discussed at length alternative means through which the international system enforces its rules, arguing variously that States punish lawbreakers through reputational sanction and that constituencies of citizens, politicians, and civil society groups internal to States play an important role in ensuring that States obey international law. Moreover, a significant body of scholarship has instead focused on creating a culture of compliance internalized by decisionmakers rather than relying on the necessity of sanction.¹³⁶

133. See Hans Krause Hansen, *Policing Corruption Post- and Pre-Crime: Collective Action and Private Authority in the Maritime Industry*, 25 *IND. J. GLOBAL LEGAL STUD.* 131, 137–38 (2018); Tanja A. Börzel & Thomas Risse, *Dysfunctional State Institutions, Trust, and Governance in Areas of Limited Statehood*, 10 *REG. & GOVERNANCE* 149, 150–51 (2016); Stephen D. Krasner & Thomas Risse, *External Actors, State-Building, and Service Provision in Areas of Limited Statehood: Introduction*, 27 *GOVERNANCE* 545 (2014); Tanja A. Börzel et al., *Does It Really Take the State?* 12 *BUS. & POL.* 1, 2–30 (2012); Tobias Debiel et al., *Local State-Building in Afghanistan and Somaliland*, 21 *PEACE REV.* 38, 38–43 (2009).

134. See U.N. Comm'n on Human Rights, Sub-Comm'n on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, ¶ 1 (Aug. 26, 2003) (declaring that “[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law”). See also U.N. Comm'n on Hum. Rts. Res. 2003/16, Rep. of the U.N. Sub-Comm'n on the Promotion and Protection of Human Rights on its Fifty-Fifth Session, U.N. Doc. E/CN.4/2004/2, at 52 (Oct. 20, 2003) (approving the Draft Norms). But see Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 3, 13–14 (2005) (critiquing the concept of spheres of influence).

135. MARY ELLEN O’CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* 69 (2008).

136. RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN*

This enforcement conundrum presents a useful point of intersection between States and for-profit firms that maintain operations in failed or fragile States. The firm's State of nationality, or where it is "at home,"¹³⁷ could conceivably regulate and restrain business activities elsewhere through the robust exercise of extraterritorial jurisdiction.¹³⁸ However, these efforts have largely proven unsatisfactory to advocates of legal accountability for a variety of reasons.¹³⁹

First, judicial principles of territorialism often dictate that it is only appropriate for the State in whose territory the alleged injuries or violations occurred to adjudicate and prescribe with respect to the acts in question.¹⁴⁰ Second, if conceptualized through the methodology of interest analysis,¹⁴¹ which functions as an alternative methodology to territorialist approaches to the conflict of laws, the firm's activities seemingly do not usually implicate fundamental interests of its home State because injuries likely impacted foreigners and the

RIGHTS THROUGH INTERNATIONAL LAW (2013); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379, 397–99, 403–05 (1999); Koh, *Why Do Nations?*, *supra* note 109, at 2645–56.

137. See, e.g., *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 919 (2011); *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014).

138. Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1343–44 (2014).

139. See Ratner, *supra* note 94, at 463, 536 (arguing that "as firms have become more international, they have also become ever more independent of government control" and that "[i]f the host state fails to regulate the acts of the company, other states, including the state of the corporation's nationality, may well choose to abstain from regulation based on the extraterritorial nature of the acts at issue."); Singer, *supra* note 117 at 536–37; Jide Nzelibe, *Contesting Adjudication: The Partisan Divide over Alien Tort Statute Litigation*, 33 N.W. J. INT'L L. & BUS. 475, 509–10 (2013); Charney, *supra* note 93, at 749 (observing that "one country usually cannot unilaterally regulate TNC [transnational corporations] power and behavior"); Marina Caparini, *Domestic Regulation: Licensing Regimes for the Export of Military Goods and Services*, in FROM MERCENARIES TO MARKET 158–78 (Simon Chesterman & Chia Lehnardt eds., 2007).

140. Ieva Miluna, *Jurisdictional Competence and Applicable Criminal Law with Regard to Private Military and Security Companies*, in MULTILEVEL REGULATION OF MILITARY AND SECURITY CONTRACTORS: THE INTERPLAY BETWEEN INTERNATIONAL, EUROPEAN AND DOMESTIC NORMS 529, 531–34 (Christine Bakker & Mirko Sossai eds., 2012); Martinez, *supra* note 92, 1393–95; Brief of Chevron Corporation et al. as Amici Curiae in Support of Respondents at 3–8, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491).

141. Herma Hill Kay, *Currie's Interest Analysis in the 21st Century: Losing the Battle, But Winning the War*, 37 WILLAMETTE L. REV. 123, 124 (2001) (defining the "bottom line" of interest analysis as an approach to conflict of laws which prescribed that "the forum court would apply forum law in all cases in which the forum had an interest").

conduct causing such harms occurred overseas.¹⁴² Indeed, the connection to and interest of the home State become even more attenuated if the firm acts through some foreign subsidiary or overseas contractor, thereby implicating issues of competing sovereignty over the regulation of entities (subsidiaries and local contractors) arguably within the regulatory scope of other States.¹⁴³ Finally, certain national courts previously receptive to transnational litigation have proven increasingly hostile to such cases, constructing procedural and prudential doctrines to avoid having to decide such cases.¹⁴⁴

Accordingly, it may be said that business actors in failed and fragile States are subject to limited traditional legal constraints because the State in which they conduct their activities is unable to enforce its own regulations and the firm's home State may not be willing to enforce its own laws with respect to operations abroad.¹⁴⁵

However, a crucial fault line in both studies of corporate social responsibility and international law has been whether corporations and States obey law out of self-interest so as to avoid sanction (construed either as direct punishment or harm to profits) or whether such obedience stems from an understanding of obedience as obligatory or in some way morally desirable. The question that often follows, then, is whether the community ought to seek to ensure that a State or business complies with law by explaining and enhancing the potentially deleterious consequences of non-compliance or instead by fostering an attitude that such obedience to law is good and thus desirable for that reason alone.¹⁴⁶

142. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013) (holding that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application”).

143. Chesterman, *supra* note 118, at 333 (observing that “[i]t is frequently asserted that private military companies such as Blackwater operate in a legal vacuum” but that “[t]his is simply not true” because “[i]n theory, at least, they are subject to the laws of the land in which they are operating, in particular its criminal law.” Yet, the Article acknowledges that “[i]n practice, however, these companies operate in places with weak or dysfunctional legal systems” and that though “contractors have been tried and convicted of crimes . . . such trials are exceptional.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 414 (AM. LAW INST. 1987).

144. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015).

145. See Tanja A. Börzel & Thomas Risse, *Governance Without a State: Can it Work?*, 4 REG. & GOVERNANCE 113, 121 (2010) (asserting that “[t]he anarchy problem in areas of limited statehood closely resembles the international system in the absence of an enforcer or a hegemon,” such that “[t]ransnational or global governance has to cope with the problem that there is no world state to ensure compliance with costly rules.”).

146. See Larry Cata Backer, *Corporate Social Responsibility in Weak Governance Zones*, 14 SANTA CLARA J. INT’L L. 297, 319–21 (2016).

