

CORPORATE COMMITMENT TO INTERNATIONAL LAW

JAY BUTLER*

I. INTRODUCTION 434 R
II. THE PUZZLE OF CORPORATE COMMITMENT 443 R
A. Corporate Opinio Juris in Theory 443 R
B. Past Insights 447 R
III. CORPORATE OPINIO JURIS IN ACTION 454 R
A. Cathay Pacific and the Hong Kong Protests 456 R
B. Google, Project Maven, and JEDI 460 R
C. Banks and Funding Illegal Weapons Systems 464 R
D. Jerusalem Infrastructure Projects 467 R
E. Microsoft and Data Sharing 467 R
IV. PREDICTING CORPORATE OPINIO JURIS 473 R
A. Pressure 475 R
B. Strategy 480 R
C. Identity 484 R
V. THE VALUE OF CORPORATE COMMITMENT TO INTERNATIONAL LAW 487 R
A. Realism's Limitations 487 R
B. Displacing the State? 489 R
C. Ambiguity and Clear Instructions 493 R
VI. CONCLUSION 499 R

Corporations are increasingly important actors in international law. But vital questions underlying this development have long gone unanswered: How and why do corporations commit to international law? This article constructs a general account of business interaction with international legal obligation and suggests that a gateway to demystifying this persistent puzzle lies in corporate opinio juris.

* Visiting Associate Professor of Law, University of Virginia School of Law; Associate Professor of Law, William & Mary Law School. Rhodes Scholar, J.D. Yale Law School, B.A. Oxford University, B.A. Harvard University. I wish to thank Kevin Davis, Harold Koh, Katharina Pistor, Guy Charles, Evan Criddle, Tendayi Achiume, Matiangai Sirleaf, Owen Pell, Lea Brilmayer, and the participants of the Jerome M. Culp Colloquium at Stanford Law School, the Public Law Workshop at the University of Chicago Law School and the Faculty Workshop at Cornell Law School for helpful feedback on this project. Ariana Cheng provided excellent research assistance. All errors are my own.

Corporate opinio juris describes a company's subscription to a rule of international law, even though the company is not technically bound by that rule. This subscription functions as a kind of pledge that, once made, has sway over the company and its peers and symbiotically enhances the authority of international law. Corporate opinio juris provides a common rubric to analyze the subfields of international law where these corporate pledges have been documented, serving as a paradigm to better understand how and why companies adhere to international law.

The article then unpacks how various structures within business law and management theory help to predict the formation of corporate commitments to international law, arguing that corporate opinio juris holds potentially sweeping implications for international law generally.

I. INTRODUCTION

Even before President Trump announced America's withdrawal from the World Health Organization (WHO) and despite his earlier threat to cancel funding to that global institution, American pharmaceutical companies had begun coordinating vaccine trial efforts with their counterparts around the world.¹ This cross-border corporate coordination has since continued under the auspices of the WHO's Access to Covid-19 Tools (ACT) Accelerator Hub.² Furthermore, when asked if his company would participate in a global vaccine deployment mechanism, the CEO of American pharmaceutical giant, Pfizer, replied "Absolutely. And we are already a part of these discussions."³

1. World Health Org. [WHO], *Draft Landscape of COVID-19 Candidate Vaccines* (July 15, 2020), <https://www.who.int/publications/m/item/draft-landscape-of-covid-19-candidate-vaccines> [<https://perma.cc/6LZP-XLVH>]; WHO, *Public Statement for Collaboration on COVID-19 Vaccine Development* (Apr. 13, 2020), <https://www.who.int/news-room/detail/13-04-2020-public-statement-for-collaboration-on-covid-19-vaccine-development> [<https://perma.cc/C3JC-Y2TM>]. See also Gabrielle Debinski et al., *The Graphic Truth: Competing and Cooperating on a COVID-19 Vaccine*, GZERO (June 14, 2020), <https://www.gzeromedia.com/the-graphic-truth-competing-and-cooperating-on-a-covid-19-vaccine> [<https://perma.cc/DZ39-V2KR>] (noting that there is "a lot of international collaboration going on behind the scenes" in the race to develop a vaccine for COVID-19).

2. WHO, *Access to COVID-19 Tools (ACT) Accelerator* (Apr. 24, 2020), [https://www.who.int/publications/m/item/access-to-covid-19-tools-\(act\)-accelerator](https://www.who.int/publications/m/item/access-to-covid-19-tools-(act)-accelerator) [<https://perma.cc/9RGP-KSRN>].

3. Int'l Fed'n of Pharm. Mfrs. & Ass'ns (IFPMA), *Global Biopharma CEO/Top Executives COVID-19 Media Briefing*, YOUTUBE (May 28, 2020), <https://www.youtube.com/watch?v=0wMMwDshed0> [<https://perma.cc/MT94->

Pfizer's CEO also admitted his fear that vaccine companies "will be caught in the middle" of a struggle over distribution between the WHO and "every national government [that] would like to get the vaccine for them."⁴ However, in language indicating a commitment to a form of sovereign equality, he pledged that "everybody will get a fair share of the supplies that exist as quickly as possible and . . . we will not forget the underprivileged countries that likely commercially [] play very little role if any but from the human perspective they have equal rights."⁵

Skeptics may posit that such easy words will become empty if companies must sacrifice profits to adhere to international institutional decisions. However, in reference to Johnson & Johnson's March 2020 pledge to not profit from any vaccine during the pandemic,⁶ the company's Vice-Chairman and Chief Scientific Officer was asked whether "the definition of pandemic period for which vaccines will be supplied on a non-profit basis" corresponds to when the WHO announces the end of the public health emergency of international concern. He replied, "Yeah, that's the assumption . . . certain countries might declare it sooner over, but that is not an established definition yet . . . the pandemic will be over when the WHO declares it over."⁷

G333] (transcript on file with author) [hereinafter Biopharma CEO Briefing].

4. *Id.* This fear of governments hoarding vaccines seems to have been realized with alleged Russian state-sponsored attempts to hack the data of various companies currently pursuing a vaccine. Chris Fox & Leo Kelion, *Coronavirus: Russian Spies Target Covid-19 Vaccine Research*, BBC (July 16, 2020), <https://www.bbc.com/news/technology-53429506> [<https://perma.cc/8BDJ-FT4R>].

5. Biopharma CEO Briefing, *supra* note 3.

6. Press Release, Johnson & Johnson, Johnson & Johnson Announces a Lead Vaccine Candidate for COVID-19; Landmark New Partnership with U.S. Department of Health & Human Services; and Commitment to Supply One Billion Vaccines Worldwide for Emergency Pandemic Use (Mar. 30, 2020), <https://www.jnj.com/johnson-johnson-announces-a-lead-vaccine-candidate-for-covid-19-landmark-new-partnership-with-u-s-department-of-health-human-services-and-commitment-to-supply-one-billion-vaccines-worldwide-for-emergency-pandemic-use> [<https://perma.cc/8KF7-7E7B>] ("The Company plans to begin production at risk imminently and is committed to bringing an affordable vaccine to the public on a not-for-profit basis for emergency pandemic use.").

7. Biopharma CEO Briefing, *supra* note 3.

As such, despite President Trump's rejection of the WHO's interpretation of international law and global public health, these American pharmaceutical companies have adopted and endorsed the WHO position as the basis for their cooperation and profit policies. Johnson & Johnson would not have promised to place its potential to profit from any vaccine in the hands of the WHO.

This apparent corporate deference to the WHO is a development so far overlooked. A recent essay describing "the collapse of global cooperation" surrounding international efforts to combat COVID-19 focused almost solely on states and mentioned as an aside that "[s]ince the WHO is not legally mandated to govern or listen to nonstate actors, its coordinating role is hindered."⁸ But that proposition is correct only if one believes coordination can be achieved solely through command. Instead, coordination may also come through subscription. The focus on states has thus created a longstanding blind spot regarding the active participation of business in the structures and processes of international law.

More generally, the sort of corporate commitment to international law evinced above and examined in this article undermines the validity of the realist critique of international law as an empty vessel, an existential threat to international law itself. Realist scholars of international law have long argued that international law is little more than an attractive cover for state self-interest and that when this diverges from the conduct international law demands, states will choose their own advantage and break the law.⁹ However, if corporations,¹⁰ actors not explicitly bound by international law and whose sole mission is often conceptualized as the self-interested generation of profit, are subscribing to and deploying international law to

8. Allyn L. Taylor & Roojin Habibi, *The Collapse of Global Cooperation Under the WHO International Health Regulations at the Outset of COVID-19: Sculpting the Future of Global Health Governance*, ASIL INSIGHTS (June 5, 2020), <https://www.asil.org/insights/volume/24/issue/15/collapse-global-cooperation-under-who-international-health-regulations> [<https://perma.cc/TB54-5W3E>].

9. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 39–40 (2006).

10. This Article uses "corporations" as a shorthand for all for-profit business entities, mirroring the general use of the term in international law scholarship.

orient their decisions and measure the validity of decisions of the state, this might well indicate that international law has more force and obligatory power than realists believe.

Indeed, in response to assertions of the primacy of states in affirming or eroding the authority of international institutions, one might rightly ask which is more important to the WHO's influence over the international response to COVID-19: rebellion by a state actor or commitments by companies like Pfizer and Johnson & Johnson, which might soon have control over the actual vaccines?

Corporations embracing international law notwithstanding their home states' attitude to the global legal system and regardless of the inability of international institutions to command businesses' adherence is not a phenomenon limited to the sphere of public health.¹¹ Nor is it just a reaction to the present petulance of a particular administration or merely a manifestation of the crisis thinking of the current pandemic. Instead, companies are crafting their own system of public value-signaling and commitments based on the precepts and rules of international law in countless contexts, from the environment, human rights, and immigration, to the law of occupation and territorial sovereignty and data protection and privacy.

This praxis raises many significant questions that bridge the fields of corporate law and international law, but the questions at the heart of this article are how and why corporations commit to international law.

A gateway to understanding the processes and outcomes of such commitment is corporate *opinio juris*.¹² According to the standard definition of customary international law, custom

11. See Jay Butler, *The Corporate Keepers of International Law*, 114 AM. J. INT'L L. 189, 189 (2020) ("In transborder environmental protection, territorial disputes, internet governance, anticorruption, international human rights, and humanitarian law, private business are increasingly supporting the implementation and enforcement of international law.").

12. This is not the first use of the term corporate *opinio juris*, but the one article to previously deploy the term did so to denote the generality of company behavior in relation to a voluntary code or international legal document, rather than as a basis for elucidating individual company discernment. Kirsten Stefanik, *Rise of the Corporation and Corporate Social Responsibility: The Case for Corporate Customary International Law*, 54 CAN. Y.B. INT'L L. 276, 289, 301 (2017).

is determined through the aggregation of state practice and *opinio juris*: a state's declaration affirming its belief in the mandatory quality of the particular act or practice in question.¹³ Generally speaking, in order for a new rule of custom to come into being, it must be supported or evidenced by widespread practice undertaken because of a stated belief of legal obligation. Without *opinio juris*, the practice is merely pattern, much like social courtesy or politesse. Statements are often treated as sufficient evidence of *opinio juris*. Thus, as Anthea Roberts explains in her oft-cited treatment of customary law, “[*o*]pinio juris concerns statements of belief rather than actual beliefs.”¹⁴ It is not for outside observers or jurists to unpack whether a state meant what it said when it declared its sense of obligation toward a particular practice.

Corporate *opinio juris* takes the principle of *opinio juris* ordinarily applicable to states and deploys it to describe a company's acknowledgement that a particular activity is required by international law. By adapting its behavior in this way and announcing this rationale, the company seeks to follow international law, even if it is not explicitly bound by it. This article does not argue that corporate *opinio juris* generates binding legal obligations in the same way that customary international law functions with respect to states. Instead, the process and outcome of corporate pledges serve both to associate the company with a standard against which others may measure and critique the company's subsequent actions and to communicate a new best practice based on international law that peer entities may be drawn to follow.¹⁵ Additionally, the company's

13. *Continental Shelf (Libya v. Malta)*, Judgment, 1985 I.C.J. 13, ¶ 27 (June 3) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States”)

14. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757–58 (2012).

15. See Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 776, 818 (2007) (arguing in favor of “debunk[ing] the notion that corporate rhetoric has no connection to actual practices,” demonstrating how rhetoric can encourage corporate engagement in beneficial behavior, and reframing “corporate rhetoric” as a form of “corporate commitment”).

pledge may enhance the authority of the international system to which it is made.¹⁶

Corporate *opinio juris* may be formed through a variable combination of external pressure from activists, internal pressure from employees or shareholders, internalized commitment from company managers to the international legal system, or company leadership decisions that international law aligns with and will further the company's own interests. Corporate *opinio juris* leads a company to undertake or refuse a particular course of action according to a rationale prescribed by international law. In either instance, a company manifests its acceptance of international law as providing the appropriate standard for its own conduct.

Corporate *opinio juris* is the proper term for business actively engaging with and deferring to international law because it accounts for situations in which an actor pronounces that it must or should do a certain thing, even though, by definition, it is not yet bound or formally obligated by that particular rule. The term *opinio juris* derives from traditional understandings of customary international law;¹⁷ it means that a particular action is done because the actor believes it is expected by law. *Opinio juris* may involve the acceptance of an obligation, but it may also include a claim of right.¹⁸ And, as explored later in the article, a mix of factors may drive the formation of that choice.

Although manifested fidelity to international law may involve sacrificing profits in favor of adherence to a rule, corporate *opinio juris* does not require it. Commitment to interna-

16. See Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88, 93 (2006) (positing that compliance with a rule of international law may be an indication of the perceived legitimacy of international law overall or the international legal system's "pull").

17. See Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 120 (2018) ("The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.").

18. See Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 608–09 (2002) (describing President Truman's Proclamations asserting sovereign rights over the exclusive economic zone and the continental shelf that states quickly accepted as customary and followed with respect to their own maritime entitlements).

tional law need not be demonstrated solely through self-denial; indeed, that requirement does not exist in other areas of law, nor does it track human behavior. Sometimes people commit to law because they believe that it will enhance, not undermine their interests. The field of contract law is based on exactly that understanding.¹⁹ So too is the principle of voluntarism or state consent—the idea that a state is not bound by a rule unless it consents to be bound—that is fundamental to international law.²⁰ Companies ought not to be treated differently from individuals or states in this respect. The fact that they act in their own self-interest does not diminish their commitment to sustain a legal rule or principle. Nor should we have to prove that a company acted to uphold law only by falling on its own sword for the cause of law. A legal system works best when it effectuates the interests of its participants and allows them to flourish. To expect otherwise is cruel and implicitly relies on a flawed conception of law as solely coercive command.

A better approach to identifying instances of corporate *opinio juris* is to analyze situations in which the preferred directions of domestic authorities and international law diverge. Because corporations are creatures and creations of domestic law, whenever the international community wishes to regulate some aspect of corporate behavior globally, it usually does so through the intermediary of the state.²¹ The state incorporates that international legal instruction into domestic law, which then becomes binding on the company. In this usual multistep setting, it is difficult to decipher whether the company is fol-

19. Indeed, a contract is not legally enforceable unless both parties benefit from the agreement. *Consideration*, BLACK'S LAW DICTIONARY (11th ed. 2019).

20. *E.g.*, *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. Rep. 14, ¶ 269 (June 27) (“[I]n international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise”); *S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7) (“International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will Restrictions upon the independence of States cannot therefore be presumed.”).

21. *See* Melissa J. Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63, 65–69 (2013) (discussing “persuasion” treaties, which “anticipate domestic implementation through regulation of private actors”).

lowing the international law or the domestic law because the two are aligned.

However, when the state is recalcitrant or rejects the international rule and refuses to incorporate it into domestic law binding on the company, the company's choice to nevertheless order its conduct according to the international legal rule is indicative of its subscription to the international legal system on that particular point. The company may find a way to abide by both rules (perhaps if the international regulation prescribes a stricter standard than the domestic),²² but that divergence provides an appropriate setting in which to center the company's choice of the international standard within the paradigm of corporate *opinio juris*.

Accordingly, this article foregrounds instances of such divergence in which the company not only adopts a different standard from that endorsed by the state, but also makes its objection to the state's approach clear. It highlights instances when a company has declined a particular line of government business, refused state incentives to do business in a certain place, or engaged in other non-cooperative acts with government actors because of a determination that working with the government in such a way would undermine some norm of international law. In so doing, the article opens a new space in the scholarly literature unpacking the interface between corporations and international law.

Because international law does not recognize corporations as formal legal persons,²³ debates rarely focus on the ways in which corporations voluntarily invoke and implement international law to check state action.²⁴ In international legal

22. For instance, companies automatically comply with many states' standards after conforming their conduct to satisfy the European Union's strict rules. Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 5–6 (2012).

23. See *Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. Rep. 3, ¶ 38 (Feb. 5) (describing corporations as "institutions of municipal law"); Jose E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1, 6 (2011) (noting the "relatively cautious (and now dated)" approach taken by the U.S. Restatement of Foreign Relations, which recognized that corporations were not subjects of international law).

24. It is true that the field of Corporate Social Responsibility (CSR) is focused on corporate actions to pursue socially beneficial outcomes, and that this field is often framed within the paradigm of human rights. However, while CSR is largely targeted toward reforming the corporation's own

discourse, corporations are usually treated as exemplifying the limitations of municipal law and the necessity of international law to coordinate a joint solution to address business entities' bad behavior.²⁵ Corporate opinio juris expands this conversation to consider the various ways that business acts not merely as subject but also as decisionmaker utilizing the authority and legitimacy of international law to buttress its policy choices.

