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GLOBALIZATION AND HEGEMONY SHIFT: ARE STATES MERELY AGENTS OF CORPORATE CAPITALISM?

UPENDRA D. ACHARYA*

Abstract: Since the advent of state sovereignty with the Peace of Westphalia, powerful Western nations have determined and applied international law in a manner that advance their national interests. In short, the international legal process has been a mechanism of hegemony, and powerful Western nations have been hegemons through this process over less-developed countries. Since the 1990s, however, the fall of the Soviet Union, the spread of technology, and the advent of multinational corporations have led to a new order wherein corporate capitalism has become a primary force in international law and states mostly serve corporate interests. This new order was seen in action in Libya, where Muammar Gaddafi was recently overthrown by rebels who received aid from Western organizations, mostly because of Gaddafi's unreliable history of partnering with Western corporations.

INTRODUCTION

We live in neither a modern world nor a post-modern world, but a globalized world. Globalization reaches economic, financial, technological, environmental, social, cultural, political, and health-related issues and events. The construct of globalization, by its nature, embraces every element of human life, and therefore has become a sort of *jus cogens* of today's world.¹

The process of globalization is not a new phenomenon. It was seeded at the time that explorers, merchants, colonizers, and occupiers

* Associate Professor of Law, Gonzaga University School of Law. This is an expanded version of the presentation delivered at the symposium "Filling Power Vacuums in the New Global Legal Order," conducted by the *Boston College Law Review* and the *Boston College International & Comparative Law Review* on October 12, 2012. I would like to thank Professor Frank Garcia for the opportunity and for his insights with this Article, as well as the panel members and participants for their helpful suggestions. I would like to thank Professor Antony Anghie, Professor Gerry Hess, and Attorney Jeannie Young for their insightful suggestions. I would also like to thank my research assistants, Sarah Karp and Eric Loefflad, for their valuable time, hard work, and insights.

¹ See Stephan Hobe, *The Era of Globalisation as a Challenge to International Law*, 40 *DUQ. L. REV.* 655, 656 (2001).

began advancing their profit projects in different territories for the Crowns of Europe, forcing weaker peoples to accept their value systems and influence.² This early process of globalization paved the way for today's corporate capitalism.³ Today, the inverse is true—corporate capitalism is the locomotive force of today's globalized world.⁴ Corporate capitalism has created an invisible and inevitable system comprised of two primary elements: market and technology, which have become two faces of globalization—a modern *Ardhanarishvara Shiva*.⁵

Individuals and states celebrate (consciously, subconsciously, or unconsciously) the invasion of market and technology, and enthusiastically adapt themselves to globalization. In this process of celebration and adaptation, individuals and states accept the hegemony of corporate capitalism without even noticing their acquiescence.⁶ States and their people, fully immersed in the corporate capitalist society, have accepted the profit motive of corporate capitalism as their political value system to the exclusion of the values of welfare and social justice that were espoused by pre-globalized social democracies.⁷ The access to goods and services made available by globalization made corporate capitalism a state of mind and lifestyle that forces us into the realm of market and technology while ignoring aspirational, emotional, and spiritual elements of human life.⁸ As Habermas states, the “lifeworld” is diminished by systems—market-driven areas of life wherein the operative rationality is money and power.⁹ This corporate-capitalism-induced,

² See Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 36–37 (1999) (quoting M.F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 91 (1926)).

³ See *id.*

⁴ See Jürgen Habermas, *Beyond the Nation State?*, 10 PEACE REV. 235, 237 (1998).

⁵ *Ardhanarishvara* is a Hindu god with two half faces—one female, one male—and infinite power. *Ardhanarishvara*, NEW WORLD ENCYCLOPEDIA, <http://www.newworldencyclopedia.org/entry/ardhanarishvara> (last visited Apr. 7, 2013).

⁶ See generally Hobe, *supra* note 1.

⁷ Jost Delbrück, *The Changing Role of the State in the Globalising World Economy*, in MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY 56, 57 (Pieter H.F. Bekker et al. eds., 2010) (describing the earlier transition from paternalistic monarchies of the sixteenth and seventeenth centuries to mercantilism or state-sponsored economic policies in order to effectuate states' obligations of security and general welfare rather than profit); Habermas, *supra* note 4, at 236 (discussing the Western trend transitioning from welfare-oriented states to a focus on market-friendly conditions in the 1980s).

⁸ See 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM* 321 (Thomas McCarthy trans., Beacon Press 1987) (1981).

⁹ *Id.* at 319; see Hugh Baxter, *System and Lifeworld in Habermas's Theory of Law*, 23 CARDOZO L. REV. 473, 545–49 (2002) (providing a concise explanation of Habermas's theory of the interaction between law and the “lifeworld”).

market-driven globalization has successfully insinuated a globalist epistemology consisting of a one-dimensional definition of Western civilization and values without reference to any social or cultural pluralism.¹⁰ The bottom line has replaced the empathic human response in the Western values hierarchy.¹¹ As some politicians have stated, “corporate greed [has] exploded beyond anything that could have been imagined,” thriving in an “ethical vacuum space.”¹²

We face a challenge in determining the role that law and authority should play in globalization induced and sponsored by corporate capitalism. How can law and authority address the effects of globalization in limiting or shaping human imagination, understanding, and expectations by directing the practices of law and its values toward a healthy and peaceful world? Where has humanism been placed in the world of corporate capitalism-induced, market-driven globalization? We also face the question of whether globalization is a natural process or a process manufactured for corporate benefit, since it directly helps promote free trade and corporate activities, but does not resolve the issues of poverty and hunger worldwide.¹³

To address this question in the context of globalization, law, and power, Part I of this Article traces the hegemonic process in the creation and application of international law. Part II and Part III analyze how several states became hegemonies and how these hegemonic states paved the road for the incubation of corporate capitalism. Part IV addresses whether these states have transformed their hegemony into corporate capitalism. Finally, Part V applies this analysis in a critical examination of Libya under Gaddafi.

I. PROCESS OF HEGEMONY: INTERNATIONAL LAW, POWER, AND DETERRITORIALIZATION

Discussions of hegemonic international law posit that international law is relatively weak, that it is nothing more than epiphenome-

¹⁰ Cf. Robert H. Wade, *Questions of Fairness: In Search of a Just International Economic Order*, FOREIGN AFF., Sept.–Oct. 2006, at 136, 141 (reviewing ETHAN B. KAPSTEIN, *ECONOMIC JUSTICE IN AN UNFAIR WORLD* (2006)) (critiquing the neo-liberal idea that all countries, regardless of development, should be fully economically open, rather than recognizing a variety of optimal degrees of economic openness).

¹¹ See *id.* at 136.

¹² *Id.* (quoting Paul Volcker, former Chairman of the Federal Reserve and Paul O’Neill, former Secretary of the United States Treasury, respectively) (internal quotation marks omitted).

¹³ See Hans Küng, *A Global Ethic in an Age of Globalization*, 7 BUS. ETHICS Q., no. 3, 1997 at 17, 18.

nal, merely a production of normative standards that mirror the interests of powerful states.¹⁴ The hegemonic international law theory also posits that hegemonies (powerful nations among the many sovereign states) define the course of states' behavior by creating and influencing international law to give effect to the hegemonies' interests and condone actions that support those interests.¹⁵ This Part critically observes hegemonies' techniques and methods of consolidating power,¹⁶ leading to the next Part's discussion addressing an emerging corporate-centric hegemonic international law, a new form of international law contrasted to Vagts's state-centric hegemonic international law.¹⁷

Because international law is based on the mutual consent of sovereign states, each participating state must have common values and interests for international law to be effective.¹⁸ Political, cultural, reli-

¹⁴Cf. Detlev F. Vagts, Editorial Comment, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 847 (2001) ("In terms of the formation of customary law, such a power can by its abstention prevent the emerging rule from becoming part of custom.").

¹⁵ See *id.* at 844 Vagts's review of earlier "hegemonies" that dominated certain regions reminds us that each hegemon "led the way in formulating the international law rules of the time," and that Rome, at least, "define[d] . . . rights and duties of the relationship[s] in its own interest." *Id.* Vagts cites to treaty agreements of the early Monroe Doctrine era, with which the United States retained the right to interpret the law and points out that the modern last-in-time rule used in the United States heavily favors domestic laws over international agreements. *Id.* at 844, 846–47. Another scholar argues that the UN Security Council behaves as a hegemon influenced primarily by the United States, despite its "refusal to give explicit approval to Operation Iraqi Freedom in advance," and its failure to prevent the Coalition invasion of Iraq. José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 873–74 (2003). Alvarez points to U.S. influence in the activities of the Security Council's Counter-Terrorism Committee, established by Security Council Resolution 1373. See *id.* at 875. This resolution selectively adopted provisions of the International Convention for the Suppression of the Financing of Terrorism, by omitting deference to international humanitarian law requirements, including the rights of judicial dispute settlement. See *id.* Alvarez also notes that the operation of the Security Council's 1267 Sanctions Committee—through which Council members with "substantial counterterrorism expertise and resources" control the procedures of identifying individuals and organizations of alleged terrorists subject to financial sanctions—provides evidence of U.S. influence. See *id.* at 874–75. Notably, the Security Council resolution granting immunity from International Criminal Court (ICC) prosecution "to personnel from ICC non-States Parties involved in United Nations established or authorized missions" has not been challenged in any courts, but was not renewed in 2004. See *Res. 1422/1487, 2004, COALITION FOR INT'L CRIM. CT.*, <http://www.iccnw.org/?mod=res1422> (last visited Apr. 14, 2013).

¹⁶ See *infra* text accompanying notes 18–32. The discussion relates to state-centric hegemony based on a realist approach to international law and state practices.

¹⁷ See *infra* text accompanying notes 33–60.

¹⁸ Cf. Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT'L L. 599, 601, 612 (1998). Kingsbury asserts that the international system's traditional emphasis on state sovereignty is often ignorant of and unconcerned with the material inequalities among nations. See *id.* at 601. As a result, states lacking in political and economic power experience a

gious, and economic traditions were naturally varied among states before the implementation of international law.¹⁹ Because of this variation, the powerful Western states superimposed self-styled Western values such as democracy, a definitive structure of rule of law, industrial development, perception of peace, and eventually capitalism on less-influential or less-powerful states.²⁰ Western hegemonies present these values as though they are prerequisites for stability.²¹ In reality, however, formal consent to these values allows (in the creation of international law) the hegemon to disrupt existing value structures—an inherently destabilizing action—and take advantage of the less-powerful states' resources.²² This process of obtaining consent is so sophisticated that it frequently requires engaging lawyers and legal scholars to guide less-powerful states.²³ These scholars typically represent Western education and ideologies within the scope of the broader interests of hegemonies, imposing Western legal traditions on non-Western states.²⁴

Despite maintaining consent to superimposed Western norms, international law lacks a formal enforcement and compliance authority.²⁵ Nevertheless, fragmented informal or non-legal authority has been institutionalized through means controlled by hegemonies that can make others comply with the norms.²⁶ In this scattered and pseudo-legal compliance mechanism, hegemonies may comply with international law when faced with worldwide pressure and opposition from competing

corresponding deficit of national sovereignty within the system, while the sovereignty of powerful states remains unchallenged and highly influential. *See id.* at 599–601.

¹⁹ *See* Anghie, *supra* note 2, at 34–66 (providing a historical overview of the colonization process).

²⁰ *See id.* at 2.

²¹ *See id.* at 39.

²² *See id.* at 49–51.

²³ *See* Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. INT'L L.J. 475, 477–78 (2010).

²⁴ *See id.* at 479–80.