Of course, the choice might seem to represent a false dichotomy, since profit and morality may align. Consequently, corporate social responsibility proponents often seek to persuade companies to undertake socially conscious activities by explaining the potential profitability of such decisions.¹⁴⁷ Scholars seeking to unpack the relatively strong rate of State compliance with international law have put forward the importance of reputational benefit or harm to explain compliance.¹⁴⁸

Invariably, however, there are times when profit does not appear immediately to align with activities that are either obligatory or that seem to go beyond the standard that law prescribes. In both corporate and international law, scholars have argued that actors under such perceived constraints will not comply if it is unprofitable to do so. In business law, the outer constraint of non-profitable activity is assumed to be imposed and enforced by the State.¹⁴⁹ In international law, realists like Jack Goldsmith and Eric Posner have argued that States act under no independent obligation to comply with international law when it deviates from their own self-interest, since international law is merely a euphemism for self-interest.¹⁵⁰

Yet, this model of pure self-interest begins to break down when we appraise decisionmaking based not merely on singular decision points or choices when confronted with a particular situation but on the basis of long-term planning.¹⁵¹ In this sense, the actors involved may be seen to act against their own self-interest where self-interest is understood merely in terms of the immediate profit to be reaped from a single choice. As such, if faced with the choice of violating the human rights of nearby inhabitants to build a road for transporting valuable minerals and building a road in a manner that does not violate the rights of those inhabitants, say through consultation and fair compensation, we would expect the firm to act in a

147. Ioannis Ioannou, *Thinking Aloud: Profiting from Corporate Social Responsibility*, 21 *BUS. STRATEGY REV.* 39, 39–40 (2010).

148. Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252, 345–46 (2011); Andrew T. Guzman, *Reputation and International Law*, 34 *GA. J. INT'L & COMP. L.* 379, 383–85 (2006).

149. On State power and legal enforcement as crucial in the restraint of opportunist business actors, see, e.g., M. Todd Henderson, *The Nanny Corporation*, 76 *U. CHI. L. REV.* 1517, 1558 (2009); Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 *VA. L. REV.* 1809, 1856–58 (2017); Veronica Root, *Coordinating Compliance Incentives*, 102 *CORNELL L. REV.* 1003, 1010 (2017).

150. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 184–85 (2005).

151. JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* 124–25 (2015).

manner that is compatible with long-term viability because humans are planning agents and a firm that undertakes such a project will have had to consider the legal routes available.¹⁵² Moreover, if the firm has had a long history of operating in the community or requires the continued good will of nearby residents, we would expect the decision to skew in favor of the choice that respects human rights because the formulation of plans will have been a key component of the activity.¹⁵³

Further, if the firm and its managers have committed to one of the various voluntary codes of good conduct that prescribe adherence to human rights, we would also expect that obligation to be incorporated into the firm's long-term planning.¹⁵⁴ Thus, though the seemingly voluntary nature may be critiqued, it does parallel the international lawmaking process whereby States are only bound through their consent unless the underlying norm is customary or a norm of so-called *jus cogens* (peremptory law).¹⁵⁵ Such codes provide not merely a standard against which to measure corporate behavior and possible liability, but perhaps more importantly, they provide a means of coordination, agreement, and public reporting as to best practices that may lead to processes of internalizing such norms within firm decisionmaking. Thus, once incorporated into a long-term plan, these norms often prove sticky and begin to exert a stronger pull toward compliance.¹⁵⁶

152. *Id.* at 105, 125 (noting that “[t]he key here is that rationality is evaluated in *larger chunks*, not isolated decision points. So the correct definition of rationality is that an action’s rationality is evaluated with regard to its place within a larger, rationally justified plan.”).

153. See Dirk Hanekom & John Manuel Luiz, *The Impact of Multinational Enterprises on Public Governance Institutions in Areas of Limited Statehood*, 55 MGMT. DECISION 1736, 1737 (2017) (asserting that “the results reveal a relationship between the depth of country embeddedness and the level of engagement of MNEs [multinational enterprises] with public institutions, and this is related to issues around risk mitigation and time horizons. Deeper embeddedness in the local markets brings greater exposure to risk leading to more and wider engagement in governance processes and cross-sector collaborations in order to influence these concerns.”).

154. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401, 403, 409–12 (2000) (observing that “establishing a commitment as a legal rule invokes a particular form of discourse” because “[a]lthough actors may disagree about the interpretation or applicability of a set of rules, discussion of issues purely in terms of interests or power is no longer legitimate.”).

155. *Id.* at 412 (noting that “[o]ver time, even nonbinding declarations can shape the practices of states and other actors and their expectations of appropriate conduct, leading to the emergence of customary law or the adoption of harder agreements”).

156. Kenneth Amaeshi & Olufemi O. Amao, *Corporate Social Responsibility in Transnational Spaces: Exploring Influences of Varieties of Capitalism on Expressions of*

That this does not occur in every instance, and the fact that firms sometimes make a choice that violates human rights does not necessarily diminish the accuracy of the insight. Indeed, criminal behavior does not ordinarily obscure the force or value of domestic law, and similarly violations of international law do not necessarily mean that the international system is without value or merit. Instead, our concern ought to be with ensuring the sincerity and strength of the firm's internalization of legal norms.

Accordingly, we may rightly be skeptical of operations of transnational corporations in fragile States undertaken through their subsidiaries.¹⁵⁷ One challenge with subsidiaries is that they allow for the potential of a singular transaction. As such, the firm may choose between pure self-interest and legal obligation in a singular interaction because the subsidiary may be discarded at the conclusion of the transaction. The reputation and potential liability of the parent company is not necessarily at jeopardy, and thus the long-term calculation, or at least, uncertainty that may point toward legal compliance is reduced to a more simplistic computation. This will not be the case with every subsidiary, of course, and some subsidiaries are more embedded in the fragile State or adhere more closely to the pronounced corporate social responsibility policies of the parent company, but the potential exploitation of operations through subsidiaries is a challenge.¹⁵⁸

Corporate Codes of Conduct in Nigeria, 86 J. BUS. ETHICS 225, 233–36 (2009) (pointing to the “stickiness” of corporate home country influences across trans national spaces” and asserting that “MNCs [multinational corporations] carry with them attributes of their national business systems as they forage into markets outside their nation states.”); Tanja A. Börzel et al., *Racing to the Top?: Regulatory Competition Among Firms in Areas of Limited Statehood*, in GOVERNANCE WITHOUT A STATE? (Thomas Risse ed., 2011), 164–65 (asserting that “firms do engage in a regulatory race to the top, even in areas of limited statehood” but that “economic incentives alone are not sufficient to ensure the fostering of regulation by firms,” but instead “corporate self-regulation may require a shadow of hierarchy to be effective.”); Aseem Prakash & Matthew Potoski, *Investing Up: FDI and the Cross-Country Diffusion of ISO 14001 Management Systems*, 51 INT’L STUD. Q. 723, 738 (2007) (analyzing corporate adherence to a voluntary environmental management standard, ISO 14001, in the context of foreign direct investment [FDI] and finding that “instead of leading to regulatory races to the bottom in corporate environmental practices, economic integration via FDI can create incentives for host-country firms to ratchet up their corporate practices beyond the regulatory requirements,” such that what matters is “not only how much FDI a country receives but from where.”).

157. Sergio Puig, *The Internationalization of Tobacco Tactics*, 28 DUKE J. COMP. & INT’L L. 495, 515–18 (2018) (discussing the exploitation of subsidiaries by multinational enterprises).