This article argues that corporate opinio juris provides a valuable means through which to understand how, when, and why companies commit to international law. It constructs a framework to identify and predict such behavior and provides tools to decode why companies act in this manner. It draws from theories of opinio juris relative to state conduct, but centers these within instances of corporate protest against state behavior. Importantly, the Article does not emphasize the role of corporations in upholding international law in order to

activities and minimizing its harmful social effects, the analysis in this article involves companies reorienting their activities to target perceived government wrongdoing. This important distinction raises new legal and policy issues that scholars are just starting to confront. Corporate use of international law to check state action has only lately begun to receive attention in international legal scholarship. See, e.g., Ashley Deeks, *A New Tool for Tech Companies: International Law*, LAWFARE (May 30, 2019), <https://www.lawfareblog.com/new-tool-tech-companies-international-law> [<https://perma.cc/LFF3-YCQ6>] (“In the past two years, a number of companies have invoked international law justifications to decline to make their products available to states that, in their view, will use those products to violate international law.”); Butler, *supra* note 11, at 189–94 (discussing “decisions by businesses to conform their operations and policies to international law in the absence of a clear domestic instruction so to do”).

25. See Daniel Bethlehem, *The End of Geography: The Changing Nature of the International System and the Challenge to International Law*, 25 EUR. J. INT'L L. 9, 20–21 (2014) (“Municipal law remains the mediator of corporate obligations today, even in respect of corporate conduct internationally.”); Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 930 (2005) (observing that “[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.”); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 463 (2001) (noting that “multinational enterprises are themselves recognizing the limits of duties on states” to regulate corporations); Peter J. Spiro, *New Players on the International Stage*, 2 HOFSTRA L. & POL'Y SYMP. 19, 28–30 (1997) (explaining that it is becoming increasingly difficult for states to regulate corporations, given their “increasingly cosmopolitan nature”).

overshadow or excuse the harms and abuses various companies have perpetrated. Corporations, like states, are frequently wrongdoers. Further, the claim advanced here is neither quantitative (it is not claimed that corporations uphold international law more than they disregard it), nor comparative (it is not claimed that corporations do a better or worse job of enforcing international law than other organizations like states, NGOs, unions, or other social movements). The theory of corporate *opinio juris* does not require measurement along either dimension to serve as a model for the sort of corporate/international interaction that it encapsulates. Instead, the article seeks to make more visible an alternative relationship between corporations and international law to broaden and nuance understanding in this increasingly important area.

Part II of this article scrutinizes the current state of the field and articulates what a theory of corporate *opinio juris* contributes to the scholarly literature. Part III highlights illustrative examples of companies demonstrating fealty to international law over domestic legal instruction in the manner that the theory of corporate *opinio juris* suggests. Part IV offers a predictive account of when corporate *opinio juris* might arise. Finally, Part V explores various limitations and implications of corporate *opinio juris* for the future of international law.

II. THE PUZZLE OF CORPORATE COMMITMENT

A. *Corporate Opinio Juris in Theory*

Corporate *opinio juris* captures the phenomenon of a company announcing that it will follow an international law prescription. This subscription to international law may manifest in the company taking a particular action or abstaining from a certain operation or transaction. Each option allows for the company to put its declared support for international law into practice, but with a different form of conduct. Usually, the company manifests this position through a statement declaring the obligatory quality of its adherence to the international rule or practice in question. But because there is not yet a formal requirement for countries to follow international law absent implementing domestic legislation, there is an element of choice to follow the rule or legal principle in question.

Corporate *opinio juris* is an application of orthodox *opinio juris* that public international law uses to describe state

behavior.²⁶ It takes the principle and methodology of *opinio juris* used to understand and categorize state conduct and applies it to the conduct of multinational corporations and the relationship of this latter set of actors to international law. In so doing, it offers a way to better understand how an actor may accept a norm as law before that norm has become law (or, more precisely, law applicable to that actor).²⁷

As with orthodox *opinio juris*, corporate statements need not be subjected to an inquiry of whether the company really meant what it said. The statement and the obeisance that it communicates to others is sufficient to tick the *opinio juris* box.²⁸ This function is particularly valuable in the context of corporations because it skirts disagreements over whether commitments are credible or will endure, questions that are difficult to evaluate for any complex, opaque entity made up of multiple actors, each of whom may coalesce around a position for different reasons.

The use of a doctrine to explain corporate behavior that is ordinarily applicable only to states may trigger the initial and understandable objection that corporations are not states. This is, of course, true. Corporations are different from states in myriad ways. States, as classical international law defines them, possess a defined territory, population, government, and capacity to enter into relations with other states.²⁹ Compa-

26. See *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. 99, ¶ 55 (Feb. 3) (explaining *opinio juris* in the context of state immunity).

27. A norm may constitute international law with respect to some actor (a state party to a treaty) before it is binding on another actor (a state that is not party). The norm contained in the treaty is international law, but it is not law that is binding on the state that has not ratified the treaty. However, a state that is not party to the treaty may still subscribe to the norms contained in the treaty, and its acceptance of the treaty as representative of international law binding even as to non-parties is a manifestation of *opinio juris* through which the content of the treaty becomes customary international law applicable also to states not party to the treaty. In the context of this article, the practice constitutes companies subscribing to norms that otherwise would not necessarily be binding upon them under classical theories of international law.

28. See *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. 99, ¶ 55 (Feb. 3) (“*Opinio juris* . . . is reflected in particular in the assertion by States . . .”).

29. Convention on the Rights and Duties of States (Montevideo Convention), art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

nies might arguably possess these latter two qualities, if their management structure can be considered a form of governance and their ability to enter into contracts with states and participate in international investment arbitration can be considered relations with other states. However, companies do not have a territory or a population. Their employees remain citizens of a particular state, even if they may more immediately identify with their corporate affiliation. And the company's sites of operation and business are still located within states, subject to those states' laws and jurisdiction.

Indeed, and perhaps most importantly, companies lack the defining attribute of states: sovereignty. Sovereignty has been defined in various ways and most agree that it involves some combination of the right to exclude others as well as a degree of responsibility for the wellbeing of those within the sovereign's care. Others have come to challenge the scope of sovereignty, noting its erosion, failure, and significant limitations both in practical terms and as a theory of statehood.³⁰ This article does not seek to engage that debate, but merely points out that sovereignty is a significant distinction between states and companies. Corporations are still creatures and creations of state law. They cannot charter themselves, and, despite all kinds of legal maneuvering to avoid state jurisdiction, law, and regulations (such as parent-subsidiary structuring), companies must be incorporated and headquartered in some country. Even those companies that inhabit primarily the world of cyberspace must have a physical home somewhere in this earthly plane.

What is apparent, however, is that corporations and states share two crucial characteristics that make the comparison and application of *opinio juris* apt. First, states and corporations are both complex, conglomerate entities made up of various constituencies and multiple moving parts. They are both made up of non-unitary institutions and actors, and even the most concentrated companies (privately held companies controlled by one family or individual) or dictatorships need other people to implement decisions, policies, and work outputs. It is this multilayered complexity that is the first point of parallel,

30. See Katharina Pistor, *From Territorial to Monetary Sovereignty*, 18 THEORETICAL INQUIRIES L. 491, 502–08 (2017) (examining the erosion of territorial sovereignty in the global financial system).

even if it is not an exact mirroring. Second, companies are active participants in the sphere of international relations.³¹ The mere fact that international law does not recognize corporations as formal subjects has not prevented these entities from being actively involved in the running and operation of international law, international institutions, and global interchange.

Opinio juris is the appropriate term to describe developments for multiple reasons. First, there is a substantial benefit in using a familiar term, even if its definition might differ and disagreements may arise as to its exact boundaries. Even first-year international law students are taught opinio juris. Thus, the common baseline understanding of what opinio juris is avoids wasting time inventing and defining a new gimmicky term. Second, opinio juris provides a tool through which to account for the paradoxical phenomenon of expressing fidelity to law which is not yet law binding on the actor. Indeed, the process through which a norm may eventually become law is exactly this repeated declaration of fidelity made prior to an authoritative external determination of its status of law. As such, the application of opinio juris provides an answer to the long-standing question of how corporations may participate in and act according to international law when they are not themselves bound by that body of law.

This is not to say, importantly, that opinio juris and custom more generally will operate in exactly the same way in terms of the crystallization of a provision or norm into law and the formal enforcement of that norm once it has become law. Unlike states, which can generate custom through consistent practice and opinio juris, this article does not suggest that corporate opinio juris should work in the same formalistic, legalistic way. Rather than creating a rule of customary law binding on companies, the practices corporations adopt in line with international law as corporate opinio juris may set standards for their industry, influencing rather than obliging other com-

31. See, e.g., Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264, 264 (2016) (“Business entities play important and underappreciated roles in the production of international treaties.”); Vaughan Lowe, *Corporations as International Actors and International Law Makers*, 14 ITALIAN Y.B. INT’L L. 23, 23 (2004) (noting that “it is the companies that effectively shape and control the character” of the international dispute settlement process).

panies to act in a certain way. Corporate *opinio juris* may therefore apply both to corporate endorsement of treaty norms whose broader validity is not in doubt as well as to their embrace of customary international law. Indeed, states regularly follow existing treaties as codifications of customary international law, even if they have not ratified the treaty itself.³²

Accordingly, and with respect to the generalizable impacts of a company's decision making, a company's practice in line with international law may set the norm for expected business behavior. It may become the gold standard of best practice if other companies follow suit, creating a degree of peer pressure or management pressure with regard to what shareholders and other outsider decisionmakers (like investors) believe to constitute best practice. As such, the corporate adoption of international law becomes something like a rule, but it does not operate in the same way that customary international law functions and applies to states.

Corporate *opinio juris* allows market participants to coalesce around a single standard rather than fear being undercut or overtaken by a competitor. Pegging the company's behavior to an international legal standard may ensure that the company is able to justify its position and easily impart it to peer companies or convey it to activists and rebellious shareholders as a measure of good performance relative to competitors. As such, *opinio juris* neatly captures the dynamic of companies endorsing an existing international legal standard or advocating for a new international law norm and then orienting their business activities to align with that stance.

B. *Past Insights*

As the increasing integration of the global economy has allowed corporations to grow in wealth and stature, scholars and activists have argued that international law must work to

32. For example, though the United States is not a party to the U.N. Convention on the Law of the Sea (UNCLOS) it has accepted UNCLOS as representative of customary international law and is accordingly bound by its provisions. See Eric Talbot Jensen, *Presidential Pronouncements of Customary International Law as an Alternative to the Senate's Advice and Consent*, 2015 BYU L. REV. 1525, 1534–35 (2016) (quoting President Ronald Regan as saying the UNCLOS “contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states.”).

restrain corporate activity so as not to overcome the regulatory limits of the state.³³ Corporations are therefore viewed less as partners in advancing the enforcement of international law and more as targets whose bad acts require international attention.³⁴ Because corporations can transcend borders in ways that undermine states' ability to effectively constrain their activities, international institutions provide a possible means through which to catch such corporate entities when they do wrong.³⁵

What is therefore articulated in much of the scholarship concerning linkages between states, corporations and international law is a hierarchical relationship between states and corporations, with the state ideally at the top and international law serving as a regulatory stop gap when the state is unable to effectively prevent the wrongdoing of business actors.³⁶ This hierarchy is very much in line with general understandings of

33. See John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1 (2008) (discussing efforts to incorporate private duties into human rights law); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001) (examining the role of international law in regulating corporate actors).

34. See, e.g., Erika R. George, *Incorporating Rights: Empire, Global Enterprise, and Global Justice*, 10 U. ST. THOMAS L.J. 917, 957–58 (2013) (noting that the “power of private commercial actors is . . . under scrutiny” under international law); Beth Stephens, *The Amoralism of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 47, 82 (2002) (arguing that “given corporate unwillingness to accept social obligations as part of the business ethic, governmental regulation is essential.”).

35. See John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 819 (2007) (noting that “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” while international institutions have “attempted to establish binding international rules to govern the activities of transnationals . . .”); cf. William Magnuson, *Unilateral Corporate Regulation*, 17 CHI. J. INT'L L. 521 (2017) (exploring the possibility of international regulation and instead advocating for states to impose unilateral corporate regulations).

36. See, e.g., Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT'L L. 259, 262 (2012) (noting that multinational corporations have outgrown their national regulatory regimes and that “extraterritorial jurisdiction has become necessary.”); James G. Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. J. INT'L L. & POL. 121 (2014) (arguing for “coupling corporate criminal liability with international crimes in national systems”).

the position of corporations in relation to the state within the general structure of international law. As both Carlos Vazquez and Melissa Durkee explain, international obligations are usually implemented through a state instruction to the corporation to comply with some domestic prohibition or through a statute that codifies an international rule or norm.³⁷ As such, the state is understood to scold and punish the corporation according to the precepts of international law.

The principal gap in this legal conversation loop lies where and when the state can no longer effectively enforce such an instruction to the corporation. As the UN Secretary General's Special Representative for Business and Human Rights, John Ruggie, observed in his widely cited 2008 report framing the central problem in the field, "[t]he root cause of the business and human rights predicament today lies in the governance gaps created by globalization . . . These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation."³⁸ Ruggie endeavored to articulate norms to structure the connection between states, corporations, and international law based on the premise that, "[g]overnments are uniquely placed to foster corporate cultures in which respecting rights is an integral part of doing business."³⁹ Ruggie later built on this report and produced a set of Guiding Principles that has become one of the most discussed interventions in this sphere (Guiding Principles).⁴⁰ The Guiding Principles af-

37. See Durkee, *supra* note 21, at 67 (observing how some treaties "anticipate domestic implementation through regulation of private actors."); Vazquez, *supra* note 25, at 930 (observing that international norms are most commonly imposed on corporations by "imposing an obligation *on states* to regulate non-state actors," such that, "for the most part, international law regulates such non-states actors indirectly").

38. John Ruggie (Special Representative of the 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*, ¶ 3, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *United Nations Framework*].

39. *Id.* ¶ 29.

40. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles*]. On the importance of the Guiding Principles, see, for example, Erika George, *Expanding the Array*

firm the primary obligation of the state to restrain and punish human rights abuses committed by business actors,⁴¹ and much international legal scholarship of the past several years has mirrored this hierarchical understanding.⁴²

This article, however, is more concerned with a question that Ruggie addressed in his earlier U.N. work: what happens when the state itself has fallen out of compliance with international law? This article interrogates that question and examines instances when, rather than simply going along with state conduct, corporations have instead marshaled an understanding of international law so as to object and push back.

Ruggie alluded to the possibility that the state may sometimes be the wrongdoer in his earlier U.N. work. He observed that corporations may be bound by an obligation not to be complicit in situations in which human rights abuses or “actual harm is committed by another party . . . including governments”⁴³ As such, Ruggie seems to have briefly entertained the notion that corporations might use international law as a shield to avoid facilitating the bad acts of states. Yet by the time of the final publication of Ruggie’s Guiding Principles in 2011, this role for corporations as a possible check on internationally unlawful state action had largely disappeared. Perhaps because of push back from states critical of the focus on the potential of companies to check state action,⁴⁴ there is scant discussion of the role of corporations in challenging state activities.

This article fills the gap in Ruggie’s work by illustrating how corporations, guided by corporate *opinio juris*, may use international law to critique and constrain the state. The article’s first intervention is to substantiate this possibility and

of Accountable Actors: Human Rights and Corporate Social Responsibility, 109 AM. SOC’Y INT’L L. PROC. 246, 247 (2015) (observing that the Guiding Principles “are emerging as the leading global standard against which to assess and regulate the social impact of corporate conduct.”).

41. *Guiding Principles*, *supra* note 40, at 6.

42. *See, e.g.*, ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 11 (2006) (noting the traditional view that “because the state has privatized . . . activities, it remains responsible for how they are conducted . . .”).

43. *United Nations Framework*, *supra* note 38, ¶ 73.

44. *See Guiding Principles*, *supra* note 40, at 3 (observing that a proposal to impose human rights duties on companies evoked “little support from Governments”).

bring it to the fore in a way that others have not. While this article runs parallel to the existing field of Corporate Social Responsibility (CSR), its contribution is distinct. CSR's primary focus relates to a company's voluntary commitments and cultivation of internal value systems for reorienting its behavior.⁴⁵ Further, CSR is inclusive of both socially beneficial aims as well as legally obligatory norms. The goal of this article is slightly different; it highlights companies' decisions to order their business affairs according to international law, specifically focusing on instances where that decision making is also directed toward depriving another actor—whom the company has deemed to be out of compliance with international law—of its services. Avoiding complicity in some other actor's wrongdoing may be motivated by a sense of legal duty but may also be intended to sanction wrongdoing where abstention either deprives the wrongdoer of legitimacy or removes some necessary instrument from the wrongdoer's hands.⁴⁶ In other words, this article argues that corporations have legal consciousness and act or withhold action to avoid violating international law or to influence or punish some other actor for its violation of international law. This is difference from CSR because international law supplies the announced rationale rather than broadly construed social benefit, and the course a company pursues is one in line with advancing international law generally rather than solely aligning its behavior with some social value.

This article focuses on corporate commitment to law rather than broadly construed social or internal values in order to address that perhaps more challenging aspect of the corporate-international interface. It sets the bar high and selects examples accordingly, pinpointing examples where the

45. *See generally*, HEVINA S. DASHWOOD, *THE RISE OF GLOBAL CORPORATE SOCIAL RESPONSIBILITY: MINING AND THE SPREAD OF GLOBAL NORMS* (2012) (describing CSR as “voluntary or quasi-voluntary initiatives undertaken by the private sector” in the environmental, labor, and human rights fields); JENNIFER A. ZERK, *MULTATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW* (2006) (noting that the “underlying philosophy” of CSR is that “drivers for companies to act ethically and to do good, above and beyond minimum legal requirements, should come primarily from employees, investors, consumers and the general public,” not from the government).

