

# Globalism from an African Perspective: The Training of Lawyers For A New and Challenging Reality\*

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## I. PREFACE

This paper deals with the definition and implications of globalism generally and for African interests in particular. Its focus is on globalism as a cluster of social, economic, and political forces contesting for the controlling paradigm of international relations and international law. The article underscores the general issue of globalism's impact on the well-being of the international community. It also considers the impact of globalism on the U.N. Charter, and, in particular, the role of the United Nations in international economic order. The connections between globalism and society are considered as part of the changing character of war and political economy in the international system.

A central theme running through this paper is that globalism stresses an element of privatizing important functions historically considered to be public in character. These include the management of important economic issues and the control and regulation of the global war system. All of these matters impact Africa. Additionally, it is important for juris consults in Africa to understand them better so that professionals, scholars, and opinion leaders

may be able to provide African leadership with more skilled, strategic, and tactical ways to protect the vital interests of Africa.

## II. AFRICA IN THE GLOBAL ECONOMIC COMMUNITY

### A. *Introduction: Globalism and Africa—The Simple View*

There is a short and simple African perspective on globalism. For Africa, globalism means the unremitting entrenchment of human deprivation on a continental scale. Africa also sees its perilously accelerating impoverishment and deprivation as the dynamic thrust of globalism.<sup>1</sup> In short, the simple view of globalism reveals a cluster of negative externalities accelerating African poverty and deprivation. Stability in this global environment has a special meaning for Africa. It is an illusion which masks a reality of regressive change and a rapid deterioration of human values. This view is as dismal as it is challenging. The dismal part may well generate not simply an African pessimism, but a new round of global Afro-pessimism. The challenging part of this simplistic view is that merely preserving an unhappy status quo is not enough; Africa must engage in change that will change the status quo. That is to say, change dedicated to progress and hope in Africa. To paraphrase Thabo Mbeki, change for the realization of the African renaissance.<sup>2</sup> Africa represents the sharp edge of globalism's global problem. In a great irony, Africa's post-apartheid world now inherits the term, previously confined to a single African country, as a symbol of the continent's deprivation in the global scheme of things: global apartheid.<sup>3</sup>

### B. *Globalism & Africa: The Comprehensive Complex Perspective*

What we have suggested above is a popular but simplistic understanding and concern about globalism and its global and African discontents. A more discriminating view of the challenge of globalism for Africa must account for global conditions, which significantly shape Africa's position in the world economy. It correspondingly must give an appraisal of Africa's reciprocal impact on the global community and the critical values that sustain it. Such an account of globalism requires deft theorizing, powers of description, and careful analysis. These are challenges to understanding the fundamental epistemology of globalism in the world community. These challenges are in part a matter not confined to public policy. The challenges are in effect scientific and intellectual challenges touching on matters of the political and

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<sup>1</sup> See U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT (2005), available at [http://hdr.undp.org/reports/global/2005/pdf/HDR05\\_complete.pdf](http://hdr.undp.org/reports/global/2005/pdf/HDR05_complete.pdf) (focusing on what governments in rich countries can do to keep their side of the global partnership bargain).

<sup>2</sup> See Winston P. Nagan, *Lawyer Roles, Identity, and Professional Responsibility in an Age of Globalism*, 13 FLA. J. INT'L L. 131 (2001) [hereinafter *Lawyer Roles*].

<sup>3</sup> For a discussion of the term "global apartheid," see generally Joel P. Trachtman, *Global Justice: Poverty, Human Rights and Responsibilities: Welcome to Cosmopolis, World of Boundless Opportunity*, 39 CORNELL INT'L L.J. 477 (2007).

social responsibility of both academics and professionals in Africa today.

### *C. Ubuntu, Community, and Globalism*

Intellectual and scholarly responsibility is a part of the challenge of comprehension. That responsibility includes a commitment to rigorous scientific research as well as the development of advanced teaching methods for higher education and particularly the interface of higher education and professional training. This level of intellectual responsibility is a matter that confronts critical challenges for the future of Africa and, in a larger sense, the have-not sector of the world community. As an aside, the focus of an epistemology of globalism, as understanding the concept of community in its broadest parameters, local to global, is a distinctively African contribution. This contribution, with its potentials and deficits, is essential for the human and African prospect. The critical African gloss on what we mean by human rights is captured in the term "Ubuntu."<sup>4</sup>

Ubuntu, in African law<sup>5</sup> and political economy, is a term that is not merely descriptive, but also carries a powerful normative message. Descriptively, Ubuntu requires us to focus on people. The ultimate focus of responsible social and legal inquiry is on the human being. The human being is connected to other human beings in micro-social relationships, which extend ultimately to communication networks within the family, clan, tribe, and community. This focus and insight is critical if globalism is to be revealed so as to understand the nature of the social forces that drive it, are impacted by it, benefit by it, and most importantly, are victimized by it.<sup>6</sup>

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<sup>4</sup> See generally Linda Ross Meyer, *Forgiveness and Public Trust*, 27 FORDHAM URB. L.J. 1515, 1540 n.5 (2000).

Archbishop Desmond Tutu has explained the African concept of Ubuntu as the following: It speaks about the essence of being human: that my humanity is caught up in your humanity because we say a person is a person through other persons. I am a person because I belong. The same is true for you. The solitary human being is a contradiction in terms. That is why God could say to Adam, "It is not good for man to be alone." No one can be fully human unless he or she relates to others in a fair, peaceful, and harmonious way. In our African understanding, we set great store by communal peace and harmony. Anything that subverts this harmony is injurious, not just to the community, but to all of us, and therefore forgiveness is an absolute necessity for continued human existence.

*Id.*

<sup>5</sup> Albie Sachs, *War, Violence, Human Rights, and the Overlap Between National and International Law: Four Cases Before the South African Constitutional Court*, 28 FORDHAM INT'L L.J. 432, 476 n.15 (2005). "The term ubuntu is not defined in the South African Constitution." *Id.*

<sup>6</sup> Justice Yvonne Mokgoro, *Ubuntu and the Law in South Africa*, 4 BUFF. HUM. RTS. L. REV. 15, 15-16 (1998).

It has also been described as a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of

We submit that this descriptive focus, implicit in Ubuntu, provides us with the most useful orientation of unpacking and understanding globalism from the vantage point of different academic disciplines and professions. The other focus, also implicit in Ubuntu, is the normative relationship expressed in the rough translation that human beings express themselves as human beings in relation to and interaction with other human beings.<sup>7</sup> The normative implication here is the golden rule of reciprocity, mutual understanding, and respect, which are the cornerstones of the aspiration of universal dignity. Globalism, of course, needs to be seen in the context of the reciprocated dynamics of inter-dependence, inter-determination, and complex human and associational interaction. The Ubuntu perspective and orientation may provide a clearer picture of how Africa, and in a larger sense, the have-nots of the world, might protect and secure their interests in peace and security, social progress, and human rights. Human rights include the fundamental right to pursue economic, social, cultural, and legal development as the pathway to a better future. This formulation of globalism imposes important challenges for Africa's intellectual, scientific, professional, and opinion leaders.

When meaningfully discussing globalism in Africa, the first and most obvious question is: What exactly is meant by the term globalism? Globalism is used loosely in the media and in ordinary conversation and frequently carries meanings that are both obvious and obscure.<sup>8</sup> The term is used widely

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resources, and the fundamental belief is that “ubuntu ngumuntu ngabantu, motho ke motho ba batho ba bangwe,” which, literally translated, means “a human being is a human being because of other human beings.” In other words, the individual's existence and well-being are relative to that of the group. This is manifested in anti-individualistic conduct that threatens the survival of the group. If the individual is to survive within the group, there must be collective effort for group survival. Basically, it is a humanistic orientation towards fellow beings.

*Id.* (Internal citations omitted).

<sup>7</sup> *Id.*

The meaning of *ubuntu*, however, becomes much clearer when we examine its practical effect on everyday life. For example, a society based on ubuntu places strong emphasis on family obligations. Family members are obliged to help one another. The concept of family is a broad “nuclear” family, which includes the extended family. People are willing to pool community resources to help an individual in need. This is captured in some of the African aphorisms such as, “*motho ke motho ka batho ba bangwe*,” which literally translated means, “people live through the help of others,” and, “*a botho ba gago e nne botho seshabeng*,” which literally translated means, “let your welfare be the welfare of the nation.”

*Id.* (Internal citations omitted).

<sup>8</sup> Arjun Appadurai identified five types of global connectivity. Ethnoscapes: the movements of people; Financescapes: the global flows of money; Ideoscapes: the global flows of ideas and political ideologies; Mediascapes: the global flows of media images; and Technoscapes: the movement of technologies around the globe. Arjun Appadurai, *Disjuncture and Difference in the Global Cultural Economy*, 7 THEORY, CULTURE AND SOCIETY 295, 295–310 (1990). See also *Lawyer Roles*, *supra* note 2.

in academic discourse, probably most frequently by intellectual leaders in economics. Nevertheless, the term also is used with precision and careful attention to detail in fields such as world politics, international relations, international comparative sociology, international law, and other discrete disciplines.

This audience is composed largely of lawyers interested in teaching law in the context of the global environment. To manage the teaching of that subject effectively, there are two possible vantage points, broad and narrow, which may be used simultaneously. Both should provide a working picture of what globalism is, and what we might do to improve and enrich the training of professionals in law. Incidentally, this focus also should deepen the African understanding of globalism. More importantly, we must figure out how the global tiger may be managed so that Africa is not swallowed by it. Instead, Africa must appropriate its wild and unruly power for the improvement of the African prospect.

### III. DEFINING GLOBALISM FROM AN AFRICAN PERSPECTIVE: ROOTING GLOBALISM IN HUMAN RELATIONS

#### A. *Globalism and the Concept of a Global Community: The Broad Perspective*

The term globalism must assume a social or community context. Since that community context essentially must be global, we then may delimit the context of globalism as involving a global community with all the complexity of cultural diversity, levels of development, disparate levels of power and authority, as well as security and insecurity. In this global village of community, human beings may act in groups or complex associations—such as multi-national corporations, political parties, and pressure groups—whose activities and actions are manifested beyond the state, or by groups committed to social deviance such as organized crime cartels and terrorist networks. This description of the global community takes into account a range of actors who participate in addition to state actors. Other relevant socioeconomic organizations with appropriate levels of legal capacity and identity include related regional trading blocks and developed continental institutions of governments such as the African Union.

Beyond the African reality and apart from other non-African nation states, there are the well-developed institutions of international governance such as the United Nations, the World Bank, the International Monetary Fund, the World Health Organization, the International Court of Justice, and other parallel continental institutions, such as the European Union and the Organization of American States. In short, we can divide the global village into state actors, about 195 globally, and non-state actors, which include commercial and political actors, international non-governmental organizations, and the cluster of associations and individuals often described as a global civil society. In this sense, it immediately can be seen that the important players and actors in global society are complex and

multitudinous. Their forms, functions, and impacts on the human prospect are vital if one is to get a picture of how one's fundamental values are being depreciated, protected, or enhanced.

This picture of globalism is one that is not in stark contrast to the importance and reality of the nation state. It simply reflects the fact that the nation-state is not the only important player in the context of globalism. The contextual meaning of globalism can be seen by defining it as a global, social, political, economic, and legal process in which the primary actors in the international system project their power and interests. They seek to vindicate their actions using the techniques important to interest, articulation and realization, and the security of those interests. These include interests long codified, recognized, and symbolized as fundamental value concerns facing humanity: security, cooperation, self-determination and independence, social progress and development, defense of humanitarianism, and human rights.

The depreciation of human dignity on a colossal scale during World War II led to the adoption of the U.N. Charter.<sup>9</sup> The issue of human rights and human dignity is one of the important outcomes of the creation of world order based on the Charter.<sup>10</sup> The Charter emphasizes as one of its primary purposes the achievement of universal dignity under the international rule of law.<sup>11</sup> The Charter recognizes, among other things, that to provide for human security, humanity must fulfill its commitment to fundamental human rights, the dignity and worth for the individual, equal rights for men and women, and equal rights of large and small nations.<sup>12</sup> The Charter recognizes that its promise, as it seeks to vindicate its high purposes, must be founded upon the notion of an international rule of law.<sup>13</sup> This description of global social process only can work, at least in terms of the values of human rights and human dignity, if globalism is not a prescription for anarchy and oppression. Globalism presents a challenge for law professors, judges, lawyers, public officials, and those in the private sector who must develop and evolve appropriate structures of law.

#### *B. Defining Globalism as a Gloss on the Sovereignty Prospective: The Narrow Perspective*

The first perspective of globalism must be tempered by a second concurrent perspective. This second perspective recognizes the importance of law as a descriptive tool in providing meaning and understanding to the context of globalism. At the height of the influence of legal positivism on international law, an elegant and concise way of defining international law

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<sup>9</sup> See U.N. Charter pmbl.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* at art. 1, para. 3.

<sup>12</sup> See *id.* at art. 1, paras. 2-3.

<sup>13</sup> See *id.* at art. 2.

was developed. International law was defined as the rules of law that operated between coordinate sovereign states. The concept of an international society could be defined by counting the number of recognized states in the system and calling the system a community of states upon which the foundations of modern international law are founded. This was and remains a powerful model that deeply influences fields such as international economic law, international relations, international diplomacy, as well as world politics.

The above model has resisted taking account of the unwashed world of non-state actors and civil society participants. It is a model that works on the assumption that all law, including international law, comes from the state, which is vested with the attribute of sovereignty. This is not a model that allows a rational inquirer to account for human activity, which cuts across state and group lines as a critical component of the neat world of positivist elegance. The more modest view of globalism, seen in the light of the architecture of conventional international law and its theoretical underpinnings, is that it is a process that erodes in some degree sovereign state boundaries, but on the other hand, admits a freer flow of goods, service capital, finance, labor, technology, science, education, and human migration. In this sense, global reality is admitted, perhaps grudgingly, because global reality indeed seems to weaken the omnipotence of the sovereign state by the erosion of its judicial, political, and economic communications while expanding social mobility and migration in ways that limit the state's power to control and regulate. This view of globalism is subversive of the conventional view of state, law, and governance. However, it is more moderate in its implicit claim that the state is an institution on the wane.

These two views of globalism contain important components of truth. They require a degree of reconciliation and integration for us to gain a clearer picture of this complex phenomena and how it affects the daily lives of the people of Africa, their governments, and their institutions of civil society. The central matter for careful investigation is the question of the conditions which inspire certain global causes and consequences with resultant impacts on security, well-being, and dignity. The conditions to which we refer may be integrated intellectually and scientifically in a broader paradigm which more effectively describe the actual conditions of global power as a starting point for understanding globalism's essential problems: what actual causes and conditions generate the problems and how the threats and potentials of globalism may receive normative and wise direction for securing the common interests of rich and poor on a global basis. We now focus on what globalism means for Africa and the have-nots of the Earth.

### *C. The Outcomes of Globalism: However Defined*

If we use Africa as a normative yard-stick for an appraisal of what globalism means for the human community, we can list several major and important outcomes that threaten human wellbeing and survival as well as

challenges and opportunities for the future. Scholars must grasp the central problems generated by globalism that affect the most fundamental values of social organization. This means that we cannot rely on the lazy, received assumption that a whole set of rules exists, which governs the complex interactions and relationships of the dynamics of activity structured and generated by globalism. Scholars now must become more creative in constructing the rules of global law in a way that clearly responds to the problems that require interventions appropriate to legal culture.

This does not mean that the rich legal inheritance of the past is obsolete. On the contrary, it means that teachers creatively must develop the rich inheritance of the past. Students must grapple with a legal reality in which the state does not have a clear monopoly on the process of law making. Additionally, teachers must develop teaching materials and must generate academic scholarship that will facilitate the professional understanding of the complex trajectories and players involved in the global law making, law applying, and law enforcement processes. Finally, professors must act as juris consults and play important roles as advisors in public and private sector activities. They may well be in the business of initiating and developing better methods for managing and understanding the legal structures in which the unruly transnational world seeks to control and regulate activity that cuts across group, state, and national lines.