158. See Justin Tan & Liang Wang, *MNC Strategic Responses to Ethical Pressure: An Institutional Logic Perspective*, 98 J. BUS. ETHICS 373, 378 (2011) (noting that “[r]egardless

Similarly, the fungibility and disposability of businesses structured through large, multi-tiered supply chains, such as Walmart and Apple, presents a further problem for regulating global business activity, particularly in the context of fragile and failed States.¹⁵⁹ Though such actors are significant in terms of the economic activity that they represent, it should be made clear that their activities are not the main focus of this Article, since the point of such structuring through supply chains is often to evade or avoid any sense of responsibility for the discharge of governance functions. When it is inconvenient to source an item from a particular location, the company's supply chain can often shift fairly easily to producers in another location (unless the resource, product, or commodity sourced in the first location is somehow unique). Moreover, because employees of the various contracted suppliers are not Walmart or Apple employees, those companies are less likely to take on the provision of public services for that set of workers or members of those communities.¹⁶⁰

B. Uncertainty, Trust, and Social Capital

Though the foregoing account may have addressed the objections of those skeptical of allowing firms to maintain any presence in fragile States for fear that their behavior unconstrained by the host State will lead to wanton illegality, it does not do enough to explain or predict why firms might surpass the baseline legal standard of respecting human rights and instead undertake quasi-governmental functions quite beyond what is legally required of them. To gain a better understanding of this phenomenon, this subsection grapples with the question of decisionmaking under conditions of uncertainty and risk. Such conditions are ever-present for business operations in failed or fragile States that represent a particularly fraught sub-classification of the business theory category of so-called emerging markets.

Firms operating in failed and fragile States often do so absent

of a MNC's [multinational corporation's] nationality, we posit that the more a MNC is ingrained in CSR [corporate social responsibility] principles, the more resistant it will be to abandon its existing CSR principles and to adopt local ethical practices in the host country."); Xiaohua Yang & Cheryl Rivers, *Antecedents of CSR Practices in MNCs' Subsidiaries: A Stakeholder and Institutional Perspective*, 86 J. BUS. ETHICS 155, 162–63 (2009).

159. Nelson Lichtenstein, *Two Cheers for Vertical Integration: Corporate Governance in a World of Global Supply Chains*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 331 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

160. *Id.* at 348–50.

the stability or guaranteed security of the State. Traditional economic accounts assume the presence of the State as both a guarantor of property interests and enforcer of regulation that governs firm activities and enables general market functionality.¹⁶¹ The State thus ordinarily provides a degree of predictability for firms taking decisions and making plans. But without the State, this predictability begins to crumble.

Indeed, fragile States are characterized by a series of institutional voids, whereby the State is unable to supply the regulatory or enforcement framework provided in more developed markets to ensure sustained commerce.¹⁶² Institutional voids occur in the broader category of emerging markets, but the problem is particularly acute in the context of failed and fragile States.

To make up for this seeming absence of governance, economic actors instead form parallel institutions to provide for a degree of self-regulation and to ensure the predictability of transactions.¹⁶³ Such institutions are fundamentally cooperative, requiring that actors build relationships to exploit their own advantageous capacities.¹⁶⁴ And thus, it may be argued that the quasi-State activities outlined above give business actors a way to construct such relationships in and among communities.¹⁶⁵ Where business actors must ensure security, payment either to their own security services or to protection rackets run by other non-State actors will often suffice.¹⁶⁶ Yet, in situations of conflict or rapidly-moving upheaval, information is at a premium because it allows for more accurate planning. In such environments, paying to build communal relationships through the provision of the sorts of quasi-governmental services or products dis-

161. AVINASH K. DIXIT, *LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE* 13 (2004) (asserting that “conventional economic theory . . . takes the existence of a well-functioning institute of state law for granted” even though the reality is instead that “[o]nly advanced countries in recent times come anywhere near the economist’s ideal picture.”).

162. Cheng Gao et al., *Overcoming Institutional Voids: A Reputation Based View of Long-Run Survival*, 38 *STRATEGIC MGMT. J.* 2147, 2148–50 (2017); Tarun Khanna & Krishnan Palepu, *Why Focused Strategies May Be Wrong for Emerging Markets*, 75 *HARV. BUS. REV.* 41, 41–48 (1997).

163. DIXIT, *supra* note 161, at 3, 5 (proposing that in fragile States firms establish “alternative institutions to provide the necessary economic governance” and that these alternative institutions “include self-protection or hired professional protection for property rights . . . networks of information transmission, and social norms and punishments for contract enforcement.”).

164. *Id.* at 32, 65.

165. *Id.* at 129–31.

166. *Id.* at 100, 107–08, 133.

cussed in Part I may be categorized as a potentially profit-maximizing but also socially beneficial activity.

Moreover, without the authoritative imprimatur of the State, such alternative institutions require trust among actors based on reputation.¹⁶⁷ Reputation is thus crucial to long-term survival in emerging markets, and so it may be that discharging the kinds of quasi-State activities discussed earlier allows for firms to demonstrate both their commitment to a particular locale and to bank social capital that may prove useful down the line.¹⁶⁸ Commercial decisions in such markets are often taken against a backdrop of uncertainty, and reputation-based social capital allows firms to self-insure against external shocks in the absence of a State to provide reliable protection.¹⁶⁹

Here it may be useful to note Antonio Gramsci's influential formulation of the nature of power that distinguishes between domination and hegemony.¹⁷⁰ For Gramsci, domination represents the power of dictation, that of giving commands backed by sanction or some punishment so as to extract compliance in some explicit fashion. Hegemony, by contrast, is a sort of power of persuasion, one that is fundamentally embedded in consciousness without the need for such commands but significant exactly because it does not require such explicit expression.¹⁷¹

It may be posited that corporations undertaking quasi-governmental tasks pursue, whether consciously or otherwise, this latter form of power, or hegemony, as Gramsci might call it. They may not dictate that the fragile State should follow a particular course of action, since that sort of domination might attract negative attention based on notions of democratic illegitimacy or improper interference. However, the company's own performance of the State may serve to create a locus of power or social capital in the attitude of the populace and decisionmakers toward the firm that is important and might later be exploited to the firm's advantage.

An example drawn from Firestone's Ebola response might

167. Tanja A. Börzel & Thomas Risse, *Dysfunctional State Institutions, Trust, and Governance in Areas of Limited Statehood*, 10 REG. & GOVERNANCE 149, 151–57 (2016).

168. Cheng Gao et al., *supra* note 162, at 2160–61.

169. *Id.* at 2154–60; Hanekom & Luiz, *supra* note 153, at 1738 (asserting that when faced with institutional voids “MNEs [multinational enterprises] must engage in novel cross-sector partnerships so as to compensate for these institutional gaps.”); Tanya Brühl & Matthias Hofferberth, *Global Companies as Social Actors: Constructing Private Business in Global Governance*, in THE HANDBOOK OF GLOBAL COMPANIES 351, 352–56 (2013).