46. Boycotts are the prototypical example of this dual function of abstention.

company itself embraces international law. This structure provides a means through which to anticipate and undermine the skeptical response that law does no work here and that international law in particular has no free-standing authority or independent value.

This article did not begin the process of unpacking the role of companies as active participants in the international legal system, but it is among the first to offer a general framework to bring together these diffuse insights. Though much useful scholarship tracing interaction among states and corporations as mediated by international law has been produced, little has engaged with the corporate-state divergence inspired by international law or used it to construct an overarching theory, as this article attempts to do. While Melissa Durkee, Anupam Chander, and Julian Arato have each, for example, charted how corporations promulgate new rules of international law to regulate their own conduct or to apply to the conduct of states, these scholars have not thoroughly engaged the possibility that international law serves as the rationale for corporations to diverge from states.⁴⁷ Similarly, Kishanthi Parella has outlined how corporations may incorporate international legal standards into their supply chain management procedures so as to police other business entities down the chain, but her account does not capture international law as a means for corporations to critique state action and thereby to distinguish between adherence to domestic versus international law.⁴⁸ Moreover, though their work is of immense value in explaining the implications for territoriality and sovereignty of companies providing internet-based technological innovations, neither Kate Klonick nor Kristen Eichensehr provide a sustained treatment of corporate invocation of international

47. See Melissa J. Durkee, *International Lobbying Law*, 127 YALE L.J. 1742 (2018) (describing how corporations influence international law through lobbying); Durkee, *supra* note 31 (“Business entities play important and underappreciated roles in the production of international treaties.”); Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT’L L.J. 229 (2015) (arguing that “multinational corporations have acquired the power to create primary rules of international law”); Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807 (2012) (noting how Facebook has influenced changes in law).

48. Kishanthi Parella, *Improving Human Rights Compliance in Supply Chains*, 95 NOTRE DAME L. REV. 727 (2019).

law as a claim of authority to oppose state conduct.⁴⁹ And, while Laura Dickinson has argued that states ought to ensure that international legal obligations are an integral part of their contracts with corporate entities in privatized state functions,⁵⁰ the assumption underlying her account is that the state, not the company, will take the initiative to include these international legal norms in their contractual arrangements.

Within the particular sub-field of global tobacco regulation, however, Harold Koh and Sergio Puig have examined tobacco companies' especially aggressive use of the means and mechanisms of international law to promote their own self-interest.⁵¹ This valuable work sets forth the potential harm of deploying international law as a mere pretext for corporate self-interest, and insights from this work provide a frame of reference for discussion of the normativity of the phenomenon of corporate opinio juris. It is the work of this article to expand discussion of corporate opinio juris beyond the scope of global tobacco regulation and to unpack the potentially sweeping implications that arise from its widespread nature.

49. See Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2495 (2020) (discussing the limited impact of the Facebook Oversight Board on governments); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1601–02 (2018) (arguing that private online platforms which moderate user-generated content “are best thought of as self-regulating private entities, governing speech within the coverage of the First Amendment by reflecting the democratic culture and norms of their users”); Kristen E. Eichensehr, *Public-Private Cybersecurity*, 95 TEX. L. REV. 467, 520 (2017) (framing public-private cooperation in the sphere of cybersecurity as a form of partnership but noting briefly that “[i]n the wake of the Snowden disclosures, many companies have taken a more pro-privacy and thus more adversarial stance vis-à-vis the government.”).

50. See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 142–43 (2005) (explaining that “provisions in government contracts might explicitly incorporate” a variety of international law norms to “render private actors contractually liable for violations . . .”).

51. See Harold Hongju Koh, *Global Tobacco Control as a Health and Human Rights Imperative*, 57 HARV. INT'L L.J. 433, 442–43 (2016) (noting that tobacco companies could invoke human rights claims to invalidate national regulations); Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. INT'L L.J. 383, 385 (2016) (analyzing “how tobacco companies have strategically relied on international law to defend product differentiation and the prevention of consumer confusion . . .”).

Accordingly, the next section offers various examples of corporate opinio juris in action to show both its relevance and potential contribution for broadening and adding much-needed nuance to current understandings of interactions between corporations and international law.

III. CORPORATE OPINIO JURIS IN ACTION

Any scholarly account that purports to substantiate its claim through the production of examples is open to allegations of bias in the selection of such examples.⁵² Certainly, it is for the author to inform the reader as to why particular examples were chosen; even once such rationale is provided, it is easy for critics to seek to undermine a work as incomplete or biased through challenging the author's rationale for highlighting such examples.⁵³ This article accepts this risk because so little has been written on this phenomenon previously and because the leanings of the great weight of scholarship in this area do not capture or predict the occurrence of activities like corporate opinio juris based on international law.⁵⁴

As such, this article aims not to prove that corporations engage in corporate opinio juris more than they do not. Such undertakings to provide a conclusive answer often pursue small research questions of limited practical import or fail to

52. See, e.g., George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 382–94 (1996) (pointing to selection problems in previous accounts that trumpeted state compliance with treaties). Despite these concerns, argumentation through the discussion of examples is popular in recent scholarship. See, e.g., ALEXANDER L. GEORGE & ANDREW BENNETT, *CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES* (4th ed. 2005) (discussing the benefits of the case study method in developing theory); Kristen E. Eichensehr, *Digital Switzerlands*, 167 U. PA. L. REV. 665, 681–85 (2019) (developing the theory of parity and neutrality of companies in relation to states through examples of certain companies); Klonick, *The New Governors*, *supra* note 49, at 1603 (discussing how YouTube, Facebook and Twitter moderate online content to demonstrate modern online governance and free expression).

53. Eric A. Posner, *Some Skeptical Comments on Beth Simmons' Mobilizing for Human Rights*, 44 N.Y.U. J. INT'L & POL. 819, 826 (2012).

54. For an illustration of this concept in the context of defining and elucidate a new concept of uncivil obedience, see Jessica Bulman-Pozen & David Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 811 (2015) (noting that the bulk of previous scholarship has focused on the differing paradigm of civil disobedience and that “[u]ncivil obedience inverts these terms.”).

offer constructive insights with respect to hard problems.⁵⁵ This article is an invitation to begin a scholarly conversation, not the final word, and this section's objective is to illustrate that the phenomenon of corporate *opinio juris* exists, especially with respect to companies that most would regard as fairly influential in terms of their market share, size, and sway as a standard-setter among their peer entities.

There are, of course, limits to such an approach. The examples in this article do not capture every kind of business entity or every legal culture. It would be unusual to expect, for example, that state-owned enterprises oppose the state in the way that the private companies discussed here have publicly objected to state conduct.⁵⁶ Such discussions may very well occur behind the scenes, obscured behind the wall of government secrecy. While it may be a useful next study to probe how state-owned enterprises guide state officials toward compliance with international law, that is not the focus of this article.

It may also be objected that a random sample set of companies should be chosen, in line with the "experimental" rationale for which some recent international law scholarship advocates.⁵⁷ This random sample could then be analyzed, and insights drawn accordingly. Yet this approach may well miss emerging trends or innovations that have not become quite so ubiquitous or evenly distributed as to be captured through the selection of a random sample. As such, it risks missing innovation at the frontier.

Moreover, other actors may need an example to follow as inspiration or may seek to orient their decision-making around relevant or perceived authoritative practice. "Google is doing it" is the sort of argument that might well be deployed to justify to some constituency within the company that international law should be taken into account. However, overlook-

55. See Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1, 4 (2012) (asserting that "[r]educing complex social realities to indicators and measures that can be used in statistical analysis is often difficult.").

56. Cf. Eichensehr, *supra* note 52, at 682 (limiting the scope of Digital Switzerlands to private technology companies that are "likely, though not certain to remain independent of direct government control.").

57. See, e.g., Adam S. Chilton & Dustin Tingley, *Why the Study of International Law Needs Experiments*, 52 COLUM. J. TRANSNAT'L L. 173, 215–16 (2013) (discussing the problem of selection bias in causal inference).

ing such innovation could leave actors that look to others for guidance in ignorance of a development that could otherwise have triggered crowd-driven coalescence around a new standard of behavior. As such, the experimental methodology could have the effect of unduly influencing future behavior by suppressing attention to innovation if the sampled companies do not evince the innovative behaviors of others.

More generally, it has long been understood that the role of a scholar of international law is not merely to highlight settled law in the manner seemingly envisaged by a purely descriptive, experimentalist approach, but also to discern and give voice to new trends and possibilities.

The examples rendered here were chosen according to the following rationale: They each illustrate a different facet of the phenomenon of corporate *opinio juris*, either because of the type of action that the company undertakes in deviating from the state or because of the category of agent that led the corporation toward such a course of action.

A. *Cathay Pacific and the Hong Kong Protests*

Amidst widespread protests in Hong Kong, Chinese government officials forced business to take sides: Support the Beijing-backed administration and be allowed to do business in mainland China's lucrative market or resist and face significant financial harm.⁵⁸

As part of this broader effort, China's Civil Aviation Administration (CAAC) ordered Hong Kong's flagship airline, Cathay Pacific, to divulge the names of all personnel involved

58. Amy Gunia, *In Hong Kong, Employees Hide Their Political Leanings as Beijing Forces Companies to Take Sides*, TIME (Sept. 16, 2019), <https://time.com/5668266/hong-kong-business-china-protests-economy-workforce-politics/> [<https://perma.cc/C3AJ-6ZL2>]; Sui-Lee Wee & Raymond Zhong, *China Pressures Business Over Hong Kong. Workers Get Caught in the Middle.*, N.Y. TIMES (Aug. 18, 2019), <https://www.nytimes.com/2019/08/18/business/economy/hong-kong-china-business-workers.html> [<https://perma.cc/3KC3-ALP5>]. See also Joyu Wang & Chuin-Wei Yap, *Hong Kong Protests Drag Nike, Other Global Companies into Upheaval*, WALL ST. J. (July 17, 2019), <https://www.wsj.com/articles/businesses-get-caught-up-in-hong-kong-protests-11563363063> [<https://perma.cc/E5VC-HVZS>] (noting that taking sides can result in increased popularity or "angry backlash" for Hong Kong businesses).

in or supportive of the protest movement.⁵⁹ These staff members were to be banned from Chinese airspace,⁶⁰ and as most of Cathay's flights use Chinese airspace, appearing on such a list would significantly curtail an employee's ability to fly for the airline.⁶¹ Non-compliance would be financially ruinous for the company.⁶²

Cathay at first sought to demonstrate its allegiance to the mainland administration by firing several employees who had either voiced their views online or who had been arrested at illegal protests.⁶³ But divulging names of political dissidents to the CAAC was apparently a step too far. Instead of complying, reports of the incident indicate that the company's CEO, Rupert Hogg, provided the CAAC with a list bearing only his own

59. Danny Lee, *Cathay Pacific Sacks Two Ground Staff over Passenger Information Leak and Says Pilot Charged over Hong Kong Protests Has Been Removed from Flying Duties*, S. CHINA MORNING POST (Aug. 10, 2019), <https://www.scmp.com/news/hong-kong/transport/article/3022263/cathay-pacific-tells-employees-expect-increased-security> [https://perma.cc/A2YM-UVS7]; see Jamie Freed, *As Protests Rack Hong Kong, China Watchdog Has Cathay Staff 'Walking on Eggshells'*, REUTERS, Oct. 3, 2019, <https://www.reuters.com/article/us-hongkong-protests-cathay-pacific-insi/as-protests-rack-hong-kong-china-watchdog-has-cathay-staff-walking-on-eggshells-idUSKBN1WI0MA> [https://perma.cc/X5MA-MBXM] (“[T]he Civil Aviation Authority of China . . . called for the suspension of staff who supported or participated in the demonstrations . . .”).

60. Josephine Ma et al., *China Bans Cathay Pacific Staff Involved in Hong Kong 'Unlawful' Protests from Mainland Routes*, S. CHINA MORNING POST (Aug. 9, 2019), <https://www.scmp.com/news/china/politics/article/3022200/china-bans-cathay-pacific-staff-involved-hong-kong-protests> [https://perma.cc/QTA4-ZRL4]; Blake Schmidt, *China Cracks Down on Cathay After Staff Join Hong Kong Protests*, BLOOMBERG (Aug. 9, 2019), <https://www.bloomberg.com/news/articles/2019-08-09/china-bars-cathay-pacific-staff-who-took-part-in-protests> [https://perma.cc/SP9N-EL7T]; Noah Sin & Stella Qiu, *China Orders Cathay Pacific to Suspend Staff Backing Hong Kong Protests*, REUTERS (Aug. 9, 2019), <https://www.reuters.com/article/us-hong-kong-protests-cathay-pacific/china-orders-cathay-pacific-to-suspend-staff-backing-hong-kong-protests-idUSKCN1UZ197> [https://perma.cc/ZB5U-87BT].

61. Freed, *supra* note 59 (labeling the ban “a de facto career killer.”).

62. Wee & Zhong, *supra* note 58 (noting that inability to use Chinese airspace would require expensive rerouting).

63. Jane Li, *A Cathay Pacific Labor Leader Was Fired for Her Facebook Posts on Hong Kong's Protests*, QUARTZ (Aug. 23, 2019), <https://qz.com/1693696/cathay-labor-leader-fired-over-facebook-posts-on-hong-kong-protests/> [https://perma.cc/G9NK-LLDD].

name.⁶⁴ Rather than exposing the activists employed by the company, he then resigned.⁶⁵ The chair of Cathay's board, John Slosar, resigned shortly after.⁶⁶

Slosar had previously spoken out in favor of freedom of speech and conscience for Cathay's employees,⁶⁷ and the choice of Hogg and Slosar not to comply is in line with Cathay's declared human rights policy.⁶⁸ Indeed, the company has previously made clear that it views "respecting the human rights of our employees" as "a fundamental responsibility."⁶⁹ Further, Cathay's parent company, the Swire Group (an entity for which both Slosar and Hogg had worked for many years), has similarly affirmed that "[w]e respect internationally recog-

64. Matt Keeley, *Cathay Pacific's New CEO Pledges to Comply with Beijing, While Taiwan Media Says Previous CEO Refused*, NEWSWEEK (Aug. 20, 2019), <https://www.newsweek.com/cathay-ceo-refused-name-hong-kong-protesters-chinese-government-named-himself-instead-resigned-1455371> [<https://perma.cc/VQ3G-APQR>]; Billie Thomson, *Former Cathay Pacific CEO Is Hailed a Hero for "Defying China" After Rumours Suggested He Handed Over a List with Just His Name on It When Asked by Beijing to Identify Staff Who Backed Hong Kong Protests*, DAILY MAIL (Aug. 20, 2019); <https://www.dailymail.co.uk/news/article-7375913/Former-Cathay-Pacific-CEO-hailed-hero-defying-China.html> [<https://perma.cc/QFA3-APJT>]; Arthur Villasanta, *Cathay Pacific CEO Praised for Not Giving Names of Staff Joining Hong Kong Protest*, INT'L BUS. TIMES (Aug. 19, 2019), <https://www.ibtimes.com/cathay-pacific-ceo-praised-not-giving-names-staff-joining-hong-kong-protest-2815487> [<https://perma.cc/4HGF-2CTT>].

65. Villasanta, *supra* note 64.

66. *Cathay Pacific Chairman Steps Down amid Hong Kong Protests*, L.A. TIMES (Sept. 4, 2019), <https://www.latimes.com/business/story/2019-09-04/cathay-pacific-chairman-steps-down-amid-hong-kong-protests> [<https://perma.cc/6RHX-38RK>].

67. See Eamon Barrett, *Cathay Pacific Vowed Not to Keep Staff from Hong Kong's Protests. Then Beijing Intervened*, FORTUNE (Aug. 12, 2019), <https://fortune.com/2019/08/12/cathay-pacific-employees-hong-kong-protest/> [<https://perma.cc/4STD-28DY>] (observing that "Slosar told reporters the company 'wouldn't dream' of telling staff 'what they have to think,' implying employees were free to participate in protests."); Tiffany May, *Cathay Pacific's Chairman Resigns as China Pressures Hong Kong Business*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/2019/09/04/business/cathay-pacific-chairman-resigns.html> [<https://perma.cc/N95C-Z53M>] ("Slosar had said the political views of employees were not the airline's business.").

68. *Human Rights Policy*, CATHAY PAC., https://www.cathaypacific.com/content/dam/focal-point/cx/about-us/responsible-business/Cathay-Pacific-Airways-Limited_Human-Rights-Policy.pdf [<https://perma.cc/8TGX-QAER>] (last visited Feb. 7, 2020).

69. *Id.*

nized human rights in line with the principles and guidelines contained in the United Nations Guiding Principles on Business and Human Rights” and “informed by the International Bill of Human Rights”⁷⁰

Although the company’s new management eventually complied with the CAAC’s demand,⁷¹ this incident indicates the possibility of a company’s management seeking to defy edicts of an administration that they believe to be contrary to international law, even at the expense of the company’s immediate profit margin.

To be clear, many companies chose instead to evince their support for the Beijing-backed Hong Kong Administration. Some justified their conduct according to a different interpretation of international law based on the principle of state sovereignty and the related notion of freedom from outside interference. For example, after an anonymous group claiming to be composed of employees of the Big Four accounting firms placed an ad in a local newspaper expressing support for the protests, the management of each company issued a response statement renouncing the anonymous ad and instead proclaiming support for the sitting Administration.⁷² One of those firms, PwC, stated, “[w]e firmly oppose any action and statement that challenge national sovereignty.”⁷³ Another firm, Deloitte, declared that it was “committed to supporting Hong Kong, as a part of China . . . predi-

70. *Human Rights Policy*, SWIRE PAC. (May 2019), https://www.swire.com/en/sustainability/sd_policy/human_rights.pdf [<https://perma.cc/83PT-69EK>].