Therefore, a brief glance at any curriculum in any law school in South Africa, reveals one obvious fact. Every legal subject contains a pure local component, which is reflected in the way law is taught.<sup>14</sup> However, every legal subject also might have a multi-state or trans-state dimension to it. Thus, effective teaching requires that education be given with a view to the trans-state or multi-group reach of legal problems.

The outcomes of the process of globalism are an appropriate beginning point from which to re-examine many components of legal pedagogy, the structure of the curriculum, and the redefinition of appropriate standards of professionalism. The following is a brief checklist of problems that are notoriously obvious in the current state of world order:

1. Global economic apartheid;<sup>15</sup>
2. The human right to development or development as a gift of the planet's economically dominant actors;<sup>16</sup>
3. Global economic institutions and their preference for vindicating the

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<sup>14</sup> See Winston P. Nagan & Danie Visser, *The Global Challenge to Legal Education: Training Lawyers for a New Paradigm of Economic, Political and Legal-Cultural Expectations in the 21st Century*, 11 ILSA J. INT'L & COMP. L. 9 (2004).

<sup>15</sup> See Winston P. Nagan, *An Appraisal of the Comprehensive Anti-Apartheid Act of 1986*, 5 J.L. & REL. 327 (1987).

<sup>16</sup> See Declaration on the Right to Development, G.A. Res. 41/128, at 186, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/41/128 (Dec. 4, 1986).

interests of the powerful over the interest of the powerless: free trade versus fair trade;<sup>17</sup>

4. Protection of the environment, global warming, and the undermining of global understandings regarding the balance between sustainable development and the destruction of the environment;<sup>18</sup>

5. Human population growth and the capacity of the earth to maintain human populations within the eco-social and economic capacity of the earth;

6. The global health crisis (AIDS, malaria, bird flu, resurgence of TB, etc.);<sup>19</sup>

7. Global capacity to respond to natural catastrophes (tsunamis, earthquakes, hurricanes, etc.);<sup>20</sup>

8. The crisis regarding the respect for human rights and humanitarian values;<sup>21</sup>

9. The crisis of the global war system;<sup>22</sup>

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<sup>17</sup> See RAVI BATRA, *THE MYTH OF FREE TRADE: THE POORING OF AMERICA* (1996).

<sup>18</sup> See U.N. Conference on the Human Env't, June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 and Corr. 1 (June 16, 1972); World Charter for Nature, G.A. Res. 37/7, at 17, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/7 (Oct. 28, 1982); United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev.1 (1992); *Johannesburg Declaration on Sustainable Development*, U.N. Doc. A/CONF.199/L.6/Rev.2, in Report of the World Summit on Sustainable Development, U.N. Doc. A/CONF.199/20 (Sept. 4, 2002), available at [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POI\\_PD.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm).

<sup>19</sup> WORLD HEALTH ORGANIZATION, *THE WORLD HEALTH REPORT 2006, WORKING TOGETHER FOR HEALTH* (2006), available at [http://www.who.int/whr/2006/whr06\\_en.pdf](http://www.who.int/whr/2006/whr06_en.pdf); WORLD HEALTH ORGANIZATION, *WORLD HEALTH REPORT 2005: MAKE EVERY MOTHER AND CHILD COUNT* (2005), available at [http://www.searo.who.int/LinkFiles/Making\\_Pregnancy\\_Safer\\_WHR2005.pdf](http://www.searo.who.int/LinkFiles/Making_Pregnancy_Safer_WHR2005.pdf); WORLD HEALTH ORGANIZATION, *WORLD HEALTH REPORT 2004: CHANGING HISTORY* (2004), available at <http://whqlibdoc.who.int/whr/2004/924156265x.pdf>; WORLD HEALTH ORGANIZATION, *WORLD HEALTH REPORT 2003: SHAPING THE FUTURE* (2003), available at <http://www.who.int/whr/2003/en/index.html>.

<sup>20</sup> NEW YORK UNIVERSITY CENTER FOR CATASTROPHE RESPONSE & THE AMERICAN RED CROSS IN GREATER NEW YORK, *HOW PREPARED ARE WE, NEW YORK?* (2006), available at <http://www.nyu.edu/ccpr/pubs/NYU-RedCrossPreparednessReport.pdf>.

<sup>21</sup> See, e.g., Winston P. Nagan, *African Human Rights Process: A Contextual Policy Oriented Approach*, 21 SW. U. L. REV. 63 (1992); Winston P. Nagan, *The Politics of Ratification: The Potential for United States Adoption and Enforcement of the Convention Against Torture, The Covenants on Civil and Political Rights and Economic, Social and Cultural Rights*, 20 GA. J. INT'L & COMP. L. 311 (1990); Winston P. Nagan, *International Intellectual Property, Access to Health Care, and Human Rights: South Africa v. United States*, 14 FLA. J. INT'L L. 155 (2002); Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 127 (1995).

<sup>22</sup> See, e.g., Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 375 (2004); Winston P. Nagan & Craig Hammer, *Patriotism, Nationalism and the War on Terror: A Mild Plea in Avoidance*, 56 FLA. L. REV. 933 (2004).

10. The acceleration of the global arms market at all levels;
11. The proliferation and ostensible deregulation of nuclear arsenals as well as biological and chemical weapons of mass destruction;<sup>23</sup> and
12. The growth of civil society deviance which threatens the world order in the form of apocalyptic terrorism, state terrorism, organized crime, trafficking in human beings, drugs, small arms, and possibly criminal trading in the components of weapons of mass destruction.<sup>24</sup>

#### IV. INTERNATIONAL LAW AND THE U.N. CHARTER

##### *A. Overview of the Charter System*

The global community or society generates important outcomes in the form of the problems listed above. It also generates structures of authority and control that facilitate appropriate community responses to these problems at different levels. In the international community, it is widely accepted that we have an international constitution: The U.N. Charter. The Charter emerged as an outcome of the social process of conflict and war. It is hard to imagine that we would have had the U.N. Charter and its commitment to human rights, peace and security if the Second World War had not happened.

There was no doubt a consensus among the victorious powers after the war that the issue of global peace and security required stronger central authority and guidance. Similarly, the causes of war and suffering were identified in large measure as a function of government commitment to the destruction of human rights and human dignity. As the charter system points out, if peoples' rights are respected, recourse to violence will correspondingly be diminished. The challenge today is to consider the adequacy of the constitutional development of the international community that has been around since 1945. What is clear is that the conditions, which defined the critical structures of world society in 1945, are vastly different to the social forces and structures, which drive the world community today.

All institutions of governance at the international, regional, and state levels—and even within state levels—either effectively have to respond to issues that affect their vital interest or find that law simply functions in a vacuum as conditions change and transcend the law. A community without law generally lends itself to situations in which the weakest will be exploited by the strongest. This, in turn, leads to powerful international forces, such as multi-national corporations, worldwide conglomerates, or the powerful organized crime cartels, stating demands that seek to limit the power of law

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<sup>23</sup> See Winston Nagan, *Nuclear Arsenals, International Lawyers, and the Challenge of the Millennium*, 24 YALE L.J. 485 (1999).

<sup>24</sup> See Winston P. Nagan & Alvaro de Medeiros, *Old Poison in New Bottles: Trafficking and the Extinction of Respect*, 14 TUL. J. INT'L & COMP. L. 255 (2006).

to regulate their conduct in the global context. With weak central guidance mechanisms, organized crime flourishes and the rational management culture of the great corporate actors is not capable of self-regulation. Corporations often are complicit in conduct that depreciates the human prospect.

The U.N. system has generated a massive new framework of entities with transnational legal personality. The U.N. framework and its functional instruments represent a significant paradigm shift in the framework of not only international law, but modern jurisprudence and legal theory as well. This framework requires a description and justification of law that is more complex and challenging. The U.N. system has influenced three aspects of regional regimes: economic integration, security, and the protection of human rights. Thus, international law, however defined, must account for non-international legal persons such as the United Nations, the European Union, the African Union, the Organization of American States, and others.

The imprint of U.N. values and institutions not only has influenced the values of regional and continental law, but it also has influenced the development of modern forms of constitutional law within states. South Africa is an important illustration. In particular, the recognition of the individual as a subject of the international legal system, gives us an insight into the way in which the constitution of the United Nations itself has served as a structural juridical basis for the development of the forces of globalism and its discontents. At the beginning of this millennium, there was a consensus in the international community that the quality of economic, social, and legal justice should be improved on a global basis. The next section outlines the framework of these goals for the new millennium.

#### V. THE INTERNATIONAL CONSTITUTIONAL SYSTEM AND THE EMPOWERMENT OF CIVIL SOCIETY

The preamble to the U.N. Charter provides a marker of global legitimacy. That marker is symbolized by the phrase “we the peoples.”<sup>25</sup> In short, the Charter roots its authority in “the peoples” and does so pointedly, without reference to the sovereign state. Yet, the Charter creates an architecture that makes formal membership in the United Nations a function of the international recognition of statehood.<sup>26</sup> The hard law of the U.N. Charter favors the legal primacy of the state. Although individuals, corporations, international non-governmental organizations (INGO), and larger civil society organizations are the essential components of the global community, as a technical matter, the state constitutionally holds a preferred position in international law. However, the salience of the neo-liberal foundations of the global economy is based upon a model of doing global business with limited state or public regulation. Business is a critical part of global civil society.

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<sup>25</sup> U.N. Charter pmb., available at <http://www.un.org/aboutun/charter/>.

<sup>26</sup> *Id.* at art. 3.

This section touches on the development of other sectors of civil society, including the important role of private military contractors in the promotion of global security and possibly insecurity. To set the scene for this analysis, the constitutional architecture of the Charter system and its state-centered dimensions are analyzed. This article also demonstrates how the growth of human rights and INGO activity indirectly, but significantly, has broadened the level of participation in the U.N. Charter system giving globalism its community texture.

The state historically has been the only player that officially engages in war. That function of the state was moderated by the creation of institutions of collective security in the United Nations. Those institutions, however, functioned on state consent as well as the consent of the permanent members of the Security Council. In general, the international system lawfully permits a state to use force in self-defense or the state to act collectively through the United Nations in the maintenance of international peace and security. This system supports the critical monopoly of the state's use of force in international law.

However, the above model seems to be undergoing a radical transformation. In order to give an accurate appraisal of that transformation, it would be useful to review the legal evolution of the role of state and non-state actors as well as civil society in the context of the U.N. Charter.

#### *A. The Nature of International Law, Globalism, and Emerging Civil Society*

The Union of International Associations urges that we are in the midst of a global revolution relating to the context, structure, and process of civil society. The organization holds, for example, that there are incipient trends toward global democratization and the visualization of an alternative organization design. The organization does not tell us exactly what that alternative design is.

However, there exist large and complex organizations in the international system, which are impacted deeply by the communications revolution. Critical indices are being developed to determine the extent of cohesion and bonding, as well as the level of formalization and coherence, of civil society associations.

There are many large, complex organizations, whether intergovernmental or multinational, or their national equivalents. Many non-profit organizations are increasingly complex. Such complexity takes the form of numerous specialized units. The challenge is to ensure that these units work together in a coherent, meaningful manner. Increasingly, the communications of such organizations are based electronically so the critical question is how the communications between the parts of civil society are organized.

In order to facilitate discussion among these complex organizations it may be useful to explore the notions of interlocking round tables as the basis

for the emergence of new forms of non-hierarchical organization that may be vital to sustainable community. It might prove to be the case that the sustainability of a community results from appropriate global configuration—interlocking the diversity of community dialogue arenas.

When we place these insights in the context of emergent globalism, the role of civil society requires us to understand more adequately the conditions shaping the future of world order and world politics. How are we to understand the “forces” of globalism and the role of civil society associations within it? The theorist, James Rosenau, argues that “the best way to grasp world affairs today is to view them as an endless series of tensions in which the forces pressing for greater globalization and those pressing for greater localization interactively play themselves out.”<sup>27</sup> These forces, Rosenau argues, are influenced by the skill and communication revolution, the “organizational explosion,” which witnesses a “staggering number of new organizations,” some tightly organized with clear lines of interest and authority, and others that are “loosely structured.”<sup>28</sup> These processes suggest states are getting stronger in some respects and weaker in others; there is a reassertion of the archaic idea of “sovereignty,”<sup>29</sup> while it is being eroded by the facts of economic, military, and cultural inter-dependence. Today, the structural foundations of international constitutional order are in flux. At the theoretical level, we are witnessing a profound change in the structure and process of international constitutional order, in which there is considerable rearrangement of the vectors of control and authority in international society.

#### *B. Apartheid: Corporate Civil Society Versus Humanitarian Civil Society*

The anti-apartheid movement generated two opposed versions of civil society. Thus the private sector created the great controversies about the relationship of human rights to political economy. These lines were drawn sharply during the period of apartheid in South Africa. Apartheid was condemned universally as an affront to the U.N. Charter, creating a dilemma for the international community. On the other hand, the apartheid system provided stability, racial exploitation, and economic opportunities resulting in seemingly attractive economic returns. Critics of corporate involvement in South Africa argued that the corporate stake in the country served to support the regime. In short, the corporations benefited substantially from their economic investments in South Africa. There was significant resistance to the imposition of economic sanctions on South Africa. Finally, when the U.S. Congress enacted the comprehensive Anti-Apartheid Act of 1986, the threat of sanctions significantly influenced the process of South Africa’s transformation to democracy. The troubling aspect of the apartheid problem,

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<sup>27</sup> JAMES N. ROSENAU, *DISTANT PROXIMITIES: DYNAMICS BEYOND GLOBALIZATION* (2003).

<sup>28</sup> *Id.*

<sup>29</sup> See Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 *COLUM. J. TRANSNAT’L L.* 141, 142 (2004).

in particular corporate involvement in sustaining it, was whether corporate action, more partial to international law, might have expedited the transformation and the costs of the change. In short, corporate involvement in the political economy of South Africa's apartheid placed enormous pressures on the international system in terms of regional security and human rights deprivations.

*C. Constitutional Limits and Allocations of Power in the Global Community*

There is a striking constitutional analogy in the documentary basis of the international constitutional system and the constitutional architecture of the modern sovereign state. The fundamental reality behind all forms of constitutionalism is that the constitution manages basic expectations and understandings about the allocation of fundamental decision-making competences in the relevant political universe. The U.N. Charter, therefore, has a formal structure that is analogous to the general way in which states constitutionally are managed. A constitution organizes and manages expectations about the distribution of power in a nation-state. The allocation of power via a Bill of Rights—whether state, regional, or international—gives modern constitutionalism the distinctive character of specifically including the rights and powers of individuals in the political and judicial processes.

The main lines of the division of power are usually some version of the separation of executive, legislative, and judicial powers. The recognition of individual rights, as rights that must be seriously maintained, reflects the modification of the sovereignty idea in a way that provides protections and significant empowerments for individuals. This form of allocating power is characteristic of the U.S. Constitution and many others modeled on it. In this constitutional model, the state must enforce individual rights when individuals claim them. Thus, the model of protecting fundamental human rights creates an individual right and creates a state obligation to prescribe, apply, and enforce these rights. As indicated earlier, the model of state sovereignty from an international perspective contained important elements of state absolutism. Thus, individuals could not rely on the state to give practical effect to fundamental rights even if these rights were part of the constitutional system and even if the actual exercise of state power compromises the formal guidance of constitutional prescription.

The paradigm of human rights in the post-war period is a critical component of the concept "we the people," which is not defined in the Charter. We may reasonably assume that the reference to human rights and the concept of "we the people" is also a reference to the civil society concept. In constitutional terms, the civil society is the allocation of competence to the sphere of human relationships where the state's role is attenuated and where it only has limited power to coerce. Thus, a constitution that recognizes the sphere of civil society also recognizes individual rights against the state.