170. Antonio Gramsci, First Notebook § 44, in 1 PRISON NOTEBOOKS 97, 136–37 (Joseph A. Buttigieg ed., 1992).

171. *See id.*

serve to illustrate this point. One of the fundamental challenges health workers and global officials faced in containing the Ebola epidemic was popular suspicion of the State and the various aid organizations that eventually arrived to support the State's efforts. People would not inform health workers when a relative was ill for fear of mandatory isolation, and so the virus would spread.¹⁷² Consequently, according to one subsequent analysis, "the trust issues Liberians had for the government and international aid groups . . . developed into an active avoidance of aid groups and ETCs [Ebola Treatment Centers] in many communities."¹⁷³

However, researchers assessing Firestone's more effective response made clear that this outcome was due not only to Firestone's greater healthcare capacity relative to nearby public sector facilities. Instead, researchers found that "[a]n important result of Firestone's response is the success with which community members identified suspected Ebola cases, agreed to voluntary quarantine in dedicated facilities, and minimized stigmatization of Ebola survivors."¹⁷⁴ Indeed, they affirmed that "[s]ome community members self-reported signs and symptoms of Ebola, encouraged in part by community radio messages and educational meetings, as well as by high community acceptance of the quarantine and patient treatment facilities."¹⁷⁵

To be clear, the suggestion is not that Firestone employees and their families trusted Firestone more than Liberians at large trusted the government. Instead, it is an example of the operation of hegemonic power. Domination by dictating to families that they report sick relatives or volunteer for quarantine may have caught some cases of Ebola, but it would not have been as effective as cultivating a willingness among workers and their families to self-report. And this willingness was based not merely on coercion or dominance but also on confidence or hegemony with respect to the capability of Firestone's health system to respond effectively. And Firestone itself

172. See Saliou Samb & Adam Bailes, *As Ebola Stalks West Africa, Medics Fight Mistrust, Hostility*, REUTERS (July 14, 2014), <https://www.reuters.com/article/us-health-ebola-westafrica/as-ebola-stalks-west-africa-medics-fight-mistrust-hostility-idUSKBN0FI0P520140714?feedType=RSS> [<https://perma.cc/HQU6-PVPY>]; Sara Jerving, *Why Liberians Thought Ebola Was a Government Scam to Attract Western Aid: Decades of Corruption Left Liberians Suspicious of Their Government*, THE NATION (Sept. 16, 2014), <https://www.thenation.com/article/why-liberians-thought-ebola-was-government-scam-attract-western-aid/> [<https://perma.cc/JTA6-E7HV>].

173. Hannah Grace Southall et al., *Lack of Cultural Competency in International Aid Responses: The Ebola Outbreak in Liberia*, 5 FRONTIERS PUB. HEALTH 1, 3 (2017).

174. Reaves et al., *supra* note 9, at 964.

175. *Id.* at 963.

benefited by ensuring that its business operations were able to continue despite the catastrophe unfolding in the rest of the country.

On this account, we might think of hegemony as stemming not from allegiance or agreement with the entity but from the business' capacity or ability to discharge the sorts of tasks ordinarily expected of the dysfunctional government. The ability of private actors to accumulate power through hegemony and the inability of the failed or fragile State to exercise power through either hegemony or dominance is a sociological dynamic of estrangement from public institutions that is important not merely for scholars of fragile and failed States but also for legal scholars generally.¹⁷⁶

Indeed, the State's sovereignty is often construed as dependent on its ability to exercise power through dominance or hegemony.¹⁷⁷ When the State is unable to exercise power in either sense, the locus of that sovereignty entitlement may be subject to question.

This is not to suggest that the private actors detailed in this Article are in any way sovereign in the way that we might expect from a State. Indeed, such private actors are not constituted with the purpose of bearing and performing sovereignty in the same way as States. They do not bear fiduciary obligations to the citizens of the territories in which they operate, and this foreignness or seeming lack of any duty of loyalty or care toward such communities may give reason for concern.¹⁷⁸

However, their accumulation of social capital through the performance of the State may lead to the accrual of an important attribute of statehood that justifies the term semi-State as more than merely a conceptual tool for reformed analysis but also a category of business asset important for the firm to ensure its own survival and profit. As such, the performance of quasi-State tasks by the firm may itself be categorized as an element of profit if it allows the firm to be accorded a portion of the authority or legitimacy ordinarily associated with the absent State.¹⁷⁹

176. See, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2075–76 (2017).

177. Stephen D. Krasner & Thomas Risse, *External Actors, State-Building, and Service Provision in Areas of Limited Statehood: Introduction*, 27 GOVERNANCE 545, 545 (2014) (defining statehood or domestic sovereignty as “the monopoly over the legitimate use of force and the ability to successfully make, implement, and enforce rules and regulations across all policy arenas within its territory”).

178. See EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* 63–65, 300 (2016).

179. See Kenneth Amaeshi et al., *Corporate Social Responsibility in Challenging and Non-enabling Institutional Contexts: Do Institutional Voids Matter?*, 134 J. BUS. ETHICS

C. Entrenchment and Illegitimacy

This subsection flags reasons for hesitation before recognizing certain firms as semi-States or encouraging their associated activities. The term has thus far been utilized as an analytical device to allow for the application of theoretical insights at the convergence of international law and business theory. But, if the account proves persuasive, the term may serve to germinate a new socio-legal category. Indeed, in some places, people have almost come to expect the completion of such tasks by a particular firm in the manner that citizens of developed countries may be seen to demand such performance of governmental institutions.¹⁸⁰ But, though they may be willing to benefit from the social capital inherent in that recognition, these firms do not necessarily aspire to the imposition of quasi-legal obligations that may come as a consequence of the global recognition of such a role.

Yet, there may be deeper reasons for hesitation before according recognition to for-profit firms as “semi-States” as an established legal category. If the State were functional, presumably the State could also exercise a regulatory function over such firms, imposing potentially expensive standards and requirements for commercial activities, products, and transactions. Without the regulatory function of the State, the firm is able to do as it likes, to the extent allowed by the extraterritorial legislation of its home State. It is for this reason that one observes in some States a degree of seeming competition between powerful business interests and nascent attempts to build a consensus State, with firms courted to ensure they do not defeat the

135, 142 (2016) (observing with respect to the study’s focal company, Fidelity Bank of Nigeria, that “Fidelity Bank’s CSR practices are broadly influenced by normative [private morality] and relational [social legitimacy] motives, which translate to some and instrumental [*sic*] [commercial benefits] outcomes.”); Tobias Debiel et al., *Local State-Building in Afghanistan and Somaliland*, 21 PEACE REV. 38, 39 (2009) (asserting that “[a] sociopolitical order can only be sustained as long as it is regarded as legitimate or as immutable” such that “power-holders need legitimacy to imbue their power with authority.”); Brühl et al., *supra* note 169, at 361.

180. See, e.g., Hanekom & Luiz, *supra* note 153, at 1737 (noting that in some areas of limited statehood where the State is unable to provide basic services, “local populations have come to expect these tasks to be carried out by MNEs [multinational enterprises] operating in their area that often reluctantly comply.”); Audrey C. Cash, *Corporate Social Responsibility and Petroleum Development in Sub-Saharan Africa: The Case of Chad*, 37 RESOURCES POL’Y 144, 144–45 (2012) (observing that “[t]he growing societal expectation in the petroleum sector is for MNCs [multinational corporations] to play a more active role in capacity-building and development activities” and contending that “due to high instability and an authoritarian regime, oil multinationals are perceived as the purveyors of development projects by both the state and the local population.”).

nascent State for fear of eventual regulation.¹⁸¹

Moreover, the social capital accumulated by firms discharging quasi-State functions may allow for a degree of market entrenchment that will in the long-run concern advocates of the advantages of broader competition. Thus, though the fact that Digicel's social initiatives have been linked to brand profile that in turn led it to corner 70% of the Haitian mobile phone market may be seen as something of an advertisement for the benefits of intensive corporate social responsibility programs, the other side of that data point is a concern as to monopolistic behavior at the eventual expense of the very citizens Digicel purports to be advantaging.