²⁵ *See* Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J., 252, 255–56 (2011) (“The principal objection made by critics of international law is that international law cannot be real law because *it cannot matter in the way that real law must matter*. In particular, they argue that international law cannot matter in the way it must to be law because it lacks mechanisms of coercive enforcement.”).

²⁶ *Cf.* Andreas Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICH. J. INT'L L. 691, 724–25 (2003) (“Indeed, the United States practices a strategic and, at times, tactical use of international law—trying to impose obligations on others while remaining unrestricted itself.”).

hegemony.²⁷ For non-hegemony, a hint of pressure, economic or otherwise, is sometimes sufficient to force compliance with the regime.²⁸

According to Antonio Gramsci:

[H]egemony presupposes that account be taken of the interests and the tendencies of the groups over which hegemony is to be exercised, and that a certain compromise equilibrium should be formed—in other words, that the leading group [hegemony] should make sacrifices of an economic-corporate kind. But . . . such sacrifices and such a compromise cannot touch the essential . . . [they] must necessarily be based on the decisive function exercised by the leading group in the decisive nucleus of economic activity.²⁹

B.S. Chimni also noted the current influence of what he terms the “transnational capitalist class,” that produces a culture in which “the third world counterparts essentially act as ‘transmission belts and filtering devices for the imposition of the transnational agenda.’”³⁰

²⁷ For example, consider the United States’ somewhat belated response to international pressure after it became clear that the United States used torture in interrogations related to the War on Terror. See U.S. DEP’T OF THE ARMY, FIELD MANUAL NO. 2-22.3: HUMAN INTELLIGENCE COLLECTOR OPERATIONS, at 5-21 (2006), available at http://www.loc.gov/rr/frd/Military_Law/pdf/human-intell-collector-operations.pdf (listing beatings, electric shock, burns, “waterboarding,” using military working dogs, and mock executions as prohibited means of interrogation). Consider also the Boeing-McDonnell Douglas merger agreement of 1997, in which the American aerospace giant Boeing conceded to Airbus on the supply exclusivity clause. See Yves Belanger & Laurent Carroué, *American Offensive for Control of the Skies*, LE MONDE DIPLOMATIQUE: ENGLISH EDITION (Sept. 1997), <http://monde.diplo.com/1997/09/boeing>.

²⁸ The clearest example of hegemony coercing non-hegemony to behave in a way that conforms to Western values is the conditioning of needed loans on “structural adjustment” and austerity-like measures on which the IMF and the World Bank insist. Cf. THOMAS S. SZAYNA ET AL., THE EMERGENCE OF PEER COMPETITORS: A FRAMEWORK FOR ANALYSIS 45–47, 49–50 (2001) (discussing a theory of hegemonic power and stating that a hegemon’s threat of imposing conflict onto another state will greatly influence that state’s behavior); Robert J. Peterson, Comment, *Political Realism and the Judicial Imposition of International Secondary Sanctions: Possibilities from John Doe v. Unocal and the Alien Tort Claims Act*, 5 U. CHI. L. SCH. ROUNDTABLE 277, 292–94 (1998) (discussing the role of economic sanctions in hegemonic stability theory).

²⁹ Antonio Gramsci, *State and Civil Society*, in THE POLITICAL ECONOMY OF LAW: A THIRD WORLD READER 198, 198 (Yash Ghai et al. eds., 1987); see ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 161 (1971).

³⁰ B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT’L L. 1, 4–6 (2004) (quoting William I. Robinson, *Globalisation: Nine Theses on Our Epoch*, RACE & CLASS, Oct. 1996, at 13, 19).

International law, in its creation and application, has been a victim of the hegemonic power consolidation process.³¹ Rather than recognizing and respecting the common goals and values of a pluralistic world, international law deems hegemons' values those of "true" civilization, held in esteem and aspired to by all others at the expense of unique and insightful non-Western thought.³² Now in the era of globalization, evolving hegemonic international law theory warrants questioning whether states are really the hegemons in today's world. In order to address this question, it is important to analyze the processes of hegemony in the development of international law and to identify when the course of the hegemonic process departed from state-centric to corporate-centric hegemony.

II. STATE-CENTRIC HEGEMONY: CIVILIZING THE UNCIVILIZED AND UNIVERSALIZING THE VALUES OF HEGEMONS

A. Founding Stage: *The Peace of Westphalia*

The Peace Treaty of Westphalia created the concept of sovereignty, which was subsequently used to universalize Western European values by rejecting the territorial sovereignty of non-European states.³³ It was the beginning of Eurocentric international law.³⁴ This fundamental

³¹ See Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 381–84 (2005) (discussing the weakening of international law through an emphasis on soft law and a return to bilateral state relations that are more easily shaped and controlled by hegemonic states).

³² See Kingsbury, *supra* note 18, at 622.

³³ See Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies arts. LXXVI, XCII, CI, CXVII, Oct. 24, 1648, available at http://avalon.law.yale.edu/17th_century/westphal.asp. The treaty is commonly understood to signal the emergence of international law based on the principle of sovereignty. See *Peace of Westphalia*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Peace_of_Westphalia (last visited Apr. 15, 2013). It gave birth to the principles of equality and peace among nation-states of the European continent. See *id.* It ended the Thirty Years' War and created a diplomatic way of dealing among European nations. See *id.* It was a compromise among emperors and churches based on geographic reality and the interests of conflicting powers at the time. See *id.* This concept of sovereignty helped form what is now also known as Eurocentric international law. See Kingsbury, *supra* note 18, at 606. The idea that the concept of sovereignty originated at Westphalia is debated among scholars, but the common understanding that sovereignty began there has had a tremendous impact on the international legal tradition, which is most important for our purposes. See John Hilla, *The Literary Effect of Sovereignty in International Law*, 14 WIDENER L. REV. 77, 111–15 (2008) (discussing the origins of sovereignty).

³⁴ Cf. Turan Kayaoglu, *Westphalian Eurocentrism in International Relations Theory*, 12 INT'L STUD. REV. 193, 199 (2010) ("The jurists' construction of 'Westphalian' international society was part of the larger intellectual trend of nineteenth century, European exceptional-

concept of international law, that all states are equally sovereign, did not apply to those peoples and societies who were most profoundly affected by it.³⁵ On one hand, it was a law that allowed Europe to proceed in peace.³⁶ On the other hand, it enabled powerful European nations to suppress non-Western peoples and conquer their land by force, denying legal personality to territories that certainly would have benefited from a right to sovereignty.³⁷ For example, European jurists interpreted in their own terms the legal status of non-Europeans, and determined when it was legal for the Spanish to go to war against Indians and the rules of conducting war.³⁸ Even Grotius, the father of modern international law, justified the Dutch East India Company's expansion in the East Indies, against the interests of Portugal.³⁹ In this way, jurists and European nations ignored the notion of sovereign equality and endorsed the hegemonic process of creating and applying international law at international law's very foundational phase.⁴⁰

B. *The Congress of Vienna and Subsequent Conquest and Expansion*

Another notable mark in the development of the Western dominance in international law was the Congress of Vienna.⁴¹ The Congress

ism. According to this perspective, European societies and political systems were superior to the European past and to the rest of the world.”).

³⁵ *Cf. id.* at 202 (“With respect to the non-Western world, this argument meant that non-Western societies did not have any place in ‘Westphalian’ international law, because these societies were not signatories to the treaties and conventions that made international law.”).

³⁶ SIR WALTER GEORGE FRANK PHILLIMORE, *THREE CENTURIES OF TREATIES OF PEACE AND THEIR TEACHING* 19 (1918).

³⁷ Lorca, *supra* note 23, at 477.

³⁸ Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 *THIRD WORLD Q.* 739, 743–44 (2006).

³⁹ Antony Anghie, *The Grotius Lecture: ASIL 2010: International Law in a Time of Change: Should International Law Lead or Follow?*, 26 *AM. U. INT'L L. REV.* 1315, 1319–21 (2011); see Peter Borschberg, *Hugo Grotius, East India Trade and the King of Johor*, 30 *J. SOUTHEAST ASIAN STUD.* 225, 231–32 (1999).

⁴⁰ See Anghie, *supra* note 39, at 1319, 1321–22; Borschberg, *supra* note 39, at 231–32; Kayaoglu, *supra* note 34, at 195–96.

⁴¹ See PHILLIMORE, *supra* note 36, at 25; Genevieve Peterson, *Political Inequality at the Congress of Vienna*, 60 *POL. SCI. Q.* 532, 533 (1945). The Congress of Vienna was an assembly in 1814–15 convened to settle boundaries peacefully by employing a balance-of-power strategy against any potential unilateral power that could destabilize Western Europe. See *Congress of Vienna*, BRITANNICA ACADEMIC EDITION, <http://www.britannica.com/EBchecked/topic/628086/Congress-of-Vienna> (last visited Apr. 18, 2013); *Diplomacy: The Concert of Europe to the Outbreak of World War I*, BRITANNICA ACADEMIC EDITION, <http://www.britannica.com/EBchecked/topic/164602/diplomacy/233745/The-Concert-of-Europe-to-the-outbreak-of-World-War-I?anchor=ref83071> (last visited Apr. 18, 2013). Although the Congress of Vienna successfully reestablished stability in Europe, it led to competition among its participants for colonies

came after 150 years of European exploration, and European powers were not inclined to extend sovereignty to the peoples of these “discovered” lands.⁴² Colonizing powers imposed their laws to deny sovereign status to the peoples of Asia and Africa.⁴³ The full effect of denying sovereignty was clear after the Berlin Conference of 1885, during which European powers divided up Africa among themselves without consulting the continent’s inhabitants.⁴⁴ This colonialism gave Western international law universal reach by the late nineteenth century.⁴⁵ This universalized Western international law justified the conquest and dispossession of non-European peoples.⁴⁶

C. *The League of Nations, United Nations, and More Equal Governmental Sovereignty*

In a watershed agreement introducing an international organization as a new actor in international law, the Treaty of Versailles created

in Asia and Africa; this colonization process involved fighting savage wars against the people of Asia and Africa. *Cf.* Anghie, *supra* note 2, at 1–2 (noting that, by the early twentieth century and after many colonial conflicts, European nations controlled almost all the territories of Asia and Africa).

⁴² See PHILLIMORE, *supra* note 36, at 35.

⁴³ See Anghie, *supra* note 2, at 2 (“By 1914, after numerous colonial wars, virtually all the territories of Asia, Africa, and the Pacific were controlled by the major European states, resulting in the assimilation of all these non-European peoples into a system of law that was fundamentally European in that it derived from European thought and experience.”).

⁴⁴ See *id.* at 1–2 (“The universalization of international law was principally a consequence of the imperial expansion that took place towards the end of the ‘long nineteenth century.’”); *cf.* Abednego E. Ekoko, Sixth Inaugural Lecture at Delta State University, Abraka: Boundaries and National Security (Mar. 25, 2004) (transcript available at <http://www.nuc.edu.ng/nucsite/File/ILS%202004/ILS-129.pdf>) (“The emergence of internal boundaries in Nigeria was the function of the administrative ingenuity, opportunism, exigency, ignorance, ineptitude and convenience of the British colonising authority between 1900 and 1960.”).

⁴⁵ See Anghie, *supra* note 38, at 736.