There are certain structural similarities between the international constitutional process and that of a developed rule of law state. There is an

International Bill of Rights and there is an international obligation to limit the state's power. Developed state constitutions have bills-of-rights- or human-rights-inspired prescriptions that also limit the state's coercive power. These general structural similarities cannot be pushed too far. Domestic systems tend to have power relationships that are largely vertical. The international system is somewhat vertical, but still largely is a horizontal system in which the rules of reciprocity and retaliation often serve as positive or negative sanctions.

One of the most important and often unobserved principles of constitutionalism at any level is that constitutional process—like all forms of institutional arrangements—it is not static. In constitutional law, the relationship of power to law is sharp and potent: constitutions allocate power. Claims for power invariably are claims for change in the management of power. This element of social realism may be observed nationally and internationally. If constitutions were simply unchanging doctrines, there only would be the illusion of a working constitutional order. Thus, the proximity of constitutionalism to change, nationally and internationally, means that this is one of the most dynamic branches of law and practice. Because the stakes of allocating power are high, the contestations about constitutional rules and principles are corresponding matters that include important legal and political stakes.

#### VI. IDEOLOGICAL ECONOMIC CONTESTATIONS AND INTERNATIONAL ECONOMIC LAW

The unfinished and contested structure of normative priority for international economic order and social justice reflects the clash of two important but critical, ideological perspectives associated with the original North/South divide. The U.N. General Assembly Resolution on Permanent Sovereignty Over Natural Resources articulated a link between state sovereignty and the sovereign's right and obligation to vest a stronger form of property entitlement in the state itself.<sup>30</sup> The resolution formulated the principle of a state's right to permanent sovereignty over its natural resources. The Resolution touched on critical, practical, and ideological interests. For example, justifying the state's power to control and expropriate property, the Resolutions targeted the economic legacy of colonialism.

Colonial conquest involved the expropriation of indigenous resources. Land was an important resource in colonial conquest and dominance. In traditional African community systems, land defines the identity of indigenous communities. It is the basis of the group itself. The expropriation of land from traditional indigenous people would therefore undermine the foundation of the group and its pattern of social and political solidarity. This

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<sup>30</sup> Resolution on the Permanent Sovereignty Over Natural Resources, G.A. Res. 1803 (XVII), U.N. Doc. A/5207 (Dec. 14, 1962) [hereinafter Resolution on the Permanent Sovereignty] available at [http://www.unhchr.ch/html/menu3/b/c\\_natres.htm](http://www.unhchr.ch/html/menu3/b/c_natres.htm) (last visited on May 31, 2007).

matter arose in southern Africa in the case of *In re Southern Rhodesia*, a decision of the Privy Council of the House of Lords.<sup>31</sup> The sequence of historical events that led to the lawsuit illustrates the problem of the acquisition of land by concessionary agreement under color of colonial law and its ultimate conquest by private sector force. Cecil John Rhodes sent agents of the British South Africa Company (BSAC) to negotiate with the King of the Ndebele for mining rights. The Company was a chartered company under the British Empire. The BSAC assumed that the kingdom was in fact sitting on a treasure trove of valuable natural resources such as diamonds. The famous, or infamous, Rudd concession thus emerged. The concession gave the British South Africa company the right to mine on the Ndebele land. In return for this right, the British Empire gave the indigenous people benefits under the concession. The British used the Rudd concession as a political instrument to justify the conquest of the African state by a private, commercial, and for-profit corporation. In short, the Rhodesian private army used the Rudd concession to conquer Southern Rhodesia.

Having conquered Southern Rhodesia, the British South Africa Company claimed all of the land as its private property. The black people took the case to the Privy Council in 1914. Because of the war, the case was not heard until 1919. The Privy Council ruled that the company had no property right to ownership of the entire state by conquest. The company, in conducting the war of conquest, acted on behalf of the Crown of England. Therefore, the company could not exercise sovereign power as an incident of conquest. However, the court also ruled that the black people had no recognizable legal interest in the land that could be adjudicated in Western courts. In short, they had no right to property. The land belonged to the colonial state, and that state therefore could allocate the land as it saw fit. The colonizers benefited greatly from their control over the colonial politics.

The history of Southern Rhodesia illustrates the process of material dispossession within the framework of colonial rule. In Latin America, the rights of the indigenous people similarly are illustrative. There, colonizers did not recognize the indigenous people's legal interest in their land. Modern economists see these kinds of colonial/feudal style processes as one of the key conditions of endemic poverty and human rights deprivation.

The Resolution on Permanent Sovereignty was a significant effort to change the economic expectations of the colonial era.<sup>32</sup> It also was a critical step in dissolving colonial claims and transitioning the indigenous people towards independence. Most importantly, the Resolution weakened the protection of the right to property in the international environment, as well as colonialists' in light of traditional market-driven concepts of state appropriation of property.

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<sup>31</sup> See *In re Southern Rhodesia* 1919 App. Cas. 211 (P.C. 1918) (S. Afr.).

<sup>32</sup> See Resolution on the Permanent Sovereignty, *supra* note 30.

Meanwhile, the supporters of the new international economic order forged ahead with an important U.N. initiative: the Charter on the Economic Rights and Duties of States.<sup>33</sup> The Charter subsequently was followed by the Declaration on the Right to Development.<sup>34</sup> These instruments forged two principle expectations about the conflicts in international economic order. The Charter and the Declaration vested a great deal of development power in newly freed states. The economic model, apparently incorporated into this state-central ideology, implied a form of creeping socialism.

The principle behind the Declaration on the Right to Development included the idea of sharing economic and technical resources to benefit the new states.<sup>35</sup> The United Nations promoted the principle of sharing as a mandatory, rather than a discretionary, obligation to sustain global equity. It is clear that this evolving international law was confronting two radically contentious ideological perspectives. The first would center on the promise of protecting property in the international environment. The protection of property would be a marker of a state's commitment to a paradigm sympathetic to the global private sector rather than the national or global public sector. The second perspective is associated with the perspectives of international socialists or social democratic ideology. It recognized that the public should control all economic development or that the public shares in the management of the production and distribution of wealth and related values.

The contemporary state of the global economy witnessed the ascent of the privatization of national and global economic institutions. It also witnessed emerging market economies, free trade zones, and the dominant role of corporate enterprise. The mantra of the free trade market phenomena has been "world peace through world trade."<sup>36</sup> The ascent of the private sector is considered to be more efficient and less wasteful than corrupt and inefficient state bureaucracies.

The global institutionalization reflected these developments (the legal and political cultures of the WTO, the IMF, and the World Bank). To some

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<sup>33</sup> See Charter on Economic Rights and Duties of States G.A. Res. 29/3281, U.N. Doc. A/RES/29/3281 (Dec. 12, 1979).

<sup>34</sup> See Declaration on the Right to Development, G.A. Res. 41/128, at 1, U.N. GAOR, 41st Sess., Annex, Agenda Item 101, 97th plen. mtg., U.N. Doc. A/RES/41/128 (1986), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/496/36/IMG/NR049636.pdf?OpenElement> (last visited May 31, 2007).

<sup>35</sup> *Id.* at art. 3(3).

<sup>36</sup> *Lawyer Roles*, *supra* note 2, at 134.

The world peace through world trade movements, spearheaded by the Trilateral Commission, envisaged a global world order under the direction of the captains of corporate monopoly efficiency, a vision which comprises a diffuse human rights agenda focusing on the role of NGO's and an enhanced role for the corporate side of civil society.

*Id.*

degree, they came at the expense of working through the development agencies of the United Nations. However, a significant policy shift had emerged in the global economy. The emergence of a coalition of economically dominant states, the Group of Eight, reflected this policy shift. From a technical point of view, the international economic soft law associated with the new international economic order has become even softer. On the other hand, it is unclear what the general emerging rules are that govern the neo-liberal economy. The institutions of this perspective have been under pressure in part because the *lex specialis* within these institutions is sometimes incompatible with general international law and international human rights law. Moreover, critical appraisal of many of the operational rules often shows that the rules are enforced strictly against the powerless and often ignored by the powerful. Moreover, the efficiency of the model is under critical examination because the outcomes seem to generate greater global disparity and greater global alienation, and some would even suggest, the radical division between rich and poor may be a cause of radical religious activism or possibly even apocalyptic terrorism.

Catastrophic natural events such as the tsunami in Southeast Asia, Hurricane Katrina in the United States, and the recent earthquake in Pakistan raise the question of whether the global collective responses to these natural tragedies are a matter of beneficence and altruism or whether the responses themselves simply generate tacit but important expectations of international soft law obligation. In Africa, the high intensity violent conflicts in many parts of the continent—especially in the Sudan, the horn of Africa, Sierra Leone, and the Democratic Republic of the Congo—also raise concerns about the protection of global peace and security as either a matter of discretionary altruism or legal obligation.

It may be that constructing a stronger moral foundation for global solidarity in the context of natural or man-made catastrophic crises requires that the first step in moral or value justification to be an appeal to the self-interest of the powerful sectors of global society. A compelling argument may be made that the self-interest of the “haves” in security, economic prosperity, and the health of their populations are better protected when those interests are recognized as of critical importance. When that interest is complemented by the idea of global solidarity and the element of altruism, we may have a stronger basis for the design of progressive policies that ensure a commitment to the deprived parts of humanity. In short, helping the poor actually helps the rich as well.

A good deal of modern economic theory seeks to insulate the market from non-market factors. Altruism may be valued only to the extent that it has market value. In short, altruism standing alone as a moral principle may actually be seen as a marker indicating weakness within the functions of market conditions and corporate culture. The business culture thrives on self-interest. This is a reality. Theory might improve the structure and process of both business and the larger social universe if the meaning of self-interest is

defined more broadly to capture the real world of human and economic relations and supplemented by an altruistic gloss to provide a strong justification for broadening the focus and concern of the culture of enterprise.

How does the above discussion impact economic policies relevant to Africa?

Although important strides have been made to improve national and continental governance, to promote more effective, on the ground, economic initiatives, and to promote the rights of women in all sectors, including the economy, the global debate remains clouded and depressing. It is clear that there is a critical agenda of great intellectual and professional importance to be developed and understood. Developing this agenda in the training of tomorrow's leaders will be a small but important step for African progress.

The challenge for law professors now is to take a hard look at all the models that have emerged and to consider the critical components of broader self-interest, elements of altruism, and a commitment to development on a universal basis as an important foundation for ultimately promoting peace, security, and dignity. Africa's lawyers and law professors will have to play important roles in unraveling the mysteries of globalism and defining and defending Africa's interests with competence, skill, and strategic insight.

#### VII. THE MILLENNIUM DECLARATION AND THE REFORM OF THE UNITED NATIONS

The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.<sup>37</sup>

The privatization animus of globalism in the international economic order was one of the factors which generated strong support for a more equitable economic world order. As the millennium approached, a global consensus emerged for the United Nations to spearhead a humanitarian initiative to capitalize on a symbolic moment, which could be given a constructive gloss. The result was the Millennium Declaration (Declaration) that touched on some of the most important questions of elementary economic justice for the deprived segment of humanity.<sup>38</sup> The Declaration was of critical importance to Africa because it represented the articulation of specific objectives with the expectation that these goal would be given a concrete measure of support and a realistic timeline to succeed. The goals represented issues about which there could be no quibbling as to their moral salience, political importance, or, economic feasibility.<sup>39</sup> The importance of the Declaration was its ability to crystallize the central issues of a global justice in a clear and effective

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<sup>37</sup> President Franklin D. Roosevelt, Second Inaugural Address (Jan. 20, 1937).

<sup>38</sup> United Nations Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/2 (Sept. 8, 2000).

<sup>39</sup> *See id.*

manner. This mood is best expressed by former U.N. Secretary General Kofi Annan:

We will have time to reach the [Millennium Development] Goals—worldwide and in most, or even all, individual countries—but only if we break with business as usual.

We cannot win overnight. Success will require sustained action across the entire decade between now and the deadline. It takes time to train the teachers, nurses and engineers; to build the roads, schools and hospitals; to grow the small and large businesses able to create the jobs and income needed. So, we must start now.

And, we must more than double global development assistance over the next few years. Nothing less will help to achieve the Goals.<sup>40</sup>

The specific millennium goals in the Declaration were:

- Goal 1: Eradicate Extreme Hunger and Poverty
- Goal 2: Achieve Universal Primary Education
- Goal 3: Promote Gender Equality and Empower Women
- Goal 4: Reduce Child Mortality
- Goal 5: Improve Maternal Health
- Goal 6: Combat HIV/AIDS, Malaria and other diseases
- Goal 7: Ensure Environmental Sustainability
- Goal 8: Develop a Global Partnership for Development<sup>41</sup>

The millennium goals also were tied to a U.N. reform. U.N. reform generated a complex and difficult debate about what the necessary changes must be. Specifically, any change ultimately would have to be a constitutional change. This meant amending the U.N. Charter. The critical challenge in a world that is vastly uneven in the distribution of power, wealth, respect, and prestige remains one of the most challenging political issues in the global agenda. The report of the Secretary General, *In Larger Freedom*, stressed getting back to the fundamental values which fueled the creation of The Charter: freedom from fear, freedom from want, freedom of conscience and belief, and freedom of assembly.

Two critical issues were the issues of freedom from want (which had a direct tie-in to the Millennium Declaration) and freedom from fear (the fear of global security and conflict management). The problem with these initiatives was that one of the most important powers in the world community, the

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<sup>40</sup> Press Release, Secretary General, Millennium Development Goals Have Unprecedented Political Support, Secretary-General Says at London Event, U.N. Doc. SG/SM/9984 DEV/2527 (June 7, 2005), available at <http://www.un.org/News/Press/docs/2005/sgsm9984.doc.htm>.

<sup>41</sup> See United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 8, 2000).

United States, had experienced a change of government. The new government, led by George W. Bush, was highly skeptical of international law. Indeed, the former ambassador to the United Nations, John Bolton, maintained early on that the United States should be exempt from international law.<sup>42</sup> A similar perspective was indicated by the current Secretary of State, Condoleezza Rice. In order to undermine both the millennium goals and the reform of the U.N. agenda, the Bush administration presented at the last minute, a list of at least 750 changes.<sup>43</sup> This could not have been considered seriously at the diplomatic level and it became clear that the purpose of this vast body of amendments simply was to make the U.N. reform process an illusion. In fact, Ambassador Bolton stated early on that, "There is no such thing as the United Nations. There is only the international community, which can only be led by the only remaining superpower, which is the United States."<sup>44</sup>

#### A. *The United Nations and Global Apartheid*

This Article focuses on two of globalism's principle outcomes. These are the problems of the political economy of globalism and the issue of so-called Global Apartheid. This first issue touches on the most widely used justification of globalism, namely the flow of goods, services, capital and finance, as well as labor. The political economy of globalism has reached extraordinary levels, sustained partly by the immense technological changes in all phases of human communications. In short, there is a global economy, with global priorities, stressing global economic inter-dependence. This economy has generated untold wealth exceeding anything in the past. This economy also has generated a radical cleavage between the states and communities that monopolize much of the wealth and resources of the global economy as against an overwhelming population of deprived people whose position seems to worsen ceaselessly.<sup>45</sup>

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<sup>42</sup> See *Nomination of John R. Bolton: Hearing Before the S. Comm. on Foreign Relations*, 109th Cong. 1 (2005) (statement of John R. Bolton, U.N. Ambassador of the United States).

It is a big mistake for us to grant any validity to international law even when it may seem in our short-term interest to do so, because over the long term, the goal of those who think that international law really means anything are those who want to constrict the United States.

*Id.* See also, Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov./Dec. 2000, available at <http://www.foreignaffairs.org/20001101facomment932/peter-j-spiro/the-new-sovereignists-american-exceptionalism-and-its-false-prophets.html>.