Finally, as John Ruggie points out with respect to this sphere of firm activity, any push to impose obligations on such firms could potentially be to the detriment of the firm, the State, and the people. Ruggie's critique is sufficiently significant here that it deserves quotation at some length. He observes, in the context of whether the general power or demonstrated functionality of firms should lead to the imposition of international legal obligations, that:

[T]he proposition that corporate human rights responsibilities as a general rule should be determined by companies' capacity, whether absolute or relative to States, is troubling. On that premise, a large and profitable company operating in a small and poor country could soon find itself called upon to perform ever-expanding social and even governance functions—lacking democratic legitimacy, diminishing the State's incentive to build sustainable capacity and undermining the company's own economic role and possibly its commercial viability. Indeed, the proposition invites undesirable strategic gaming in any kind of country context.¹⁸²

To be clear, this Article does not suggest nor recommend the imposition of an obligation to carry out the quasi-governmental functions on corporations outlined above. It neither endorses the extension of the responsibility-to-protect principle in international law to corporations

181. See WORLD BANK GRP., CONFLICT IN SOMALIA: DRIVERS AND DYNAMICS 25–29 (2005), <https://openknowledge.worldbank.org/bitstream/handle/10986/8476/360320SO0Conflict0in0Somalia01PUBLIC1.pdf?sequence=1&isAllowed=y> [https://perma.cc/C3PD-9S82].

182. John Ruggie (Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, ¶ 64, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).

nor seeks to invoke the vast business law literature on the moral or ethical duty of rescue.¹⁸³ Instead, it simply examines the implications of the voluntary discharge by firms of these activities.

However, once that simple distinction with regard to Ruggie's statement is highlighted, the other points inherent in his observation are of concern for the account articulated. Certainly, to the extent that the provision of public goods by private actors thwarts or otherwise disincentivizes the government from undertaking these tasks, that may appear to be a significant challenge. But this phenomenon ought to be of concern only if it is generally accepted that the firms involved here do an inferior job to the government or if it is demonstrated that it is otherwise preferable for the government to undertake such activities. Thus, inherent in Ruggie's statement is either an assumption that the private sector will not provide service in a manner as competent as the public sector or that there ought to be some other bias in favor of the functionality of a Western-style, Weberian State able to perform all functions demanded of it by its citizens. But the reality in many parts of the world is that such a State is lacking and so alternatives must be considered. Moreover, even developed States regularly privatize certain governance functions. There are, of course, concerns as to the seeming democratic deficit involved in the processes of decisionmaking undertaken by business actors, and so these must be acknowledged.¹⁸⁴ However, it may also be argued that the primary question ought to be whether the service provision, both in terms of quality and in terms of coverage, is equivalent to that which could or might be provided by the State.

There are, of course, a range of NGOs and international organizations operating in such settings, such that the choice is not such a stark one between for-profit firms and the host State. Yet, these other actors sometimes themselves also fall short in both service provision and in the model of service undertaken.

In Haiti, for example, a massive earthquake in 2010 caused

183. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at xi (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [<https://perma.cc/FW2X-NL9C>] ("Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."). See also Jay Butler, *Amnesty for Even the Worst Offenders*, 95 WASH. U. L. REV. 591, 599–609 (2017) (describing the implications of the Responsibility to Protect principle for international law).

184. See Doreen Lustig & Eyal Benvenisti, *The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings*, 15 THEORETICAL INQUIRIES L. 125 (2014).

vast human suffering, eviscerated large swaths of infrastructure, and severely reduced government capacity. Haiti had experienced significant governance challenges before, but the earthquake was an unprecedented disaster.¹⁸⁵ Thereafter, donations poured in to assist survivors and rebuild the country, and NGOs largely filled the void left by the recovering State. Indeed, such foreign NGOs became so ubiquitous that Haiti came to be known as the “republic of NGOs.”¹⁸⁶

Yet, commentators have begun to question where the money has gone.¹⁸⁷ Infrastructure still suffers from severe deficiencies, many buildings have not been rebuilt, and widespread poverty persists. Moreover, a U.N. peacekeeping operation deployed shortly after the earthquake introduced cholera to the island, thereby causing over 9,000 deaths, and then relied on the organization’s legal immunity to thwart victims’ calls for compensation.¹⁸⁸ Additionally, the earthquake’s destruction and the cholera epidemic that followed contributed to the fact that an overwhelming majority of Haitians now procure even their water from private companies.¹⁸⁹ Finally, even the subsistence model of much charitable and U.N. aid provision has been criticized as out of step with the aspirations of the Haitian people to forge a more autonomous means of recovery. Indeed, in the

185. U.N. SCOR, 72d Sess., 8068th mtg. at 2, U.N. Doc. S/PV.8068 (Oct. 12, 2017) (observing that, when the United Nations Stabilization Mission in Haiti was established in 2004, “Haiti was in a profound state of instability and widespread political violence, and a climate of lawlessness and impunity had affected the everyday life of millions of Haitians,” such that “State authority was weak and limited to parts of the capital, Port-au-Prince, with the three branches of power either non-functional or non-existent.”).

186. Kathie Klarreich & Linda Polman, *The NGO Republic of Haiti*, THE NATION (Nov. 19, 2012), <https://www.thenation.com/article/ngo-republic-haiti/> [https://perma.cc/P37B-JV]; VIJAYA RAMACHANDRAN & JULIE WALZ, CTR. FOR GLOB. DEV., HAITI: WHERE HAS ALL THE MONEY GONE? 15 (2012), <https://www.cgdev.org/publication/haiti-where-has-all-money-gone> [https://perma.cc/AU6T-Y6LC].

187. Tracy Connor et al., *What Does Haiti Have to Show for \$13 Billion in Earthquake Aid?*, NBC NEWS (Jan. 12, 2015), <https://www.nbcnews.com/news/investigations/what-does-haiti-have-show-13-billion-earthquake-aid-n281661> [https://perma.cc/BCT7-XYK3]; see Letter from Patricia O’Brien, Under Sec’y Gen. for Legal Aff., U.N. to Brian Concannon, Jr., Dir., Inst. for Justice & Democracy in Haiti (July 5, 2013), <http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf> [https://perma.cc/QQM6-XYM6]. See also Matiangai Sirleaf, *Responsibility for Epidemics*, 97 TEX. L. REV. 285, 299–300 (2018) (discussing the United Nations’ assertion of organizational immunity in connection with the Haiti cholera epidemic).

188. U.N. SCOR, 72d Sess., 8068th mtg. at 6, U.N. Doc. S/PV.8068 (Oct. 12, 2017).

189. Molly Patrick et al., *Assessment of Drinking Water Sold from Private Sector Kiosks in Post-Earthquake Port-au-Prince, Haiti*, 97 AM. J. TROPICAL MED. & HYGIENE 84 (2017); Richard Gelting et al., *Water, Sanitation and Hygiene in Haiti: Past, Present, and Future*, 89 AM. J. TROPICAL MED. & HYGIENE 665 (2013).

aftermath of the earthquake, some local ventures commandeered or diverted subsistence aid from NGOs toward more entrepreneurial endeavors as a means of long-term viability.¹⁹⁰

As such, democratic legitimacy may be a concern not merely for for-profit firms but also for the range of NGO and international organization actors providing public goods in fragile and failed States. However, we ought also to see democratic legitimacy not merely in terms of process or elections, since public disaffection with the lack of State capacity may lead to minimal participation in such electoral processes.¹⁹¹ Instead, it is important to think through the extent to which the approach of the actors involved aligns with the aspirations of the populace. Where locals seek to exploit entrepreneurial opportunities, the presence of business actors may more closely align with such aspirations than the activities of charitable, non-profit organizations, potentially problematizing simplistic notions of which actors are in fact giving closest expression to the wishes of the people.