⁴⁶ See *id.* at 745. The justification for conquest was to civilize the uncivilized. See *id.* at 742. So-called uncivilized nations lacked legal personality to make claims against colonial powers to participate in international lawmaking. *Id.* at 745. Colonizing powers utilized their national corporations as a trade tool to strengthen their hegemonic muscles. *Cf. id.* at 748 (stating that less-powerful nations pursued economic independence after decolonization by nationalizing “foreign entities that had [previously] acquired rights over” those nations’ natural resources). Further, legal positivism simultaneously supplied an intellectual and jurisprudential basis for doing so by arguing that non-European states were uncivilized, and therefore lacked sovereignty and legal personality to use international law against European powers. See *id.* at 745; Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence Racing American Foreign Policy*, 94 AM. SOC’Y INT’L L. PROC. 260, 263 (2000).

the League of Nations.⁴⁷ Though the League was hailed as an innovation with the potential to bring lasting peace to the world under the guidance of Western Europe and the United States, the League also created the mandate system, which has been criticized for advancing the idea of moral colonialism.⁴⁸

After the Second World War, the Charter of the United Nations (UN) was adopted.⁴⁹ This development celebrates a unique compromise between the contemporaneously existing hegemons and other less-powerful states.⁵⁰ Under the UN system, newly decolonized and independent states made efforts to resist the hegemon states' colonial practices by adopting a series of General Assembly resolutions, including the resolution regarding *Inadmissibility of the Policy of Hegemonism*.⁵¹ Those resolutions, however, lacked effect due to opposition from the hegemonic states.⁵² Meanwhile, international financial institutions such

⁴⁷ See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 213–14 (1997).

⁴⁸ Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT'L L. & POL. 513, 526 (2002).

⁴⁹ The representatives of fifty countries met in San Francisco in 1945 at the UN Conference on International Organization and drafted the UN Charter. *History of the United Nations*, <http://www.un.org/en/aboutun/history/> (last visited Apr. 21, 2013). Those representatives signed the Charter on June 26, 1945, and the UN officially came into being on October 24, 1945. See *id.*

⁵⁰ An example of such compromise is the adoption of the concept of sovereign equality as a foundational principle of the Charter on the one hand, and creation of the permanent members of the Security Council and their veto power on the other. Compare U.N. Charter art. 2, para. 5 (“The organization is based on the principle of the sovereign equality of all its members.”), with U.N. Charter art. 23 para. 1, art. 27, para. 3 (creating the Security Council and its voting rules). This compromise produced a concept of legal inequality in the system of international rule of law under the Charter. For other compromises between hegemons and non-hegemons, see Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1, 2 (2000); Krisch, *supra* note 31, at 405–06.

⁵¹ See *Inadmissibility of the Policy of Hegemonism in International Relations*, G.A. Res. 34/103, ¶ 1, U.N. Doc. A/RES/34/103 (Dec. 14, 1979); see also Charter of Economic Rights and Duties of States, G.A. Res. 29/3281 (XXIX), art. 2, U.N. Doc. A/RES/3281, (Dec. 12, 1974) (“Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.”); Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), ¶ 4(e), U.N. Doc. A/RES/S-6/3201 (May 1, 1974) (“The new international economic order shall be founded on . . . [f]ull permanent sovereignty of every State over its natural resources and all economic activities.”); G.A. Res. 3171 (XXVIII), ¶¶ 1–2, U.N. Doc. A/RES/3171 (Dec. 17, 1973); G.A. Res. 1803 (XVII), ¶ 1, U.N. Doc. A/5217 (Dec. 14, 1962).

⁵² General Assembly Resolution 1803 of December 14, 1962 passed by eighty-seven votes to two, with twelve abstentions. Gregory J. Kerwin, Note, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983

as the International Monetary Fund (IMF) and the World Bank, dominated by Western influence, expanded privatization of the third world's resources, hindering newly independent states' ability to exercise the sovereignty they had finally achieved.⁵³

DUKE L.J. 876, 883 n.37. Resolution 3171 passed by 108 votes to one, with sixteen abstentions; however, Paragraph 3 of the Resolution, stating that each state has the right to determine the amount of possible compensation for resource nationalization and the means of payment, was adopted by eighty-six votes to eleven, with twenty-eight abstentions. *Id.* Resolution 3281 was adopted by 118 votes to six, with ten abstentions. *Id.* Both Resolutions 3171 and 3281 were subject to roll-call votes on the compensation and nationalization sections, and all of the industrialized countries either voted against these provisions or abstained. *See* *Texaco Overseas Petroleum Co. v. Libya*, 17 I.L.M. 1, ¶¶ 84–85 (1978) (recognizing that the opposition and abstention of a few industrialized nations created no general consensus and therefore does not refer to international law); Kerwin, *supra*, at 883 n.37.

⁵³ The World Bank's purposes include alleviating poverty and fulfilling such basic needs as clean water, education, healthcare, housing, and environmental protection. Ibrahim F.I. Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 DENV. J. INT'L L. & POL'Y 39, 40 (1988). It also provides subsidized loans (known as "credits"), technical assistance, and policy advice to the least-developed states, some of whom are unable to attract the attention of, or obtain favorable borrowing terms from, the international financial markets. *See id.* at 40. Indeed, the World Bank is "one of the world's largest sources of funding for the developing world." Press Release, The World Bank, The World Bank, in P'ship with WWF and IUCN, Are Implementing the EU Funded Program To Improve Forest Law Enforcement and Governance in the ENPI East Countries and Russ. (July 14, 2010), <http://www.worldbank.org/en/news/press-release/2010/07/14/world-bank-partnership-wwf-iucn-implementing-eu-funded-program-improve-forest-law-enforcement-governance-enpi-east-countries-russia>. The International Finance Corporation, a division of the World Bank Group, "provides debt and equity financing for private enterprises in developing countries." Ann M. Scarlett, *Imitation or Improvement? The Evolution of Shareholder Derivative Litigation in the United States, United Kingdom, Canada, and Australia*, 28 ARIZ. J. INT'L & COMP. L. 569, 570 (2011). The Multilateral Investment Guarantee Agency "insures private investors against noncommercial risks in politically volatile environments," while the International Centre for Settlement of Investment Disputes (ICSID) "settles investment disputes between private investors and their host states," compromising the sovereignty interests of developing countries in favor of private investment sectors. *See* Emeka Duruigbo, *The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa*, 26 U. PA. J. INT'L ECON. L. 1, 27 (2005). The World Bank Group has been involved for a considerable period of time in oil, gas, and mining projects in different parts of the world. *See* Heather Turcotte, *Slippery Security: National, International and Global Security Issues Within Petroleum Production*, ALTERNATIVES: TURK. J. INT'L REL., Winter 2002, at 109, 130. Since 1992, the Bank has approved \$18.5 billion for oil, gas, and coal projects in twenty-five developing countries, including Bolivia, Brazil, Bosnia, Guatemala, Russia, and Trinidad and Tobago. *See id.* at 130, 133 (detailing the extent of the World Bank's involvement in funding for oil production).

D. Globalization as a Precursor to Hegemony Shift

The twenty-first century reached a new threshold in the development of international law—the war on terror.⁵⁴ It is again up to the hegemon states to determine what constitutes terrorism and what methods to apply to suppress terrorism.⁵⁵

From international law's advent at Westphalia, it has suffered from the hegemonic process in its development and application.⁵⁶ International law, as a product of hegemonic process of powerful Western states, has globalized the values of Western hegemons as a necessary legal condition for the world order and has shaped a worldview.⁵⁷

Nevertheless, there has been a remarkable shift in the development of international law since 1990.⁵⁸ Until 1990, powerful states used international financial institutions and their national corporations to expand the idea of capitalism as a political ideology against the competing Soviet model of socialism.⁵⁹ In the post-1990 globalized world, corporations and states have partnered to promote the hegemon's influ-

⁵⁴ See Upendra D. Acharya, *War on Terror or Terror Wars: The Problem in Defining Terrorism*, 37 DENV. J. INT'L L. & POL'Y 653, 671 (2009); Noman Goheer, *The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent Is Not a War Crime*, 10 N.Y. CITY L. REV. 533, 560 (2007); Ikechi Mgbogji, *The Bearded Bandit, the Outlaw Cop, and the Naked Emperor: Towards a North-South (De)Construction of the Texts and Contexts of International Law's (Dis)Engagement with Terrorism*, 43 OSGOODE HALL L.J. 105, 132 (2005); Ved P. Nanda, *International Law Implications of the United States' "War on Terror,"* 37 DENV. J. INT'L L. & POL'Y 513, 521–22 (2009); Sami Zeidan, *Agreeing to Disagree: Cultural Relativism and the Difficulty of Defining Terrorism in a Post-9/11 World*, 29 HASTINGS INT'L & COMP. L. REV. 215, 216 (2006); Sami Zeidan, *Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism*, 36 CORNELL INT'L L.J. 491, 491 (2004).

⁵⁵ See Goheer, *supra* note 54, at 543 (noting that the U.S. government defined who would be classified as a terrorist after September 11, 2001).

⁵⁶ See René Guilherme S. Medrado, *Renegotiating Remedies in the WTO: A Multilateral Approach*, 22 WIS. INT'L L.J. 323, 327 n.13 (2004) (“[T]he Treaty of Westphalia is seen as the event marking the advent of the traditional international law . . .”) (internal quotation marks omitted); Vagts, *supra* note 14, at 843 (examining the history and legal implications of hegemonic international law); *supra* text accompanying notes 33–53.

⁵⁷ See Anghie, *supra* note 2, at 39.

⁵⁸ See Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 838–39 (2009) (“In the early 1990s, on the heels of the Cold War, a great enthusiasm for international law and institutions existed. But by the mid-1990s, this optimism subsided.”); W. Michael Reisman, Editorial Comment, *International Law After the Cold War*, 84 AM. J. INT'L L. 859, 866 (“The international political system is at the threshold of a time of hope. The ending of the Cold War is a major achievement, but we are not about to enter the millennium. . . . The need for international law after the Cold War will be more urgent than it was during the conflict. In many ways, what is expected of international law will be greater.”).

⁵⁹ Anne Boschini & Anders Olofsgård, *Foreign Aid: An Instrument for Fighting Communism?*, 43 J. DEV. STUD. 622, 622–23 (2007).

ence and market access until corporations attained or even exceeded the power wielded by their native states.⁶⁰

III. INCUBATING CORPORATE CAPITALISM: A TRANSITION TO HEGEMONY SHIFT

A. *Non-Hegemon States' Battle for New Economic Order*

International law generally functions in a decentralized and horizontal system of law and order, where hegemonic states create international law to maximize their self-interests at the cost of global good and the true value of the rule of law.⁶¹ Further, international institutions are generally used by hegemon states to facilitate their interests.⁶² Hegemonic states have used international law and institutions to maximize their economic interests by providing and advocating for the protection of foreign investments made by their national corporations.⁶³ Global-

⁶⁰ See Samuel P. Huntington, *Transnational Organizations in World Politics*, 25 *WORLD POL.* 333, 335–36 (1973).

⁶¹ See Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a "They," Not an "It,"* 96 *MINN. L. REV.* 194, 212 (2011) ("In recent years, scholars have challenged the model of unitary states acting within the international system and proposed instead a liberal account of international relations that disaggregates the state. . . . State preferences represent subsets of domestic society and powerful interest groups, and the configuration of state preferences determines state behavior in international relations."); Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 *CARDOZO L. REV.* 45, 54 (2009) (examining different theories of international law that emerged after the 1990s).

⁶² William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice*, 17 *U. PA. J. INT'L ECON. L.* 995, 1064 (1996); Robert D. Cooter, *Structural Adjudication in the New Law Merchant: A Model Decentralized Law*, 14 *INT'L REV. L. & ECON.* 215, 215–16 (1994).

