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Historical Precedents for Holding Corporations Responsible for
Violations of International Law and Human Rights

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Abstract

There are no specific historical precedents for holding corporations responsible for violations of international law and human rights. This brief report, however, outlines some historical precedents which demonstrate that corporations and other business enterprises may be regarded as *subjects* of international law as opposed to objects. For that reason, it concludes that there are no grounds in international law for any corporation, including Private Military and Security Contractors (PMSCs), to avoid accountability for international law contraventions, in particular violations of human rights and, where applicable, international humanitarian law. Nevertheless, international law has not yet developed to a stage whereby PMSCs can be held responsible for internationally wrongful acts.

Historical Precedents for Holding Corporations Responsible for violations of International Law and Human Rights

SORCHA MACLEOD*

1. Introduction

There are no specific historical precedents for holding corporations responsible for violations of international law and human rights. This short paper, however, outlines the historical precedents which demonstrate that corporations and other business enterprises may be regarded as *subjects* of international law as opposed to objects. For that reason, it concludes that there are no grounds in international law for any corporation, including Private Military and Security Contractors (PMSCs), to avoid accountability for international law contraventions, in particular violations of human rights and, where applicable, international humanitarian law. Nevertheless, international law has not yet developed to a stage whereby PMSCs can be held responsible for internationally wrongful acts.

2. Corporations and Business Enterprises as Objects of International Law

It is self-evident that the status of 'subject' of international law is conferred upon states which meet the Montevideo Convention criteria for statehood, the most important of which historically was the exercise of sovereign power. According to Charlesworth and Chinkin this 'establishes a model for full international personality that other claimants for international status cannot replicate'.¹ Strictly speaking this is true, however, in recent times the international community has witnessed a trend whereby other entities are recognised as subjects of international law, in particular, international organisations.² Whereas international organisations are recognised on the international plane by virtue of associated objective legal personality, corporations are not. There is, however, no reason to assume that future recognition of corporate international legal personality is a flight of fancy. Since 1949 and the *Reparations Case* the international community has taken steps towards a point where international organisations are recognised as subjects of international law with associated rights and duties.³ The established position, however, is that neither individuals nor corporations are subjects of international law and derive any meagre international legal personality from the will of the states creating them, reflecting the traditional Austinian position enunciated by the Permanent Court in the *Lotus* decision that 'international law governs relations between independent states...[which] emanate from their own free will...'.⁴

Such an Austinian analysis will elicit an enquiry as to where the power lies and will conclude inevitably that it rests solely with the state or law-maker. On this so-called voluntarist analysis, international law depends upon the consensual engagement of states. Any imposition of international obligations is thus dependent upon state consensus. So, for example, individuals are recognised as subjects of international law under the Statute of the International Criminal Court and as such bear

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¹ H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (2000), 124.

² ILC Draft Articles on International Organisations, Report of the International Law Commission 58th Session 2006, p.252.

³ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174 at 179.

⁴ *The Case of the SS Lotus*, PCIJ Series A, No.10 (1927) p.18.

responsibility for the commission of genocide, crimes against humanity and war crimes as a result of such a consensus.⁵ On the other hand, corporations have not been regarded traditionally as possessing international legal personality and as such do not bear responsibilities under international law, in particular responsibility for human rights violations and, where applicable, violations of international humanitarian law. This limited role is reflected in the limited jurisprudence of the International Court of Justice. The ICJ regards corporations as legal entities separate from their shareholders but which are capable only of being protected by virtue of diplomatic protection exercised by their state of incorporation.⁶ Such protection is not an automatic right, rather it is a discretionary power to be effected by the state of nationality. This position has been reaffirmed recently by the Court in the *Case Concerning Ahmadou Sadio Diallo* decided in 2007.⁷

Thus the traditional Westphalian narrative where states are the sole subjects of international law with attendant rights and duties persists and a conservative view of international law prevails rendering corporations ostensibly devoid of international legal constraint. Several anomalies in this approach can be identified, however, upon an examination of how corporations have been treated by states historically and in more recent times. It can be demonstrated that states have clearly considered corporations to be subjects of international law *or* at least capable of engaging international responsibility in a derivative manner.

3. Corporations and Business Enterprises as Subjects of International Law

As far back as the 17th century the Royal Charters issued to the Dutch and British East India Companies permitted the exercise of key elements of what would today be recognized as sovereign power. The subsequent “little republics” created by the companies exercised various sovereign powers including, in the case of the British East India Company, “the right to have its contracts treated as international treaties and the right to make war” as well as issuing currency, governing territories and maintaining “standing armies” which “engaged in military action.”⁸ Max Huber in the *Islands of Palmas* arbitration concluded that “the acts of the Dutch East India Company” in terms of “occupying or colonizing the regions at issue in the present affair must, in international law be entirely assimilated to acts of the Netherlands State itself.” Furthermore he found that under the Treaties of Münster and Utrecht, the Dutch East and West India Companies ‘were entitled to create situations recognized by international law’ even to the extent of concluding conventions of a political nature.⁹

It is clear, therefore, that the powers of the East and West India Companies were derived from and usually exercised on behalf of the sovereign state in question and therefore to a certain extent they are based upon the traditional perception of international law as reflecting the will of states. Nevertheless, the powers awarded demonstrate an historical acceptance of corporations as actors on the international plane.