What is clear is that the political situation in failed and fragile States is far from ideal.¹⁹² The violence and upheaval that often mark such places is well documented. Yet, this Article suggests that an understanding of the discharge of government functions or the possession of sovereignty that is the progenitor of the obligation to undertake such tasks need not be understood in exclusive terms with the State at the pinnacle of a hierarchical model. Instead, it may be more constructive to think of sovereignty in conglomerate terms, with its component attributes discharged by multiple actors in socially beneficial fashion when the State is absent.¹⁹³ However, the realization of

190. Trenton A. Williams & Dean A. Shepherd, *Building Resilience or Providing Sustenance: Different Paths of Emergent Ventures in the Aftermath of the Haiti Earthquake*, 59 ACAD. MGMT. J. 2069, 2087–89 (2016).

191. See, e.g., Catherine Charlemagne, *The Record Low Voter Participation in Haiti's 2016 Election*, HAÏTI LIBERTÉ (Dec. 28, 2016), <https://haitiliberte.com/the-record-low-voter-participation-in-haitis-2016-election/> [<https://perma.cc/66LB-LUGR>]; *Haiti—Elections: Voter Turnout of the Elections of 29 January 2017*, HAÏTI LIBRE (Feb. 18, 2017), <https://www.haitilibre.com/en/news-20135-haiti-elections-voter-turnout-of-the-elections-of-29-january-2017-official.html> [<https://perma.cc/7Z9X-N4DV>].

192. Michael Reisman, *Designing and Managing the Future of the State*, 3 EUR. J. INT'L L. 409, 417–18 (1997) (“Wherever and whenever it occurs, the problem in failed states is classically Hobbesian. Order has broken down and life has become nasty, brutish and short.”).

193. See generally Stephen D. Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 29 INT'L SECURITY 85, 108 (2004) (noting that “[s]hared sovereignty would involve the engagement of external actors in some of the domestic authority structures of the target state for an indefinite period of time.”).

such a model with respect to for-profit firms may face certain legal obstacles that the next section seeks to address.

IV. LEGAL AND POLICY IMPLICATIONS

This section highlights how law can make it more difficult for for-profit firms to operate in failed and fragile States. In so doing, it builds on the account's descriptive and theoretical discussion of the constructive potential of such firms in challenging environments and seeks to apply these insights to the governing legal regime that often thwarts such activities.

The materials highlighted include U.S. domestic law with extraterritorial reach and international law in the form of the newly proposed U.N. draft treaty on business and human rights. The account is not exhaustive but is instead meant to be indicative of the implications that may be derived from the foregoing account.

The section concludes by extending the analysis to processes of transnational decisionmaking. Accordingly, it discusses how the Article's account might affect and implicate not only existing rules but also the formulation and application of law in the face of new policy challenges.

A. Anti-Corruption and Anti-Money Laundering

For decades, the prevailing economic wisdom has been that State corruption through the payment of bribes to officials is harmful to economic development and stunts the formation of sound institutions of domestic governance.¹⁹⁴ Moreover, concerned about such practices spilling over into domestic politics in the aftermath of the Watergate Scandal, the United States adopted the Foreign Corrupt Practices Act in 1977 to prohibit American companies from paying bribes to foreign officials.¹⁹⁵ The legislation has subsequently been extended through the Dodd-Frank Act to require issuers operating in the extractive industries (such as companies drilling for oil, natural gas, or other minerals) to report payments to foreign government of-

194. See SUSAN ROSE-ACKERMAN & BONNIE J. PALIFKA, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 316–21 (2016).

195. Susan Rose-Ackerman & Sinead Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 N.Y.U. ANN. SURV. AM. L., 436–38 (2012).

officials.¹⁹⁶ And, though the FCPA lay un- or under-enforced for many years, recent enforcement actions against companies operating in emerging markets indicate a significant uptick in the utilization of the Act.¹⁹⁷ Moreover, other States have also adopted significant anti-corruption measures, with the OECD Anti-Bribery Convention, the U.N. Convention against Corruption, and the African Union Convention on Preventing and Combating Corruption among the most prominent international instruments.¹⁹⁸

Yet, much commentary has also been focused on the potentially deleterious effects of these measures on firms doing business in fragile States.¹⁹⁹ Other scholars have pushed back against this critique of anti-corruption measures, arguing variously that corrupt activity ought to be regarded by international law as a human rights violation because of the way it harms the citizenry at large, or asserting that anti-corruption measures do not as an empirical matter deter very many firms.²⁰⁰

This Article does not seek to resolve the debate concerning the virtues or detriments of the various anti-corruption regimes that States have adopted writ large. Instead, it seeks to add nuance to the application of these statutes by decisionmakers to for-profit firms by expanding our understanding of the actors and beneficiaries impacted

196. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1504, 15 U.S.C. § 78m(q) (2018).

197. Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1646–55 (2017).

198. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 2802 U.N.T.S. 225; United Nations Convention Against Corruption, Dec. 9, 2003, 2349 U.N.T.S. 41; African Union Convention on Preventing and Combating Corruption, *opened for signature* July 11, 2003, 43 I.L.M. 5. See also Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 CHI. J. INT'L L. 84, 97–107 (2014).

199. See, e.g., Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 366–73 (2010). Cf. Kevin E. Davis, *Does the Globalization of Anti-corruption Law Help Developing Countries?*, in INTERNATIONAL LAW, ECONOMIC GLOBALIZATION AND DEVELOPMENT 18–28 (Julio Faundez and Celine Tan eds., 2010).

200. See Anne Peters, *Corruption as a Violation of Human Rights* (Max Planck Inst. for Comparative Pub. Law & Int'l Law Research Paper, No. 2016–18), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2805099 [<https://perma.cc/5K7J-WA4Y>]; James Thuo Gathii, *Defining the Relationship Between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125, 146–60 (2009); Leah M. Trzcinski, *The Impact of the Foreign Corrupt Practices Act on Emerging Markets: Company Decision-Making in a Regulated World*, 45 N.Y.U. J. INT'L L. & POL. 1201, 1222 (2013) (finding that even after being sanctioned for corrupt activity, “70% of the time a company continues to do business in the implicated country”).

by these legislative pronouncements in the context of economic development in fragile States.

Indeed, though the prohibition on bribes might be seen as a way of regulating the conduct of business overseas and ensuring the compliance of government officials in such countries, the imposition of penalties upon companies that run afoul of such provisions may make it significantly more expensive and risky to operate in such jurisdictions.²⁰¹ Thus, companies may wish to avoid the risk of doing business in such locales altogether or may have less capital available to expend on some of the socially beneficial activities outlined in Part I. Of course, some companies may persist. But the potential of sanction is likely to drive out a segment of risk-averse firms.

In any case, the Article's account in this area suggests that prosecutors enforcing anti-corruption measures ought to be more mindful of the indirect consequences of such settlements. Monetary penalties imposed may harm not merely the company's management or its shareholders but also the various people in communities in which the firm operates as a semi-State. Consequently, local prosecutors may be conceptualized as global governance actors, and their enforcement of domestic legislation may also impact and impede the attainment of developmental objectives of citizens in foreign States. In this respect, though there is little express international law that might directly regulate or restrain such activities, officials in other branches of government ought to take such international implications into account in restructuring the operation and application of these anti-corruption measures.