⁶³ See Burton I. Kaufman, *Mideast Multinational Oil, U.S. Foreign Policy, and Antitrust: The 1950s*, 63 *J. AM. HIST.* 937, 938–39 (1977). The U.S. government expressly relaxed antitrust regulations for American-based transnational oil and gas companies so that they could be used in the vulnerable Middle East "for foreign policy purposes." See *id.* at 938, 940. The Truman administration dropped criminal charges for antitrust violations and granted immunities to those laws. *Id.* at 938. Additionally, 1918's Webb-Pomerene Act exempted "business combinations engaged in export trade from the provisions of the antitrust laws." *Id.* at 940. Nonetheless, companies rarely took advantage of this law. See *id.*; see also Chimni, *supra* note 30, at 20 (describing Western dominance in the World Trade Organization (WTO)); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 *HARV. INT'L L.J.* 67, 76 (2005) (stating that the United States has actively encouraged investment and market liberalization with host countries to facilitate the entry and operation of investments, and has actively protected private investments by U.S. nationals through aggressive negotiation of bilateral investment treaties); *Bilateral Investment Treaties*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties> (last visited Apr. 21, 2013).

ization has become a shibboleth under which corporations export their values through the legal institutions that protect corporate interests.⁶⁴

During the pre-globalized era, capital export from hegemon states to non-hegemon states or former colonies for the purpose of extracting natural resources was routine.⁶⁵ In addition to capital, legal concepts and values such as private property, contract guarantee, privatization, and market-based economic growth were also exported, making them inevitable conditions for modern civilization under corporate capitalism.⁶⁶ These ideas and values formed the framework required by international trade and investment for relations between hegemon, business entities of hegemon nations, and the non-hegemon nations.⁶⁷ International financial institutions' involvement ensured that neo-liberal economic, political, and legal infrastructures were implemented to give way to the capital export in the name of the economic development of non-hegemons.⁶⁸ In this mission, newly decolonized countries' rights to permanent sovereignty over natural resources were weakened.⁶⁹ The

⁶⁴ See MICHAEL PARENTI, *AGAINST EMPIRE* 21–22 (1995).

⁶⁵ See Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 *COLUM. J. TRANSNAT'L L.* 1, 9 (1995) ("If states are free to trade, and goods require differing amounts of two stylized factors, capital or labor, patterns will develop in which countries rich in capital, export capital intensive goods, and countries rich in labor, export labor intensive goods."); Joel R. Paul, *Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 *VA. J. INT'L L.* 285, 305 (2003) ("In conditions of free trade, a country that had an abundance of capital would export capital-intensive goods, whereas a country with an abundance of labor would export labor-intensive goods.").

⁶⁶ See DAVID HARVEY, *THE ENIGMA OF CAPITAL AND THE CRISES OF CAPITALISM* 48–49 (2010). Capitalism can only be sustained through perpetual reinvestment of surplus into new sources of capital. See *id.* at 45. Harvey notes that "[b]oth legal as well illegal means . . . are deployed [to assemble capital]. The legal means include privatisation of what were once considered common property resources (like water and education), the use of the power of eminent domain to seize assets, widespread practices of takeovers, mergers, and the like . . ." *Id.* at 49.

⁶⁷ See PARENTI, *supra* note 64, at 35 ("Designed to leave the world's economic destiny to . . . bankers and multinational corporations, globalization is a logical extension of imperialism, a victory of empire over republic, international finance capital over democracy."); see also INT'L LABOR RIGHTS FUND, *THE WORLD BANK AND IMF POLICIES IN COTE D'IVOIRE: IMPACT ON CHILD LABOR IN THE COCOA INDUSTRY* 1–2 (2004), available at <http://www.laborrights.org/stop-child-labor/cocoa-campaign/resources/10651>.

⁶⁸ See John Williamson, *A Short History of the Washington Consensus*, 15 *L. & BUS. REV. AM.* 7, 9–10 (2009) (reflecting on the use of the ten-point plan Williamson published twenty years prior that eventually became the Washington Consensus); see also Enrique R. Carasco, *An Opening for Voice in the Global Economic Order: The Global Financial Crisis and Emerging Economies*, 12 *OR. REV. INT'L L.* 179, 189–94 (2010) (discussing the rise of "structural adjustment" programs as preconditions to IMF lending and the perceived need for "universality" despite the outcry from heavily indebted third-world states).

⁶⁹ See Kaufman, *supra* note 63, at 939–40.

hegemonic states did not hesitate to use force or aggression to protect their economic or investment interests.⁷⁰ Decolonized nations tried to block the use of force in this context.⁷¹ The Drago Doctrine⁷² and the Calvo Clause⁷³ are examples of such resistance against hegemonic force.

The developing countries felt that the rule of colonial power failed to advance their societies economically due to the peripheral positions they had in the international economy.⁷⁴ The non-hegemonic states suggested the New International Economic Order (NIEO) as an alternative economic system suitable to their needs.⁷⁵ The NIEO challenged unfair international trading, investment, and finance rules and favored the right to development.⁷⁶ Nevertheless, hegemonic states successfully advocated not only the rule of succession, but also the rule of customary international law to bind non-hegemons to treaties signed by or under their colonizers.⁷⁷ The defeat of the NIEO and similar theories

⁷⁰ See DAVID GRAEBER, *DEBT: THE FIRST 5,000 YEARS* 349–50 (2011) (noting that, between 1909 and 1912, tens of thousands of Huitoto Indians in Peru were massacred for their refusal to enter into commercial relations with agents representing a British rubber company subsidiary).

⁷¹ See Bernardo M. Cremades, *Disputes Arising out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues*, 59 DISP. RESOL. J. 78, 80 (2004).

⁷² See Claudio Grossman, *Latin American Contributions to International Law*, 94 AM. SOC'Y INT'L L. PROC. 45, 45 (2000). The Drago Doctrine held that international law did not authorize European powers to use armed intervention to force American republics to pay public debts. See *id.* The Doctrine was asserted by Argentine Foreign Affairs Minister Luis María Drago on December 29, 1902. See Amos S. Hershey, *The Calvo and Drago Doctrines*, 1 AM. J. INT'L L. 26, 28–30 (1907).

⁷³ See Grossman, *supra* note 72, at 45. The Calvo Doctrine also suggests that an armed intervention or diplomatic interventions are not authorized to collect public debts. *Id.* Nations must go to court to resolve debt disputes. *Id.*

⁷⁴ See G.A. Res. 3201, *supra* note 51, ¶ 4(e); Upendra D. Acharya, *Is Development a Lost Paradise? Trade, Development and Environment: A Triadic Dream of International Law*, 45 ALTA. L. REV. 401, 404 n.9 (2007) (“The initiative for the NIEO was launched in 1973 at the Conference of Non-Aligned Countries held in Algiers. This economic order was proposed by the developing countries during the Non-Aligned Movement conference as a first comprehensive vision of world problems and their economic solutions. Later in 1974, the UN General Assembly adopted the resolution on the establishment of [the] NIEO. The resolution is based on the recognition of the inequalities among countries in the North and the South; it reiterates the sovereignty of the states over their natural resources and economic activities and enumerates a set of demands of developing countries in the areas of international trade, financial assistance, monetary reforms, technology transfer, etc., while denouncing colonialism, neo-colonialism, and other forms of oppression faced by developing countries.”).

⁷⁵ See Acharya, *supra* note 74, at 404.

⁷⁶ See *id.*

⁷⁷ These norms are practiced for a long period of time and the old treaties must be observed under the principle of *pacta sunt servanda*; as such, customary international law

cemented the hegemon's law as universal with regard to trade and development.⁷⁸ The hegemonic states' use of rules to promote their trade and investment reflect the Hull doctrine to protect the trade interests of the hegemon.⁷⁹ Now the concept of the right to development has been replaced by or prioritized through international trade and investment mechanisms.⁸⁰

B. *Investment Treaties and Trade Bodies as Modern Hegemonic Processes*

Customary international law has been employed and interpreted in favor of hegemonic states.⁸¹ The treaties establishing the International Center for Settlement of Investment Disputes (ICSID)⁸² have been branded "bills of rights for foreign investors"⁸³ as part of an international legal framework that forces non-hegemon sovereign states to be

that has been in existence for a long time cannot be challenged by newly independent states. See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331; Catherine Logan Piper, *Reservations to Multilateral Treaties: The Goal of Universality*, 71 IOWA L. REV. 295, 307-08 (1985). Although the new independent countries advocated a notion that they should be able to select only those treaty commitments that best suited them and objected the old international legal regime as a part of their right to self-determination (Nyerere Doctrine), the old regime prevailed. See Valerie Knobelsdorf, Note, *The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal System*, 44 COLUM. J. TRANSNAT'L L. 622, 632-34 (2006) (describing the Nyerere doctrine).

⁷⁸ See Barbara Stark, *Theories of Poverty/The Poverty of Theory*, 2009 BYU L. REV. 381, 421-23.

⁷⁹ See Tali Levy, Note, *NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate, and Effective" Standard*, 31 STAN. J. INT'L L. 423, 425-26 (1995) (describing the Hull Doctrine and its lasting impact on the United States' trade agreements).

⁸⁰ Acharya, *supra* note 74, at 405.

⁸¹ See Vagts, *supra* note 14, at 847 (discussing how one powerful state's abstention from a customary norm can prevent the norm from having the force of customary international law); see also Julien Cantegreil, *The Audacity of the Texaco/Calasiatic Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law*, 22 EUR. J. INT'L L. 441, 455-58 (2011) (critiquing Professor Dupuy's interpretation of customary international law from the point of view of an arbitrator determining compensation for nationalized property).

⁸² The ICSID is a forum created through a multilateral treaty formulated by the Executive Directors of the World Bank. See *About ICSID*, ICSID, https://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp (last visited Apr. 22, 2013). It offers arbitration services to consenting parties with the goal of "remov[ing] major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement." *Id.*

⁸³ JAMES THUO GATHII, *WAR, COMMERCE, AND INTERNATIONAL LAW* 166 (2010) (quoting Jose E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 308 (1996)); see Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 48 (2005).

accountable to corporations.⁸⁴ *American Manufacturing & Trading, Inc. v. Republic of Zaire*⁸⁵ and *Wena Hotels Limited v. Arab Republic of Egypt*⁸⁶ are two ICSID arbitrations where states were made responsible for compensating the capital exporting corporations for losses, even though there were out-of-control security situations involved. In addition to the ICSID, the escape clause⁸⁷ of the General Agreement on Tariffs and Trade (GATT) strengthened hegemonic states' power to discriminate against less-powerful states.⁸⁸ Also, the World Bank and the IMF are constantly promoting the idea of privatization in order to accommodate corporate

⁸⁴ See RICHARD PEET & ELAINE HARTWICK, THEORIES OF DEVELOPMENT 63 (1999).

A single developmental model, export-oriented manufacturing within an open, market economy, achieves a position of such dominance that alternative forms of development are dismissed as irrelevant, even by supposedly leftist governments like the Mandela administration in postapartheid South Africa . . . IMF-imposed structural adjustment programs, designed to produce the social and economic conditions for export-oriented growth, are continually resisted by masses of starving people.

Id.

⁸⁵ See *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, ¶ 7.16 (Feb. 21, 1997), 36 I.L.M. 1534 (1997). The ICSID determined Zaire was obligated to compensate American Manufacturing and Trading Company (AMT) for loss caused by its armed forces, even though Zaire invested in AMT through SINZA, a local Zairian company. See *id.* ¶¶ 3.13, 5.15–16.