<sup>43</sup> See Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 375 (2004); Winston P. Nagan & Craig Hammer, *Patriotism, Nationalism and the War on Terror: A Mild Plea in Avoidance*, 56 FLA. L. REV. 933, 948 (2004).

<sup>44</sup> Roland Watson, *Bush Deploys Hawk as New UN Envoy*, TIMES ONLINE (London), Mar. 8, 2005, available at <http://www.timesonline.co.uk/article/0,,11069-1515816,00.html> (last visited Oct. 22, 2006).

<sup>45</sup> See Winston P. Nagan, *Law and Post-Apartheid South Africa*, 12 FORDHAM INT'L L.J. 399,

The Report of the Secretary General of the United Nations, titled “In Larger Freedom: Towards Development, Security and Human Rights for All,” gives importance to the freedom from want, freedom from fear, the right to live in dignity, and to the ways in which the institutional architecture of the United Nations might be improved to respond to the central problems of our time.<sup>46</sup> The Secretary General notes that one of the most important issues for the international community is the issue of global poverty. Global poverty contributes to pandemic diseases and compromises global health security. Poverty also breeds alienation, and this in turn fuels violent conflict and the desperation of terrorism. Thus, new forms of terrorism sometimes are conceptualized as apocalyptic forms of terrorism. The Secretary General notes the continued ubiquity of the low and high intensity of conflict and the natural catastrophes that displace millions of people. The report also states that more than one billion people live below the poverty line and subsist on approximately one U.S. dollar per day. Twenty thousand people die as a direct result of poverty each day.<sup>47</sup> Therefore, it is critical that the world community works toward the millennium development goals.

The problem with the millennium goals is that they challenge some of the most fundamental ideological issues concerning the roles of the state and the international community, who act mainly through the United Nations to deliver a core minimum of defensible values incorporating economic and social justice rights. When U.S. President Franklin Delano Roosevelt inserted “freedom from want” into the Atlantic Charter,<sup>48</sup> it reflected his belief, drawn from the American experience, that civil and political rights are diminished if basic economic rights and social entitlements are absent.<sup>49</sup> The New Deal captured this idea in an appealing, yet graphic metaphor: “A chicken in every pot.” It therefore was quite natural for Roosevelt to insert into the war aims of the allies this component as a social justice entitlement for the post-war community.<sup>50</sup> When the instruments based on the universal declaration were adopted, the most controversial one, in an economic context, was the International Covenant on Social, Cultural, and Economic Rights.<sup>51</sup> It was

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399–451 (1989).

<sup>46</sup> See SECRETARY GENERAL, IN LARGER FREEDOM: TOWARDS DEVELOPMENT, SECURITY AND HUMAN RIGHTS FOR ALL, FOR DECISION BY HEADS OF STATE AND GOVERNMENT (Sept. 2005), available at <http://www.un.org/largerfreedom/executivesummary.pdf>.

<sup>47</sup> *Id.*

<sup>48</sup> See The Atlantic Charter, U.S.-U.K., Aug. 14, 1941, available at <http://usinfo.state.gov/usa/infousa/facts/democrac/53.htm>.

<sup>49</sup> See Franklin D. Roosevelt, U.S. President, Inaugural Address (Mar. 4, 1933), in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, VOLUME 2: THE YEAR OF CRISIS 11, 11–16 (Samuel I. Rosenman ed., 1938).

<sup>50</sup> See Franklin D. Roosevelt, U.S. President, The “Four Freedoms” Speech, Annual Message to Congress (Jan. 6, 1941), available at <http://www.fdrlibrary.marist.edu/4free.html>.

<sup>51</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 4 2200A (XXI), U.N. Doc. A/6316 (1966), available at [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm).

vigorously contested whether such rights could be rights at all,<sup>52</sup> or merely goals.<sup>53</sup> Thus there was no binding obligation on states to vindicate them as an international mandate for its citizens.<sup>54</sup> This issue remains highly charged and contested. South African jurisprudence has made an important contribution in determining the extent to which socio-economic constitutional rights fall within the competence of constitutional adjudication.<sup>55</sup> However, it is imperative to locate the Millennium Declaration in its appropriate historic and ideological context.

At the height of the decolonization process, a number of U.N.-inspired instruments were promulgated, which sought to give a stronger imprimatur of legal authority to the issue of global economic justice.<sup>56</sup> Those instruments were in part influenced by the fact that colonial rule in most of the colonized world had been in some degree economically exploitive of the nations under colonial dominance. Thus, the important resolution concerning permanent sovereignty over natural resources was an effort to regress the appropriation of the resources of colonized nations in the interest of the colonial rulers.<sup>57</sup>

The Resolution proved to be incredibly controversial because it suggested that there was an implicit equity, which could support a new state in its need or desire to appropriate property of the colonial rulers on the basis of such property. If the property is characterized as an intrinsic part of the state's natural resources, it could be nationalized or otherwise defined by the new post-colonial elite.<sup>58</sup> This resolution, in effect, touched on a central issue relating to the security of foreign investments. Thus, the Resolution could be used in a just and equitable way and still lead to consequences that are far-reaching in the financial markets of the larger world community. If a state expropriated, even if it had justifiable grounds for doing so, it would be seen as a state hostile to foreign investment. Additionally, the standards for taking the property met an ostensible public purpose but weakened the standard of compensation as well as the time frame for it.<sup>59</sup>

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<sup>52</sup> See *International Human Rights Treaties: Hearing Before the S. Comm. on Foreign Rel.*, 96th Cong., 106 (1979) (statement of Phyllis Schlafly, lawyer, activist, and journalist).

<sup>53</sup> E.V.O. Dankwa & C. Flinterman, *The Significance of the Limburg Principles*, in *INTERNATIONAL LAW AND DEVELOPMENT* 275, 277 (Paul DeWaart, Paul Peters & Erik Denters eds., 1988).

<sup>54</sup> *Id.*

<sup>55</sup> See Danie Brand, *Introduction to Socio-Economic Rights in the South African Constitution*, 2 *L. DEMOCRACY & DEV.* 153 (1998).

<sup>56</sup> See U.N. Decolonization Instruments, available at <http://www.un.org/issues/docs/d-decol.html>.

<sup>57</sup> Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), at 15, 17 U.N. GAOR Supp. No. 17, U.N. Doc. A/5217 (1962), available at [http://www.unhchr.ch/html/menu3/b/c\\_natres.htm](http://www.unhchr.ch/html/menu3/b/c_natres.htm)

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

The above approach clearly challenged the traditional way in which international law protected foreign investment. The primary problem was that international rules protecting foreign investment worked on assumptions that did not take into account the special circumstances of the exploitative character of colonial rule. This became an important ideological objective for the newly independent de-colonized states. The process evolved into what was called a new international economic order. This was in turn sustained by the important view in declaration on the economic rights and duties of states and the declaration on the right to development. The de-colonized world and its allies, generally called “the South,” now confronted the former colonial powers and their allies, generally called “the North.”<sup>60</sup> There were many arenas where such ideological conflicts were contested among the more prominent conflicts and negotiations relating to the Convention on the Law of the Sea.<sup>61</sup> It regularly has been seen that the resources, such as the Manganese Nodules on the deep-sea ocean floor, have been accessible mainly to states that monopolize the technology of deep-sea ocean mining.<sup>62</sup> Thus, the Law of the Sea could mandate a free enterprise approach to the common resources—the heritage of all of humankind—or it could create a common enterprise of sharing, which would be similar to the goals of global social democratic dispensation.

The global forces antagonistic to the principles of New International Economic Order and its assertion of a fundamental right to development began to evolve in ways that sought to weaken the economic role of the United Nations in matters of global economic policy. One strategy essentially was to decouple international economic order from general international law and politics.<sup>63</sup>

As these conflicts evolved in the international community, it became apparent that the U.N. Charter system, general international law, and international economic order were becoming disengaged matters. A diminished U.N. influence meant that general international law and international economic order began to travel in parallel, but always complementary, trajectories. Politics and economics are specialized matters, and their scientific and intellectual universes are both distinct and discrete. The major objectives of the U.N. Charter's include matters of international peace and security.<sup>64</sup> However, the U.N. Charter also suggests that peace and security are important bases for the achievement of other global world priorities, such as respect for the rule of law, human rights, global economic

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<sup>60</sup> See GARRETT NAGLE, *DEVELOPMENT AND UNDERDEVELOPMENT* (1998).

<sup>61</sup> See POLITICS IN THE UNITED NATIONS SYSTEM 175 (Lawrence S. Finkelstein ed., 1988).

<sup>62</sup> See YUWEN LI, *TRANSFER OF TECHNOLOGY FOR DEEP SEA-BED MINING* 1–2 (1994).

<sup>63</sup> See JERZY MAKARCZYK, *PRINCIPLES OF A NEW INTERNATIONAL ECONOMIC ORDER* 166–67 (1988).

<sup>64</sup> See U.N. Charter art. 2, pmb1, *available at* <http://www.un.org/aboutun/charter/> (last visited Apr. 4, 2008).

equity, development, and progress.<sup>65</sup> If the mandate of general international law was unclear about the inter-dependence of peace, political economy, and human rights, the key institutions of Western economic order sought to insulate players such as the International Monetary Fund and the World Bank from being contaminated both by world politics and general international law.<sup>66</sup> In contrast, as indicated, newly emancipated states were strident in defending their permanent sovereignty over their natural resources and sought to integrate a new economic global agenda.<sup>67</sup> The North-South discourse and the New International Economic Order were meant to be the centerpieces of a new world order framework.

*B. The Group of Eight and Its Impact on the New International Order*

The most visible expression of the triumph of the counterrevolution against the New International Economic Order perspective and its commitment to human rights development has been the emergence of a coalition of economically dominant or influential powers known as the Group of Eight or G8. The G8 currently seems to function as a type of de facto “international economic security council.”<sup>68</sup> It clearly has a legal architecture and an immense influence on the international community. However, its inner workings and the living law of the G8 process of norm-setting remains somewhat non-transparent,<sup>69</sup> any poorly-understood, yet critical global policies that affect the lives and well being of billions of people may emerge from the G8’s decision-making process. In the aftermath of the transformation of South Africa, President Nelson Mandela attended a G8 meeting.<sup>70</sup> It was his hope and expectation that the promises to give South Africa the kind of financial assistance necessary for its transformations to a democracy would be honored. As he graphically suggested, the leaders of the G8 came to the meeting with all the pens and papers, but the pens had no ink. According to Mandela:

As long as poverty, injustice and gross inequality persist in our world, none of us can truly rest. . . . The steps that are needed from the developed nations are clear. The first is ensuring trade justice. . . . The second is an end to the debt crisis for the poorest countries. The third is to deliver much

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<sup>65</sup> *Id.* The same Preamble states: “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.” *Id.*

<sup>66</sup> NGAIRE WOODS, *THE GLOBALIZERS: THE IMF, THE WORLD BANK AND THEIR BORROWERS* 182 (2006).

<sup>67</sup> Nagan & Hammer, *supra* note 29, at 180.

<sup>68</sup> *NEW PERSPECTIVES ON GLOBAL GOVERNANCE* 83 (Michele Fratianni et al. eds., 2005).

<sup>69</sup> *See THE NEW ECONOMIC DIPLOMACY: DECISION-MAKING AND NEGOTIATION IN INTERNATIONAL ECONOMIC RELATIONS* (Nicholas Bayne, Stephen Woolcock & Colin Budd eds., 2003).

<sup>70</sup> *Africa to Miss Key Poverty Goals*, BBC NEWS, Jan. 17, 2005, available at <http://news.bbc.co.uk/1/hi/world/africa/4180595.stm>.

more aid and make sure it is of the highest quality. . . . But not to do this would be a crime against humanity, against which I ask all humanity now to rise up.<sup>71</sup>

This experience indicated disillusionment about the predictability and reliability of G8 undertakings. It is important to note that the G8 itself works on a model of so-called “neo-liberal” economic and political perspectives that are reflected in the forces of globalism, the concept of emerging markets, and an implicit political culture which seeks to separate law and politics from economics.<sup>72</sup> The fact that the problems of economic equity are still matters of critical global concern suggests that the focus of attention of many states is on the G8 itself. This is a new field of conflict. The new battleground is the requirement that globalism and its “neo-liberal” animating principles have a human face, a face that has a political and juridical side to it. Prime Minister Tony Blair has insisted that the G8 take a more expansive approach to the problem of global poverty—a matter that is tied to the issue of global debt repayments.<sup>73</sup> Global poverty, which seems to be an institutional part of the new global economic order, has been characterized as a form of economic apartheid.<sup>74</sup> Whatever perspective one takes on the current state of world economic order, it would seem that a great deal of the current structure and process—how this order actually works, what its known generating qualities are, how it impacts upon matters of war and peace, prosperity, and poverty—suggest a critical but necessary focus for the future of legal education and professionalism, at least in Africa.

### C. *The Consequences of the Current Global Economic Order*<sup>75</sup>

The shortest way to get a grasp of the consequences of the current state of global economic order is reflected in numbers. The planet has a population of roughly 6.5 billion people.<sup>76</sup> Every year 30 million people die of hunger,<sup>77</sup> and 800 million people are starving or suffer acute malnutrition.<sup>78</sup> Roughly one

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<sup>71</sup> Nelson Mandela, Address to the Campaign to Make Poverty History at London Trafalgar Square, (Feb. 3, 2005), available at <http://www.anc.org.za/ancdocs/history/mandela/2005/nm0702.html>. See also *In Full: Mandela's Poverty Speech*, BBC NEWS, Feb. 3, 2005, available at [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4232603.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4232603.stm).

<sup>72</sup> DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 66 (2005).

<sup>73</sup> *Aid for Africa: G8 Debt Relief is a Positive Step*, STAR TRIB. (Minneapolis, Minn.), July 2, 2005, at 20A.

<sup>74</sup> ALTERNATIVES TO ECONOMIC GLOBALIZATION 33 (John Cavanagh et al. eds., 2002).

<sup>75</sup> John Hooper, *Pope's Book Accuses Rich Nations of Robbery*, THE GUARDIAN (London), Apr. 5, 2007, available at <http://www.guardian.co.uk/globalisation/story/0,2050253,00.html>.

<sup>76</sup> U.S. Census Bureau, U.S. & World Population Clocks, <http://www.census.gov/main/www/popclock.html> (last visited Apr. 1, 2008).

<sup>77</sup> See Global Policy World Hunger—Social and Economic Policy, [www.globalpolicy.org/soecon/hunger/hungerindex.htm](http://www.globalpolicy.org/soecon/hunger/hungerindex.htm) (last visited Apr. 1, 2008).

<sup>78</sup> See Conscious Alliance, Educate, [www.consciousalliance.org/educate.htm](http://www.consciousalliance.org/educate.htm) (last visited May 8,

billion are underemployed or unemployed.<sup>79</sup> The above figure may be contrasted with the fact that the richest 2 percent of adults in the world own more than half of the global household wealth.<sup>80</sup> The richest 1 percent of adults own 40 percent of the global assets, and the richest 10 percent account for 85 percent of the total world assets.<sup>81</sup> On the other hand, the bottom half of the world adult population owns 1 percent of global assets.<sup>82</sup> Every two minutes four people die from malaria.<sup>83</sup> One in five people (one billion people) in the world survive on less than \$1 a day.<sup>84</sup> Another 1.5 billion live on \$1 to \$2 a day.<sup>85</sup> More than one billion people do not have access to safe water.<sup>86</sup> About 2.6 billion people lack access to improved sanitation.<sup>87</sup> Some authorities hold that approximately five hundred million people on the planet live in relative comfort, which is in stark contrast to the six billion people in the world who struggle to survive and live. Even in the United States, 44.8 million people are deprived of medical health care or coverage<sup>88</sup> and almost forty million Americans live close to or below the poverty line.<sup>89</sup> In short, globalism, which has produced a vast increase in the production of values, seems to fail miserably in the distribution or sharing of those values.