A similar pattern is witnessed in the various anti-money laundering regimes. Some companies have been subject to hefty penalties, while others have been ordered to stop doing business in particular emerging markets altogether.²⁰² Much of the concern underpinning the anti-money laundering regimes relates to the infiltration of dark money or illicit commercial activity into the financial operations of banking and other fiscal entities operating in weak States. Yet, to the extent that such anti-money laundering regulations

201. See Rebecca L. Perlman & Alan O. Sykes, *The Political Economy of the Foreign Corrupt Practices Act: An Exploratory Analysis*, 9 J. LEG. ANALYSIS 153 (2017) (exploring various categories of business cost associated with doing business in emerging markets and complying with the FCPA).

202. See INT'L FIN. CORP., WORLD BANK GRP., MITIGATING THE EFFECTS OF DE-RISKING IN EMERGING MARKETS TO PRESERVE REMITTANCE FLOWS 4 (2016), <https://www.ifc.org/wps/wcm/connect/68a895a7-dc34-48fd-9c80-215b0fdc6da4/Note+22+EMCompass++De-Risking+and+Remittances++FINAL.pdf?MOD=AJPERES> [<https://perma.cc/WSM5-UJGD>].

force banks and other financial institutions either to exit fragile States or completely avoid such potentially risky markets, they may defeat some of the development objectives of for-profit firms that otherwise might wish to operate there to the potential benefit of the local community.

B. The New U.N. Draft Treaty on Business and Human Rights

As the culmination of the long-running project to reconcile the power and increasing capacity of business actors with their uncertain place in the framework of international law, the U.N. Human Rights Council undertook in 2014 to draft a new treaty defining the legal relationship between business entities and the superstructure of international human rights law.²⁰³ Accordingly, in July 2018, the Council's Intergovernmental Working Group released its first draft of this new treaty, the so-called Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.²⁰⁴ The draft treaty has elicited much comment, but this subsection focuses on one particularly pertinent and problematic section.

In its current form, Article 10 of the draft treaty defines various aspects of criminal and civil liability to be attributable to business entities.²⁰⁵ Article 10(6) mandates liability “to the extent [the business] exercises control over the operations” in a manner that few apart from the most ardent international law purists would find controversial.²⁰⁶ Yet, that same article also allows for liability “to the extent risk have [*sic*] been foreseen or should have been foreseen of human rights violations within its chain of economic activity.”²⁰⁷

Unfortunately, however, “chain of economic activity” is not a term of art in international law, and the drafters have given little

203. Human Rights Council, Rep. on the Work of Its Twentieth Special Session, at 157, 187, U.N. Doc. A/69/53 (2014); Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (2014).

204. Office of the High Comm'r for Human Rights, Intergovernmental Working Grp. on Transnat'l Corps. and Other Bus. Enterprises with Respect to Human Rights, Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (2018), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> [<https://perma.cc/282Z-7EX8>].

205. *Id.* at art. 10.

206. *Id.* at art. 10(6)(a).

207. *Id.* at art. 10(6)(c).

guidance as to its expected meaning. Indeed, though some might assume that it merely means “supply chain,” that term is instead used elsewhere in Article 10 to ascribe liability on the basis of activity of a business’s subsidiary or “entity in its supply chain” with whom “there is strong and direct connection between its conduct and the wrong suffered by the victim.”²⁰⁸

Moreover, for the sorts of for-profit firms discussed earlier that undertake fairly expansive functions in fragile States, the term “chain of economic activity” may well have the effect of encompassing activities or persons well outside the circle that the business might reasonably be able to control or whose actions it might be able to predict. Without further guidance, risk-averse companies may well either avoid such activities or avoid fragile States altogether.

Indeed, if anything, the provision gives such business entities added incentive to tighten their circle of associations when operating in fragile States so as to minimize the risk of possible liability if one of these people or activities turns out to violate the human rights of a member of the local community.

Furthermore, this version of Article 10 appears to build on an earlier failed attempt at U.N.-initiated treaty-making in this area of international law, namely the U.N.’s Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights first promulgated in 2003.²⁰⁹ The draft norms mandated that within their “spheres of activity and influence,” business entities “have the obligation to promote, secure the fulfillment of, ensure respect of and protect human rights.”²¹⁰ Yet, as with Article 10 of the new draft treaty, the drafters of the Norms did not define “spheres of activity and influence.”

It seems instead that a fundamental problem that global policymakers and firms operating in this area have to grapple with is that of complicity. To what extent is the presence of business in a failed State itself complicit or otherwise likely contributing to the turmoil therein? In various settings, the answer will be different, and one objective of this Article has been to show that the answer need not always be the same. Moreover, international law lacks a nuanced or tailored doctrine of complicity specific to each of its subfields, in-

208. *Id.* at art. 10(6)(b).

209. Comm’n on Human Rights, Sub-Comm’n on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

210. *Id.*

stead preferring a one-size-fits-all model that may be ill-suited to capturing the complexities of the fragile State paradigm.²¹¹

Further, we must understand complicity both in its legal sense and in terms of its potential for reputational or social harm. Consequently, to the extent that the new draft treaty opens up a quasi-legal avenue for civil society groups or activists to criticize for-profit firms operating in failed States on the basis of harms tangentially connected to these firms, such firms will likely avoid operating in such environments, thereby depriving inhabitants of the potential economic development that might ensue. Indeed, as John Ruggie presciently observed in one of his first reports on the relationship between business and human rights, “companies cannot be held responsible for the human rights impacts of every entity over which they may have some leverage, because this would include cases in which they are not contributing to, nor are a causal agent of the harm in question.”²¹²

There is a balance to be struck, surely, and the treaty ought not to be so forgiving as to tolerate direct violations of human rights committed by the company itself. However, to the extent that the current formulation of the treaty allows for claims of complicity to be marshalled in a legal or quasi-legal manner, the draft treaty may work to create a degree of uncertainty or almost incalculable risk for for-profit firms acting as semi-States in settings of State failure and may well inhibit what could potentially be socially constructive business activity.

C. Universal Health Coverage and the U.N.’s 2030 Development Goals

In 2015, member States of the United Nations collectively pledged to attain Universal Health Coverage (“UHC”) for the world’s population by 2030.²¹³ Since then, a battle royale has raged over whether the international community ought to pursue this ambitious objective by increasing the capacity of State-based institutions to de-

211. See James G. Stewart, *Complicity in Business and Human Rights*, 109 PROC. AM. SOC’Y INT’L L. ANN. MEETING 181, 183–84 (2015).

212. John Ruggie (Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Clarifying the Concepts of “Spheres of Influence” and “Complicity,”* ¶ 13, U.N. Doc. A/HRC/8/16 (May 15, 2008).