⁸⁶ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶ 131 (Dec. 8, 2000), 41 I.L.M. 896 (2002). In *Wena Hotels*, both the original arbitral tribunal and the ad hoc annulment committee failed to respect the ICSID Convention's Article 48 requirement to state the reasons upon which an investor-state arbitration award is based. See *id.*

⁸⁷ General Agreement on Tariffs and Trade art. XIX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. Article XIX of GATT provides that if any product is being imported by a member nation in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers . . . of like or directly competitive products," the country concerned can "suspend the obligation" or "withdraw or modify the concession" with respect to that product for such time or to such extent as necessary to prevent or remedy the injury. *Id.* Typically GATT refers to Article XIX as an escape clause, but there are other ways countries can escape their obligations under Articles XXVII (permanent protection), XII or XXVIII (balance of payments problem), XX or XXI (national security or other general security problems), and XXV (granting of waivers). See *id.* arts. XII, XXV, XXVII–XXVIII.

⁸⁸ It appeared that the GATT rules treated all member nations equally under the Most Favored Nation and NTO clauses, however the poor and less-powerful countries could not stand equally with the hegemon states for the purpose of trade retaliation. See C. O'Neal Taylor, *Impossible Cases: Lessons from the First Decade of WTO Dispute Settlement*, 28 U. PA. J. INT'L ECON. L. 309, 446 (2007) ("There is a problem of less compliance by the major states and the reality of differential compliance: the major powers are in a position to refuse to comply while the smaller/less powerful cannot.").

activities.⁸⁹ Among these laws and institutional functions, transnational corporations emerged as a main engine of the globalizing economy.⁹⁰

IV. HEGEMONY SHIFT: THE RISE OF CORPORATE CAPITALISM

Until 1990, the hegemonic states used corporations as their trading and economic tools to foster capitalism as a political ideology against the Soviet Union's competing communist political ideology.⁹¹ Immediately after the collapse of the Soviet Union and the formal conclusion of the Cold War, the IMF predicted a utopia where, at the end of the twentieth century, the new world order would be governed by liberal democratic views that would bring about a global economy based on free-market ideals.⁹² This prediction was supported by Francis Fukuyama, who wrote that the liberalized Western view would remain the monopolistic concept sustaining the world order, and ideological threats to this world order would be over.⁹³ Unfortunately, during this globalized era, the world is witnessing not only the struggle of Western hegemonic states to maintain their unilateral decisive actions, either in the course of the war on terror,⁹⁴ or trade war,⁹⁵ but also the emergence of quasi-hegemon states⁹⁶ (newly emerged economically powerful states) and multinational corporations as super hegemons.⁹⁷ The

⁸⁹ See generally PEET & HARTWICK, *supra* note 84.

⁹⁰ See Luz Estella Nagle, *Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude*, 26 WIS. INT'L L.J. 131, 152-53 (2008).

⁹¹ See *supra* note 59 and accompanying text.

⁹² Upendra D. Acharya, Humanitarian Aid and Assistance to Constrain Piracy in Somalia: Ignored Facts and the Political Delivery of Charity 3 (Aug. 20, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139198.

⁹³ FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 211 (1992).

⁹⁴ Difficulties faced by the United States and its allies in Iraq and Afghanistan have led some to question whether a victory can be claimed in the war on terror. See, e.g., Philip H. Gordon, *Can the War on Terror Be Won? How to Fight the Right War*, FOREIGN AFF., Nov.-Dec. 2007, at 53; Mary L. Dudziak, *This War Is Not over Yet*, N.Y. TIMES, Feb. 15, 2012, at A31. The recent attack on the U.S. embassy in Benghazi, Libya has shown the world that acts of terrorism persist. See Nat'l Counterterrorism Ctr., *Country Reports on Terrorism 2011*, U.S. DEP'T ST. (July 31, 2012), <http://www.state.gov/j/ct/rls/crt/2011/195555.htm>.

⁹⁵ As China ascends to the level of a global economic hegemon, trade disputes with established powers, especially the United States, will likely increase in number and intensity. See Kara Lorigas, *United States-China Trade War: Signs of Protectionism in a Globalized Economy?*, 34 SUFFOLK TRANSNAT'L L. REV. 403, 413-14 (2011).

⁹⁶ David P. Fidler, *Eastphalia Emerging?: Asia, International Law, and Global Governance*, 17 IND. J. GLOBAL LEGAL STUD. 1, 7 (2010) (considering China and India as possible new contenders as the most influential states in global policy).

⁹⁷ See SHELDON S. WOLIN, DEMOCRACY INCORPORATED: MANAGED DEMOCRACY AND THE SPECTER OF INVERTED TOTALITARIANISM 136 (2008) ("An important fact of contemporary politics is that, while the scope of government regulatory authority has receded, corporate

globalization of economic interests of corporate capitalism through financial and technological transactions and expansion has dictated international law and its interpretation,⁹⁸ domestic policy agendas,⁹⁹ and the socio-cultural values of the entire world.¹⁰⁰

Before globalization, states had varying degrees of control (depending upon their position in the power structure) over the gravity of their authority with regard to international law and its application. They accordingly implemented domestic policy based on the original values of democracy: that the state and the system of governance are for the people, and that businesses and corporations are mere economic conveniences for each individual's pursuit of life, liberty, and happiness.¹⁰¹ However, the emergence of corporate capitalism in today's globalized context has foreclosed such humanitarian policymaking priority.

A. States: Conduits for Corporate Capitalism

Corporate capitalism is propagated by two actors in the age of globalization—transnational conglomerates (primary actors) and states (secondary actors).¹⁰² Corporate boards lead trade negotiations as ex-

power has increasingly assumed governmental functions and services, many of which had previously been deemed the special preserve of state power. . . . To the extent that corporation and state are now indissolubly connected, 'privatization' becomes normal and state action in defiance of corporate wishes the aberration."); Joel Slawotsky, *The Global Corporation as International Law Actor*, 52 VA. J. INT'L L. DIG. 79, 80 (2012) (arguing that large multinational corporations should be treated similarly to states in the application of international law because of their comparable reach, power, and asset control).

⁹⁸ See *supra* text accompanying notes 61–80 (discussing the concept of sovereignty and the defeat of the NIEO); see also Office of the U.S. Trade Representative & U.S. Dep't of State, 2012 U.S. Model Bilateral Investment Treaty, pmb., <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

⁹⁹ See WOLIN, *supra* note 97, at 136 ("The strategy followed by privatization's advocates is, first, to discredit welfare functions as 'socialism' and then either to sell those functions to a private bidder or to privatize a particular program."); Thomas B. Edsall, *Lobbyists' Emergence Reflects Shift in Capital Culture*, WASH. POST, Jan. 12, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/11/AR2006011102318.html> (describing the thriving lobbying industry in American politics).

¹⁰⁰ See HERBERT MARCUSE, ONE-DIMENSIONAL MAN 3–5 (1964).

¹⁰¹ See Chari Alson Maddren, *AIDS Vaccines: Balancing Human Rights with Public Health*, 17 TEMP. INT'L & COMP. L.J. 277, 294 (2003); John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1752–55, 1761 (2009) (discussing the advantages of democratic process over international standards for states when protecting human rights and deterring self-dealing political elites).

¹⁰² Cf. JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 187–88 (2007) (detailing Guatemala's struggle to force Gerber baby food producers to label the product despite U.S. threats to revoke Most Favored Nation status; the Guatemalan Supreme Court eventually found in favor of Gerber). Another classic example is the 1990s dispute at the WTO over the European Economic Community's banana tariffs. See Zsolt K. Besskó, *Going Bananas over EEC*

perts—states’ roles are merely secondary.¹⁰³ Primary actors are invisible in the daily lives, thinking, and changing cultures of peoples around the world, while secondary actors are visible in creating and enforcing policy agendas necessary to serve the primary actors’ interests. Secondary actors sometimes advance these agendas in the name of democracy and human rights,¹⁰⁴ and sometimes in the name of countries’ economic interests.¹⁰⁵ States, as secondary actors, participate in economic relations with other states in two ways: direct government-to-government relations through bilateral treaties, and indirect government-to-government relations through multilateral economic organizations.¹⁰⁶ States have coor-

Preferences?: A Look at the Banana Trade War and the WTO’s Understanding on Rules and Procedures Governing the Settlement of Disputes, 28 CASE W. RES. J. INT’L L. 265, 266, 270–71 (1996). Numerous acts in recent years have illustrated instances where corporate entities has been intertwined with, and directly benefited from, exertions of state power at the highest levels. See WOLIN, *supra* note 97, at 136; Besskó, *supra*, at 265; HalliburtonWatch.org, *Halliburton Announces 284 Percent Increase in War Profits*, GLOBALRESEARCH (Aug. 4, 2005), <http://www.globalresearch.ca/halliburton-announces-284-percent-increase-in-war-profits/801>.

¹⁰³ See Mohamed Omar Gad, *Impact of Multinational Enterprises on Multilateral Rule Making: The Pharmaceutical Industry and the TRIPS Uruguay Round Negotiations*, 9 LAW & BUS. REV. AM. 667, 686 (2003) (“Established by statute in 1974 to provide the U.S. President with advice on trade negotiations, the [Advisory Committee for Trade Negotiations] was a committee of leading executive officers from major U.S. corporations with a stake in U.S. and international trade policy.”); Allison D. Garrett, *The Corporation as Sovereign*, 60 ME. L. REV. 129, 148 (2008) (“For example, corporations engage in diplomacy, establish outposts in other nations, engage in trade negotiations, and often serve as proxies for their home country’s government.”).

¹⁰⁴ For example, in 2003 President George W. Bush, in his “freedom deficit” speech, said:

[This] freedom deficit . . . has terrible consequences for the people in the Middle East and for the world. In many Middle Eastern countries, poverty is deep, and it is spreading. Women lack rights and are denied schooling. Whole societies remain stagnant while the world moves ahead Sixty years of Western nations excusing and accommodating the lack of freedom in the Middle East did nothing to make us safe, because in the long run, stability cannot be purchased at the expense of liberty.

Remarks on the 20th Anniversary of the National Endowment for Democracy, 2 PUB. PAPERS 1468 (Nov. 6, 2003).

¹⁰⁵ The U.S. government has always made the national economic interest a top policy priority. See, e.g., Edward P. Djerejian, Assistant Sec’y of State for Near East Affairs, U.S. Economic Policy in the Middle East: Challenges and Opportunities, Address Before the Arab-American Business and Professional Association (Sept. 16, 1993), *available at* http://www.disam.dsca.mil/pubs/Vol%2016_2/Djerejian.pdf. For example, the Clinton administration tied political, diplomatic and security policies with the policy of promoting U.S. business, investment, and commercial interests abroad. See *id.*

¹⁰⁶ Cf. Osvaldo Sunkel, *Transnational Capitalism and National Disintegration in Latin America*, in THE POLITICAL ECONOMY OF LAW 282, 285–86 (Yash Ghai et al. eds., 1987). Sunkel addresses the structure of the system of international economic relations and states that this structure has turned into a superstructure of international relations, where trans-

minated with corporations by instituting new liberal economic reforms designed to facilitate market penetration.¹⁰⁷ State functions are primarily to institutionalize and rationalize the markets by protecting property rights (including intellectual property rights), liberalizing economic policies everywhere, and securing key inputs at lower cost to please the primary actors.¹⁰⁸ The key inputs include labor, capital, technology, economic infrastructure, and social consensus.¹⁰⁹

In addition, states engage in the external relations managerial function.¹¹⁰ Under this function, states organize and maintain their relations with foreign systems within and outside of domestic territories in order to expand or de-territorialize corporate capitalism.¹¹¹ In this managerial role, states use a variety of instruments that they legitimately own or control: military power, aid, grants, commercial and financial sanctions, and appropriate forms of government control—all functions within the scope of the direct participation model.¹¹² Under the indirect participation model, states create multilateral treaties and organizations (such as the IMF, World Bank, ICSID, WTO, etc.), and bring national sovereignty to an end, reinterpreting the sovereignty of all states by requiring political, monetary, and fiscal reforms to gain access to capital.¹¹³ As one scholar states, international trade and financial institutions are nothing but a policy tool in the name of free trade to serve “the interests of the strongest economic powers . . . not because trade really exists or could be achieved again, but because the progres-

national corporations are the structure (primary actors or elements) and states are superstructure (secondary actors or elements). *See id.* He explains further that the IMF, the GATT (now the WTO), and the World Bank are “partly a nostalgic hangover of economists who would like to recreate the nineteenth century ‘golden’ age of free trade . . .” *Id.* at 285.