As the new millennium unfolds, statistics indicate that nearly 800 million people are illiterate.<sup>90</sup> This fact illustrates that people basically are powerless. They are treated as economic commodities to be exploited by the powerful or as economic waste matter to be discarded by the market. The adverse effects that the global market has caused does not just include

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<sup>79</sup> See ILO WORLD EMPLOYMENT REPORT 1998–99, [www.ilo.org/public/english/bureau/inf/pr/1998/33.htm](http://www.ilo.org/public/english/bureau/inf/pr/1998/33.htm).

<sup>80</sup> See Worthwhile Canadian Initiative, Growth, [http://worthwhile.typepad.com/worthwhile\\_canadian\\_initi/growth/index.html](http://worthwhile.typepad.com/worthwhile_canadian_initi/growth/index.html) (last visited Apr. 1, 2008). See also, *Richest 2% Hold Half the World's Assets*, FIN. TIMES, Dec 5, 2006, <http://www.ft.com/cms/s/41470ec0-845b-11db-87e0-0000779e2340.html>.

<sup>81</sup> James Randerson, *World's Richest 1% Own 40% of All Wealth, UN Report Discovers*, THE GUARDIAN (London), Dec. 6, 2006, available at <http://business.guardian.co.uk/story/0,,1965149,00.html>.

<sup>82</sup> *Id.*

<sup>83</sup> See Human Development Report 2005, *The State of Human Development*, ch. 1, [http://hdr.undp.org/reports/global/2005/pdf/HDR05\\_chapter\\_1.pdf](http://hdr.undp.org/reports/global/2005/pdf/HDR05_chapter_1.pdf).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> U.S. Census Bureau, Newsroom, Mar. 23, 2007, [http://www.census.gov/Press-Release/www/releases/archives/health\\_care\\_insurance/009789.html](http://www.census.gov/Press-Release/www/releases/archives/health_care_insurance/009789.html).

<sup>89</sup> U.S. CENSUS BUREAU, POVERTY: 2005 HIGHLIGHTS, available at <http://www.census.gov/hhes/www/poverty/poverty05/pov05hi.html> (last visited May 8, 2007).

<sup>90</sup> See HUMAN DEVELOPMENT REPORT 2005, CH. 1: THE STATE OF HUMAN DEVELOPMENT, available at [http://hdr.undp.org/reports/global/2005/pdf/HDR05\\_chapter\\_1.pdf](http://hdr.undp.org/reports/global/2005/pdf/HDR05_chapter_1.pdf).

illiteracy, but other areas including: demographics, the migration of people, issues of conflict, trade, aid, debt, debt repayment, etc. However, this new world order referred to as neo-liberal global economics, is not solely to blame. For example, the economic arrangements in China, India, Brazil, and other parts of Asia demonstrate that each of these state-commanded economies are designated to benefit the elite who are not held accountable by government constraints for their actions.

Further, neo-economic freedoms may vanish much like they did in the former Soviet Union, which it transitioned from a communist state to a capitalist market. These problems include the mass concentration of wealth in actors well-placed in the former communist regime.<sup>91</sup> Many of the dominant communist elite took a lion's share of state-owned enterprises, essentially claiming it as their own property.<sup>92</sup> In order for economic freedom to be preserved, public and private laws need to be implemented and adhered to, in order to prevent a select few from destroying this freedom.

The economic revolutions in India, China, and Brazil were successful because their populations implemented a strong legal framework that did not allow any individual to manipulate the market system. The central flaw in the philosophy of economic liberalization from a lawyer's point of view is the principle that liberalization of anything if unconstrained will result in a license for the liberalizer and oppression for the victim. A specific problem with socialist regimes is that the government can abuse its power of control. The concentration of power does not necessarily mean that everyone shares in it; such a belief is typified by the myth: "dictatorship of the proletariat." In practice, the proletariats likely will be disempowered by the internal elites who manage the power of the state, according to their own interests.

If we take a social democratic state where the power resides in both public and private sectors, a high level of disparity arises. Nonetheless, the power of the various groups, if reasonably well distributed, imposes certain checks and balances sufficient to sustain a reasonably transparent, responsible, and accountable system. For example, in a neo-liberal state, certain groups abhor government interference, except when the government acts in its interest. In this type of state, corporate culture stakes a claim to legitimacy on the basis that state officials and state elites simply are

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<sup>91</sup> Vladimir Volkov & Julia Denenberg, *Wealth & Poverty in Modern Russia*, WORLD SOCIALIST, Mar. 11, 2005, <http://www.wsws.org/articles/2005/mar2005/russ-m11.shtml>.

Twenty percent of the Russian population lives below the poverty line and the great majority of Russian families are teetering on the edge of poverty. Then there is the other Russia, Russia is ranked third in the world for the number of billionaires. The greatest part of shareholdings in the largest Russian enterprises can be found in the hands of this tiny social layer. There are more billionaires in Russia (36) than anywhere else in the world. The total assets of these thirty-six richest Russians amounts to \$110 billion—24 percent of the country's economic output.

*Id.*

<sup>92</sup> JOSEPH RAPHAEL BLASI ET AL., *KREMLIN CAPITALISM* 33–36 (1996).

inefficient.

To generate economic efficiency, it is important to allocate as much power to economic enterprise as possible. Thus, labor unions must be weakened because they represent a dysfunctional limit on the freedom of enterprise. Social spending, spending for education, health, and other public purposes are matters for which the state is an ineffectual distributor. Thus, where possible, these matters must be privatized in order for these enterprises to be most efficiently run. In short, the private arena does not need many rules; the master rule of enterprise is to generate productivity and profit, while stimulating the interest for invention and for economic expansion. The public's fear of depreciation in social and political capital by such a process is seen as a necessary, but short-term, cost for the greater good of society.

The state's imperfections in its exercise of power recreates a need for a strong legal infrastructure that would help to foster the ideals of responsibility, transparency, and change. It is not clear what standards govern decision-making inside major economic enterprises when its business cannot be on an optimal level. Whether power and authority, transparency and openness are invested solely in government or not, we will not have solved the problem of how power itself is controlled, regulated, appraised, and changed in the interest of the people.

## VIII. AFRICAN DEPRIVATION IN GLOBAL CONTEXT

### A. *The Historic Legacy*

I now turn to some of the specific issues concerning Africa. Africa seems to lead the world today as a zone of hardship. It is appropriate for us to consider what has toiled Africa and obstructed its ability for human growth. One of the points made by social critics is that while the centers of economic activity represented by the Asian Tigers significantly improved their gross domestic product, Africa during the same period seemed to move in the opposite direction. Africa is getting poorer. Africans are living shorter lives, while experiencing increased hunger and deprivation.<sup>93</sup> The critical determination is whether South Africa's success can be reciprocated throughout the rest of the African continent. It still requires us to understand what factors serve to undermine the effort of many of Africa's leaders so that we can move Africa in a constructive direction.

The African historical record has a great deal to do with the trans-generational instability that Africa has experienced in the post-independence period. This does not mean that the past rules the future, but it does mean that the societies that benefited from Africa's tumultuous history cannot say that they are absolved from Africa's current predicament. It is well known

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<sup>93</sup> See WORLD BANK'S WORLD DEVELOPMENT REPORT 2000/2001, available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/0,,contentMDK:20195989~pagePK:148956~piPK:216618~theSitePK:336992,00.html>.

that the foundation of their prosperity was rooted in part in the African slave trade. This does not take into account the value of slave labor to Western economies at the birth of the industrial revolution; King Leopold of Belgium, for example, created a personal fiefdom over the Congo and established a regime of murder and brutality that halved the country's population.<sup>94</sup> Recent scholarship demonstrates how the economic, social, and political forces triggered by "Leopold's Ghost" tends to be a component of the Congo tragedy today.<sup>95</sup> The enlightened Charles de Gaulle, astonished by Ahmed Sekou Toure's assertion of dignity, required French administrators to remove even the office furniture when leaving Guinea.<sup>96</sup> The record was simply not a benevolent one as the approach of independence came along. Thus, history is a factor, and the players are not exclusively African. It may well be hard to undo the damage done to Africa without some truth reconciliation and altruistic assistance from former colonial hegemonies.

A second major factor in Africa's depressing development is the "big man syndrome;" African "big men" have proved to be men of small vision. Nigeria, for example, is both blessed and cursed by oil.<sup>97</sup> Since the 1970s, the Nigerians pumped \$300 billion worth of oil. The chief beneficiaries of the oil boom were Nigeria's army dictators.<sup>98</sup> There are numerous examples of leaders who seek to control an African state only to exploit that state for their undivided wealth.

The big man syndrome goes hand-in-hand with corruption. This means that law is inconvenient and possibly even a form of treason when the big man seeks to exercise power without restraint. The big man syndrome and the culture and corruption could not thrive without an international constituency of supporters and beneficiaries. Thus, the problem cannot be resolved through solely African internal mechanisms. With regard to Nigeria's stolen oil money, it is important that there be more transparency and less secrecy to ensure that the state's stolen heritage might be returned. This effort will require law reform, international cooperation, and a willingness to probe and craft claims around which appropriate law and policy may be developed. It should be noted that according to the African Union, corruption appropriates one quarter of Africa's gross domestic product every year, or approximately \$148 billion.<sup>99</sup>

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<sup>94</sup> ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* 233 (1999).

<sup>95</sup> JAMES F. CONWAY, *AFRICA REAWAKENING: WHAT THE CONTINENT DID WITH INTERNATIONAL AID* 28 (2004).

<sup>96</sup> WILLIAM GLENN GARY, *GERMANY'S COLD WAR: THE GLOBAL CAMPAIGN TO ISOLATE EAST GERMANY, 1949-1969*, at 91 (2003).

<sup>97</sup> ALAN H. GELB, *OIL WINDFALLS: BLESSING OR CURSE?* 229 (1988).

<sup>98</sup> KENNETH C. OMEJE, *HIGH STAKES AND STAKEHOLDERS: OIL CONFLICT AND SECURITY IN NIGERIA* 27-28 (2006).

<sup>99</sup> *Global Grease Trade*, WALL ST. J., July 28, 2004.

*B. Contemporary Theories of Sustained Deprivation in Africa*

There are theorists who argue that many African governments are bad and that their governing failures are a function of having to manage and rule countries that are desperately impoverished. Their conclusion is that desperate poverty breeds bad government. African economic deprivation is therefore a function of poverty. Because poverty perpetuates bad government, poverty is sustained.<sup>100</sup> Another view holds that Africa, as a whole, remains impoverished because of the failures of African politics. African leaders are seduced by the big man syndrome. It then is in their interests to prevent the people from improving their economic and political position.<sup>101</sup>

A variation of the above views is attributed to economist Jeffrey Sachs. Sachs suggests that Africa's economic plight is just a matter of bad luck.<sup>102</sup> In addition to the dysfunctions of badly run governments and endemic poverty, Africa's geography often brings economic deficits. These deficits include the soil that produces little food, the vast proliferation of diseases like malaria and AIDS, the concentration of populations away from the coast, and the lack of navigable rivers and decent roads. All these geographic deficits hamper the development of trade and economic growth. Sachs believes that what Africa needs is the equivalent of a Marshall plan.<sup>103</sup>

Under present conditions, Africans have difficulty accumulating capital. These physical disabilities of the continent do not exclude the problems of corruption in the public sphere. But Sachs believes that a Marshall Plan-like initiation might be necessary to make progress. The Marshall Plan idea is generally compatible with the millennium goals and the NEPAD agenda. The Marshall Plan-like program, if given a serious commitment, might accelerate the results envisioned in NEPAD. Indeed, a more generous approach to both trade and aid is better than the current indecision regarding the African economic situation at the global level. A Marshall Plan-like initiation may well drive the wheels of the global economy toward a more progressive and prudent New International Economic Order with a more thoughtful and penetrating conceptualization of development as a human right. A Marshall Plan for Africa, a more generous and less grudging trade and aid package, as well as a realistic approach to crippling debt and its role in sustaining poverty and bad government, may represent a win-win situation for both the North and the South.

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<sup>100</sup> HOWARD WHITE & TONY KILLICK, AFRICAN POVERTY AT THE MILLENNIUM: CAUSES, COMPLEXITIES, AND CHALLENGES 30 (2001).

<sup>101</sup> *Id.*

<sup>102</sup> Andrew Rice, *Why is Africa Still Poor?*, NATION, Oct. 24, 2005, available at <http://www.thenation.com/doc/20051024/rice/4>.

<sup>103</sup> Jeffrey Sachs, *Growth in Africa: It Can Be Done*, ECONOMIST, June 29, 1996, at 19–21.

*C. Corporate Governance, Ethics, and Corruption: Lessons from America*

The United States is regarded as the leading influence of corporate culture in economic organization.<sup>104</sup> The United States frequently sets the standard in the structure and operations of entities in its financial markets.<sup>105</sup> The United States has enormous experience in balancing the economic freedom of corporations and curbing their potential exploitation of consumers, investors, and the markets in which they operate. The United States has been a leader in its jurisprudence of anti-competitive corporate practices in the field of antitrust.<sup>106</sup> In short, the style and methods of doing business by U.S. corporations frequently sets the standards of practice and ethics followed by the rest of the world's business community.

Congress has tinkered with modest reform of corporate governance in an effort to avoid future Enron-style crises.<sup>107</sup> The larger impact of the Enron problem radically eroded public confidence in the market.<sup>108</sup> Corporate leaders now resist the recent congressional reforms.<sup>109</sup> These leaders essentially argue that Congress should repeal the rules that facilitate the chain of decision-making responsibility and mandate transparency because they pose too great a burden on corporations.<sup>110</sup> The problem of the concentration of economic power in powerful corporate entities is, in fact, an allocation of power. As antitrust law recognizes, without regulating the power of a monopoly it will become the foundation of abusive economic power. Furthermore, the abuse of economic power could have large-scale impacts on the political and legal cultures of a society and could generate social unrest and political deterioration.

As Africa moves into the modernization of political economy along neo-liberal lines, African leaders, especially those in the business and legal professions, will have to take a hard look at the models of corporate governance. They will have to ensure responsible exercise of power allocated to these sectors of the economy. Unfortunately, it is extremely difficult to prosecute white collar crime.<sup>111</sup> For Africa successfully to establish a free market system, society and the state must invest in policing white collar

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<sup>104</sup> GARETH MORGAN, *IMAGES OF ORGANIZATION* 128–29 (1997).

<sup>105</sup> KRIS OLDS, *GLOBALISATION AND THE ASIA-PACIFIC: CONTESTED TERRITORIES* 156 (1999).

<sup>106</sup> THIERRY BOURGOIGNIE & DAVID TRUBEK, *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* 43 (Mauro Cappelletti et al. eds., 1985).

<sup>107</sup> *ADVANCES IN CORPORATE FINANCE AND ASSET PRICING* 190 (Luc Renneboog & Piet Duffhues eds., 2006).

<sup>108</sup> LOREN FOX, *ENRON: THE RISE AND FALL* 264 (2002).

<sup>109</sup> JOHN C. BOGLE, *THE BATTLE FOR THE SOUL OF CAPITALISM* 48 (2005).

<sup>110</sup> *CORPORATE FRAUD RESPONSIBILITY: A LEGISLATIVE HISTORY OF THE SARBANES-OXLEY ACT OF 2002*, at 150 (William H. Manz ed., 2003).

<sup>111</sup> LEE DRUTMAN & CHARLIE CRAY, *THE PEOPLE'S BUSINESS: CONTROLLING CORPORATIONS AND RESTORING DEMOCRACY* 197 (2004).

crime. The following U.S. corporate reform suggestions may aid Africa in establishing their free market system:

1. Limit the power of top executives and financial decision-makers who may have the power to use the corporation for inappropriate ends and for personal gain;

2. Allow institutional investors, such as pension fund managers, to nominate independent directors to the boards of the corporations in which they are major investors;

3. Implement an aggressive program to make employees on all levels stakeholders in the corporation itself, thus giving them an interest in the success of the corporation; corporations may achieve this by awarding stock options to employees as bonuses or rewards for excellent company performance;

4. Give blue and white collar employees a direct voice in corporate decision-making to represent the perspectives of professional and non-professional employees in the business to improve the objectivity and quality of corporate decision-making;

5. Reduce salary packages and stock options for top-level executives to avoid artificial inflation of the company's share price; stock options may remain part of an executive incentive package, but the corporation should limit their magnitude to protect and enhance corporate interest.