71. *Sacked Hong Kong Cathay Staff Decry ‘Cultural Revolution’ Purge*, H.K. FREE PRESS (Oct. 1, 2019), <https://www.hongkongfp.com/2019/10/01/sacked-hong-kong-cathay-staff-decry-cultural-revolution-purge/> [<https://perma.cc/6JC5-3GCN>].

72. James Patterson, *Big 4 Accounting Firms Fear China Wrath After Newspaper Ad Supporting Hong Kong Protests*, INT’L BUS. TIMES (Aug. 20, 2019), <https://www.ibtimes.com/big-4-accounting-firms-fear-china-wrath-after-newspaper-ad-supporting-hong-kong-2815579> [<https://perma.cc/AA5A-UXT8>]; Raymond Zhong et al., *As Hong Kong Firms Fall in Line Over Protests, Some Workers Push Back*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/2019/08/23/world/asia/hong-kong-protests-accountants.html> [<https://perma.cc/M9QC-ACXR>].

73. *Big Four Accounting Firms Condemn Violent, Illegal Acts in Hong Kong*, XINHUA (Aug. 17, 2019), http://www.xinhuanet.com/english/2019-08/17/c_138314834.htm [<https://perma.cc/NB7Z-AVRV>].

cated on the ‘One Country, Two Systems’ concept, underpinned by the Basic Law.”⁷⁴

As such, international law may be used both to justify opposition to a government and its policies or to justify support for such an entity. The multi-textured quality of international law and its consequent amenability to multiple interpretations underlies this divergence. But international law does not differ so much from domestic law in this respect; hard cases often involve disputes between two sides that might be said to lay near equal claim to some legal justification or entitlement.⁷⁵

B. *Google, Project Maven, and JEDI*

Project Maven is a research study funded by the U.S. Department of Defense (DoD) to enhance the processing of video imagery used in drone weapon targeting.⁷⁶ Google first accepted a contract from the DoD to develop the artificial intelligence (AI) technology underlying Project Maven shortly after the project began in April 2017.⁷⁷ However, once Google’s employees learned of the contract, they swiftly began to coordinate their objections to pressure the company to change course.⁷⁸ A group of employees addressed Google’s head of cloud computing, Diane Greene, expressing their concern over the company’s AI technology being used to wage

74. Press Release, Deloitte, Deloitte Media Statement, <https://www2.deloitte.com/cn/en/pages/about-deloitte/articles/deloitte-announcement.html> [<https://perma.cc/EQ7B-U344>] (last visited July 18, 2020).

75. See Jamal Greene, *Foreword: Rights as Trumps*, 132 HARV. L. REV. 28 (2018) (using *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) as an example of such a hard case).

76. Cheryl Pellerin, *Project Maven to Deploy Computer Algorithms to War Zone by Year’s End*, U.S. DEP’T OF DEF. (July 21, 2017), <https://dod.defense.gov/News/Article/Article/1254719/project-maven-to-deploy-computer-algorithms-to-war-zone-by-years-end/Kate> [<https://perma.cc/37LB-A7KH>].

77. Dell Cameron & Kate Conger, *Google Is Helping the Pentagon Build AI for Drones*, GIZMODO (Mar. 6, 2018), <https://gizmodo.com/google-is-helping-the-pentagon-build-ai-for-drones-1823464533> [<https://perma.cc/4QR8-HB2G>].

78. See Liam Tung, *Google Employee Protest: Now Google Backs off Pentagon Drone AI Project*, ZDNET (June 4, 2018), <https://www.zdnet.com/article/google-employee-protests-now-google-backs-off-pentagon-drone-ai-project/> [<https://perma.cc/5KEF-H2EP>] (noting that more than 4,000 employees “signed a petition calling on Google to quit its work and about a dozen employees have quit due to its involvement . . .”).

war.⁷⁹ Greene responded that the technology being developed would not be used to “operate or fly drones” or “to launch weapons.”⁸⁰ However, the potential for such tools to be put to these ends once sold to the government left many employees dissatisfied. Over a dozen consequently resigned in protest,⁸¹ and several thousand signed a petition urging Google to withdraw from its work for the government in this area.⁸² The petition implored Google to live up to its “Don’t Be Evil” motto and argued that the company should develop and enforce a clear policy that “neither Google nor its contractors will ever build warfare technology.”⁸³ The United Nations Charter (of which the United States is a founding state party) expressly prohibits the use of force against another state, and the Arms Trade Treaty (of which the United States is a signatory) specifically forbids states from exporting arms to places where there is an “overriding risk” that such weaponry will be used “to commit or facilitate a serious violation of international humanitarian law [or] . . . of international human rights law.”⁸⁴ However, the petition did not explicitly invoke adherence to the commands of international law as its principal rationale.⁸⁵ Instead, the employee petition framed the argument against Google’s AI work for the government according to the company’s values, ethical principles, and moral responsibility. The employees accordingly declared that the company “cannot outsource the moral responsibility of our technologies to third parties” and asserted that Google had an inescapable responsi-

79. Letter from Google employees to Sundar Pichai, Chief Exec. Officer, Google, <https://static01.nyt.com/files/2018/technology/googleletter.pdf> [<https://perma.cc/W4DN-652G>] [hereinafter Google Letter]

80. *Id.*

81. Kate Conger, *Google Employees Resign in Protest Against Pentagon Contract*, GIZMODO (May 14, 2018), <https://gizmodo.com/google-employees-resign-in-protest-against-pentagon-con-1825729300> [<https://perma.cc/BQ85-CFK3>].

82. Scott Shane & Daisuke Wakabayashi, *‘The Business of War’: Google Employees Protest Work for the Pentagon*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/technology/google-letter-ceo-pentagon-project.html> [<https://perma.cc/5LHR-YMLC>].

83. Google Letter, *supra* note 79.

84. U.N. Charter art. 2, ¶ 4; Arms Trade Treaty, art. 7, Apr. 2, 2013, 3013 U.N.T.S.

85. Google Letter, *supra* note 79.

bility to ensure that its products are used properly, even when sold to the government.⁸⁶

Apparently persuaded or sufficiently eager to avoid further employee action, Google responded first by declining to renew its contract for Project Maven with the DoD in March 2019.⁸⁷ But, what is particularly interesting for the purposes of this article is what the company did next: Google then promulgated a set of principles designed to orient any future contracts and the public sector in this sphere of AI.⁸⁸ These AI Principles drew significantly on and explicitly made reference to international law,⁸⁹ promising that Google “will not design or deploy AI” technologies that “gather or use information for surveillance violating internationally accepted norms,” nor would the company develop technology that “contravenes widely accepted principles of international law and human rights.”⁹⁰ As such, the company took employee discontent regarding its seeming lack of fidelity to its values as an impetus and reframed its policy position for future government contracts according to international law.

Google then issued a white paper in which it explicitly advocated for the adoption of “international standards and norms” to “relieve pressure on individual countries and regions to advance a controversial use of technology,” thereby “preventing a race to the bottom.”⁹¹ Though companies are often blamed for instigating such races, Google affirmed its wish to stand in the way of such a downward, deregulatory spiral. The company further acknowledged that “while international treaties cannot in themselves prevent violations, they

86. *Id.*

87. Daisuke Wakabayashi & Scott Shane, *Google Will Not Renew Pentagon Contract That Upset Employees*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/technology/google-pentagon-project-maven.html> [<https://perma.cc/X8PT-VMJK>].

88. *Artificial Intelligence at Google: Our Principles*, GOOGLE AI, <https://ai.google/principles/> [<https://perma.cc/75B6-QY75>] (last visited Jan. 8, 2021).

89. Ashley Deeks, *A New Tool for Tech Companies: International Law*, LAWFARE (May 30, 2019), <https://www.lawfareblog.com/new-tool-tech-companies-international-law> [<https://perma.cc/MM7L-72C7>].

90. *Artificial Intelligence at Google: Our Principles*, *supra* note 88.

91. *Perspectives on Issues in AI Governance*, GOOGLE 4 (2019), <https://ai.google/static/documents/perspectives-on-issues-in-ai-governance.pdf> [<https://perma.cc/68RU-FVMQ>].

clarify shared expectations of behavior and thus serve as a metric against which sanctions can be imposed for misuse.”⁹² Such an observable metric would, according to Google, promote a “level playing field within industry and rais[e] the bar for responsible use.”⁹³

While the articulation of Google’s commitment to international law remains fairly general, leaving it a fair degree of interpretative latitude, it would be a mistake to dismiss the company’s statements as mere “cheap talk.”⁹⁴ Indeed, when asked why it declined to bid for a multibillion dollar cloud computing contract with the DoD for the U.S. government’s Joint Enterprise Defense Infrastructure (JEDI) Project,⁹⁵ a company spokesperson confirmed that Google passed up the opportunity because “we couldn’t be assured that it would align with our AI Principles.”⁹⁶ Evidently, Google’s commitment to international law, as expressed through its AI Principles, led the company to refuse a potential government contract because the company did not believe with certainty that the government would act in a manner compatible with international law. As such, Google denied the government of its highly talented staff and significant knowledge because it feared that the state would not honor the company’s princi-

92. *Id.*

93. *Id.*

94. On the subject of “cheap talk” and arguing that states make international law commitments only to break them when they cut against their national interest, see GOLDSMITH & POSNER, *supra* note 9, at 177–80.

95. HEIDI M. PETERS, CONG. RES. SERV., THE DEPARTMENT OF DEFENSE’S JEDI CLOUD PROGRAM 11 (Aug. 2, 2019); Kate Conger et. al, *Microsoft Wins Pentagon’s \$10 Billion JEDI Contract, Thwarting Amazon*, N.Y. TIMES (Oct. 25, 2019), <https://www.nytimes.com/2019/10/25/technology/dod-jedi-contract.html> [<https://perma.cc/V9D5-7DQ3>].

96. Aaron Gregg, *Google Bows Out of Pentagon’s \$10 Billion Cloud-Computing Race*, WASH. POST (Oct. 9, 2018), <https://www.washingtonpost.com/business/2018/10/09/google-bows-out-out-pentagons-billion-cloud-computing-race/> [<https://perma.cc/4565-HGMK>]; Naomi Nix, *Google Drops Out of Pentagon’s \$10 Billion Cloud Competition*, BLOOMBERG (Oct. 8, 2018), <https://www.bloomberg.com/news/articles/2018-10-08/google-drops-out-of-pentagon-s-10-billion-cloud-competition> [<https://perma.cc/H5C6-EQCN>]; Liam Tung, *Google: Here’s Why We’re Pulling Out of Pentagon’s \$10bn JEDI Cloud Race*, ZDNET (Oct. 9, 2018), <https://www.zdnet.com/article/google-heres-why-were-pulling-out-of-pentagons-10bn-jedi-cloud-race/> [<https://perma.cc/XJ2L-YGTF>].

ples, principles explicitly oriented around international law standards and human rights.

C. *Banks and Funding Illegal Weapons Systems*

Resistance to state action is not always undertaken directly. Instead, companies sometimes reject work with other actors that facilitate state violations of international law. In this way, companies may exert a degree of pressure on the state if the targeted company is important to the state's end enterprise.

Such an example occurred recently with regard to financing for Elbit, a major supplier of arms to Israel and the country's largest weapons manufacturer.⁹⁷ In November 2018, Elbit acquired the automated weapons division, IMI Systems, from the Israeli government.⁹⁸ At the time, the company claimed that this purchase would transform it into a one-stop shop for purchasing weapons systems and move it into "a different category of defense companies."⁹⁹ However, multinational bank HSBC, a major financier for Elbit, reacted to the acquisition adversely and withdrew its investments in the company the next month.¹⁰⁰ HSBC claimed that IMI had been engaged in

97. Seth J. Frantzman, *Israel's Revolutionary Defense Industry*, JERUSALEM POST (May 23, 2019), <https://www.jpost.com/Israel-News/Israels-revolutionary-defense-industry-590370> [<https://perma.cc/Q2L4-H4PL>]; see also Hagai Amit, *Israeli Army Inks \$127-Million Deal with Elbit to Develop Next Generation of Artillery Cannons*, HAARETZ (Mar. 27, 2019), <https://www.haaretz.com/israel-news/business/.premium-israeli-army-inks-127-million-deal-with-elbit-to-develop-new-artillery-cannons-1.7063208> [<https://perma.cc/LH6J-PMMD>] (announcing major contracts between Elbit and the Israeli Defense Ministry).

98. *Elbit Completes Purchase of Israel's IMI After Government Approval*, REUTERS (Nov. 25, 2018), <https://www.reuters.com/article/us-elbit-systems-imi/elbit-completes-purchase-of-israels-imi-after-government-approval-idUSKCN1NU0HK> [<https://perma.cc/5NMD-FGA3>].

99. Seth J. Frantzman, *With IMI Acquisition, Elbit Looks to Be a 'One-Stop Shop' for Defense Needs*, DEF. NEWS (Mar. 27, 2019), <https://www.defensenews.com/industry/2019/03/27/with-imi-acquisition-elbit-looks-to-be-a-one-stop-shop-for-defense-needs/> [<https://perma.cc/Y5X6-J5VF>].

100. Avraham Gold & Tovah Lazaroff, *Citing Human Rights, HSBC Bank to Divest from Israeli Arms Developer Elbit*, JERUSALEM POST (Dec. 27, 2018), <https://www.jpost.com/Arab-Israeli-Conflict/HSBC-bank-decides-to-divest-from-Israeli-defense-contractor-Elbit-575632> [<https://perma.cc/AW2P-K5HT>]; *Europe's Largest Bank to Divest from Israeli Defense Contractor Following BDS Campaign*, HAARETZ (Dec. 29, 2018), <https://www.haaretz.com/israel-news/busi->

the production of illegal weapons, namely cluster bombs, and that this practice would continue under Elbit.¹⁰¹ The bank accordingly announced that it would be severing ties with Elbit and cutting off the company's funding sources.¹⁰²

HSBC's banking operations in Israel have long been the target of Boycott-Divestment-Sanctions (BDS) campaigns.¹⁰³ BDS activists allege that Israel oppresses Palestinians through its long-running occupation and hope to "pressure Israel to comply with international law."¹⁰⁴ But the movement's activities have not been uncontroversial, and some have alleged that its targeting of Israel belies nefarious motives.¹⁰⁵

Despite lobbying from BDS activists, however, HSBC stressed that a desire to adhere to international law, not pressure from BDS, motivated it to divest from Elbit.¹⁰⁶ Cluster bombs are banned under the Cluster Munitions Convention, to which 106 countries are party.¹⁰⁷ Though Israel itself is not a party to the convention, cluster munitions are also illegal under customary international law, which prohibits the use of

ness/europe-s-largest-bank-hsbc-divest-israel-elbit-bds-1.6788301 [https://perma.cc/DVK6-BWMX].

101. Tovah Lazaroff, *HSBC Tells 'Post': 'We Divested from Elbit Over Cluster Bombs, Not BDS'*, JERUSALEM POST (Jan. 2, 2019), <https://www.jpost.com/BDS-THREAT/HSBC-tells-Post-We-divested-from-Elbit-over-clusters-bombs-not-BDS-576175> [https://perma.cc/66MH-R8GC].

102. *Id.*

103. See *UK Banks 'Complicit' in Palestinian Oppression, Rights Group Claims*, BDS (July 12, 2017), <https://bdsmovement.net/uk-banks-complicit-arms-trade> [https://perma.cc/D8Z3-5AH4] (calling HSBC a "crucial link in the chain" of Palestinian oppression.).

104. *What is BDS?*, BDS, <https://bdsmovement.net/what-is-bds> [https://perma.cc/9DRT-W3J6] (last visited Jan. 7, 2021).

105. See, e.g., *Trudeau Blasts BDS Movement as Anti-Semitic*, TIMES ISR. (Jan. 17, 2019), <https://www.timesofisrael.com/trudeau-blasts-bds-movement-as-anti-semitic/> [https://perma.cc/93AW-ZQJ7] (quoting Canadian Prime Minister, Justin Trudeau, as claiming that BDS evinces "the three Ds: demonization of Israel, a double standard around Israel and a delegitimization of the State of Israel.").

106. Lazaroff, *supra* note 101.

107. Convention on Cluster Munitions, art. 1, May 30, 2008, 2688 U.N.T.S. 39; *Universalization Status by Region*, CONVENTION ON CLUSTER MUNITIONS, <http://www.clusterconvention.org/wp-content/uploads/2016/09/1.-CCM-Universalization-Status-by-Region-4.pdf> [https://perma.cc/2B4M-GPYN] (last visited Jan. 8, 2020).

weapons that do not discriminate between civilians and combatants.¹⁰⁸

Moreover, in taking this stance against the use of technology deemed contrary to international law, HSBC is not an outlier. Several years earlier, Danske Bank, Denmark's largest bank, also decided to divest from Elbit, citing the company's provision of surveillance systems to the Israeli government for its border wall with Occupied Palestine.¹⁰⁹ The International Court of Justice had already declared the construction and maintenance of the wall to be a violation of international law.¹¹⁰ Echoing this position, Danske Bank stated that it would not invest client money "in companies that violate international standards."¹¹¹ The bank clarified that while its previous investment position was not "in itself against national legislation," it "adheres to UN conventions" and believes that "the settlements are illegal and a hindrance to a peaceful solution."¹¹²

Such corporate opposition is notably not without financial consequence. Mischaracterizing these attempts to promote international law as boycotts of Israel motivated purely by animus, various U.S. states (including New York and New Jersey) have in turn announced boycotts of the banks involved and sought to withdraw their business.¹¹³ Thus, to say that these private actors' decisions to support international law are moti-

108. See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 1577–78 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (discussing numerous U.N. General Assembly resolutions calling for prohibiting or restricting weapons "which might be deemed to be excessively injurious or to have indiscriminate effects").

109. *Israeli Companies Excluded from Bank's Investments*, COPENHAGEN POST (Jan. 25, 2010), <https://web.archive.org/web/20100131114212/http://www.cphpost.dk/component/content/48048.html?task=view>.

110. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 163 (July 9).

111. *Israeli Companies Excluded from Bank's Investments*, *supra* note 109.

112. *Id.*

113. See Lindsey Lawton, *A New Loyalty Oath: New York's Targeted Ban on State Funds for Palestinian Boycott Supporters*, 42 N.Y.U. REV. L. & SOC. CHANGE 649, 668, 674 (2019) (examining New York State's sanctions on BDS); Benjamin Weinthal, *New Jersey Bans Business with Danish Bank for Israel Boycott*, JERUSALEM POST (Dec. 24, 2017), <https://www.jpost.com/BDS-THREAT/New-Jersey-bans-business-with-Danish-bank-for-Israel-boycott-519925> [<https://perma.cc/Z3KF-RA99>] (reporting that New Jersey "divested all of its investment from the Danish bank Danske due to its boycott of Israeli companies").

vated solely by profit from positive publicity does not adequately capture the potential harm that may flow from supporting and seeking to advance a particular interpretation of international law when state officials have chosen a different course. Indeed, there may be negative financial consequences to the adoption of such a stance. These harms beg the question whether corporate *opinio juris* is motivated purely by profit or whether something else might explain the adherence to a course of action these banks claim best aligns with what international law requires.

Of course, one may here distinguish between long-term and short-term profit maximization. It is possible that compliance with the law is motivated by long-term profit maximization, but such a prospect and its potential payoffs may well be less certain. These general payoffs are explored in greater detail later.

D. *Jerusalem Infrastructure Projects*

The city of Jerusalem has long been a source of heightened tension in the ongoing dispute between Israel and Palestine.¹¹⁴ Israel currently occupies East Jerusalem, and Palestine claims this area as its own territory and future capital.¹¹⁵ Both the U.N. General Assembly and the Security Council have declared aspects of Israel's operations in East Jerusalem to be illegal under international law,¹¹⁶ but the legal consequences of these determinations for companies that operate in the Occupied Territories remain a source of controversy.

Thus, when the Israeli Government sought to extend the city's light rail system through occupied East Jerusalem and solicited tender bids for the project from a range of companies, divestment activists swiftly launched a pressure campaign against these tendering firms.¹¹⁷ Veolia and Alstom, two French firms who had long performed contracts in Israel on

114. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. Rep. 136, ¶¶ 75–79.

115. S.C. Res. 478 (Aug. 20, 1980).

116. G.A. Res. ES-10/13, ¶ 1 (Oct. 27, 2003); G.A. Res. ES-10/2, ¶ 3 (Apr. 25, 1997); S.C. Res. 2334, ¶ 1 (Dec. 23, 2016); S.C. Res. 478, *supra* note 115, ¶ 2.

117. Peggy Cidor, *A Long and Winding Rail*, JERUSALEM POST (Feb. 22, 2019), <https://www.jpost.com/In-Jerusalem/A-long-and-winding-rail-581333> [<https://perma.cc/G9V7-TS9Q>].

other public works projects, joined a consortium to bid for the contracts. Shortly thereafter, the Palestine Liberation Organization sued Alstom and Veolia in French courts, claiming that the project and Alstom and Veolia's involvement therein violated international humanitarian law.¹¹⁸ The Versailles Court of Appeals, however, found that Alstom and Veolia's conduct was not unlawful because the international humanitarian law obligations governing the treatment of occupied lands apply only to states.¹¹⁹ As such, the companies were free to pursue the project, at least according to the court's interpretation of international law.¹²⁰ Yet despite this apparent victory, Veolia announced that it would withdraw from the project in 2015, and Alstom made a similar announcement in 2019.¹²¹ Neither company has said much about the rationale for their withdrawal, but Alstom's Israeli business partners, Dan and Electra, sent a furious letter to the Israeli government explaining that Alstom's decision to exit was "entirely based on the Israeli-Palestinian conflict" and that the company was concerned that the project would "ostensibly harm or [is] liable to harm human rights."¹²² Accordingly, Alstom appears to have justi-

118. Raphael Ahren, *French Court's Light Rail Ruling Breaks No Legal Ground, Scholars Say*, TIMES ISR. (Apr. 29, 2013), <https://www.timesofisrael.com/french-ruling-on-jeruselems-light-rail-adds-nothing-new-scholars-say/> [<https://perma.cc/JVD6-R2C7>].

119. Cour d'appel [CA] [regional court of appeal] Versailles, 3e ch., Mar. 22, 2013, 11/05331, 23 ("Les sociétés intimées morales de droit privé qui ne sont pas signataires des conventions invoquées, ni destinataires des obligations qui les contiennent, ne sont pas, en conséquence, des sujets de droit international. Dépourvues de la personnalité internationale, elles ne peuvent se voir opposer les différentes normes dont se prévaut l'appelante." [The private law corporate respondent companies which are not signatories of the conventions invoked, nor recipients of the obligations that they contain, are not, consequently, subjects of international law. Devoid of international personality, they cannot be bound by the different norms on which the appellant relies.]).

120. *Id.* at 31–32.

121. Stéphane Richard, *Transdev Exits Jerusalem Light Rail Project*, FIN. TIMES (Aug. 30, 2015), <https://www.ft.com/content/ed506b0c-4f37-11e5-b029-b9d50a74fd14> [<https://perma.cc/CFK4-PG4S>]; *French Company Drops Tender Bid for Light Rail Because It Enters East Jerusalem*, TIMES ISR. (May 16, 2019), <https://www.timesofisrael.com/french-company-drops-tender-bid-for-light-rail-over-east-jerusalem-lines> [<https://perma.cc/S6B7-TS7U>].

122. Eytan Halon, *French Firm Could Face Lawsuit After Quitting Jerusalem Light Rail Tender*, JERUSALEM POST (May 16, 2019), <https://www.jpost.com/Israel-News/French-firm-could-face-lawsuit-after-quitting-Jerusalem-light-rail->

fied its withdrawal from the project on the basis of international law.

Similarly, in an earlier government project in East Jerusalem for a wastewater treatment plant, Dutch engineering firm Royal HaskoningDHV withdrew its bid because it “carries out its work . . . in compliance with international laws and regulations” and believed that “future involvement in the project could be in violation of international law.”¹²³ Accordingly, it affirmed that this “led to the company’s independent decision to end its involvement in the project.”¹²⁴ The company notably added that it “was not pressured by the Dutch government to do so” and that “[t]here is no boycott of Israel by Royal HaskoningDHV.”¹²⁵

In sum, the companies involved in both these instances were not subject to the command of their home states. Instead, they each reached and sought to implement their own interpretation of international law.

E. *Microsoft and Data Sharing*

As commerce and personal activity are increasingly conducted over the internet, technology companies are vital partners for law enforcement when online fora are used to commit or plan crimes.¹²⁶ These companies usually comply readily when government actors request data to aid in prosecutions, as they can charge a steep price for their assistance. For example, Microsoft has charged the FBI hundreds of thousands of dollars a month for access to user data.¹²⁷

tender-589735 [https://perma.cc/U85X-YLD4]; Lee Naim ?? ????, (@naimleee), TWITTER (May 12, 2019, 11:07 AM), https://twitter.com/naimleee/status/1127591150817284098 [https://perma.cc/4LWS-4Y53].

123. Press Release, Royal HaskoningDHV, Explaining Royal HaskoningDHV’s Decision to Terminate Involvement in Wastewater Treatment Project in East Jerusalem (Jan. 14, 2014), https://www.royalhaskoningdhv.com/en-gb/news-room/news/20140114pr-explaining-terminate-wwtp-east-jerusalem/3339 [https://perma.cc/3MHU-9SGU].

124. *Id.*

125. *Id.*

126. See Edward Lucas, *The Spycraft Revolution*, FOREIGN POL’Y (Apr. 27, 2019), https://foreignpolicy.com/2019/04/27/the-spycraft-revolution-espionage-technology/ [https://perma.cc/7VKZ-CX5U] (asserting that “[p]rivate contractors have become an essential part of the spy world.”).

127. Kevin Collier & Frank Berkman, *Hacked Emails Show what Microsoft Charges the FBI for User Data*, DAILY DOT (Mar. 20, 2014), https://www.daily

However, in *United States v. Microsoft*,¹²⁸ the tech giant refused such a request. In that case, Microsoft argued that because the data it held was stored on servers outside the United States, surrendering it to U.S. officials would violate international law.¹²⁹ Microsoft argued that the relevant statute only allowed the government to request data held within the United States and that the government should use the existing Mutual Legal Assistance Treaty (MLAT) procedure to obtain the data.¹³⁰ While the case inspired extensive commentary on the question of extraterritorial jurisdiction and the limits of state power,¹³¹ little has been said about Microsoft's embrace of international law as its justification for rejecting the government's instruction.

Microsoft consistently maintained that international law required a different outcome. At the district court level, for example, Microsoft asserted that under the current search warrant procedure, "U.S. privacy interests are satisfied. But international law says that we are not allowed to engage in police searches and seizures in foreign lands without the consent and knowledge of the foreign government."¹³² Similarly, before the Second Circuit, the company founded its opposition upon "international law norms that the Government's excursion would violate" and further argued that "a law enforcement ac-

dot.com/news/microsoft-compliance-emails-fbi-ditu/ [https://perma.cc/UWF2-H2R2].

128. *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018).

129. *Id.* at 1187.

130. *Id.*

131. See, e.g., Jennifer Daskal, *Borders and Bits*, 71 VAND. L. REV. 179, 188 (2018) (examining the Second Circuit's ruling on the Electronic Communications Privacy Act); Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326, 328 (2015) (discussing "[t]he question of where the relevant state action takes place when the government compels the production of e-mails from an Internet Service Provider . . ."); Andrew Keane Woods, *Litigating Data Sovereignty*, 128 YALE L.J. 328, 335 (2018) (combining "scholarship about the regulation of data and scholarship about foreign affairs"); Andrew Keane Woods, *Against Data Exceptionalism*, 68 STAN. L. REV. 729, 732 (2016) (noting that *Microsoft Corp.* raises "a much larger problem: while many people now store their most personal data in the cloud—that is, on remote servers scattered around the globe—there is no settled understanding of who has jurisdiction over that data.").

132. Transcript of Proceedings at 15, *In re Warrant to Search a Certain Email Account Controlled and Maintained by Microsoft Corp.*, 15 F. Supp. 3d 466 (S.D.N.Y. 2014) (No. 1:13-mj-02814-UA).

tion taken without the sovereign's permission breaches international law."¹³³ Finally, in its brief to the Supreme Court, Microsoft even scolded the government for "ignoring carefully negotiated international agreements," claiming that "the Government may rely on the international cooperative mechanisms it has used for decades to obtain evidence located in foreign countries."¹³⁴ As such, Microsoft acknowledged that domestic law might legitimate the Government's request, but invoked international law in opposition to the Government's position.

Of particular note, the company argued that it, not the government, was acting as the legitimate protector of American sovereignty and the rights of U.S. citizens. The company contended that "[t]he government's position means when China or Russia . . . does that next week, we have no claim that this infringes on our sovereignty," which is "a very, very dangerous principle"¹³⁵ Microsoft similarly asserted that the government's proposed search "has profound foreign policy consequences" and "threatens the privacy of U.S. citizens" because "[t]he Golden Rule applies as much to international relations as to other human relations."¹³⁶

Various other tech companies critiqued the government's position as an affront to international law that could create harmful consequences for the rights of U.S. persons. In their joint amicus brief, Amazon, Apple, Cisco, Facebook, Google, Verizon, and several other very large technology and communications companies opposed the government's position because it would "undermine existing international treaties" through which "the U.S. government has endorsed a specific set of procedures" designed "to strike a balance between one nation's law enforcement needs and another nation's auton-

133. Brief for Appellant at 33, 51, *In re* Warrant to Search a Certain Email Account Controlled and Maintained by Microsoft Corp., 829 F.3d 197 (2d Cir. 2014) (No. 14-2985-cv).

134. Brief for Respondent at 14, 57, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (No. 17-2).

135. Transcript of Proceedings at 52, *In re* Warrant to Search a Certain Email Account Controlled and Maintained by Microsoft Corp., 15 F. Supp. 3d 466 (S.D.N.Y. 2014) (No. 1:13-mj-02814-UA).

136. Brief for Appellant at 3, *In re* Warrant to Search a Certain Email Account Controlled and Maintained by Microsoft Corp., 829 F.3d 197 (2d Cir. 2014) (No. 14-2985-cv).

omy”¹³⁷ These companies further contended that “[e]very nation founded on democratic principles has a strong and legitimate interest in ensuring that the security and privacy of the people it is charged with protecting are not improperly or unduly invaded”, and that “[f]ailure to accommodate that legitimate sovereign interested threatens to provoke dangerous reciprocation by foreign governments—at great potential cost to U.S. citizens and service providers.”¹³⁸ Similarly, twelve business and consumer associations including the U.S. Chamber of Commerce, observed in their joint amicus brief that allowing the government’s warrant to stand would “undermine . . . the practical reality of the international legal system,” “violat[e] fundamental principles of international comity,” and “threaten the privacy and security of U.S. citizens and businesses.”¹³⁹ As such, these corporate actors positioned themselves as defenders of the international legal system and the privacy rights of U.S. citizens against the overstepping of the U.S. government.

The Supreme Court ultimately declared the case moot because Congress changed the underlying statutory regime through the adoption of the CLOUD Act.¹⁴⁰ While the CLOUD Act extends the Stored Communications Act (SCA) specifically to authorize warrants to compel the surrender of data controlled by U.S. companies but stored overseas (thus resolving the dispute before the Court concerning the SCA’s extraterritorial reach), the new legislation also instructs the executive to negotiate new international agreements to regulate such requests from other countries for data stored in the United States.¹⁴¹ The Department of Justice asserted that these changes were necessary because Microsoft’s litigation efforts had “effectively hamstrung the ability of law enforcement to obtain data from U.S. communications service providers who

137. Brief for Technology Companies as Amici Curiae in Support of Respondent at 23, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (No. 17-2).

138. *Id.* at 21.

139. Brief of 12 Business and Consumer Associations as Amici Curiae in Support of Respondent at 6, 20, 23, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (No. 17-2).

140. *United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018).

141. Consolidated Appropriations Act, Pub. L. No. 115-141, §§ 103, 105, 132 Stat 1213, 1213–24 (2018) [hereinafter CLOUD Act].

store data outside the United States.”¹⁴² Microsoft itself issued a declaration of six principles to guide the newly crafted statutory regime, including a requirement that “the demand is not in furtherance of an investigation that infringes on internationally recognized fundamental human rights.”¹⁴³ The final statute reflects Microsoft’s concern by only authorizing the U.S. government to enter into executive agreements to allow foreign countries access to data stored in the United States if “the foreign government . . . adheres to applicable international human rights obligations and commitments or demonstrates respect for international universal human rights”¹⁴⁴ Accordingly, the insistence of Microsoft and other corporations that an international law-compliant solution be found was eventually adopted.

IV. PREDICTING CORPORATE OPINIO JURIS

Though corporate opinio juris has demonstrable analytical value as the basis for a theoretical paradigm, there are obstacles to its use as a tool to predict such instances in the future. A prerequisite question is which body of predictive literature ought to orient the model of corporate opinio juris. There is a robust scholarly conversation regarding when individuals and firms follow the law and why they do so,¹⁴⁵ but analyses are usually framed in the context of domestic law and presuppose a fairly firm legal rule. When international law is included, the focus is on the behavior of states, not corpora-

142. *Law Enforcement Access to Data Stored Across Borders: Facilitating Cooperation and Protecting Rights: Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 116th Cong. 1 (2017) (statement of Brad Wiegmann, Deputy Assistant Att’y Gen., Dep’t of Just.).

143. SIX PRINCIPLES FOR INTERNATIONAL AGREEMENTS GOVERNING LAW-ENFORCEMENT ACCESS TO DATA, MICROSOFT (Sept. 11, 2018), <https://blogs.microsoft.com/wp-content/uploads/prod/sites/5/2018/09/SIX-PRINCIPLES-for-Law-enforcement-access-to-data.pdf> [<https://perma.cc/27DA-MNA4>].

144. CLOUD Act, *supra* note 141, at 1218.

145. *See, e.g.*, John Armour, Jeffrey Gordon & Geeyoung Min, *Taking Compliance Seriously*, 37 YALE J. ON REG. 1, 49 (2020) (proposing a “compliance clawback” system for executive pay in cases of wrongdoing); Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1036 (2017) (advocating for a regulatory emphasis on recidivist companies); FREDERICK SCHAUER, *THE FORCE OF LAW* (2015) (exploring “various aspects of law’s coercive dimension . . .”).

tions.¹⁴⁶ Relatedly, though there exists important literature unpacking business decisions on what kind of entity to form (whether to incorporate as a B-Corp, for example) and how to keep an enterprise faithful to its founders' understanding of fulfilling social good, such CSR-aligned accounts are oriented toward business behavior in pursuit of vague notions of the collective good, not corporate action in compliance with some notion of law, even if ill-defined.¹⁴⁷

Corporate interfacing with international law to create *opinio juris* by definition occurs in an area where the rule is neither clear, fully formed, nor even necessarily applicable to the category of actors (corporations) whose adherence is sought to be forecast. But there is still some understanding of coalescence around a legal standard, even if not necessarily applicable to the corporate actors who have decided to take up its mantle. Indeed, one point of *opinio juris* is to bridge the gap between mere custom or social nicety and law. Further, though there is much literature predicting the formation of customary international law, the presupposition is that the actors making, accepting and applying such custom are states.¹⁴⁸ This section finds these bodies of scholarship informative, but not directly applicable. Inspired and guided by them, this article seeks to craft a predictive account derived both from gen-

146. See, e.g., RICHARD McADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 67–70 (2015) (discussing the role of coordination and focal points amongst states in international law).