States have furthermore recognised corporations as subjects of international law possessing obligations and responsibilities on the basis of international covenants. This is not a new phenomenon, in fact Wolfgang Friedmann in 1964 concluded that “private corporations are participants in the

⁵ Art. 25 Statute of the International Criminal Court UN Doc./A.CONF.183.9*, 2187 UNTS 90 (1998).

⁶ *Barcelona Traction Light and Power Company*, I.C.J. Reports (1970), p. 3.

⁷ Summary of Judgment, 24th May 2007.

⁸ D. Garrett, ‘The Corporation as Sovereign’, 60 *Me. L. Rev.* (2008), 129 at 133.

⁹ *The Islands of Palmas Case (The Netherlands v. United States)*, 2 RIAA 829 (1928).

evolution of modern international law.”¹⁰ An examination of several treaties reveals the truth of this assertion as there are several examples of legal rules which are aimed directly at corporate actors. For example, under the UN Convention on the Law of the Sea 1982 the restrictions relating to appropriation of the seabed apply to natural and juridical persons as well as states.¹¹ Likewise Article 1 of the Convention on Civil Liability for Oil Pollution Damage 1969 provides that the owner of a ship (natural or legal person) will be held liable for pollution caused by that ship.¹² More recently, Article 10 of the UN Convention against Transnational Organized Crime of 2000 makes reference to the liability of legal persons.¹³

It is thus clear that in historical terms and into the twenty-first century, corporations have been treated as possessing the legal power to act on the international plane both on behalf of their home states and also as independent subjects of international law with attendant obligations.

4. Conclusion

If the international community recognises, therefore, that private actors may incur international responsibility in some contexts, why not under human rights law and, where appropriate, international humanitarian law? There are several possible responses. Antonio Cassese posits an answer as to why “States have not upgraded [corporate entities] to international subjects proper.”¹⁴ Writing in 1986, he stated that:

Socialist countries are politically opposed to them and the majority of developing countries are suspicious of their power; both groups will never allow them to play an autonomous role in international affairs. Even Western countries are reluctant to grant them international standing; they prefer to keep them under their control – of course, to the extent that this is possible. It follows that multinational corporations possess no international rights and duties: they are only subjects of municipal and transnational law.¹⁵

This is probably an accurate summation of the debate which has taken place within the international community over the past thirty-five years but it is not the conclusion of the debate. Andrew Clapham (in the context of the ICC) argues that:

As long as we admit that individuals have rights and duties under customary international human rights law and international humanitarian law, we have to admit that legal persons also have the necessary international legal personality to enjoy some of these rights and conversely be prosecuted or held accountable for violations of their international duties.¹⁶

It is thus evident that corporations over centuries have exercised sovereign power on behalf of the state *and* have been made subject to the provisions of international covenants. Any narrative which posits that international legal personality is the sole preserve of states is historically inaccurate. The

¹⁰ M. Kamminga, *Corporate Obligations under International Law*, Stakeholder submissions to the report of the High Commissioner for Human Rights on the Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights [<http://www2.ohchr.org/english/issues/globalization/business/docs/kamminga.doc>] at p.1 citing W. Friedmann, *The Changing Structure of International Law* (1964), 230.

¹¹ 1833 UNTS 397 Art. 137(1).

¹² 973 UNTS 3.

¹³ 2225 UNTS 275. See also A. Clapham, ‘On Complicity’ in M. Henzlin, and R. Roth (eds.), *Le droit penal à l’épreuve de l’internationalisation*, (2000), 241-274 at 261.

¹⁴ A. Cassese, *International Law in a Divided World* (1986), 103.

¹⁵ *Ibid.*

¹⁶ A. Clapham, ‘The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court’ in M. Kamminga and S. Zia-Zarif (eds.), *Liability of Multinational Corporations under International Law* (2000), 139 at 190.

political will, however, has not yet crystallized to allow corporations to be accepted fully as legal persons on the international plane and be held directly responsible for their violations of international law in every circumstance but as the 'Report on International Initiatives for Holding Corporations to Account and their Viability with regard to PMSCs' demonstrates, they *are* recognised as international actors who can and should be held to account for their wrongful acts.¹⁷

¹⁷ MacLeod & McArdle, PRIV-WAR Work Package 6, Deliverable 2