Africa's economic development problems include corporate overreaching. In South Africa, for example, the public protector found that Petro-South Africa made questionable payments to Imvume Corp. and required payment of outstanding amounts due to Petro-South Africa "without delay."<sup>112</sup> The problem gained a certain public notoriety and earned the use of the term 'Oilgate.'<sup>113</sup>

#### *D. Trade and Development Issues*

The World Trade Organization (WTO) has undergone a continuing crisis of indecision.<sup>114</sup> When the WTO admitted third world players to its process, it had to ensure that third world governments and their advisors understood the complex rules governing world trade and development.<sup>115</sup> Thus, the WTO consistently assumed that third world countries would violate ground rules of

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<sup>112</sup> Linda Ensor, *PetroSA, Imvume Head for Court Over Loan*, BUS. DAY (S. Afr.), Sept. 29, 2006, at Crime, Law & Justice 3.

<sup>113</sup> Vukani Moe & Karima Brown, *Scramble to Contain Fallout from Oilgate*, BUS. DAY (S. Afr.), July 8, 2005, at Crime, Law & Justice 3.

<sup>114</sup> THE WORLD TRADE ORGANIZATION MILLENNIUM ROUND: FREER TRADE IN THE TWENTY-FIRST CENTURY 36 (Klaus Günter Deutsch & Bernhard Speyer eds., 2001).

<sup>115</sup> PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 24 (2005).

world trade. The experience in the organization and the greatest skill of those representing the so-called “South” states began to review more critically the fine print of agreements and regulation to avoid discrimination through the rules and processes of the WTO. Thus, the “South” began to push for a much more informed discussion and a more meaningful agenda reflecting its critical interests. These interests represent Africa’s interests as well. The agenda it put forward contained the following issues:

1. A critical review of the “North” states agricultural subsidies. The \$353 billion of agricultural subsidies given by the North to its farmers radically depresses world prices of agricultural commodities critical to Africa; as a consequence, African produce remains unsubsidized while the North subsidizes its produce, generating manifestly unfair competition;<sup>116</sup>

2. A critical review of WTO rules of the past that institutionalized discriminatory trade consequences for the South;

3. Improved “special and differential treatment” in WTO agreements for the “South” would permit poorer nations to adjust or generate some flexibility in the application of WTO agreements;

4. For improved access to the “North” markets, the least developed countries, including thirty-three in Africa, should be given duty-free rights of access.

5. Enlarged “Aid for Trade” to facilitate the volume of export to “North” markets would improve compliance with WTO rules.

These claims were presented to the WTO process during a period dominated by the mantra of economic liberalization and free trade. The WTO, while making verbal commitments with some measure of empathy for the claims of the South, has in effect done very little to advance them politically or legally. Mr. Tetteh Hormeku of the Third World Network best articulates the nature of the problem from the African prospective:

Trade liberalization has not been beneficial to African economies. We have not improved our location in the global economy. We have not moved out of dependency on primary commodities. We have not moved into more efficient provision of manufactured goods and services. We are on the receiving end of the global economy, which is repatriating our resources and locking in IMF and World Bank conditionalities through trade agreements. . . . What we have at the moment is a trade paradigm that African countries should open up all sectors of their economy to foreign providers in a context that destroys the basis for domestic production and jobs. It can never lead

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<sup>116</sup> See ActionAid, *Reducing Poverty in a World of Plenty: The Crisis of Aid, in IMPACT OF RICH COUNTRIES’ POLICIES ON POOR COUNTRIES* 23, 28 (Robert Picciotto & Rachel Weaving eds., 2004).

an African country out of poverty.<sup>117</sup>

Economists associated with the World Bank projected that under WTO policies and in the aftermath of the Doha Declaration, the economies of the South would generate an enormous amount of wealth, which by 2015 would make a serious dent in the endemic poverty of the South.<sup>118</sup> These figures have been redefined radically downwards, suggesting that the critics of the WTO were sensible in their skepticism of its ostensible promises.<sup>119</sup> In short, it is difficult for Africa to trade its way out of poverty. The resources in the international community exist to generate more aggressive policies for the economic transformation of Africa. Mainstream economists suggest that trade by itself is only weakly related to growth. Economic growth is necessary for poverty alleviation, but it is not a sufficient condition to get the job done. Perhaps the best conclusion about the current state of the global trading regime is the conclusion of Professor Joseph Stiglitz, a former World Bank Nobel Laureate. Stiglitz says,

Both as it was conceived, and even more as it has evolved, today's development round does not deserve its name . . . . Many of the issues that it has addressed should never have been on the agenda of a genuine development round, and many issues that should have been on the agenda are not. . . . Those in the developing world who believe that there has been a history of bargaining in bad faith have a strong case.<sup>120</sup>

Conclusions can be drawn from the two illustrations of enterprise economics in the global system. The major role lawyers play in defining the maximum freedom for the corporate or entrepreneurial sector indicates that a corporation with an army of lawyers might fare well in the system. Conversely, when governments and private sector watchdogs seek to police the business sector, they often cannot generate the legal muscle to constrain corporate or economic license. This presents a challenge to the legal profession and to the teaching of law. An effective and socially responsible corporate or legal culture may function optimally when it works within a framework of established rules expeditiously and fairly enforced.

It is hard to imagine a successful capitalist system without an excellent commercial and corporate legal framework. This framework is in fact a central feature of a working, dynamic, entrepreneurial system. When the system works well, the corporate lawyers themselves, within the

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<sup>117</sup> Michael Fleshman, *Trade Talks: Where is the Development?*, 20 AFR. RENEWAL 14 (2006), available at <http://www.un.org/ecosocdev/geninfo/afrec/vol20no1/201-trade-talks.html> (quoting Tetteh Hormeku).

<sup>118</sup> WILLIAM R. CLINE, TRADE POLICY AND GLOBAL POVERTY 282 (2004).

<sup>119</sup> Kym Anderson et al., *Global Impacts of the Doha Scenarios on Poverty*, WORLD BANK DEV. RES. GROUP ELECTRONIC NEWSL. (World Bank), Sept. 2005, available at [http://siteresources.worldbank.org/INTRANETTRADE/Resources/Topics/285683-1109974429289/Chapter17\\_Trade&Povertybook\\_Hertel&Winters.pdf](http://siteresources.worldbank.org/INTRANETTRADE/Resources/Topics/285683-1109974429289/Chapter17_Trade&Povertybook_Hertel&Winters.pdf).

<sup>120</sup> Joseph Stiglitz, *The Development Round that Wasn't*, ECON. TIMES (India), Dec. 15, 2005.

corporations, serve as an internal restraint to ensure compliance with the law and to ensure further that corporate energy and resources are not wasted on public investigations and possible prosecutions. The WTO system also seems to have developed without regard to effective input from the lawyers of the South. When they finally learned the rules of the game, those who benefited from the unfair system were reluctant to modify the rules sufficiently to reflect the fundamental policies of world economic order. It is clear, however, that without a legal framework that is defensible, free trade may become unfair trade, and grotesque exploitation may lead to conflicts and alienation.

Thus, there must be some circumspection about how the global economic system appropriately is regulated so that corporate activity falls within the fundamental norms established by law. There is no obvious or easy answer to the problem of managing power, material, technological and financial resources, and common rules that function within and across state lines without a framework of developed legal expectations. Lawyers must play a major role in organizing the business of teaching business; they can outline appropriate legal standards to enhance accountable and responsible enterprise. In short, the ideological principle that enterprise behavior does not include social responsibility is no longer tenable. However, this new view requires more focus on the development of evolving legal rules and principles that touch on many areas of law—domestic, regional, and international.

#### IX. MODERN INTERNATIONAL LAW, PRIVATIZATION, AND THE MANAGEMENT OF VIOLENCE AND WAR

The central point of any constitution is to manage power, prevent destructive conflict, or channel conflict in ways that are constructive regarding human values. Thus, war and the institutions of war remain critical challenges for constitutional stability and the viability of the constitutional system itself. The League of Nations, with its unanimity rule, could not constrain state sovereignty in terms of international peace and security. The Second World War destroyed the League of Nations as an international constitutional regime. After the War, the U.N. Charter's first principle was to create a constitutional system that in some measure could constructively account for the cooperation of the major global powers to maintain peace and security.

As we examine the global society in this millennium, we see that the role of the state globally, while still critically important, has undergone considerable change. The retreat of state absolutism has tended to enhance the space for the civil society of business, non-governmental organizations, individuals, as well as the socially deviant global society. The international constitutional system is undergoing change. Sometimes change is reflected in the operational code of rules and understandings in the system. Sometimes these rules directly conflict with the official rules of the system. Change is often untidy, and legal scholars and practitioners have a critical role to play in understanding which changes have become operational laws and which

rules of conventional law have been confirmed or depreciated.

The dynamic aspect of international constitutional law in the global community today provides an illustration of the challenges emerging in this millennium. We immediately recognize that there are many more actors than the state. Often, non-state actors are the most critical factors in the prescriptive application and enforcement of international human rights law. The role of civil society has created a virtual global pressure group of human rights activists. The central element of emerging international constitutional order is the unruly, often untidy world of civil society.

Scholars interpret the emergence of global civil society as a double-edged sword. As Professor R. J. Rummel has indicated, the state, with its access to modern lethal instruments of destruction, has proven to be a vast engine of mass murder. There is a plea for the relevance of the minimal state. Rummel indicates that between 1900 and 1980, murder by state and quasi-state operatives accounted for the deaths of some 180 million people.<sup>121</sup> In short, concentrating power in the state is dangerous to the existence of humanity.

Conversely, the cluster of interest and pressure groups in civil society are uneven and unpredictable. While elements of civil society such as Amnesty International Human Rights Watch are good for humanity, organized crime and drug-controlled cartels are dangerous. Scholars question whether, as an ideological matter, allocation of power from the state to the private sector solves the power problem at all. The almighty state, which lacks checks and balances or the elements of transparency, responsibility, and accountability, is indeed a dangerous political artifact. On the other hand, shifting the power to civil society may not altogether solve the power problem.

One point is very clear: the idea of civil society, viewed from a global perspective, is to a very large extent viewed as an incipient form of global democratization. Although, as an ideological construct, it may not prove sufficiently sensitive to the reality of the distribution of power in the global civil society, civil society is nonetheless ideologically promoted as a very critical component of an improved world order.

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<sup>121</sup> ROBIN MURPHY WILLIAMS, JR., *THE WARS WITHIN: PEOPLES AND STATES IN CONFLICT* xii (2003).

A. *Private Military Contractors, Globalism, and World Order*

Africa remembers with horror the role of mercenaries<sup>122</sup> running amok across the continent, spreading chaos in the difficult period of political transition to independence. Notorious mercenaries, such as Mike Hare and Bob Denard, seemed to specialize in the overthrow of governments and in the assassination of political leaders.<sup>123</sup> Today, South Africa boasts of one of the prototypes of the modern private military contractor, Executive Outcomes.<sup>124</sup> Executive Outcomes does not exist in its original corporate form today. Rather it has gone global and combined resources and capabilities with British interests. Executive Outcomes is reported “active all over Africa.”<sup>125</sup> The organization seemed particularly interested in performing its services where the stakes touch on mineral and oil interests.<sup>126</sup>

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<sup>122</sup> Article 47 of the 1977 Protocol I addition to the 1949 Geneva Conventions defines the term mercenary as:

any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; b) does, in fact, take a direct part in the hostilities; c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; e) is not a member of the armed forces of a Party to the conflict and f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Protocol Addition to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 47, June 8, 1977, 1125 U.N.T.S. 3, 13 I.L.M. 1391 (entered into force Dec. 7, 1979), available at <http://www.unhcr.ch/html/menu3/b/93.htm>. For another definition of mercenaries, see Fred Schreier & Marina Caparini, *Privatizing Security: Law, Practice and Governance of Private Military and Security Companies*, (Geneva Centre for the Domestic Control of Armed Forces, Occasional Paper No. 6, 2005), available at [http://www.smallarmssurvey.org/files/portal/issueareas/security/security\\_pdf/2005\\_Schreier\\_Caparini.pdf](http://www.smallarmssurvey.org/files/portal/issueareas/security/security_pdf/2005_Schreier_Caparini.pdf).

<sup>123</sup> ROGER PFISTER, APARTHEID SOUTH AFRICA AND AFRICAN STATES: FROM PARIAS TO MIDDLE POWER, 1962–1994, at 34 (2005).

<sup>124</sup> “Created in 1989, EO (Executive Outcomes) is an incorporated private security group registered in Great Britain and South Africa. EO markets its military expertise in achieving regional security and stability through the deployment of trained and experienced military personnel.” DAVID ISENBERG, SOLDIERS OF FORTUNE LTD: A PROFILE OF TODAY’S PRIVATE SECTOR CORPORATE MERCENARY FIRMS (1997), available at [http://www.totse.com/en/politics/us\\_military/armylove.html](http://www.totse.com/en/politics/us_military/armylove.html) (last visited June 7, 2007). The company ceased operations under the name Executive Outcomes in 1999. See Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT’L L. 521, 535 (2004); see also *South Africa: Executive Outcomes to Terminate its Activities*, S. AFR. PRES. ASS’N, Dec. 9, 1998, available at [http://nl.newsbank.com/nl-search/we/Archives?p\\_product=NewsLibrary&p\\_multi=BBAB&place=BBAB&p\\_theme=newslibrary2&p\\_action=search&p\\_maxdocs=200&p\\_topdoc=1&p\\_text\\_direct=0&F98E7C3A7F038C0&p\\_field\\_direct=0&document\\_id&p\\_perpage=10&p\\_sort=YMD\\_date:D&s\\_trackval=GooglePM](http://nl.newsbank.com/nl-search/we/Archives?p_product=NewsLibrary&p_multi=BBAB&place=BBAB&p_theme=newslibrary2&p_action=search&p_maxdocs=200&p_topdoc=1&p_text_direct=0&F98E7C3A7F038C0&p_field_direct=0&document_id&p_perpage=10&p_sort=YMD_date:D&s_trackval=GooglePM).

<sup>125</sup> GLEN SEGELL, STABILITY AND INTERVENTION IN SUB-SAHARA AFRICA 28 (1998).

<sup>126</sup> *Id.*

One of the high visibility issues involving private military contractors in Africa has been tied to the issue of so-called “conflict diamonds” or, more dramatically, “blood diamonds.” Essentially, in African countries with high intensity conflicts, natural resources such as diamonds may be used to fund private military operators. These operators may come in to defend the state or to destroy the government. The government may be a weak democracy or a vulnerable authoritarianism. The government’s detractors similarly may be movements of liberation or movements concerned with power and privilege regardless of cost. Countries implicated in the conflict diamonds matter included Angola, Liberia, Ivory Coast, the Democratic Republic of the Congo, and the Republic of the Congo. In a complex deal encoded in the so-called Kimberly Process—which is an international intervention involving the United Nations—the international conglomerates involved in the diamond industry as well as civil society produced a process designed to remove conflict diamonds from their role in funding ruthless conflicts on a seemingly endless timeline. The Kimberly Process requirements are summarized as follows:

- Each shipment of rough diamonds crossing an international border must be:
  - Transported in a tamper-resistant container.
  - Accompanied by a government-validated Kimberly Process Certificate.
- Each certificate must be resistant to forgery, uniquely numbered and describe the shipment's contents.
- The shipment can only be exported to another Kimberly Process participant country.
- It is illegal for uncertified shipments of rough diamonds to be imported or exported by a Kimberly Process participant country.
- Failure to comply with these procedures can lead to confiscation or rejection of parcels and/or criminal sanctions.
- If any concerns arise regarding a country’s adherence to the Kimberly Process, they are investigated and handled at an intergovernmental level.<sup>127</sup>

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<sup>127</sup> DiamondFacts.org, Eliminating Conflict Diamonds, [http://www.diamondfacts.org/conflict/eliminating\\_conflict\\_diamonds.html](http://www.diamondfacts.org/conflict/eliminating_conflict_diamonds.html) (last visited Apr. 2, 2008). Conflict diamonds came to the attention of the world media during the extremely brutal conflict in Sierra Leone in the 1990s. The United Nations, governments, the diamond industry, and non-governmental organizations (such as Global Witness, Amnesty International, and Partnership Africa Canada) recognized the need for a global system to prevent conflict diamonds from entering the legitimate diamond supply chain helping to fund conflict.