147. See Jennifer S. Fan, *The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 441 (2019) (discussing how “court cases and changing norms about the role of the corporation . . . laid the groundwork for corporations’ involvement in social movements”); Suntae Kim et al, *Why Companies Are Becoming B Corporations*, HARV. BUS. REV. (June 17, 2016), <https://hbr.org/2016/06/why-companies-are-becoming-b-corporations> [https://perma.cc/H93Y-P497] (explaining that the key drivers of the emergence of B Corporations include the “increasing efforts of more conventional profit-driven companies to be seen as ‘green’ and ‘good’” as well as “the movement of creating a new economy with a new set of rules”).

148. See, e.g., Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487, 1490–91 (2020) (arguing that we should think of CIL as less of a rulebook and more like an inherently “contingent and variable kind of law.”); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 141 (2005) (examining the common observation that “international law cannot bind states without their consent, and notions of consent are often said to be the basis for CIL.”).

eral understandings elsewhere in legal scholarship as well as an inductive theory drawn from the examples uncovered.

As the above examples illustrate, corporate *opinio juris* may be formed through a variety of factors, the proportions and exact ratio of which may differ significantly. Companies are not unitary entities. Instead, they are composed of many subcomponents and interest groups that are both within the corporate form and outside of it. The account here draws on the transnational legal process theory of Harold Koh and the international relations and liberal internationalist approaches of Anne-Marie Slaughter that have expanded understandings of states and their adherence to international law¹⁴⁹ to present corporations as complex, multilayered entities composed of groups with different affiliations, preferences, and goals in order to frame the predictive model of corporate *opinio juris*.

In order to forecast the occurrence of corporate *opinio juris*, this article understands companies' interactions with international law along three interface axes that hold predictive value for foreshadowing the likely occurrence of corporate *opinio juris*: pressure, strategy and identity. These categories are linked and there may be overlap between them, but they are intended to provide a framework rather than a precise taxonomy.

A. *Pressure*

Corporate commitment through pressure involves the exertion of influence by employees, shareholders and various constituencies within the managerial structure and board of the company. Pressure may also come from states other than the company's place of incorporation or principal place of business who have chosen to condition market access on compliance with international law, scolding from international organizations, customer preferences, and campaigning from activists and NGOs that seek to influence the company to align its conduct with international law.

This account is necessarily general because companies are formed and structured in different ways according to their home legal systems. But this pressure framework is, to some

149. Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996); Anne-Marie Slaughter, *International Law and International Relations: Dual Agenda*, 87 *AM. J. INT'L L.* 205 (1993).

extent, perennial and universal, with the particular form of the company required by its national law altering the ability of each constituency to exercise its pressure function effectively.

As the examples above illustrate, critique and argumentation are often crucial elements in the formulation of corporate *opinio juris*. This is particularly so because corporations are not itself usually invited to the treaty negotiation table. As such, companies are not necessarily part of the intended audience for the legal norms that their *opinio juris* eventually endorses, especially when their home states or places of business do not share such amenability to international law's instruction. There is thus a process of argumentation and negotiation that involves the company shifting from its position outside the formal legal framework to a point that is actively supportive of international law.

This process sometimes occurs via negative publicity which in turn drives customers, shareholders and employees to apply pressure upon the company and move it toward committing to international law. Thus, in the example of Google and Project Maven above, employee activism and the necessity of employee talent for a company like Google to succeed combined to move the company toward the international standards that its employees had called upon it to respect.¹⁵⁰

A further example of pressure coalitions may also be helpful in illustrating this point. When the Trump administration began detaining immigrant children in steel-fenced cages and tearing families apart in 2018, public outcry was swift and the U.N. High Commissioner for Human Rights quickly condemned the practice as illegal.¹⁵¹ International law generally

150. See generally Jennifer S. Fan, *Employees as Regulators: The New Private Ordering in High Technology Companies*, 2019 UTAH L. REV. 973, 1026 ("The continued impact of employee-initiated private ordering remains to be seen, but as long as there is a demand for this group of highly skilled employees, they will continue to have a voice.").

151. Beth Van Schaack, *New Proof Surfaces That Family Separation Was About Deterrence and Punishment*, JUST SECURITY (Nov. 27, 2018), <https://www.justsecurity.org/61621/proof-surfaces-family-separation-deterrence-punishment/> [<https://perma.cc/Y4UR-YKRB>]; David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, REUTERS (Oct. 13, 2018), <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO00C> [<https://perma.cc/MQ23-U2AB>]; Nick Cumming-Bruce, *Taking Migrant Children from Parents Is Illegal, U.N. Tells U.S.*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/us/politics/un-criticizes-us-immigration-policy.html>.

guarantees a universal right to family life against which no state may arbitrarily interfere,¹⁵² and the Convention on the Rights of the Child affirms that “States Parties shall ensure that a child shall not be separated from his or her parents”¹⁵³

Shortly after, tweets and Facebook posts from airline employees expressing their outrage made the public aware that the U.S. government was flying immigrant children separated from their parents out of the country on various private airlines.¹⁵⁴ This revelation snowballed into negative publicity for the airlines.¹⁵⁵ These companies had already committed to general human rights principles in various internal policies, but the employee activism and the bad press that it produced moved these companies to assert their previous human rights commitments so as to withhold their services from facilitating the child separation program.¹⁵⁶ In statements paralleling international rules, six major airlines declared that they would not allow their aircraft to be used for the purpose of separat-

www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.html [<https://perma.cc/PPF5-LQX3>].

152. International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, 999 U.N.T.S. 171; *see also* Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L L. 213 (2003) (identifying and comparing international legal norms to establish family separation as a violation of international law).

153. Convention on the Rights of the Child, art. 9, Nov. 29, 1989, 1577 U.N.T.S. 3.

154. Amy Pollard, *Flight Attendants Want No Part in Separating Immigrant Children from Parents*, SLATE (June 20, 2018), <https://slate.com/news-and-politics/2018/06/flight-attendants-oppose-trump-administrations-family-separation-policy.html> [<https://perma.cc/LPD3-STFL>].

155. Emily Stewart, *Airlines to Trump: We Won’t Help You Separate Migrant Kids from Parents*, VOX (June 20, 2018), <https://www.vox.com/2018/6/20/17485544/family-separation-united-american-airlines> [<https://perma.cc/Q9VQ-ZTCE>].

156. *See, e.g.*, AM. AIRLINES BUS. ETHICS & COMPLIANCE OFF., STANDARDS OF BUSINESS CONDUCT FOR EMPLOYEES 23, <https://www.aa.com/content/images/customer-service/about-us/corporate-governance/standards-of-business-conduct-for-employees.pdf> [<https://perma.cc/B385-58ND>] (declaring that American Airlines is “committed to respecting human rights” and that conducts “business in a manner that protects human rights and the rights of children within our sphere of influence”); UNITED, CODE OF ETHICS AND BUSINESS CONDUCT 18–19 (Aug. 2020), <http://ir.united.com/static-files/3482652b-31b2-4b3e-be3c-69c773b12e11> [<https://perma.cc/G9TZ-PRTA>] (affirming that the company “respects . . . international principles on human rights” and “is not complicit in human rights abuses.”)

ing immigrant families.¹⁵⁷ Spirit Airlines announced that it would not “knowingly participate in transporting immigrant children away from their parents and families.”¹⁵⁸ United flagged its “serious concerns about this policy” by instructing that the government “should not transport immigrant children on United aircraft who have been separated from their parents,”¹⁵⁹ and American Airlines insisted that it had “no desire to be associated with separating families, or worse, to profit from it.”¹⁶⁰

Pressure may also impel the formation of corporate opinio juris. An increasingly important mechanism in this respect is benchmarking. Benchmarking is a process in international commerce through which a ratings agency or evaluator of a particular standard grades entities according to a system of rankings.¹⁶¹ States are commonly benchmarked with respect to their sovereign debt and credit ratings, but the process may also be applied to companies. As a measure of benchmarking’s significance, major global law firms like White & Case, Freshfields, and DLA Piper, among others, now actively advise clients on how they may improve their benchmarking scores.¹⁶² A growing number of NGOs, like

157. Annalisa Merelli, *All the US Airlines that Refused to Fly Separated Immigrant Children—and the Ones that Did Not*, QUARTZ (June 21, 2018), <https://qz.com/1311588/which-us-airlines-are-not-working-with-ice/> [https://perma.cc/A65V-TAFT].

158. Spirit Airlines (@SpiritAirlines), TWITTER (June 20, 2018, 5:05 PM), <https://twitter.com/SpiritAirlines/status/1009542862877360128> [https://perma.cc/H65T-NBHC].

159. United Airlines (@united), TWITTER (June 20, 2018, 1:37 PM), <https://twitter.com/united/status/1009490504688525312> [https://perma.cc/45NS-LA7X].

160. Press Release, American Airlines, Statement on Recent Reports of Separated Families (June 20, 2018), <http://news.aa.com/news/news-details/2018/Statement-on-Recent-Reports-of-Separated-Families/default.aspx> [https://perma.cc/G5B8-FTD6].

161. CLARE CONNELLAN ET AL., WHITE & CASE, HUMAN RIGHTS BENCHMARKS: CORPORATE PERFORMANCE RANKINGS ON THE RISE 1 (Jan. 9, 2020), <https://www.whitecase.com/sites/default/files/2020-01/human-rights-benchmarks-2020-01-10.pdf> [https://perma.cc/69BA-XH8C].

162. *Id.*; *Authoritative Human Rights Advice*, FRESHFIELDS, <https://www.freshfields.com/en-us/what-we-do/services/disputes-litigation-and-arbitration/business-and-human-rights/> [https://perma.cc/TDT2-5EVU] (last visited Jan. 8, 2021); Daniel D’Ambrosio, *Business and Human Rights: Interaction of Human Rights Impact Assessment and Legal Advisory Work*, DLA PIPER

Know the Chain in the apparel and footwear industry,¹⁶³ have undertaken benchmarking projects to give to consumers and investors an easily understandable rating of the various companies in the sector to guide their shopping preferences.¹⁶⁴ And financial institutions have included benchmarking indices in their evaluation of whether and at what rate to offer financing to a variety of commercial transactions. For instance, in both the Equator Principles (regarding financing infrastructure projects) and the Poseidon Principles (regarding financing shipping transactions), the world's major banks have agreed to incorporate compliance with international law into their calculus on whether and under what terms to grant a loan.¹⁶⁵ Remediation of any violations of international law from the company's proposed project is a requirement which, if unsatisfied, may constitute a default on the loan itself.¹⁶⁶

Because loans may be bought and sold between financial institutions, companies have an incentive to comply with the terms of international law if their current or future creditors have themselves decided on a standard for financing that is inclusive of such legal norms. Furthermore, because failure to abide by international law may, through the Equator and Poseidon Principles, constitute an event of default, a company with a spotty human rights record may be categorized as one with a higher likelihood of default and thus as a riskier and

(Feb. 5, 2018), <https://www.dlapiper.com/en/czech/insights/publications/2018/02/business-and-human-rights/> [<https://perma.cc/B2DU-NYV2>].

163. KNOWTHECHAIN, <https://knowthechain.org/> [<https://perma.cc/W4WJ-PRNV>] (last visited Jan. 29, 2021).

164. See Kishanthi Parella, *Improving Human Rights Compliance in Supply Chains*, 95 NOTRE DAME L. REV. 727, 787 (2019) (noting that "consumer relied upon information produced by . . . NGOs and nonprofits in lawsuits filed against Purina, Nestlé, Mars, and Hershey").

165. POSEIDON PRINCIPLES, <https://www.poseidonprinciples.org/#home> [<https://perma.cc/4R95-C9HB>] (last visited Jan. 8, 2021); see Butler, *supra* note 11 (discussing how the Equator Principles incorporate international law standards).

166. EQUATOR PRINCIPLES FIN. INSTS., THE EQUATOR PRINCIPLES, princ. 8, (2020), <https://equator-principles.com/wp-content/uploads/2020/01/The-Equator-Principles-July-2020.pdf> [<https://perma.cc/7NXM-P666>]; See *Principle 3: Accountability*, POSEIDON PRINCIPLES, <https://www.poseidonprinciples.org/principles/enforcement/> [<https://perma.cc/Q4PN-2DF3>] (last visited Jan. 8, 2021) ("We will require that ongoing compliance with the Poseidon Principles is made contractual in our new Business Activities using standardized covenant clauses.").

consequently more expensive investment. Accordingly, to the extent that international law standards are a criterion for evaluation in benchmarking projects, international law forms a sort of “law in hiding.”¹⁶⁷

B. *Strategy*

A second axis to consider is strategy. Strategy may be defined in various ways, but here it is used merely to indicate that a company either has or hopes for some current or future payoff for staking out a position in alignment with international law, or that a company believes or speculates that it may somehow profit from such a course.

In the sphere of international investment law, the potential payoff for a company for adhering to international law is clear. When a foreign investor claims it has been financially harmed by the host state in some way, international arbitration offers a recourse and a remedy. In consumer-driven enterprises where the relevant customer base cares about international law, declaring commitment to international law may benefit a company’s bottom line.

But strategy is not necessarily or always derived from a one-time payoff; it may also encompass long-term planning. Long-term planning is not always apparent, and so an example of its operation within the structures of business law may be helpful in perceiving how this strategy may support the formation of corporate *opinio juris*. Corporations have recently sought to communicate their adherence to international law through the adoption of certification regimes. These certifications add a stamp of approval to whatever product is manufactured in order to verify the compatibility of the company’s activities with international law. Securing certification may crystallize into a mandatory requirement either because it constitutes a form of best practice or due diligence or because some state actor expressly adopts certification as a condition

167. Odette Lienau, *Law in Hiding: Market Principles in the Global Legal Order*, 68 HASTINGS L.J. 541, 574 (2017). Odette Lienau coined the term “law in hiding” to refer to market principles that undergird the international debt markets and are universally accepted despite their seeming lack of both a formal legal basis and an exact prominence. For further elaboration, see ODETTE LIENAU, RETHINKING SOVEREIGN DEBT 202 (2014).

for market entry.¹⁶⁸ Indeed, some states have incorporated certifications into their processes for public procurement or general market access.¹⁶⁹

Although popular with activists, adopting an enhanced standard for doing business legitimately may also increase the cost of business, thereby raising the barriers to entry for potential new market participants.¹⁷⁰ Where certification requires adherence to an international law standard that is costly, complex, or not easily verifiable, the requirement may obstruct new entrants to a market, effectively shielding established market participants from being undercut by new competition.¹⁷¹ Certification processes usually require an ability to know each step of the supply chain and to be able to trace and document the route of whatever goods are involved.¹⁷² Consequently, committing to and publicly signaling commitment to international law may also shield established market participants from being undercut by fresh competition.

For example, some have argued that the Kimberley Process Certification Scheme for ensuring that conflict diamonds do not reach the market helped entrench De Beers' strangle-

168. See Bradford, *supra* note 22, at 12 (noting that the “high value of market access to the EU explains why many producers are prepared to incur even significant adjustment costs” to meet the European Union’s strict market entry standards).

169. See, e.g., *Green Public Procurement*, EUR. COMM’N, https://ec.europa.eu/environment/gpp/index_en.htm [<https://perma.cc/FNR6-BHH2>] (last visited Jan. 8, 2021) (noting that the European Commission and some European countries have voluntarily promulgated “environmental criteria for products and services in the public procurement process”).

170. See Barak D. Richman, *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal*, 95 VA. L. REV., 325, 326, 340 (2009) (concluding that “if the objective of antitrust law is to promote economic efficiency, then per se treatment—or any heightened presumption of illegality—of reputation mechanisms with coordinated punishments is misplaced.”).

171. This discussion is not intended to advocate for competition from entities that fall below human rights and other international law standards in their operations. Instead, it is meant to illustrate that companies may have long-term, strategic interests in the formation of corporate *opinio juris* that transcend the profitability of one simple or singular transaction.

172. See generally Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2084–85 (2016) (describing the U.S. Sentencing Commission’s Sentencing Guidelines for Organizations to “induce greater corporate compliance with federal law.”).

hold over the international diamond trade.¹⁷³ Tellingly, as soon as the Kimberly Process was implemented, De Beers settled its decades-long dispute over alleged anticompetitive activities initiated by the U.S. Department of Justice (DoJ).¹⁷⁴ It is quite possible that the barriers to entry imposed by the certification and tracing requirements of the Process were sufficiently onerous to achieve the same outcome lawfully that De Beers had been seeking in defending the DoJ suit.¹⁷⁵

Another example of coordinated behavior by market participants with a long-term strategy to advance international law standards is the Global Battery Alliance (GBA). The seventy private and public members of the GBA in the spheres of international environmental law, human rights, and fair labor protections represent some of the largest stakeholders, as well as civil society and public sector groups.¹⁷⁶ Their stated goals include establishing “a circular battery value chain as a major driver to achieve the Paris Agreement” and implementing a responsible sourcing program to eliminate child and forced labor in the battery value chain by 2030.¹⁷⁷ These are, no doubt, noble objectives, and the GBA is very clear in linking them to international law norms. However, the Alliance has also proposed creating a Battery Passport by 2030. The Battery Passport would constitute “a digital representation of a battery conveying information about all applicable environmental, social, governance and lifecycle requirements based on a comprehensive definition of a ‘sustainable’ battery.”¹⁷⁸ Eventually,

173. See Virginia Haufler, *The Kimberley Process Certification: An Innovation in Global Governance and Conflict Prevention*, 89 J. BUS. ETHICS 403, 406 (2010) (noting that “the new regulatory control regime established by the Kimberley Process may have had the unintended consequence of saving De Beers”).