¹⁰⁷ *See id.* at 285; *see also* Williamson, *supra* note 68, at 9–10.

¹⁰⁸ *See* Sunkel, *supra* note 106, at 283–85.

¹⁰⁹ *Cf. id.* at 288 (describing the major investments in transnational conglomerates as research, design, technology, capital, and international expansion via subsidiaries).

¹¹⁰ *See id.* at 285.

¹¹¹ *See id.*; *see also* Frank J. Garcia, *Three Takes on Global Justice*, 31 U. LA VERNE L. REV. 323, 357–59 (2010). Professor Garcia analyzes the concept and process of globalization and suggests a global basis for global justice. *See id.* He first identifies three takes on global justice: global justice as the foreign policy of liberal states, globalization and global justice, and consent, oppression, and the nature of trade itself, and concludes that the current trade system tends to ignore the role of consent in economic exchange, risking facilitation of coercion and exploitation at the cost of intended social benefit. *See id.*

¹¹² *Cf.* Sunkel, *supra* note 106, at 285 (“The instruments of domination in bilateral relationships are well known: tied loans, aid, preferential arrangements with regard to transportation, foreign investment, tariffs, and so on.”).

¹¹³ *See id.* at 285–86.

sive dismantling of protectionist practices (especially in underdeveloped countries) facilitates the opening up of new markets for the multinational corporation."¹¹⁴

B. Corporations: Super Hegemons?

Corporate capitalism plays a dominant role in today's state and human affairs, and multinational corporations (MNCs) are ubiquitous in modern life.¹¹⁵ They are capable of dictating the decisions of states and directing the course of international law by either prompting states to implement and enforce treaties¹¹⁶ or influencing international soft law.¹¹⁷ Promotion of corporate interests by state governments creates an apparent conflict of values; democratic states are built around valu-

¹¹⁴ See *id.* at 286.

¹¹⁵ Cf. SOL PICCIOTTO, REGULATING GLOBAL CORPORATE CAPITALISM 108–10 (2011) (“[T]he corporation is . . . a central institutional form mediating social relations of power [The corporate form may be used] with virtually any combination of personal, family, institutional and governmental involvement.”); *Multinational Enterprises*, INT’L LAB. ORG., <http://www.ilo.org/global/topics/employment-promotion/multinational-enterprises/lang-en/index.htm> (last visited Apr. 23, 2013) (“Today, some 50,000 multinational enterprises and their 450,000 affiliates employ over 200 million people throughout the world. Their impact is felt in virtually every facet of industry, trade, services and business activities.”).

¹¹⁶ Bilateral investment treaties, free trade agreements like NAFTA, ICSID’s implementation, and the influence of Western states in the World Bank and the IMF are all examples of ways states have acted to further the interests of private corporations. See Salacuse & Sullivan, *supra* note 63, at 71.

¹¹⁷ On corporate responsibilities, two soft law instruments can be considered. First, the International Labour Organization first adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in 1977, and has since revised it in 2000 and 2006. See INT’L LABOUR OFFICE, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY 1 (4th ed. 2006), available at http://www.ilo.org/wcmsp5/groups/public/-ed_emp/-emp_ent/-multi/documents/publication/wcms_094386.pdf. Second, the Organisation for Economic Co-operation and Development has developed various sets of guidelines for multinational enterprises, including a corporation’s duties to follow the policies of its host country. See ORG. FOR ECON. CO-OPERATION AND DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 19 (2011), available at <http://www.oecd.org/daf/inv/mnc/48004323.pdf>. These guidelines address human rights violation, bribery, pollution, and other effects of corporate practices. See *id.* at 19–20. There are other international soft laws that are developed by corporate entities that are widely recognized by state apparatuses (in contrast to environmental and human rights soft laws); the International Chamber of Commerce’s Incoterms and UCPs are examples of such soft law regimes. See, e.g., *Incoterms*, AQUAMARINE TRANS, <http://www.aquamarine-trans.com/en/incoterms.php> (last visited Apr. 23, 2013). See generally Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT’L L. 41 (2010) (discussing corporations’ voluntary development of soft law as constraints on their own behavior).

ing human dignity and ingenuity while the only corporate value is the bottom line.¹¹⁸

Increasing state reliance on MNCs comes at the cost of the states' sovereignty, allowing corporate forces to become hegemony in their own right.¹¹⁹ First, state agencies outsource their major public functions, including criminal investigations and arrest, protection of citizens and private properties, prison administration, migration and asylum, and food policies to corporations.¹²⁰ Corporations now function like states and there are occasions when states act like corporations.¹²¹ Even conducting war, a major state function to protect sovereign interests, has been commercialized or corporatized.¹²² The power of the state is thus marginalized without the backing of powerful MNCs, replacing the responsibility of the state for its people with the responsibility of the MNC to its shareholders.¹²³

Nevertheless, the notion of partnership between states and corporations has taken a path of legitimacy with the distinctive ideas of "power with" and "power over" suggesting that the "power over," a vertical

¹¹⁸ *But see* Slawotsky, *supra* note 97, at 85 (citing M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269, 282 (2010)) ("[S]tates' goals of power and wealth are in frequent contrast with the human goals of justice and peace") Human goals and states' goals in a democracy are, in theory, one in the same. *See id.* (quoting Bassiouni, *supra*, at 282). Democratic government is, after all, by the people and for the people. But the increasing dependence of states on MNCs logically conflates the goals of the two, effectively separating the state from the people that mandate it.

¹¹⁹ *Cf.* Huntington, *supra* note 60, at 335 (comparing private transnational organizations, such as General Motors, with public governmental bodies, such as the United States Air Force).

¹²⁰ *See* Slawotsky, *supra* note 97, at 86–88.

¹²¹ *See* Huntington, *supra* note 60, at 335; Slawotsky, *supra* note 97, at 86–88. Huntington compares General Motors (GM) to the United States Air Force (USAF) in terms of scale and global presence. *See* Huntington, *supra* note 60, at 335. He notes that in 1969, the USAF's budget was twenty-seven billion dollars and GM's sales were around twenty-four billion dollars. *Id.* The USAF had fifty-four installations in twenty foreign countries employing 862,000 people (including domestic employees), while GM had fifty-three plants or facilities in twenty-five foreign countries employing 794,000 people. *Id.* The shared bureaucratic and hierarchical nature of these organizations makes them indistinguishable for Huntington's analysis. *See id.* He notes that these "transnational" institutions with operations in multiple states nonetheless employ significant centralized control. *See id.* at 333. He maintains that multinational corporations are transnational in operations, multinational in personnel, but almost entirely national in control. *See id. passim.*

¹²² GATHI, *supra* note 83, at 223–28 (2010); *see* WOLIN, *supra* note 97, at 136 ("Corporate expansion extends to military functions, a province once jealously guarded as a state prerogative.").

¹²³ *See, e.g.,* *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir. 2010), *aff'd*, No. 10-1491 (Apr. 17, 2013) (holding that corporations are not responsible under customary international law after allegedly facilitating governmental human rights violations).

system of power exercise, is implied to state practices, and the “power with,” a horizontal system of power exercise, is implied to corporate management as a problem-solving tool, and is a difficult concept to be applied in international law.¹²⁴ Why should “power with” be so difficult to apply in international law, where the concept of sovereign equality promotes a horizontal international community? It will be difficult if we are committed to a hierarchical division among hegemon, quasi-hegemon, and non-hegemon states. States share “power with” corporations to solve states’ economic, political, diplomatic, and security problems. In this process, corporations may enjoy sovereign immunity and profit from their expertise by opening up the market for state functions.¹²⁵ The second U.S.-Iraq war (2003) can be considered an effective state-corporate partnership (under the “power with” model), facilitating corporate interests by states¹²⁶ and at the same time fulfilling states’ efficiency deficit (from supply of food to the military to the security of government officials) with what amounts to merely another profit venture for corporations.¹²⁷

In this context, I would like to present the regime change in Libya as an example of a tacitly corporate-driven cause. In such situations, states act to advance democracy, implement Responsibility to Protect (R2P),¹²⁸ and clear the way for corporations to control market and resources, while corporations may help with security in post-conflict areas and begin their resource exploration projects.¹²⁹

¹²⁴ Anne-Marie Slaughter, *Commentary on 2010 Grotius Lecture*, 26 AM. U. INT’L L. REV. 1369, 1375 (2011).

¹²⁵ Cf. Jenny S. Lam, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 CALIF. L. REV. 1459, 1462 (2009) (“Until relatively recently, [private military contractors] enjoyed immunity from criminal prosecution in Iraq.”).

¹²⁶ See Paul Bignell, *Secret Memos Expose Link Between Oil Firms and Invasion of Iraq*, INDEP. (London), Apr. 19, 2011, at 4.

¹²⁷ See Chad C. Carter, *Halliburton Hears a Who? Political Question Doctrine Developments in the Global War on Terror and Their Impact on Government Contingency Contracting*, 201 MIL. L. REV. 86, 127 (2009); Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT’L L. 395, 402 (2009); Naomi Klein, *Bomb Before You Buy: The Economics of War*, 2 SEATTLE J. FOR SOC. JUST. 331, 340 (2004); Lam, *supra* note 125, at 1459; David Jackson & Jason Grotto, *Inside the World of War Profiteers: From Prostitutes to Super Bowl Tickets, a Federal Probe Reveals How Contractors in Iraq Cheated U.S.*, CHI. TRIB., Feb. 21, 2008, at 1.

¹²⁸ See generally *Responsibility to Protect*, OFFICE SPECIAL ADVISER ON PREVENTION OF GENOCIDE, <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml> (last visited Apr. 18, 2013).

¹²⁹ Cf. Scott Shane, *West Sees Libya as Ripe at Last for Business*, N.Y. TIMES, Oct. 28, 2011, at A1 (reporting on dialogue between the interim post-revolutionary Libyan government and foreign corporations, including security firms).

V. LIBYA'S GADDAFI: A SUSPECT OF CORPORATE CAPITALISM AND AN EXAMPLE OF HEGEMONY SHIFT?

Recent events in Libya show how states can act as conduits for corporate capitalism. Actions against Libya and negotiations and compromises in terms of international security threats and human rights, stability, and peace have been considered international law in action in Libya.¹³⁰ The NATO-backed overthrow of Muammar Gaddafi, Libya's head of state, was surprising considering he had agreed to all of the West's security demands just a few years before and was hailed for his cooperation by U.S. President George W. Bush¹³¹ and UK Prime Minister Tony Blair.¹³² A comprehensive analysis of Gaddafi's tempestuous relationship with Western corporate interests, however, reveals the possibility of sinister motivations and provides evidence of a shift in hegemonic power from states to MNCs.¹³³

A. Gaddafi's Checkered History of Cooperation and Its Consequences

After the explosion of Pan Am Flight 103 in 1988, the UN Security Council imposed economic sanctions against Libya at the behest of the

¹³⁰ Cf. Jonte van Essen, *De Facto Regimes in International Law*, 28 UTRECHT J. INT'L & EUR. L., no. 74, 2012 at 31, 31, 42, 46 (discussing the relation of international state-recognition doctrines to the Libyan interim government's diplomacy).