213. G.A. Res. 70/1, ¶ 3.8 (Oct. 21, 2015) (declaring member States’ goal to “[a]chieve universal health coverage” and affirming that UHC would include “financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all”).

liver healthcare, or whether donors ought instead to prioritize funding for private-sector health services providers. The position of those in favor of building State-based institutions is aptly summarized by former U.N. Secretary-General Ban Ki-moon, who contended in a recent speech that “you simply cannot reach universal health coverage if your health system is dominated by private financing,” because such actors “prioritize profit over care.”²¹⁴ On the other side of the debate, the World Bank has consistently endorsed private-sector healthcare funding and, in December 2017, Japanese Prime Minister Shinzo Abe announced his country’s intention to donate \$2.9 billion to facilitate the delivery of healthcare by private providers in developing countries.²¹⁵ Thus, as Richard Horton and Stephanie Clark observed in a timely article in *The Lancet*, “Few issues provoke as much disagreement, even anger, as the question of the private sector’s role in delivering health care.”²¹⁶

This disagreement is particularly fraught in the context of failed and fragile States.²¹⁷ In principle, international law demands

214. Jessica Glenza, *Ban Ki-Moon Urges US to Shun ‘Powerful Interests’ and Adopt Universal Healthcare*, GUARDIAN (Nov. 9, 2017), <https://www.theguardian.com/us-news/2017/nov/09/ban-ki-moon-us-universal-healthcare> [<https://perma.cc/54U2-ETTS>]. See also Helene Barroy et al., *Toward Universal Health Coverage: Thinking Public 1* (WHO, Working Paper No. 7, 2017), <http://apps.who.int/iris/bitstream/10665/255782/1/9789241512428-eng.pdf?ua=1> [<https://perma.cc/GS6G-XMBV>].

215. See DANIEL COTLEAR ET AL., WORLD BANK GRP., GOING UNIVERSAL: HOW 24 DEVELOPING COUNTRIES ARE IMPLEMENTING UNIVERSAL HEALTH COVERAGE REFORMS FROM THE BOTTOM UP 146 (2015), <http://documents.worldbank.org/curated/en/936881467992465464/pdf/99455-PUB-Box393200B-OUO-9-PUBDATE-9-28-15-DOI-10-1596-978-1-4648-0610-0-EPI-210610.pdf> [<https://perma.cc/7782-2NSN>] (“Many UNICO [Universal Health Coverage Studies Series] programs are contracting with private providers to deliver care. . . . [and noting] a willingness of governments to use the UHC [Universal Health Coverage] programs to also engage with private providers [14 programs] or philanthropic providers [12 programs] to expand capacity.”); INT’L FIN. CORP., WORLD BANK GRP., THE BUSINESS OF HEALTH IN AFRICA: PARTNERING WITH THE PRIVATE SECTOR TO IMPROVE PEOPLE’S LIVES 37–50 (2008), <http://documents.worldbank.org/curated/en/878891468002994639/pdf/441430WP0ENGLI1an10110200801PUBLIC1.pdf> [<https://perma.cc/G2W3-5Q4C>]; Shinzo Abe, Prime Minister, Gov’t of Japan, Prime Minister’s Remarks on Universal Health Coverage at the UHC Forum (Dec. 14, 2017), https://www.japan.go.jp/tomodachi/2018/winter2018/prime_ministers_remarks.html [<https://perma.cc/DGQ7-QXRM>].

216. Richard Horton & Stephanie Clark, *The Perils and Possibilities of the Private Health Sector*, 388 LANCET 540, 540 (2016).

217. Throughout this Article, the terms “failed” and “fragile” State have been used as a convenient shorthand to denote States with severe governance challenges. I am aware of the imprecision of the terms, and that challenge has long been recognized in this field. On the difficulties of adequate terminology, see Charles T. Call, *The Fallacy of the ‘Failed State,’* 29 THIRD WORLD Q. 1491, 1492, 1500–02 (2008).

that these States guarantee the right to health of their citizens.²¹⁸ However, developing public-sector capacity to fulfill this legal obligation is tremendously difficult in practice because of weaknesses in the States' institutions.²¹⁹ Yet, endorsing private sector healthcare delivery in such States is controversial because of the suspicion that profit-motivated actors will engage in exploitative conduct unless the State restrains them. This tension still frames much of the debate.²²⁰

Many healthcare systems eventually end up being comprised of a combination of public and private entities, but the willingness of some to embrace such private healthcare providers is based on the function of the State as a regulatory backdrop. However, this Article has sought to show that even when the State is seemingly absent, as in the context of failed and fragile States, private entities may take on significant quasi-governmental functions, including healthcare, in an effective manner.

218. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25.1 (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights, art. 12, Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14, ¶ 1, U.N. Doc. E/C.12/2000/4 (2000) (affirming that “[e]very human being is entitled to the enjoyment of the highest standard of health conducive to living a life of dignity”).

219. See Rosemary Morgan et al., *Performance of Private Sector Health Care: Implications for Universal Health Coverage*, 388 LANCET 606, 609 (2016) (observing that “[p]oor performance and lack of availability of the public sector . . . create gaps in service provision which the private sector steps in to fill, often providing essential primary services to the population”); Michele Forzley et al., *Law as a Guide to Regulatory System Design for the Health Sector: An Essential Tool for Regulating the Private Health Sector in Afghanistan and Other Developing Countries*, in 7 WORLD BANK LEGAL REV. 61 (Frank Fariello et al. eds., 2016), <http://documents.worldbank.org/curated/en/824011473329198139/Financing-and-implementing-the-post-2015-development-agenda-the-role-of-law-and-justice-systems> [<https://perma.cc/H2WQ-QQ3W>]; Alison Burt et al., *Eradicating Poverty in Fragile States: Prospects of Reaching the “High-Hanging” Fruit by 2030*, at 16 (World Bank Grp., Pol’y Research Working Paper No. 7002, 2014), <http://documents.worldbank.org/curated/en/909761468170347362/pdf/WPS7002.pdf> [<https://perma.cc/XJL8-2FLQ>] (asserting that “weak institutions contribute to poor health”).

220. See Press Release, Oxfam Int’l, *Unregulated and Unaccountable: How the Private Health Care Sector in India Is Putting Women’s Lives at Risk* (Feb. 6, 2013), <https://www.oxfam.org/en/pressroom/pressreleases/2013-02-06/unregulated-and-unaccountable-how-private-health-care-sector> [<https://perma.cc/VG2D-HU2S>] (arguing that “proactively promoting the private sector has led to the proliferation of private health providers which are unregulated, unaccountable, and out of control”); Karin Buhmann, *A Poverty Perspective on Human Rights and Business*, in CASTING THE NET WIDER: HUMAN RIGHTS, DEVELOPMENT AND NEW DUTY-BEARERS 245, 248 (Margot E. Salomon et al. eds., 2007) (asserting that “[w]eak legislative, governance and enforcement systems create the risk of strong companies acting in ways that infringe human rights without being held to account”).

CONCLUSION

For-profit firms in failed and fragile States sometimes themselves act like semi-States. They perform the State, discharging functions ordinarily expected of governments in fundamentally challenging situations. Yet, legal scholars have often overlooked this phenomenon.

The Article has highlighted the impressive response of Firestone during Liberia's Ebola outbreak and the various other quasi-governmental actions undertaken by business entities in fragile States so as to add nuance and expand our understanding of the policy options available to global decisionmakers facing such situations. The Article has constructed an alternate model based on the accumulation of reputation as a means of investment or insurance against future uncertainty to explain the observed behavior of firms discharging quasi-State functions in settings of State dysfunction. Applying this model, it has also suggested alternative legal and policy formulations through which the international community might better encourage and facilitate such business actors, while also acknowledging reasons for concern.

As transnational corporations become increasingly wealthy and powerful and the challenge of State failure persists, international law must grapple with how business entities may contribute constructively. Although corporations have a problematic history as international actors within the enterprise of European colonialism, the positive contributions of for-profit firms when States do not or cannot perform core functions today represent another avenue through which the international community might work to transcend the consequences of that legacy. As such, the Article suggests that versions of sovereign hybridity that combine public and private entities discharging State-like functions or providing public goods ought to be examined more seriously when States fail.