They developed an agreement called the Kimberly Process. This process requires participating governments to ensure that each shipment of rough diamonds be exported or

Executive Outcomes no longer exists. It has merged into a still larger operation known as Omega Security. Observers claim that 50 percent of the private military contractors (PMCs) working in Iraq work for Omega Security.<sup>128</sup> By the time the Iraq war ends, very strong PMCs with close ties to Africa will have developed. This could have important and under-appreciated consequences for African security interests. For example, assume the now well-financed, experienced Omega Security is in search of new security missions in Africa. Omega might be tempted to engage in activities that might have a profound impact on the African state system under the new African Union Constitution. To illustrate this point, assume a minority dictator emerges in a Southern African state like Lesotho or Botswana. To maintain power, the dictator might engage an experienced security organization like Omega to maintain that leader's grip on power in the state. It is possible to hypothesize a potential threat to South Africa, Africa's most important democracy.

The private military and security contracting industry today is an industry experiencing exponential growth and development.<sup>129</sup> Industry

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imported in a secure container, accompanied by a uniquely numbered, government-validated certificate stating that the diamonds are from sources free of conflict.

Under the Kimberley Process, diamond shipments can only be exported and imported within countries which participate in the Kimberley Process. No uncertified shipments of rough diamonds are permitted to enter or leave a participant's country. This ring-fences conflict diamonds and ensures they are unable to enter the legitimate diamond supply chain. Thus, they cannot be used for illegitimate purposes.

In November 2002, 52 governments ratified and adopted the Kimberley Process Certification System. It was fully implemented in August of 2003.

Today, 71 governments, in partnership with the diamond industry and NGOs, are committed and legally bound to the U.N.-mandated process. Kimberley Process participants currently account for well over 99 percent of the global production of rough diamonds.

Kimberley Process participants undergo periodic reviews, along with peer monitoring to ensure compliance. Furthermore, all rough diamond sales are independently audited. They also are subject to separate governmental regulations. Any country that is found not to be in compliance can be sanctioned under the Kimberley Process.

All participant countries are monitored closely. A recent Kimberley Process Review Mission to Brazil noted anomalies and weaknesses within the country's procedures. The Brazilian Government took definitive action by suspending its official exports of rough diamonds and is in the process of working with the Kimberley Process to remedy the situation as soon as possible. *See id.* *See also* The Kimberley Process, Background, [http://www.kimberleyprocess.com/background/index\\_en.html](http://www.kimberleyprocess.com/background/index_en.html).

<sup>128</sup> On Omega Security, see Private Military Contractor, Answers.com, <http://www.answers.com/topic/private-military-company> (last visited Apr. 8, 2008).

<sup>129</sup> CAROLINE HOLMQVIST, PRIVATE SECURITY COMPANIES THE CASE FOR REGULATION 12 (2005), available at [http://www.sipri.org/contents/conflict/SIPRI\\_PolicyPaper9.pdf](http://www.sipri.org/contents/conflict/SIPRI_PolicyPaper9.pdf).

A variety of both demand- and supply-side factors have been associated with the rise of the current corporate security sphere, although three factors are most often cited: (a) the dominance of post-cold war free market models of the state, propelling a strong trend towards the outsourcing of traditional government functions; (b) the global downsizing of national militaries, providing a vast pool of trained former military personnel for recruitment by private companies; and (c) the gradual disengagement of

leaders maintain that the growth of the industry is a function of identifying the appropriate market niche.<sup>130</sup> The industry also has been skilled in sometimes creating its own market or capitalizing on events that may have market possibilities. The War on Terror, launched by President George W. Bush after 9/11, has been a boon to the industry. The industry also has sought to involve itself in humanitarian relief efforts,<sup>131</sup> including relief in the United States. Private military contractors serve governments and international organizations, as well as humanitarian groups, business groups, and others. Although we have used the omnibus terms—private military contractors—they are sometimes described as private military companies,<sup>132</sup> military service providers,<sup>133</sup> and, more generally, as the privatized military industry.<sup>134</sup> They can use a corporate business form<sup>135</sup> to

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the major powers from many parts of the developing world.

*Id.*

<sup>130</sup> Peter W. Singer, *The Dogs of War Go Corporate*, LONDON NEWS REV., Mar. 19, 2004. “PMCs now operate in more than 50 countries and do up to \$100 billion business a year.” *Id.* A nearly two-year investigation by the International Consortium of Investigative Journalists (ICIJ) reported the existence of at least 90 PMCs that have operated in 110 countries worldwide. According to Glüsing and von Ilsemann, “80 such companies were involved in the Angolan civil war alone between 1975 and 2003, companies staffed with decommissioned gladiators from all over the world: French Foreign Legionnaires, South African paratroopers, Ukrainian pilots, Nepalese Gurkhas.” J. Glüsing & S. von Ilsemann, *Gladiators for the Hire*, DER SPIEGEL, May 3, 2004.

<sup>131</sup>

The emerging marketplace of private military provision offers humanitarian organisations a means to enhance their capacities without turning to traditional state military assistance. This option is being chosen by humanitarian clients, albeit very quietly. However, with greater power comes greater responsibility. The privatised military industry may open up a range of possibilities, but it also poses some fundamental questions that go to the heart of the humanitarian identity.

RESETTING THE RULES OF ENGAGEMENT: TRENDS AND ISSUES IN MILITARY-HUMANITARIAN RELATIONS 75 (V. Wheeler & A. Harmer eds., 2006), *available at* <http://www.odi.org.uk/HPG/papers/hpgreport21.pdf>. But there is a risk for humanitarian agencies in dealing with PMCs. *Id.* at 76 (citing an email correspondence with Doug Brooks, President of the International Peace Operations Association (IPOA), an association of private contractors, which states that “[t]oo many NGOs would risk their funding bases if it were publicized that they were working with the peace and stability industry, no matter what the humanitarian benefits”).

<sup>132</sup> “The term private military company (PMC) does not exist within any current international legislation or convention.” Schreier & Caparini, *supra* note 122, at 17.

<sup>133</sup> “Companies that provide military services internationally are termed *Military Service Providers*. Most MSPs need little if any additional regulation beyond existing commercial laws since their services are said to be nonviolent and beneficial to humanitarian and international operations.” *Id.* at 36.

<sup>134</sup> Because PMC operations are often controversial, some “prefer to call themselves Security Company in order to attract less attention from the media, to have a better claim to legitimacy or less reason to fear regulation.” *Id.* at 18.

<sup>135</sup> Ortiz explains:

PMCs might also be considered a result of the expansion of the broader security sector

provide services to a global market for which there is considerable demand.<sup>136</sup>

A discriminating appraisal of the institution of privatized military actors, in a historical perspective, demonstrates an astonishing ubiquity in the conduct of human warfare. Mercenaries and other private forces provided such services long before the modern state was recognized as a dominant political construction.<sup>137</sup> Some states specialized in warfare and the sale of their skills as a means to prosperity. One of the fathers of the French Revolution said of Prussia that it was “not a state with an army, but an army

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over the last two decades. Both the security and the military business satisfy a demand for protection. However, this overlapping of protective functions need not imply that the frameworks established to regulate security firms are effective sanctioning mechanisms for PMCs. Besides the intrinsic military nature of PMC services, the defensive and offensive potential delivered or transferred by PMCs distinguishes them from security firms. This requires careful consideration at a time when both businesses expand and consolidate rapidly. For instance, many security corporations have expanded their catalogue of services to include the military element absent in the past. One of the strategies followed has been by way of taking over PMCs.

Carlos Ortiz, *Regulating Private Military Companies: States and the Expanding Business of Commercial Security Provision in* GLOBAL REGULATION: MANAGING CRISES AFTER THE IMPERIAL TURN 205 (2004).

<sup>136</sup> MAJ. S. GODDARD, THE PRIVATE MILITARY COMPANY: A LEGITIMATE INTERNATIONAL ENTITY WITHIN MODERN CONFLICT (2001), available at <http://www.globalsecurity.org/military/library/report/2001/pmc-legitimate-entity.pdf>.

The West became (politically) unwilling to commit and risk its own military forces in an effort to resolve regional conflicts and humanitarian disasters for fear again of “crossing the Mogadishu Line.” Lacking determined international action in the form of direct intervention from the West, less powerful and developed nation-states could not guarantee their own security, nor provide for and raise effective national armies against interstate wars and internal civil wars. This situation resulted in an increasing world demand for PMCs that could create and contribute to nation-states’ security.

*Id.*

<sup>137</sup> Mercenaries have existed since at least the Fourteenth Century:

The privatization of conflict is not a new phenomenon; it was widely practiced until the 1800s. As kings and princes tried to extend their control over new tracts of land, the feudal system of military service prevented them from raising the required larger armies. This constraint led them to employ mercenaries. . . . The early European use of organized mercenaries was in the form of private bodies in the 14th century known variously as Free Companies or Great Companies. These organizations ultimately developed in Italy as condottieri (literally, military contractors), who offered their services to the highest bidder. The condottieri system maintained fairly permanent companies of armed military specialists that were hired out for set periods to various Italian states. This practice of offering large private armies for hire flourished through the 17th century. As early as the 15th century, however, some sovereigns were already finding these large private armies to be a threat to their own security. As a consequence, they began to integrate individual mercenaries into their own armies or hire the services of other army units from another ruler. By the 18th century, this was a fairly common practice, as the British demonstrated with their use of Hessians to fight in the American Revolution.

Eugene Smith, *The New Condottieri and US Policy: The Privatization of Conflict and Its Implications* PARAMETERS, Winter 2002–03, at 104–05 (footnotes omitted), available at <http://carlisle-www.army.mil/usawc/Parameters/02winter/smith.pdf>.

with a state.”<sup>138</sup> Indeed, mercenaries fought on the side of George Washington during the American Revolution.<sup>139</sup> Today, private military contractors are not simply mercenaries, but a much more complex structure of for-profit security services. The line between services and actual combat operations often becomes indistinguishable, and it is sometimes unclear whether private operators actually are functioning in conventional military roles or whether their roles are ostensibly distinct.

The U.N. International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries<sup>140</sup> has not received a great deal of state support. It intuitively is felt that mercenaries represent unorganized forces in the international system and contribute to anarchy rather than stability.<sup>141</sup> Meanwhile, the trend is to outsource or significantly privatize military functions for a variety of reasons. In general, democracies tend to

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<sup>138</sup> See PETER W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 37 (2003) (quoting Marquis de Mirabeau, one of the fathers of the French Revolution).

<sup>139</sup> America has a long history of using private contractors to support its military:

Contractors have been routinely operating on our battlefields throughout most of our recorded history. Factory to foxhole support is not a new phenomenon. American history is replete with examples of contractor presence in federal and military operations. It is well documented that our founding father, George Washington utilized contractors to design and lay out our nation's capital. During the American Revolution, the Continental Army was besieged with inefficiencies permeating throughout the logistical supply system. The leadership sought out solutions to devise an efficient support infrastructure. So civilians were employed to drive wagons: provide architectural, engineering, and carpentry services; obtain foodstuffs; and deliver medical services. Robert Morris, one of the first heads of the Treasury Department, observed that, 'Experience has sooner or later pointed out that contracts with private men of substance and talents equal to understanding as the cheapest, most certain and consequently the best mode of obtaining those articles, which are necessary for the subsistence, clothing and moving of any army. The primary mode of land transportation from 1776 until the 1920's was the horse or mule drawn escort wagon. Although it appeared to be a simple device, the wagon was, in fact, a complex technology that required the skills of wheelwrights, farriers, blacksmiths, carpenters, and harness makers to keep it in sound working order. This important tactical transportation mechanism required the concerted efforts of all those skilled contract laborers in order to build and maintain them.

MICHAEL MCBRIDE, *THE PROLIFERATION OF CONTRACTORS ON THE BATTLEFIELD: A CHANGING DYNAMIC THAT NECESSITATES A STRATEGIC REVIEW* 3 (2003), <http://handle.dtic.mil/100.2/ada415747> (last visited Apr. 1, 2008).

<sup>140</sup> International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, 29 I.L.M. 91 (1990), *available at* [http://www2.ohchr.org/english/issues/mercenaries/docs/1989UNConvention\\_English.pdf](http://www2.ohchr.org/english/issues/mercenaries/docs/1989UNConvention_English.pdf).

<sup>141</sup> Machiavelli wrote:

The mercenaries and auxiliaries are useless and dangerous, and if anyone supports his state by the arms of mercenaries, he will never stand firm or sure, as they are disunited, ambitious, without discipline, faithless, bold amongst friends, cowardly amongst enemies, they have no fear of God, and keep no faith with men.

NICCOLO MACHIAVELLI, *THE PRINCE AND OTHER WRITINGS* 52 (Wayne Rebhorn trans., Barnes & Noble Classics 2003).

resist compulsory military service and reductions in manpower, suggesting that outsourcing or privatizing certain military functions are important strategies for organizing defense. PMCs have been growing in importance in the current world-order situation, and the industry itself is worth around \$200 billion and is rising.<sup>142</sup> PMCs' services include carrying out risk appraisals, training local police or paramilitaries, providing site security, strategic transportation services, intelligence for securing buildings and facilities in the public and private sphere, supplementing war zone needs, facilitating weapons procurement, providing logistics and support services for armed forces (air, sea, and land), providing computer and cyber security, distributing surveillance propaganda, carrying out covert operations, providing bodyguards, and destroying weapons systems.

### *B. The Privatization of the Military and the Changing Role of the State*

When Donald Rumsfeld became Secretary of Defense for the second time, he implemented a policy consistent with the Thatcher-Reagan economic revolution. The economic policy associated with these themes was simply that any activity engaged in by the state that had economic value and that conceivably could be done by the private sector should be privatized. The Rumsfeld version of this idea was that any function involving the military that could conceivably be done by the private sector should be given to the private sector to perform as a normal business enterprise.<sup>143</sup> The War on Terror with its indefinite timeline and its wide-ranging terrain of threat has proved to be a vital market niche. It has stimulated the industry. Frequently, such corporations boast of vast numbers of retired military personnel who involve themselves in the functions of the business.<sup>144</sup> One U.S.-based PMC

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<sup>142</sup> "PMCs are involved in practically all aspects of warfare in a global market worth an estimated \$US 200 billion per year." Daniel Lachance, *Military Forces for Hire: Is the World Ready to Privatize Peace?* (Apr. 29, 2005) (unpublished research project, Canadian Forces College), available at <http://wps.cfc.forces.gc.ca/papers/csc/csc31/mds/lachance.pdf>. See also JOANNA SPEAR, *FAFO, MARKET FORCES, THE POLITICAL ECONOMY OF PRIVATE MILITARY COMPANIES, ECONOMIES OF CONFLICT: PRIVATE SECTOR ACTIVITY IN ARMED CONFLICT, NEW SECURITY PROGRAMME 41* (2006), available at <http://www.fafon.org/pub/rapp/531/531.pdf> ("Given the projected growth in the international trade in private security—annual global revenues are expected to increase by seven percent annually, reaching \$200 billion by 2010.")