174. *Id.* See generally BARAK D. RICHMAN, *STATELESS COMMERCE: THE DIAMOND NETWORK AND THE PERSISTENCE OF RELATIONAL EXCHANGE* 87 (2017) (describing the multiple DoJ antitrust lawsuits against De Beers).

175. *Id.* at 143 (asserting that “the Kimberley Process removed conflict diamonds from the global market and excluded a source of competition, giving De Beers a larger market share.”).

176. *Global Battery Alliance Partners*, WORLD ECON. FORUM, <https://www.weforum.org/global-battery-alliance/our-members> [<https://perma.cc/573A-NDKV>] (last visited Jan. 8, 2021)

177. *Global Battery Alliance: Action*, WORLD ECON. FORUM, <https://www.weforum.org/global-battery-alliance/action> [<https://perma.cc/CLT2-47CH>] (last visited Jan. 8, 2021).

178. *Id.*

the GBA envisages that the Battery Passport will function as a “a quality seal” to transform the market for batteries towards sustainable outcomes by 2030.¹⁷⁹ Such a quality seal would potentially transform the market itself. It would make consumers concerned about international law more likely to buy approved products, and other companies would be eager to avoid the risk of negative publicity should any of their components be found to come from unapproved sites or processes. As such, the seal would advantage batteries from GBA producers, potentially allowing them to charge a premium for the added work of verifying the entire supply chain’s compliance with prescribed standards.

If states endorse and mandate such certification processes, they may also constitute barriers to trade. States control entry to their own markets, but they are subject to international trade and investment agreements to which they are party. Thus, when the United States adopted its Dolphin-Safe seal requiring tuna companies to verify that no dolphins were harmed in their catches, the World Trade Organization (WTO)’s Dispute Settlement Body ruled that the requirement inhibited market access in breach of the General Agreement on Trade and Tariffs.¹⁸⁰ As for the Kimberley Process, the WTO granted and has continually reauthorized an explicit exemption from its requirements, recognizing that the process would likely violate trade rules but that states would waive such claims so as to further the legitimate ends of the scheme.¹⁸¹

To be clear, this discussion is not intended to advocate for competition from entities that fall below human rights and other international law standards in their operations. Instead, it is meant to illustrate that companies may have long-term, strategic interests in the formation of corporate opinio juris

179. *Id.*

180. Report of the Panel, *United States—Restrictions on Imports of Tuna*, ¶ 7.1, (Sept. 3, 1991), GATT BISD (39th Supp.) at 41 (1993).

181. *Extension of Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, WTO Doc. WT/L/1039 (July 26, 2018), [https://perma.cc/ZZD3-C8M6](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=247145,246824,246733,246522,246314,245099,241029,241030,241036,241037&CurrentCatalogueIdIndex=0&FullTextHash&HasEnglishRecord=true&HasFrenchRecord=true&HasSpanishRecord=true)].

that transcend the profitability of one simple or singular transaction.

C. *Identity*

Identity represents two concepts: who a company represents itself to be and who a company actually is.¹⁸² There may be multiple elements within the component of self-identification, depending on the constituency within a company and the company's external image or brand.

Fidelity to international law is sometimes quite personal and may therefore be an important part of how corporate officials conceive of themselves and the companies that they own or run. For example, Microsoft's advocacy of human rights and its critique of government actions in this regard can be seen as the manifestation of its President and Chief Legal Officer Brad Smith's long-standing commitment to the international legal system. For instance, in connection with their recent \$1.25 million gift to support the work of Columbia Law School's Human Rights Clinic, Smith and his wife (and law school classmate), Kathy Surace-Smith, announced that they "have been globalists since Law School" and even "married at the United Nations Chapel."¹⁸³

For others, like CEO and founder of the multibillion-dollar Epic Games, Tim Sweeney, commitment to human rights reflects the sort of company he wishes to direct. Moreover, it is a means to distinguish Epic Games from competitors and cultivate a degree of loyalty among users. Although the Chinese Government has pressured many companies doing business in China to support the current Hong Kong administration and ban or block those expressing opposition, Epic, which owns and runs the highly successful *Fortnite* game, specified that unlike its competitor, Blizzard, it would not ban Hong-Kong based gamers who expressed pro-democracy views.¹⁸⁴ Instead,

182. See generally, Sonia K. Katyal, *Trademark Cosmopolitanism*, 47 U.C. DAVIS L. REV. 875, 895 (2014) (discussing what the author calls "rights-sensitive branding").

183. *Human Rights Clinic Receives \$1.25 Million Gift*, COLUM. L. SCH. (Nov. 17, 2017), <https://www.law.columbia.edu/news/archive/human-rights-clinic-receives-125-million-gift> [<https://perma.cc/D53M-EWWB>].

184. Steven Russolillo et al., *Hong Kong Protests Force Companies to Choose: Their Employees or China*, WALL ST. J. (Aug. 25, 2019), <https://www.wsj.com/>

Epic declared that it “supports everyone’s right to express their views on politics and human rights” and refused to “ban or punish a Fortnite player or content creator for speaking on these topics.”¹⁸⁵ When Twitter users theorized that Epic would inevitably cave to the pressure from a major investor because it is forty percent owned by the Chinese company Tencent, Sweeney instead declared that reversal of Epic’s pro-human rights policy, even under potential pressure from Tencent, “will never happen on my watch as the founder, CEO, and controlling shareholder.”¹⁸⁶

Similarly, identity may be determined by who composes the company. Employees may wish to work only for companies that uphold international norms, and shareholders may likewise wish to invest only in such businesses. The self-identification of the various actors in each group and their willingness to pressure companies into a position that upholds international law and aligns with the value set or identity of that given group is an important component for the decision-making of company leadership.

Identity may also compose a company’s position within the relevant market. If the company is large enough, carries some unique knowledge, or offers something else distinct, it may be more willing to stand by its support of international law knowing that it will not be undercut by rivals. Moreover, if the company inhabits a fairly saturated market, it may be easier for it to coordinate with other market participants to jointly

articles/hong-kong-protests-force-companies-to-choose-their-employees-or-china-11566757662 [https://perma.cc/7627-WR3H].

185. Lulu Yilun Chen & Yuji Nakamura, *Inside Tencent’s Struggle to Bring World’s Hottest Game to China*, BLOOMBERG (Aug. 23, 2018), <https://www.bloomberg.com/news/articles/2018-08-23/fortnite-tencent-and-the-fate-of-world-s-biggest-game-market> [https://perma.cc/RS94-UYBG]; Makena Kelly, *Unlike Blizzard, Epic Games Says It Won’t Ban Players for Political Speech*, VERGE (Oct. 9, 2019), <https://www.theverge.com/2019/10/9/20906110/blizzard-hearthstone-ban-hong-kong-china-epic-games-fortnite-bltzchung> [https://perma.cc/4Y69-4VJS]; Chris Kerr, *Amid Blizzard’s Hong Kong Controversy, Epic Says It Wouldn’t Censor Players*, GAMASUTRA (Oct. 9, 2019), https://www.gamasutra.com/view/news/351865/Amid_Blizzards_Hong_Kong_controversy_Epic_says_it_wouldnt_censor_players.php [https://perma.cc/WM3U-X8VU].

186. Tim Sweeney (@TimSweeneyEpic), TWITTER (Oct. 9, 2019, 10:55 AM), <https://twitter.com/timsweeneyepic/status/1181946357759844352?s=21> [https://perma.cc/6KV3-DJXJ].

endorse and embrace international law as an industry standard.

Alternatively, it may be that the international law standard at issue represents some political position or policy preference about which the company's management or shareholders care deeply. In this situation, aligning the company's operations with international law is a means through which the company may advance this particular commitment. For example, the 1951 Refugee Convention expressly requires that states guarantee refugees a right to work.¹⁸⁷ States are often reluctant to comply with this requirement because of a fear of disadvantaging their own nationals or a xenophobic belief that refugees are a drag on the economy.¹⁸⁸ Corporate support for hiring refugees may be both a means to blunt this argument and a way to show disagreement with relevant state policy.¹⁸⁹ For instance, Greek-style yogurt manufacturer Chobani has led the way and formed Tent, a non-profit organization to encourage other companies to hire refugees to which more than one hundred companies have signed on.¹⁹⁰ Chobani's founder and CEO, himself an immigrant, explained that this effort arises from his understanding that "[t]he minute [refugees] get a job, that's the minute they stop being a refugee."¹⁹¹

187. Convention Relating to the Status of Refugees, arts. 17–19, July 28, 1951, 189 U.N.T.S. 137.

188. See Jean-Christophe Dumont et al., *Hiring Refugees - What Are the Opportunities and Challenges for Employers?*, 10 OECD MIGRATION POL'Y DEBATES 1 (Sept. 2016), <https://www.oecd.org/els/mig/migration-policy-debates-10.pdf> [<https://perma.cc/VS9Q-MTQK>] (arguing that "[m]any employers do not see an immediate business case for hiring refugees or asylum seekers").

189. See generally Zachary Cohen & Elise Labott, *Refugee Levels are Surging Worldwide. Trump Is Slashing the Number the US Will Let in*, CNN (Sept. 18, 2018), <https://www.cnn.com/2018/09/17/politics/pompeo-trump-refugee-asylum-levels/index.html> [<https://perma.cc/W4T6-U79J>] ("[T]he Trump administration is capping refugee admissions at the lowest level since 1980.").

190. Cristina Alesci, *US Yogurt Billionaire's Solution to Immigration: 'Humanity First'*, CNN (Oct. 1, 2018), <https://www.cnn.com/2018/09/30/politics/chobani-ceo-immigration-solution/index.html> [<https://perma.cc/BNP3-JGHJ>].

191. *Chobani Founder Stands by Hiring Refugees*, CBS (Apr. 6, 2017), <https://www.cbsnews.com/news/chobani-founder-stands-by-hiring-refugees/> [<https://perma.cc/EJB4-G6ZS>].

As this section outlines, corporate *opinio juris* may be driven by pressure, strategy, and identity. The exact combination of these factors will differ with each instance, but understanding each category as leading to the formation of corporate commitments to international law may further empower activists and officials who seek greater effectiveness of international law. Having outlined how to predict the formation of corporate *opinio juris*, the next section traces the important implications of the theory.

V. THE VALUE OF CORPORATE COMMITMENT TO INTERNATIONAL LAW

A. *Realism's Limitations*

International law has long been understood as a unique legal system. Its proponents represent it as a multi-textured framework with rules amenable to a range of interpretations and in which signals of authority and strategic policy choices shape decision-making. Consequently, straightforward principles that usually apply to legal systems (such as like situations producing like outcomes) are not guaranteed. International law's realist critics, on the other hand, describe the system as one of mimicry that merely masks state self-interest and betrays its own rhetoric of community and negotiated solutions to common problems. To the realists, the system is less law than a cover for state gain, an insight that is supposedly revealed when states disobey the law when it is not in their interest to adhere to it.

But the focus of such critiques has largely rested on how states understand and respond to international law. Though this perspective is worthwhile (as states are the main subjects of international law and the principal addressees of its rules), states are not the only participants in the global system. Corporations are becoming increasingly present actors on the international stage, and the realist argument ought not to apply to them in the same way. Corporations, traditionally understood, are and should be motivated solely by profit. Though made up of different factions or elements (management, shareholders, employees, etc.), the purpose of the corporate entity is to pursue its own financial advancement. As such, one might expect corporations to be particularly unwilling to endorse any constraint on their ability to profit. Therefore, the fact that these

entities choose to adopt and advance international law to their own financial detriment by declining state contracts that they perceive as contrary to international law is of particular interest and import.

The phenomenon of corporate *opinio juris* may appear to give credence to theories that advance the moral authority and “compliance pull” of international law.¹⁹² But corporate *opinio juris* has the potential to add another dimension to these earlier analyses of compliance pull by suggesting that the pull of international law extends to and influences actors beyond states, including corporations. Moreover, corporations may then exert the pull of international law against states.

Corporate *opinio juris* reveals that, in focusing on states and their officials, earlier debates on the means and meanings of international law and its quality as a legal system have been too narrow. Indeed, instances of corporations turning down lucrative agreements and declining profitable transactions because of international law indicate that international law has more power than it has previously been credited. Moreover, because legal rules are usually understood as a sovereign function, a private actor like a corporation instructing a state on its compliance (or lack thereof) with international law would seem to indicate that international law possesses a persuasive power that other scholars have yet to adequately articulate.

Another way in which corporate commitment reveals the inadequacy of realist theories of international legal obligation is by highlighting the potential of corporations to use international law to advance their own interests. The realist view holds that a company must choose between international law or self-interest, but, as the examples in Part III suggest, this dichotomy is too limited. Law regularly serves as a tool for giving value to assets,¹⁹³ so the strategic use of law to advance corporate interests ought to come as no surprise. It does, however, undermine the realist position that legal obligation may only be adduced when it drives conduct that is contrary to self-interest. Law may be used to advance self-interest, and international law is no different in that respect. Accordingly, corpo-

192. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 26 (1990).

193. KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 159 (2019).

rate commitment reveals the realist theory to be unnecessarily limited in its view of the actors in the international legal regime and what their actions tell us about international law.

B. *Displacing the State?*

In her groundbreaking analysis of the privatization of foreign affairs powers and other international functions discharged by public actors, Laura Dickinson urged public officials to contractually incorporate international law principles and public values into their dealings with corporations. Her suggested framework largely mirrored the usual hierarchy of international-state-corporation instruction, except rather than ordering compliance with international law through domestic statute, obligations would be established in contracts for the privatization of services.¹⁹⁴ Ultimately, though, the instruction and insistence on adherence to international law in Dickinson's model would ideally come from the state.

Dickinson is hardly alone in her concerns over privatization. Philip Alston, in his role as U.N. Special Rapporteur for Human Rights and Poverty, recently pronounced his fear that increasing privatization will lead to less protection of human rights because companies are not bound by human rights obligations or subject to the same remedies as states for violations.¹⁹⁵ Moreover, Principle 5 of the U.N. Guiding Principles on Business and Human Rights envisages a similar hierarchy, with international institutions instructing states to ensure that human rights are respected when services are privatized. According to Principle 5, it is for the state to "exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the en-

194. See LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS* 124 (2014) (suggesting that governments or international organizations could create contracts with private organizations to require public participation).

195. Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Extreme Poverty and Human Rights*, U.N. Doc. A/73/396, ¶ 83 (Sept. 26, 2018); *UN Expert: Privatization of Government Services Undermines Human Rights Protections*, INT'L JUST. RESOURCE CTR. (Oct. 30, 2018), <https://ijrcenter.org/2018/10/30/un-expert-privatization-of-government-services-undermines-human-rights-protections/> [<https://perma.cc/TD58-R8G6>].

joyment of human rights.”¹⁹⁶ The official commentary to the Principle makes clear that “the relevant service contracts or enabling legislation should clarify the State’s expectations that these enterprises respect human rights” and notes that states should “ensure that they can effectively oversee the enterprises’ activities”¹⁹⁷ As such, states are expected to be the guarantors of human rights protections, even when they delegate the provision of services to companies not under international legal human rights obligations. It is for the state to convey its human rights understandings to the company that it entrusts with the provision of services.

But existing scholarship does not consider how the act of privatization or even a company’s control of a significant share of a market important to the state may allow the company a degree of responsibility or leverage to ensure human rights protections in a way that the state itself has not or does not seem inclined to do. What Dickinson’s account and those of the others who have come after her overlooks is the possibility that corporations might instead insist that states comply with international law through their privatized functions or their oversight of a certain market of concern to the state. This possibility is the inverse of Dickinson’s model but corporate *opinio juris* shows it to be real and potentially significant.

If the company providing the good or undertaking the service has maintained a commitment to international law and carries out a promise that its work for the government will be guided by international law principles, it effectively acts as an embedded agent of the international system, ensuring the fulfillment of international law principles even though not necessarily binding on the corporation. This is particularly the case where the company fulfils or complies with some international obligation from which the state has sought to derogate.¹⁹⁸ Moreover, the potential of achieving international law adherence through corporate *opinio juris* is not limited to the examples examined above. Take, for example, the U.N. Global Compact, which imposes international law-based commit-

196. *Guiding Principles*, *supra* note 40, princ. 5.

197. *Id.*

198. *See* Butler, *supra* note 11, at 215 (arguing that private businesses in these scenarios effectively “become direct agents of the international legal system”).

ments that over nine thousand companies incorporated in 161 different countries have voluntarily pledged to honor. Under the ten principles of the Global Compact, these companies have promised to “support and respect the protection of internationally proclaimed human rights,” “make sure that they are not complicit in human rights abuses,” uphold fundamental labor rights, support environmental protections including the “precautionary approach to environmental challenges,” and “work against corruption in all its forms”¹⁹⁹ The Compact’s principles are silent as to whom corporations may rightly exercise their influence and exert pressure against to ensure the fulfilment of these obligations, but corporate *opinio juris* reveals the possibility of corporations utilizing the principles as inspiration and authority for ensuring state compliance.

Of course, commitments do not equate always to compliance and a degree of skepticism is certainly warranted. Shift, an NGO, and Mazars, a global accountancy firm, teamed up in 2015 to establish the U.N. Guiding Principles Reporting Framework to track corporate commitments to and compliance with the Guiding Principles on Business and Human Rights.²⁰⁰ They have received disclosures from over ninety well-known companies across a range of different business sectors to date,²⁰¹ but the results are not uniformly positive. The Guiding Principles Reporting Framework announced that seventy-five percent of the reporting companies have expressly committed to abide by the Guiding Principles in structuring their operations,²⁰² and eighty percent of the reporting com-

199. *The Ten Principles of the UN Global Compact*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> [https://perma.cc/4MN3-2THE] (last visited Jan. 8, 2021).

200. *About Us*, U.N. GUIDING PRINCIPLES REPORTING FRAMEWORK, <https://www.ungpreporting.org/about-us/> [https://perma.cc/SG7H-4FPV] (last visited Jan. 8, 2021).