¹³¹ The UN lifted sanctions on Libya in September 2003, while U.S. economic sanctions ended on September 20, 2004. *Global Message*, WHITE HOUSE (Sept. 20, 2004), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040923.html>; *Security Council Lifts Sanctions Against Libya Imposed After Lockerbie Bombing*, UN NEWS CENTRE (Sept. 12, 2003), <http://www.un.org/apps/news/story.asp?newsid=8225&cr=libya#.UV8AOKtVSv8>. President Bush removed economic sanctions that were in place since 1986, due to Libya's "concrete progress in dismantling its weapons of mass destruction" (WMD) and other missile capable programs. See *Global Message*, *supra*. The decision was made based on a nine-month investigation of Libya's "transparent and verifiable" work "with international organizations, the United States and United Kingdom to eliminate its WMD . . ." See *id.* "[T]he CIA and Britain's MI6 maintained a close—even intimate—relationship with their Libyan counterparts dating as early as 2002, before the CIA had set up a 'permanent' mission in Libya (which, according to . . . documents, began in 2004)." See Abigail Hauslohner, *How Libya Seems to Have Helped the CIA with Rendition of Terrorism Suspects*, TIME (Sept. 2, 2011), <http://www.time.com/time/world/article/0,8599,2091653,00.html#ixzz1Wuedf4vb>. "[W]estern intelligence agencies worked closely with the Libyans on the renditions of terrorism suspects to Libya for questioning between 2002 and 2004." *Id.*

¹³² See *Blair Hails New Libyan Relations*, BBC NEWS, http://news.bbc.co.uk/2/hi/uk_news/politics/3566545.stm (last updated Mar. 25, 2004). British Prime Minister Tony Blair visited Tripoli in March 2004 and hailed Gaddafi for the extraordinary step of renouncing Libya's WMD programs. See *id.*

¹³³ Cf. *id.* ("As Mr. Blair met Mr. Gaddafi, it was announced Anglo-Dutch oil giant Shell had signed a deal worth up to £550 [million] for gas exploration rights off the Libyan coast.").

United States and the United Kingdom.¹³⁴ The UN sanctions were lifted after Libya handed over two suspects and agreed to pay compensation to the families of the explosion's victims.¹³⁵ UN sanctions against Libya were suspended during a boom in oil demand and price.¹³⁶ The United States, however, continued its trade sanctions for supporting international terrorism and for attempting to develop weapons of mass destruction (WMD).¹³⁷

In 2003, Libya declared that it was ready to disclose its WMD program and agreed to WMD monitoring programs with the International Atomic Energy Agency (IAEA).¹³⁸ In December 2003, Libya agreed to help make the Middle East and North Africa a WMD-free zone and to comply with the Missile Technology Control Regime (MTCR)¹³⁹ to limit its missile activities. Libya also reaffirmed its commitments to the Treaty on the Non-Proliferation of Nuclear Weapons,¹⁴⁰ Convention on Chemi-

¹³⁴ See S.C. Res. 748, ¶¶ 4–5, U.N. Doc. S/RES/748 (Mar. 31, 1992).

¹³⁵ See *Contemporary Practice of the United States Relating to International Law—U.S./UK Negotiations with Libya Regarding Nonproliferation*, 98 AM. J. INT'L L. 169, 195–97 (2004) [hereinafter *Nonproliferation Negotiations*].

¹³⁶ Ronald Bruce St. John, *The Changing Libyan Economy: Causes and Consequences*, 62 MIDDLE E. J. 75, 80 (2008).

¹³⁷ *Nonproliferation Negotiations*, *supra* note 135, at 195.

¹³⁸ See *id.* at 196.

¹³⁹ See *Libyan Nuclear Weapons*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/wmd/world/libya/nuclear.htm> (last visited Apr. 23, 2013).

The [MTCR] is an informal and voluntary association of countries which share the goals of non-proliferation of unmanned delivery systems capable of delivering weapons of mass destruction The MTCR was originally established in 1987 by Canada, France, Germany, Italy, Japan, the United Kingdom and the United States. Since that time, the number of MTCR partners has increased to a total of thirty-four countries, all of which have equal standing within the Regime.

The MTCR was initiated partly in response to the increasing proliferation of weapons of mass destruction (WMD), i.e., nuclear, chemical and biological weapons. The risk of proliferation of WMD is well recognized as a threat to international peace and security While concern has traditionally focused [sic] on state proliferators, after the tragic events of 11 September 2001, it became evident that more also has to be done to decrease the risk of WMD delivery systems falling into the hands of terrorist groups and individuals. . . .

The MTCR rests on adherence to common export policy guidelines (the MTCR Guidelines) applied to an integral common list of controlled items (the MTCR Equipment, Software and Technology Annex).

The Missile Technology Control Regime, MISSILE TECH. CONTROL REGIME, <http://www.mtcr.info/english/index.html> (last visited Apr. 23, 2013).

¹⁴⁰ *Libyan Nuclear Weapons*, *supra* note 139.

cal Weapons,¹⁴¹ Convention on Biological Weapons,¹⁴² the IAEA Safeguards Agreement,¹⁴³ and the obligations in the Protocols to those conventions.¹⁴⁴

President Bush welcomed Libyan cooperation and promised Libya a return to a better relationship with the United States.¹⁴⁵ Thereafter, U.S., UK, and IAEA experts reached an agreement to end Libya's nuclear weapons program.¹⁴⁶ Libya also ratified the Comprehensive Test Ban Treaty (CTBT) in 2004.¹⁴⁷ In 2006, the United States removed Libya from the list of states that sponsor terrorism.¹⁴⁸ Libya transformed from Reagan's mad-dog dictator of the Middle East to a great success story of U.S. unilateral sanction against a rogue state.¹⁴⁹

Gaddafi "opened the Libyan economy to Western capital, carried out . . . economic reforms, and granted . . . investment deals to major oil companies of the West."¹⁵⁰ The Office of the United States Trade Representative (USTR) and the Libyan General People's Committee on Industry, Economy, and Trade signed the Trade and Investment Framework Agreement in May 2010.¹⁵¹ According to USTR, Libya was the sixty-ninth largest trade partner of the United States, with \$2.6 billion in import/export trade in 2009.¹⁵² In 2007, the French sold anti-

¹⁴¹ *Libya Joins the Chemical Weapons Convention*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Jan. 14, 2004), <http://www.opcw.org/news/article/libya-joins-the-chemical-weapons-convention/>.

¹⁴² See NUCLEAR THREAT INITIATIVE, LIBYA BIOLOGICAL CHRONOLOGY 1 (2011), available at http://www.nti.org/media/pdfs/libya_biological.pdf?_id=1321485045.

¹⁴³ See generally Int'l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement of the Socialist People's Libyan Arab Jamahiriya*, IAEA Doc. GOV/2004/12 (Feb. 20, 2004).

¹⁴⁴ *Nonproliferation Negotiations*, supra note 135, at 196 (quoting Letter Dated 19 December 2003 from the Permanent Rep. of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/1196 (Dec. 29, 2003)).

¹⁴⁵ *Id.* at 197 (quoting Remarks on the Decision by Colonel Muammar Abu Minyar al-Qadhafi of Libya to Disclose and Dismantle Weapons of Mass Destruction Programs, 39 WEEKLY COMP. PRES. DOC. 1835, 1835-36 (Dec. 19, 2003)).

¹⁴⁶ See *id.*

¹⁴⁷ *Id.*

¹⁴⁸ Jonathan B. Schwartz, *Dealing with a "Rogue State": The Libya Precedent*, 101 AM. J. INT'L L. 553, 553 (2007).

¹⁴⁹ See *id.* at 580; The President's News Conference, 1 PUB. PAPERS 439 (Apr. 9, 1986), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=37105>.

¹⁵⁰ Ismael Hossein-Zadeh, *Why Regime Change in Libya?*, GLOBALRESEARCH (June 20, 2011), <http://www.globalresearch.ca/why-regime-change-in-libya/>.

¹⁵¹ *United States, Libya Sign Trade and Investment Framework Agreement*, OFFICE U.S. TRADE REP., <http://www.ustr.gov/about-us/press-office/press-releases/2010/may/united-states-libya-sign-trade-and-investment-framework> (last visited Apr. 23, 2013).

¹⁵² *Id.*

tank missiles and communications equipment to the Gaddafi regime.¹⁵³ UK Prime Minister Tony Blair reportedly lobbied Saif-al-Islam Gaddafi (son of Muammar Gaddafi) for Libya to invest \$70 billion of oil proceeds with American investment bank JP Morgan.¹⁵⁴ Mr. Blair also reportedly began work in January 2008 as a “two million pound-a-year” advisor to JP Morgan.¹⁵⁵

After Libya’s diplomatic thaw, British Petroleum (BP) started a major oil exploration venture and seismic test studies to drill forty-four billion barrels of Libyan oil reserves.¹⁵⁶ BP signed a joint venture agreement with Gaddafi’s Libya.¹⁵⁷ At the dawn of this thaw in 2003, Libya’s foreign minister said that Libya hoped to attract oil investment by American companies.¹⁵⁸ In 2003, the U.S. government also gave three oil corporations—the Oasis Group formed by ConocoPhillips, Amerada Hess, and Marathon—permission to negotiate with Libyan authorities.¹⁵⁹ Other Western oil corporations such as Total of France, ENI of Italy, OMV of Austria, Woodside of Australia, Repsol of Spain, and Hellenic of Greece had already explored Libyan oil.¹⁶⁰ After the waiver of UN and U.S. sanctions, Gaddafi was able to dampen opposition with the help of Libya’s economic and political partnership with the West.¹⁶¹

B. National and Regional Development Under Gaddafi

Though orchestrated by a corrupt dictator, Libya under Gaddafi made rapid progress in improving the lives of Libyans.¹⁶² Gaddafi

¹⁵³ Kim Willsher, *France Denies Libyan Arms Trade-Off: No Deal over Jailed Health Workers, Sarkozy Insists Socialist Leader Demands Inquiry into Negotiations*, GUARDIAN (London), Aug. 4, 2007, at 38.

¹⁵⁴ Richard Spencer et al., *Blair Went to Tripoli ‘To Lobby Gaddafi for Deals with US Bank,’* DAILY TELEGRAPH (London), Sept. 19, 2011, at 20.

¹⁵⁵ Robert Mendick, *Tony Blair’s Six Secret Visits to Col. Gaddafi*, TELEGRAPH (London), Sept. 24, 2011, <http://www.telegraph.co.uk/news/politics/tony-blair/8787074/Tony-Blairs-six-secret-visits-to-Col-Gaddafi.html>; Spencer et al., *supra* note 154.

¹⁵⁶ See Ian Griffiths, *UK Investment in Energy Heats Up After Thaw in Relationship: Oiling the Wheels*, GUARDIAN (London), Aug. 19, 2009, at 7.

¹⁵⁷ See *id.*

¹⁵⁸ See Simon Romero, *Oil Giants Look Anew at Libya*, N.Y. TIMES, Dec. 24, 2003, at 1.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ St John, *supra* note 136, at 84.