<sup>143</sup> See Jack M. Bear, *Agora: Military Commissions Act of 2006: The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 AM J. INT'L L. 56, 66 n.61 (2007) ("The Pentagon has estimated that there are 100,000 government contractors operating in Iraq, doing such jobs as serving meals, guarding convoys and interrogating prisoners." (quoting Griff Witte, *New Law Could Subject Civilians to Military Trial*, WASH. POST, Jan. 15, 2007, at A1)). Although then-Secretary of Defense Rumsfeld defended the extensive use of private contractors in Iraq by saying it "frees up military personnel in combat zones," there has been considerable disagreement about what constitutes appropriate "nonmilitary" missions for these contractors. Peter Spiegel, *U.S. Is Faulted for Using Private Military Workers*, L.A. TIMES, May 24, 2006, at A26; see also William Neikirk, *Use of Contractors for Military Purposes Under Scrutiny*, CHI. TRIB., May 9, 2004, at C16.

<sup>144</sup> See Myriam Gilles, *Association of American Law Schools: Private Parties as Defendants in Civil Rights Litigation: Price Considerations in the Market for Corporate Law*, 26 CARDOZO L. REV. 1, 6 n.21 (2004). Gilles notes:

boasts that it has more generals per square foot working for it than the Pentagon itself.<sup>145</sup>

The recent trend in the acceleration of Private Military Corporations<sup>146</sup> has generated controversy and complexity about the law that is to control and regulate these entities.<sup>147</sup> The problems sometimes underscore the limits of national law when the entities work and possible transgressions internationally.<sup>148</sup> It is acknowledged widely that national law only weakly controls the structure and functions of PMCs.<sup>149</sup> Since PMCs are not states, it

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Outsourcing of services to the armed forces has been on the rise since the end of the Cold War and the concomitant downsizing of the world's huge standing armies. In 1991, the U.S. military numbered 2 million; today, it's 1.5 million. Thousands of newly unemployed special forces and intelligence officers signed up with the burgeoning private security industry. The difference is that a decade ago, the industry was mainly used by multinational corporations and oil companies operating in high-risk regions. Today, after 9/11 and the war on terror, its biggest client is the Pentagon. There are hundreds of for-profit companies, mainly American, some British, with about 20,000 personnel in Iraq, doing traditional military work, including intelligence. That makes private contractors the largest contingent after the U.S. military, far outnumbering the British forces. Many analysts believe that it was the under-deployment of troops (only 130,000 were sent, whereas the military recommended deploying over 250,000) that led to the unprecedented number of private contractors being used in Iraq.

*Id.* See also Spencer E. Ante, *The Other Army*, BUS. WEEK., May 31, 2004, at 76.

<sup>145</sup> See Esther Schrader, *U.S. Companies Hired to Train Foreign Armies*, L.A. TIMES, Apr. 14, 2002, at A1.

<sup>146</sup> "The increase in the use of PMCs has grown dramatically these last fifteen years. During the first Gulf War in 1991 for every one contractor there were 50 military personnel involved. In the 2003 conflict the ratio was 1 to 10." David Isenberg, *A Government in Search of Cover: PMCs in Iraq*, British American Security Information Council 5 (Mar. 23–24, 2006), available at <http://www.basicint.org/pubs/Papers/pmcs0603.pdf>.

<sup>147</sup> Singer describes some of these complexities:

[Private Military Firms] also create legal dilemmas, the fourth sort of policy challenge they raise. On both the personal and the corporate level, there is a striking absence of regulation, oversight, and enforcement. Although private military firms and their employees are now integral parts of many military operations, they tend to fall through the cracks of current legal codes, which sharply distinguish civilians from soldiers. Contractors are not quite civilians, given that they often carry and use weapons, interrogate prisoners, load bombs, and fulfill other critical military roles. Yet they are not quite soldiers, either. One military law analyst noted, "Legally speaking, [military contractors] fall into the same grey area as the unlawful combatants detained at Guantánamo Bay."

Peter W. Singer, *Outsourcing War*, FOREIGN AFF., Mar./Apr. 2005, at 119, available at <http://www.brookings.edu/views/articles/fellows/singer20050301.htm>.

<sup>148</sup> Indeed, "[m]ilitary privatization entered the popular consciousness in early 2004, when private contractors working as interrogators and translators for the U.S. government abused detainees at Abu Ghraib prison in Iraq." Laura Dickinson, *Public Law Values in a Privatized World*, 31 YALE INT'L L. 383, 385 (2006) (citing Douglas Jehl & Kate Zernike, *Greater Urgency on Prison Interrogation Led to the Use of Untrained Workers*, N.Y. TIMES, May 28, 2004, at A11). For another recent example, see also Steve Fainaru, *Four Hired Guns in an Armored Truck, Bullets Flying, and a Pickup and a Taxi Brought to a Halt*, WASH. POST, Apr. 15, 2007, at A1.

<sup>149</sup> "Because of the instability of the judicial systems in foreign countries such as Afghanistan and

is unclear how much international law directly may bind them. Thus, PMCs generate complex challenges to both national and international law. When some PMCs become a critical component of a state's war-making arsenal, it is unclear how far and to what extent corporate decision-makers are bound, if at all, by the developed strictures of military justice. How far are they bound by humanitarian and human rights law? What kinds of contracts are enforceable by such entities and under what law? What (if any) are the limits of contract law in tasking PMCs in context that makes it difficult to differentiate between combat and security activity?

### C. *Private Military Contractors (PMCs) in Iraq*

PMCs represent the second largest contingent of actors inside Iraq today.<sup>150</sup> The United States and the United Kingdom are the most developed in this area and have captured some 70 percent of the global market. South Africans and Israelis also figure prominently in some situations. The modern growth of PMCs directly was tied to the aggressive development of the neo-liberal economics by Margaret Thatcher in the United Kingdom and Ronald Reagan in the United States. By downsizing government, economic opportunities were generated for the private sector to fill in the gap created by deregulation.<sup>151</sup> At the end of the Cold War, the mantra of reform of the military, at least in the United States, resulted in a significant downsizing of the Pentagon. Whatever could be allocated to the private sector, within the law, would be allocated to the private sector.

Those with connections and influence with the military-industrial elite benefited. Downsizing thus became a significant allocation of public funds to well-connected private sector interests. Most recently, by creating a vast homeland security budget, the United States also has created an enormous pork barrel for the private sector. In response, governmental officials who crafted the national security rules have been leaving the government in droves to set up private security consultancies or to join pre-existing private

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Iraq and the lack of adequate legal protections, foreign courts in those countries do not hold much promise as a suitable venue for trying U.S. civilians accused of abusing detainees." Ryan P. Logan, *The Detainee Treatment Act of 2005; Embodying U.S. Values to Eliminate Detainee Abuse by Civilian Contractors and Bounty Hunters in Afghanistan and Iraq*, 39 VAND. J. TRANSNAT'L L. 1605, 1620 (2006).

<sup>150</sup> "By some estimates, more than 20,000 security contractors operate in Iraq—a private army that is the second-largest armed foreign contingent in the country, surpassed only by the 140,000 U.S. troops." T. Christian Miller, *Contractors Say Marines Behaved Abusively*, L.A. TIMES, June 11, 2005, at A1.

<sup>151</sup>

A second structural factor behind the rise of PMCs is the post-Cold War draw-down of armed forces and the end of apartheid-driven conflicts in Africa, which has led to a glut of trained manpower. According to the Bonn International Conversion Centre, the world's armies shrank by over six million soldiers between 1987 and 1996. The downsizing of the 1990s has also contributed to a general trend from public to private service of skilled soldiers.

SPEAR, *supra* note 142, at 12.

security corporations.<sup>152</sup>

The nature of the business does not lend itself to levels of transparencies that approximate the levels of normal corporate actors.<sup>153</sup> To provide one illustration of the problem, former contractors and survivors of a failed PMC operation in Iraq have sued Blackwater USA, a PMC engaged in transportation security work. Properly-trained military decision-makers should have known of the danger. The company's transportation operatives were sent on a dangerous route in Fallujah. Moreover, the company's personnel were sent into a danger zone without adequate military equipment for protection. Several transport workers were killed, triggering the first battle of Fallujah.<sup>154</sup>

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<sup>152</sup> Schreier and Caparini describe this phenomenon:

[O]n taking office, Cheney named executives from leading military contractors as heads of the three services. James Roche, the secretary of the Air Force, is a former vice president of Northrop Grumman; Gordon England, the secretary of the Navy, is a former executive at General Dynamics; and Thomas P. White, a former secretary of the Army, came from Enron. A recent study of defense contracting in the U.S. identified 224 high-ranking government officials over the past seven years who moved into the private sector to work as lobbyists, board members or executives of contractors. Moreover, at least one-third of these former high-ranking government employees had held positions that allowed them to influence government contracting decisions. A survey of the revolving door phenomenon concluded that "the revolving door has become such an accepted part of federal contracting in recent years that it is frequently difficult to determine where the government stops and the private sector begins. The rapid growth of outsourcing and the private military industry in the US has strengthened and accelerated the revolving door between the Pentagon and industry. Typically, the large PMCs count many former military personnel as employees. The reputation that retired officers built while in public service may cause government officials, as well as members of the legislature, to give undue credence to their lobbying efforts. The report recommended simplification of the complex laws and regulations on post-government employment (which also contain significant loopholes for high-ranking government officials in policy positions) and more oversight.

Schreier & Caparini, *supra* note 122.

<sup>153</sup> *Reliance on Private Military Contractors in Iraq Reconstruction, Hearing Before the H. Comm. On Oversight & Gov't Reform*, 110th Cong. (2007) (opening statement of Henry A. Waxman, Rep.).

We know that the war in Iraq has given private contractors an unprecedented role in providing security services. Almost \$4 billion in taxpayer funds has been paid for private security services in the reconstruction effort alone. But sorting out overhead, subcontracts, subsubcontracts, profit, and performance has been nearly impossible. . . . It's remarkable that the world of contractors and subcontractors is so murky that we can't even get to the bottom of this, let alone calculate how many millions of dollars taxpayers lose in each step of the subcontracting process.

*Id.*

<sup>154</sup> *Id.* Rep. Waxman recounted:

On March 31, 2004, four Americans working as private security personnel for Blackwater, all of whom were military veterans, were ambushed and killed in Fallujah while on a protection mission. Their tragic death became a turning point in public opinion about the war and directly resulted in a major U.S. military offensive, which is known as the First Battle of Fallujah. Twenty-seven American soldiers and over 800

One of the victims wrote home about the company's incompetence and malfeasance. It is alleged that his death is attributable to the corporation's ineptitude.<sup>155</sup> One must inquire about the PMC's competence to train people to defend themselves, while avoiding harm to others. However, PMCs now represent a type of organization within the twilight zone of international regulation. It is not clear what national rules of engagement apply to them in terms of different arenas of involvement or engagement of conflict. According to various watch facilities, at least 90 companies provide services that normally would be provided by the state military establishment. They function in approximately 110 countries, but the level of public accountability for their conduct, either nationally or internationally, is unclear. It is possible that the only constraint on their activity is either what their market will bear or what they will get away with.

Today, the Pentagon does not know how many PMC contracts it has or with whom. What is known is that the contracts are for billions of dollars.<sup>156</sup> Halliburton, Kellogg, Brown, and Rought have had long-standing contracts with the Pentagon. Earlier numbers indicate that Kellogg and Booz Allen Hamilton had a contract worth approximately \$300 billion. Figures show that between 1998 and 2003, the Pentagon awarded some \$47 billion for small business companies for the provision of services. In the year 2010, Homeland Security is projected budget is approximately \$130 billion. It also has developed a constituency of security of PMCs to perform its functions.<sup>157</sup>

#### *D. Politics and Private Military Contractors (PMCs)*

One of the main problems with the use of PMCs is the level of control exercised over them in situations where they may deploy force directly or indirectly. Another problem with the PMC industry is political. As a

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insurgents and Iraqi civilians died in that battle, and military observers believe it helped fuel an escalation of the insurgency.

*Id.*

<sup>155</sup> *Id.* ("The day before the four soldiers were killed, a Blackwater employee sent an e-mail alerting superiors that a lack of equipment, armored vehicles, and other safety equipment left the team unprepared to begin its mission. That warning was seemingly ignored and we need to explore that further.")

<sup>156</sup> Schreier and Caparini explain:

In 2003, Halliburton's Pentagon contracts increased from \$900 million to \$3.9 billion, a jump of almost 700 percent. The company now has over \$8 billion in contracts for Iraqi rebuilding and Pentagon logistics work in hand, and that figure could hit \$18 billion if it exercises all of its options. Computer Sciences Corporation, which does missile defence work and also owns DynCorp, a private military contractor whose work stretches from Colombia to Afghanistan and Iraq, saw its military contracts more than triple from 2002 to 2003, from \$800 million to \$2.5 billion. And Iraq contracts have boosted the annual revenue of British-based PMCs alone from \$320 to more than \$1.7 billion.

Schreier & Caparini, *supra* note 122, at 34 (footnote omitted).

<sup>157</sup> *Id.* at 22.

constituency, PMCs have become so powerful that they have contributed millions to presidential and congressional campaigns in order to muster support for their security operations.<sup>158</sup> If we accept the fact that deregulation of security and political economy are weakening the state, then the principles of good governance and democracy become weak if the state cannot regulate activities touching upon the central values of the community. How are we to account for the allocation of state functions that encroach upon the deployment of force, or the selective support in the deployment of force, or which may act covertly on behalf of the one who pays the highest price?

As earlier indicated, the allocation of competence to the private sector in the sphere of coercion and the use of force particularly may be difficult in African nations attempting to build sustainable states. These efforts may be frustrated by the neutral PMC factor, undermining a crucial component of state security: the predictability of future threats and the capacity to manage them. This may be one of Africa's most important issues in a post-Iraq global system rife with private armies and private military contractors.

I would suggest that when we compare the financial side of the global system with the security side, then we see that there are important structural changes occurring. Those changes will not be neutral. They are generating or staking claims over what is licit and appropriate for the international environment. Implicit in what is presented is a normative scenario seeking to establish its efficacy as the living law of the international community as contrasted with the ineffective law on the books in the U.N. Charter and allied instruments. There is no luxury here of a legal vacuum. On the contrary, it is important to defend the values of the current Charter system and to consider reform of the Charter in order to rationally account for modern problems and modern challenges that require innovation and creativity to fulfill the Charter's purpose.

## X. CONCLUSION

In this article, we have focused not on the formal rules of international economic order or the control and regulation of coercion in the international system, but rather on the forces that are pressurizing the international system and staking claims for an important rearrangement of the control and regulation of power and wealth. These claims are supported by powerful ideologies which hold that the state concentrates power in ways that are both lethal and often economically inefficient. Thus, the solution is developing private power through national and global privatization policies and practices.

Extreme concentrations of state power result in the abuse of power. Extreme concentrations of power in the private sector move power outside the law or may simply erode the power of law. Globalism complicates these

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<sup>158</sup> *Id.* at 70 n.226 (“[Seventeen] of the nation's leading PMCs have invested more than \$16 million in congressional and presidential campaigns since 1999.”).

issues, but they are real and have to be understood. In this arena of global complexity, the legal profession and the juris consults play an important role. If we, juris consults, can agree on anything, it is that it is better that power be constrained by law than by brute force.

Thus, scholars and teachers should focus on practical applications of the law in addition to developing an articulate legal ideology that is morally justifiable, analytically rigorous and truthful, and appropriate for community stabilization. Rules of contract, delict, property, agency, partnership, and others over time have moderated the effects of political upheaval and have stood the test of facilitating social good in periods of tranquility. That is the kind of challenge that we grapple with in our time. Africa, and poor regions in general, desperately need equal protection against public and private predators.