201. *Reporting Trends and Insights*, U.N. GUIDING PRINCIPLES REPORTING FRAMEWORK, <https://www.ungpreporting.org/database-analysis/reporting-trends-and-insights/> [https://perma.cc/DB5H-P5ZV] (last visited Jan. 8, 2021).

202. Michelle Langlois, *Reporting Trends and Insights: Are Companies Making the Commitment to Respect Human Rights?*, U.N. GUIDING PRINCIPLES REPORTING FRAMEWORK, <https://www.ungpreporting.org/reporting-insights-trends-are-companies-making-the-commitment-to-respect-human-rights/> [https://perma.cc/E5XF-Y59U] (last visited Jan. 8, 2021).

panies have established a committee to monitor their corporate social responsibility.²⁰³ But only thirty-one percent clarified how human rights are balanced against other business considerations and a mere seven percent gave a complete accounting of their chain of decision-making responsibility when operations raise potential human rights implications.²⁰⁴

Thus, it would seem that companies are eager to pronounce their adherence to human rights principles, but that such commitments may not be backed with effective mechanisms to ensure their general application. It may be that companies prefer to make ad hoc decisions in this sphere, manifesting their subscription to international law when some particularly critical rule or obligation is at stake or where their conduct in upholding such a norm is especially vital.

At the end of the day, the state controls entrance to its own market.²⁰⁵ The state may have subscribed to a variety of international trade and investment agreements that purport to dictate equal market access, but these merely lay out rules for the state to use its power to regulate market access and make violations more expensive.²⁰⁶ Where that market is especially lucrative and the state is able to withstand corporate or other external pressure, then companies may lose and yield to the preferences of the state to gain market access. Consider, for example, Cathay Pacific's swift shift to compliance with the

203. Michelle Langlois, *Reporting Trends and Insights: Who's Responsible and Accountable for Addressing Human Rights Risks Within the Company?*, U.N. GUIDING PRINCIPLES REPORTING FRAMEWORK, <https://www.ungpreporting.org/reporting-insights-trends-responsible-accountable-human-rights-risks-company/> [<https://perma.cc/37EN-6RZT>] (last visited Jan. 8, 2021).

204. *Id.*

205. General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, art. XVI, Apr. 15, 1994, 1869 U.N.T.S. 183. See General Agreement on Tariffs and Trade, arts. VIII, XX, Oct. 30, 1947, 55 U.N.T.S. 194 (discussing import and export fees and the ability of states to impose exceptions on free trade).

206. See Matthias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 919 n. 34 (2004) ("It is not surprising that [multinational corporations] have been among those non-governmental actors pushing the Rule of Law" because "[c]orporations want to be able to make strategic decisions knowing that market access according to international rules will be guaranteed.")

Chinese Government's directives after a change in company leadership.²⁰⁷

C. *Ambiguity and Clear Instructions*

When President Trump sought to implement his long-touted “Muslim ban,” a prohibition on entry into the United States of persons from seven predominantly Muslim countries, several software engineers at Google brainstormed how they might respond to and undermine the policy.²⁰⁸ Various U.N. officials had already condemned the policy as contrary to international human rights law,²⁰⁹ but instead of taking formal legal action, these software engineers turned to the technology that is the bedrock of their company’s profitability and mission. These Googlers, the quasi-national moniker used to refer to employees of Google, sought to “leverage” the company’s market power and ubiquity so as to “actively counter islamophobic, algorithmically biased results”²¹⁰ They intended to manipulate the search functionality of Google so that any Islamophobic searches would instead take users to pro-immigration groups. As such, they planned to blunt access to resources underpinning one line of the political controversy

207. See discussion *supra* Part III(a).

208. John D. McKinnon & Douglas MacMillan, *Google Workers Discussed Tweaking Search Function to Counter Travel Ban*, WALL ST. J. (Sept. 20, 2018), <https://www.wsj.com/articles/google-workers-discussed-tweaking-search-function-to-counter-travel-ban-1537488472> [<https://perma.cc/KWG5-S98N>].

209. Somini Sengupta, *U.N. Leader Says Trump Visa Bans Violate Our Basic Principles*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/world/trump-immigration-ban-un.html> [<https://perma.cc/2ASG-VL6K>]; *U.N. Rights Chief Says Trump’s Travel Ban Is Illegal*, REUTERS (Jan. 30, 2017), <https://www.reuters.com/article/usa-trump-immigration-un/un-rights-chief-says-trumps-travel-ban-is-illegal-idINKBN15E1SV> [<https://perma.cc/UJL3-MEUG>]; *US Travel Ban a ‘Significant Setback’ for Those Needing International Protection – UN Rights Experts*, U.N. NEWS (Feb. 1, 2017), <https://news.un.org/en/story/2017/02/550592-us-travel-ban-significant-setback-those-needing-international-protection-un> [<https://perma.cc/RC4Y-2NVN>]; Adam Withnall, *UN Denounces Trump’s Travel Ban as ‘Mean-Spirited’ and Illegal Under Human Rights Law*, INDEPENDENT (Jan. 30, 2017), <https://www.independent.co.uk/news/world/americas/donald-trump-muslim-travel-ban-illegal-un-rights-chief-a7552991.html> [<https://perma.cc/N6GF-ZGUH>].

210. McKinnon & MacMillan, *supra* note 208.

to “re-educate” those with whom they disagreed.²¹¹ Unfortunately for the Googlers, the plan did not go over well and in fact caused a good degree of public outrage. President Trump exploited the story for his own advantage, arguing that it was further evidence of a deck stacked against him by the “public enemy” media and tech companies sharing the Google activists’ viewpoints.²¹² Google’s CEO quickly apologized after emails were leaked to the Wall Street Journal and explained that the company fostered a culture in which employees could discuss ideas, no matter how controversial or contrary to the company’s desired public persona and mission.²¹³

This exchange represents both the extraordinary power of corporations to impact the tools of political discourse and how the words of international officials may resonate with groups within corporations (like employees) who may then accordingly seek to carry out such officials’ instructions. This article has highlighted corporate commitment to international law as an underappreciated element in influencing corporate decision-making, and it has thus far framed the relationship between and amongst corporate actors and government officials largely, though not exclusively, in an oppositional way.

However, the emergence of corporate power to purportedly invoke international law to oppose the state raises a further question: When *must* corporations resist? This is not the first time such a question has been posed, but its treatment has been cursory at best. For example, in the penultimate page of his 2018 article on the extraterritorial regulation of tech firms (or data intermediaries), Andrew Keane Woods asked, “[w]hen should an intermediary resist the state?”²¹⁴ Woods gives no firm response, merely positing that this “complex

211. *Id.*

212. Alexandra Hutzler, *Google Brainstormed Ways to Combat Trump’s Travel Ban by Leveraging Search Results for Pro-Immigration Causes*, NEWSWEEK (Sept. 21, 2018), <https://www.newsweek.com/google-brainstormed-search-functions-mitigate-trump-travel-ban-1132848> [<https://perma.cc/2P3W-SBJ8>].

213. McKinnon & MacMillan, *supra* note 208; Jackie Wattles, *Google CEO: ‘We Do Not Bias Our Products to Favor Any Political Agenda’*, CNN BUS. (Sept. 23, 2018), <https://money.cnn.com/2018/09/23/technology/sundar-pichai-google-memo/index.html> [<https://perma.cc/5QTL-4DWS>].

214. Andrew Keane Woods, *Litigating Data Sovereignty*, 128 YALE L.J. 328, 405 (2018).

question” has “no easy answer”²¹⁵ Similarly, Alan Rozenshtein recently highlighted challenges to state-corporate cooperation in the national security surveillance industry and argued that “giant technology companies . . . meaningfully constrain the government’s ability to conduct electronic surveillance.”²¹⁶ However, despite his extensive discussion of corporate-government relations in the surveillance sector, Rozenshtein neglects the role that international law plays as a source of standards and inspiration for shaping corporate objections to state incursions upon civilian privacy. With regard to the larger question of how corporations should balance technological developments against social accountability through the means of representative government, Rozenshtein, like Woods, admits that, “[u]ltimately, I don’t have a comprehensive answer”²¹⁷

International law itself does not always produce one answer. Indeed, the system is premised on a balancing of competing interests or a choice between divergent legal norms and thus sometimes produces several options. While sovereign states selecting among those options is not very controversial, people may be less comfortable with companies assuming this function because they do not fully represent the cross-section of interests that states are usually expected to take into account. People may question whether it is appropriate for corporations of different geographic or cultural origins than the state to scold the state for choosing an alternative balance. This discomfort may be particularly exaggerated when the company’s management and employees are not drawn from the legal culture against whose actions the company is purporting to protest. In the Hong Kong protests, for example, various corporations cited their support for China’s national sovereignty (another well-known international law principle) as the underlying basis for their decision to denounce the street protests.²¹⁸

215. *Id.*

216. Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99, 185 (2018).

217. *Id.*

218. See *supra* Part III. See also Frédéric Mégret, *Civil Disobedience and International Law: Sketch for a Theoretical Argument*, 46 CAN. Y.B. INT’L L. 143, 160 (2008) (contending that because international law is “historically committed to sovereignty, order, and the maintenance of the supremacy of institutions

Thus, the multi-textured nature of international law might give rise to particular concern. International law is usually open to multiple interpretations, and companies may be expected to justify their decisions by choose and cite the interpretation of international law that is most beneficial to their own interests. Almost twenty years ago in a joint report to the United Nations Sub-Commission on the Promotion and Protection of Human Rights, Joe Oloka-Onyango and Deepika Udagama expressed their deep concern that increasing links between the United Nations and various corporate entities may give rise to those private actors seeking to exploit the authority of the United Nations for their own ends. They observed that a “danger exists of such linkages being exploited by the latter [corporations], while only paying lip-service to the ideals and principles for which the United Nations was created and to which it continues to be devoted.”²¹⁹

The beginnings of an answer to the question of when a corporation may have an obligation to oppose actors not in compliance with international law were sketched by John Ruggie in the Guiding Principles. Principle 19 declares that corporations should use their “leverage,” the same term used by the Google engineers discussed above, to oppose human rights violations of other entities.²²⁰ While Ruggie began his series of reports contemplating corporate opposition to the state, his final product largely casts leverage as a tool to be deployed by corporations against private actors of equal status and standing before international law (such as other businesses).²²¹ Furthermore, the prototypical examples given in the commentaries involve utilizing a company’s position atop a corporate supply chain to extract human rights compliance from other businesses downstream in the production process.²²² This is a valuable exercise of leverage, but, as this article highlights, it is not

of international regulation[,]”the international system has been “broadly unsympathetic to what is often perceived as agitation by individuals”).

219. J. Oloka-Onyango & Deepika Udagama, Comm. on Hum. Rts., Sub-Comm. on the Promotion and Protection of Hum. Rts., *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights*, ¶ 61, U.N. Doc. E/CN.4/Sub.2/2000/13 (June 15, 2000).

220. *Guiding Principles*, *supra* note 40, princ. 19.

221. *Id.*

222. *Id.* princ. 17.

the only way a corporation may seek to exercise a degree of power or influence against the state.

Indeed, the Guiding Principles do not fully explain when leverage *must* be deployed, perhaps because it is not always clear either that a violation of international law is being or will be committed, or that the company is contributing to that violation in some way that should trigger its obligation to exercise its leverage to stop it.²²³ International law is open to interpretation; as the above example of competing norms of human rights and state sovereignty in Hong Kong illustrates, a company may either struggle to know which side to pick or may simply choose the interpretation that allows it to continue the most profitable lines of business.

Similarly, the field of Corporate Social Responsibility is replete with ambiguity. Recent studies indicate that companies regularly operate without any consistent, industry-wide vision of how they ought to interpret and apply the various objectives that may fall under the CSR subheading.²²⁴ Furthermore, companies tend to focus on and report only their efforts toward compliance with corporate sustainability goals rather than their actual results.²²⁵

There is thus significant potential value for international organizations to authoritatively announce law and adjudicate

223. See Owen C. Pell & Kelly Bonner, *Corporate Behavior and Atrocity Prevention: Is Aiding and Abetting Liability the Best Way to Influence Corporate Behavior?*, in RECONSTRUCTING ATROCITY PREVENTION 393, 402 (Sheri P. Rosenberg et al. eds., 2015) (arguing that “the international legal community has not yet articulated standards sufficient to impose clear and predictable liability on corporations for indirect conduct relating to atrocity crimes, let alone impose direct legal liability on corporate directors or officers for failing to supervise subordinates or subsidiaries within conflict zones”).

224. See CASEY O’CONNOR & SARAH LABOWITZ, NYU STERN CTR. FOR BUS. & HUM. RTS., PUTTING THE ‘S’ IN ESG: MEASURING HUMAN RIGHTS PERFORMANCE FOR INVESTORS 20, <https://static1.squarespace.com/static/547df270e4b0ba184dfc490e/t/58cad912e58c6274180b58b6/1489688854754/Metrics-Report-final-1.pdf> [<https://perma.cc/U9Y4-UEW8>] (finding that there is “no consistent set of standards underpinning ‘S’ among ESG frameworks”); Florian Berg et al., *Aggregate Confusion: The Divergence of ESG Ratings* (MIT Sloan Sch., Working Paper No. 5822-19, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438533 [<https://perma.cc/CS9B-B6D5>] (recognizing that “ESG ratings from different providers disagree substantially”).

225. See O’CONNOR & LABOWITZ, *supra* note 224, at 19 (finding that the “human rights-focused frameworks were the most likely to be limited to measuring efforts”).

its application. When, for example, the Human Rights Council announced its list of businesses carrying on operations deemed to be in unlawful support of a particular state's near annexation of territory, Airbnb paid attention and sought to remove itself from that list.²²⁶ In the garment industry, companies, unions, state actors, and other stakeholders have formalized their adherence to international law through the Bangladesh Accord.²²⁷ That agreement provides for factory inspections, safety monitoring, training, and arbitration in the event that these pre-judicial processes do not resolve noncompliance with labor and safety standards to which garment companies have subscribed.²²⁸ In addition, the Hague Rules on Business and Human Rights Arbitration, launched in December 2019, are an exciting new initiative offering clearer instruction to business actors.²²⁹ Consenting parties may submit for resolution existing disagreements involving the human rights impacts of business conduct. Rather than waiting for such a dispute to arise and then getting parties to agree to arbitrate, it may also be valuable to establish a preclearance process for international institutional input when a business is unsure if a particular transaction or operation is compatible with international law. This could function in a manner similar to the U.S. domestic preclearance process for obtaining the President's approval of mergers with potential national security implications.²³⁰ This is just one possible model for such a process, but the underlying principle is to make clear whether a company's contemplated course of action is lawful or unlawful by deferring to a decisionmaker with a greater degree of perceived legitimacy and free from the conflicts of interest the company's own managers experience. In this way, company leadership will not be able to so easily exploit the ambiguity of interna-

226. Butler, *supra* note 11, at 189–90.

227. Accord on Fire and Building Safety in Bangladesh (May 13, 2013), <https://bangladesh.wpengine.com/wp-content/uploads/2018/08/2013-Accord.pdf> [<https://perma.cc/LM74-HZBB>].

228. *Id.* cl. 5.

229. CTR. FOR INT'L LEGAL COOP., THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION 1 (2009), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf [<https://perma.cc/4U8E-SDC5>].

230. Defense Production Act of 1950, 50 U.S.C. § 4565 (amended 1988).

tional law to facilitate a course that is contrary to that law's spirit, even if not explicitly prohibited in its strictest terms.

VI. CONCLUSION

How and why corporations commit to international law are questions which have so far lacked a coherent and generally applicable response. This article's primary contribution, therefore, has been to propose and construct the theory of corporate *opinio juris* as a more satisfactory reply.

This article has explained how corporate *opinio juris* encapsulates a company's decision to defer to and follow international law, even though that body of rules may not be formally binding upon it. As the examples highlighted here demonstrate, corporate *opinio juris* may be manifested through a company's actions or abstention from a course of business; each is a means through which the company may manifest its commitment to international law to guide its operations. The article has also proposed that corporate *opinio juris* is formed through a varying mix of three fundamental factors: pressure, strategy, and identity. Finally, this article has sought to offer a predictive account of when corporate *opinio juris* might arise and explain the major implications this overlooked and important phenomenon has for international law and corporate behavior.

Corporate *opinio juris* exposes the limited focus of realist theories and illustrates the expanded compliance pull of international law on actors that the realists ignore: business entities. It also illuminates the problems with the realist assertion that a sense of international legal obligation may only be proved in instances where actors work against their own interests. Corporate *opinio juris* demonstrates that self-interested actors do sometimes choose law over immediate profit, but that law may also serve to advance profit in the long term. As such, the choice between law and profit or self-interest need not be framed so dichotomously.

Moreover, corporate *opinio juris* shows how other actors within the international system, including states and international institutions, may harness corporate behavior to advance international law's commands. As such, corporations may function as important agents of the international system, but only if state actors and international institutions with enough

legitimacy and authority to command the respect of corporate decisionmakers make clear what international law demands. Ambiguity, while a boon for the power and sovereignty of states by providing legitimation to varying courses of conduct, is the enemy of international law's incisiveness.

This article has begun the work of filling gaps in existing international legal scholarship to understand the potentially vast contributions of corporations not merely as lawbreakers but as law-supporters and to unpack the emerging symbiosis between international law and corporate participants. The necessary questions this article addresses have the potential to lead to coordination on some of the world's most pressing challenges. But this process of standardization is also open to corporate manipulation in ways that undermine its objectives and the fairness of international law as a system of global governance. Finding and pursuing the proper balance between empowering corporations to support and promote international law and restraining their more devious activities will be the work of the field for some time to come.