¹⁶² Libya ranked sixty-fourth on the UN Human Development Index (HDI). Under Gaddafi, Libyans’ life expectancy rose to 74.8 years, the highest in Africa. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2011, at 24, 128 (2011), *available at* <http://hdr.undp.org/en/reports/global/hdr2011/download/>. The adult literacy rate was 88.9% for both sexes ages fifteen and above. *Id.* The mortality rate was one per one thousand births, less than Saudi Arabia, which was twenty-one per one thousand births. See *id.* The UN Devel-

played a leading role in promoting trade, development, and industrialization projects on a local, national, and regional level, particularly in telecommunications.¹⁶³ By gaining access to telecommunications technology developed and sold by Western countries, Libya was able to provide the region with low-cost connectivity.¹⁶⁴ Forty-five African countries established the Regional African Satellite Communication Organization (RASCOM) to have their own satellite and communications system and avoid a \$500 million annual fee to the European system.¹⁶⁵ Beginning in the early 1990s, African countries asked the IMF and the World Bank to fund RASCOM.¹⁶⁶ The IMF and the World Bank could not make any decisions for over a decade.¹⁶⁷ Africa got its first satellite and communications system in 2007 when Gaddafi offered \$300 million, the African Development Bank offered \$50 million, and the West African Development Bank offered \$27 million.¹⁶⁸

In another project, the Gaddafi regime invested billions to bring aquifer freshwater from southern Libya's desert to the coastal regions where the populations are concentrated.¹⁶⁹ The Man Made River is an acclaimed achievement that stands as a testimony to Gaddafi's contribution to Libya's economic development.¹⁷⁰

opment Programme (UNDP) noted that Libya has made significant progress on gender equality in the fields of education and health, but mentioned that much work remains in the area of politics and economy. *See id.* In 2010, Libya's HDI rank (53) was ahead of Egypt (101) and Saudi Arabia (55). UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2010, at 144 (2010), *available at* <http://hdr.undp.org/en/reports/global/hdr2010/chapters/>.

¹⁶³ *See* Bienvenu-Magloire Quenum, *Tribute to Gaddafi Panafrikanism in Spite of Everything Else*, BUSINESSAFRICA.NET, <http://businessafrica.net/africabiz/arcvol2/email123.php> (last visited Apr. 23, 2013).

¹⁶⁴ *See id.*

¹⁶⁵ LUKE M. OBALA, AL JAZEERA CTR. FOR STUDIES, AFRICA AND THE ARAB WORLD AFTER GADDAFI 7 (2011), *available at* <http://studies.aljazeera.net/ResourceGallery/media/Documents/2011/11/30/2011113014232503734Africa%20and%20the%20Arab%20World%20after%20Gaddafi.pdf>.

¹⁶⁶ *See* Quenum, *supra* note 163.

¹⁶⁷ *Id.* The IMF had been solicited to finance the project. *Id.* But from 1992 to 2006, the IMF did not consider this project seriously and delayed the financing. *See id.*

¹⁶⁸ *Id.* Quenum notes:

Other satellites had been launched since then, by Angola, Algeria, South Africa, benefiting from low-cost technology transfer from China and Russia. Another second African satellite had been launched in July 2010. . . . [T]his new African satellite will lower the cost of inter-telecommunication between African countries to just one tenth of what it was when European monopoly was dominant.

Id.

¹⁶⁹ *See id.*

¹⁷⁰ *Id.*

With the improved quality of life, a hopeful development process, strong support and partnership with the West on the global war on terror, and expanding globalization in Libya, NATO support of a violent regime change seemed impractical. Four major factors may be identified that likely contributed to Gaddafi's overthrow:

1. Resource nationalization initiatives by Gaddafi in 2006: Gaddafi, focused on Libya's forty-four billion-barrel oil reserve, began to implement a program of resource nationalism in 2006, declaring that Libyans must take their profit share of oil resources controlled by foreigners.¹⁷¹ This program showed Gaddafi again as an unreliable partner with corporate capitalism. The resource nationalization was not a new venture for Libya. When Libya became independent in 1951, the country was poor and underdeveloped. When large oil deposits were discovered in 1959, Libya decided to bring Western oil companies to explore Libya's oil deposits, letting them earn substantial profit from the investments. In the 1970s, Libya nationalized the interests and properties of Western oil companies.¹⁷²
2. Investment diversification from Western corporations to BRIC (Brazil, Russia, India, and China) nations: Gaddafi also made extensive trade investment deals with BRIC powerhouse trading countries.¹⁷³
3. Gaddafi refused to join the United States Africa Command (AFRICOM).¹⁷⁴ Some forty-nine countries signed on to the United States Military Charter for Africa.¹⁷⁵
4. Gaddafi neglected eastern Libya, where the population suffered from discrimination and oppression.¹⁷⁶ Benghazi was

¹⁷¹ See Christopher Helman, *Is Libya Going To Boot U.S. Oil Companies?*, FORBES.COM (Jan. 22, 2009, 10:09 AM), http://www.forbes.com/2009/01/22/libya-gaddafi-oil-biz-energy-cx_ch_0122libya.html.

¹⁷² JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 89 (2010).

¹⁷³ Pepe Escobar, *A History of the World, BRIC by BRIC*, NATION (Apr. 26, 2012), <http://www.thenation.com/article/167581/history-world-bric-bric#>; *Gaddafi Threatens West, Plays BRIC Card*, WEEKLY VOICE, <http://www.weeklyvoice.com/world-news/gaddafi-threatens-west-plays-bric-card/> (last visited Apr. 23, 2013).

¹⁷⁴ Dan Glazebrook, *An Ongoing Disaster: Libya, Africa and Africom*, GLOBALRESEARCH (May 26, 2012), <http://www.globalresearch.ca/an-ongoing-disaster-libya-africa-and-africom/31053>.

¹⁷⁵ Hossein-Zadeh, *supra* note 150.

more influenced by the Arab Spring in Egypt than other parts of Libya, in part because of its geographic location. As a result, oppressed people from eastern Libya (Benghazi) sought regime change.¹⁷⁷

Despite the dictator's efforts and some achievements toward making Libyans' lives comfortable, Gaddafi failed to demonstrate that he was a reliable partner with Western MNCs due to a pattern of obtaining capital from powerful Western corporations and then nationalizing that capital.¹⁷⁸ The uprising in Libya against Gaddafi immediately received huge support from corporate capitalism, which hoped to maintain lucrative oil operations.¹⁷⁹ Internal conflict in Libya created an atmosphere ripe for gross violation of human rights, challenges to dictatorship, and demands for democracy and civil rights, and coincided with corporate interests.¹⁸⁰ These conditions triggered the involvement of the UN Security Council, which passed Resolution 1973 to protect civilians from Gaddafi's military, and ended with direct support to rebels with arms and money from NATO members.¹⁸¹

The rebels' transitional government immediately declared its intent to honor all oil contracts with corporations whose countries supported regime change and post-regime political stability.¹⁸² Sovereign states, the UN and its agencies, and international law scholars all rushed to determine international law as it applied to the Libyan turmoil in the areas of human rights, war conduct, democracy, genocide, humanitarian intervention, and the R2P initiative. This approach is all

¹⁷⁶ See Alexander Dziadosz, *Fear Stalks Tripoli as Libya's East Celebrates*, REUTERS (Feb. 23, 2011, 6:29 PM), <http://www.reuters.com/article/2011/02/23/us-libya-protests-idUSTRE71G0A620110223>.

¹⁷⁷ Cf. Robert F. Worth, *On Libya's Revolutionary Road*, N.Y. TIMES MAG., Mar. 30, 2011, at MM32 (detailing initial uprising in Benghazi, in which protesters borrowed slogans from Tunisian and Egyptian rebels).

¹⁷⁸ See, e.g., *Texaco Overseas Petroleum Co. v. Libya*, 17 I.L.M. 1, ¶¶ 1-7 (1978).

¹⁷⁹ See *Libya Rebels 'Promised France 35% Oil'*, NEWS24 (Sept. 1, 2011), <http://www.news24.com/Africa/News/Libya-rebels-promised-France-35-oil-20110901>.

¹⁸⁰ Cf. Earle Scarlett, *Libya: Internal War and Foreign Intervention*, JAMAICA OBSERVER (Mar. 12, 2011), http://www.jamaicaobserver.com/columns/Libya-Internal-war-and-foreign-intervention_8490249 ("Failure of the international community to take military action to avoid widespread carnage will raise questions of its respect for humanity and cause the rebels and the world to doubt the motives of the major powers which trumpet democracy.").

¹⁸¹ Press Release, Security Council, Security Council Approves 'No-Fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

¹⁸² Mahmoud Habboush, *Libya Interim Government Says to Review ENI Contracts*, FEB17.INFO (Dec. 29, 2011), <http://feb17.info/news/libya-interim-government-says-to-review-eni-contracts/>.

too typical of the application of international law, adding insight into the question of whose interests are served by international law. Did Libyans achieve what they intended to achieve? Or is this yet another addition in the world of events in which peoples (Libyans') freedom aspirations are trapped between corporate interests, success interests of international organizations, international legal process, and states that initiated the regime change action in the name of human rights and democracy? If this is a success story of international law of human rights and democracy, what other countries are next in line—Bahrain, Saudi Arabia, Jordan, and other non-democratic countries?

CONCLUSION

Globalization has allowed corporate capitalism to achieve several goals: economic globalization; social, political, and legal value globalization; creation of conflicts within states; and giving globalized effect to those internal conflicts. While undermining the real aspirations of the people involved in such conflict and crushing people's expectations of freedom, development, and independence, corporate capitalism has converted globalization into a profit-making venture. All states—hegemon, quasi-hegemon, and non-hegemon—have begun to behave as agents of corporate capitalism. This is not to say that we should ignore the importance of corporations and positive effects of globalization with regard to the free and open flow of information, access to technology in most corners of world, and contributions to social and economic development that corporate trade and investment activities and government policies have brought throughout the world. However, it is important to realize that corporations' trade and investment activities and governments' policies are beneficial only insofar as they are tools to advance human conditions, and should be resisted when they defeat that purpose.

We are now in a new world order of hegemony shift from states to corporate capitalism. In this new world order, states are functioning as a conduit for corporate capitalism. The theory of global governance has been based on market and technology, particularly since the 1990s. Due to corporate capitalism-induced, market-driven globalization, we are beginning to enter an era of post-human society with a decline or an absence of aspirational and emotional human elements. States have become soft power and corporate capitalism has become hard power in the system of international law and order. The notion of peace and the conduct of war have become the primary business of corporations while states facilitate and sacrifice their resources and citizens for the

interests of corporate capitalism. Corporate capitalism now dictates when and where war or conflicts over resources are to be declared or manufactured. Corporate capitalism decides how free markets should be promoted through the IMF, World Bank, WTO, and direct state-to-state bilateral agreements. States and civil societies are submitting their sovereign authority and political will to the greater good of supranational norms of globalization favorable to corporate capitalism. States will have responsibility toward only those people who are left by the process of globalization—globalization refugees. Market-friendly human rights, humanitarian assistance, the doctrine of R2P, systems of democracy, peace and security, and market-friendly think tanks and scholars will be (indeed, are being) realized—overall, an Aristotelian oligarchy on a global scale.

At the same time, this corporate capitalism-centric hegemonic international law and globalization brings global disorder—global financial meltdown, global Occupy Wall Street movements, and possible exacerbation of terrorism—and a desired illusion among hegemon, quasi-hegemon, and non-hegemon states that they still possess sovereign power while basically hosting a service to corporate capitalism and inviting class warfare, even within stable societies.

