SOVEREIGNTY, MEET GLOBALIZATION: USING PUBLIC-PRIVATE PARTNERSHIPS TO PROMOTE THE RULE OF LAW IN A COMPLEX WORLD

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The international system—as constructed following the Second World War—will be almost unrecognizable by 2025 owing to the rise of emerging powers, a globalizing economy, an historic transfer of relative wealth and economic power from West to East, and the growing influence of nonstate actors.[1]

I. Introduction

For hundreds of years, nation-states enjoyed a unique legal status as sovereign actors on the international scene.[2] The post-World War II formation of the United Nations, followed by the rise of U.S. hegemony after the Cold War, solidified nation-states' positions as the primary actors in world affairs.[3] But the emerging trends toward multi-polarity and disaggregation, where power is distributed more broadly among nation-states, international organizations,[4] and non-state actors, cause

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[1] NAT'L INTELLIGENCE COUNCIL, GLOBAL TRENDS 2025: A WORLD TRANSFORMED, at vi (2008) [hereinafter GLOBAL TRENDS 2025].

[2] Jessica T. Matthews, *Power Shift*, FOREIGN AFF., Jan.–Feb. 1997, at 50.

[3] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 9 (2004).

[4] This article uses the phrase "international organizations" to refer specifically to organizations created under traditional international law instruments, such as treaties. As for (legitimate) non-state actors, many commentators recognize two broad categories: "experts," and "enthusiasts." Or, put another way, those driven by "profits" (such as multinational corporations), and those driven by "passions" (such as human rights

many observers to question the old assumption that states hold a monopoly over the power to shape international events.[5]

In light of these emerging power shifts,[6] nation-states need new tools and strategies for managing their global relationships and exerting influence. United States security strategy is no exception.[7] The ongoing struggles in Iraq and Afghanistan demonstrate that overwhelming military force cannot by itself guarantee security and stability in the emerging world order.[8] Other U.S. and non-U.S. entities, including international organizations and non-state actors, have real stakes in building, or destroying, the needed political, economic, and social stability in post-conflict environments.[9]

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organizations and other non-governmental organizations). *Id.* at 9 (quoting Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. OF GLOBAL LEGAL STUD. 369, 369 (2001)).

[5] As one analyst notes, "[T]he multipolar movement has arrived ahead of schedule." A. Wess Mitchell, Op-Ed., *Obama's Multipolar Moment,* L.A. TIMES, Nov. 23, 2008, at C1; *see also* Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.–Oct. 1997, at 183. Some scholars, although they are in the minority view, even portend the end of the sovereign state system altogether. *See, e.g.*, Eric A. Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 QUINNIPIAC L. REV. 23, 23 (2004) ("The rise of private rights and duties under international law enforced through universal jurisdiction and supranational trading systems both global and regional mark the end of the Westphalian state system.").

[6] There remains considerable debate about the extent of the power shifts described in the opening to this article, as well as how power is exerted on an international scale. *See, e.g.*, David Kennedy, *The Mystery of Global Governance*, 34 OHIO N.U. L. REV. 827, 827 (2008) ("Global governance remains a mystery because so much about global society itself eludes our grasp. . . . How is public power exercised, where are the levers, who are the authorities, how do they relate to one another?").

[7] *See, e.g.*, Shawn Brimley, *Crafting Strategy in an Age of Transition*, PARAMETERS, Winter 2008–09, at 27, 32 ("The ongoing shift to a multipolar world characterized by increasingly powerful state and nonstate actors is already impacting the operational environment for America's joint force. Beyond . . . sustainable stability in both Iraq and Afghanistan, the broader operational challenges associated with likely twenty-first century threats are as daunting as the strategic inheritance.").

[8] As one author notes, "In recent years, many observers have concluded that the United States excels at winning wars, but has failed to develop interagency capabilities to win the peace." Colonel David W. Shin, *Narrowing the Gap: DOD and Stability Operations*, MIL. REV., Mar.–Apr. 2009, at 23, 23. *See also* Mick Ryan, *The Military and Reconstruction Operations*, PARAMETERS, Winter 2007–08, at 58, 58 ("The post-Cold War trend of convergence between military and nonmilitary tasks has accelerated over the past six years as western nations seek to defeat the insurgencies in Afghanistan and Iraq. One result . . . is an increased role for military forces in . . . humanitarian missions previously viewed as the sole preserve of nongovernmental organizations.").

[9] As U.S. Defense Secretary Robert M. Gates remarked in 2007:

This unruly, unpredictable world order poses new challenges to domestic and international efforts to build rules-based frameworks for managing the rights, responsibilities, and interrelationships of individuals and institutions—what could be termed the "rule of law."[10] However, at just the time that more rule of law is needed at every societal level to address these complex international relationships,[11] rule of law practice, as it is traditionally understood, seems to be scattered in every direction with major players forging their own ways through their own programs with little coordination.[12]

> One of the most important lessons of the wars in Iraq and Afghanistan is that military success is not sufficient to win: economic development, institution-building and the rule of law, promoting internal reconciliation, good governance, providing basic services to the people, training and equipping indigenous military and police forces, strategic communications, and more—these, along with security, are essential ingredients for long-term success.

Sec'y of Def. Robert M. Gates, Remarks at the Landon Lecture, Kansas State Univ. (Nov. 26, 2007) (available at http://www.defenselink.mil/speeches/speech.aspx?speechid =1199).

[10] Anne-Marie Slaughter calls this twenty-first century governance problem the "globalization paradox." SLAUGHTER, *supra* note 3, at 8. A complicated, disaggregated world actually *needs* more government on a regional and global scale, but groups ranging from individual states to multi-national corporations (MNCs) generally resist the "centralization of decision-making power and coercive authority so far from the people to be actually governed." *Id.*

[11] As co-authors Ashraf Ghani and Clare Lockhart note in the opening to their important book:

> We have a collective problem: Forty to sixty states, home to nearly two billion people, are either sliding backward and teetering on the brink of implosion or have already collapsed. While one half of the globe has created an almost seamless web of political, financial and technological connections that underpin democratic states and market-based economies, the other half is blocked from political stability and participation in global wealth.

ASHRAF GHANI & CLARE LOCKHART, FIXING FAILED STATES: A FRAMEWORK FOR REBUILDING A FRACTURED WORLD 3 (2008). They go on to note: "A glaring gap–what we call the sovereignty gap–exists between the de jure sovereignty that the international system affords such states and their de facto capabilities to serve their populations and act as responsible members of the international community." *Id.* at 3–4. The authors call for a "citizen-based" approach to rebuilding states and the rule of law, "[A] new legal compact between citizen, state and the market, not a top-down imposition of the state." *Id.* at 7.

[12] For one example of scholarship addressing the disparate approaches to rule of law practice, see Randy Peerenboom, *The Challenge of Rule of Law: Challenges and Prospects for the Field*, 1 HAGUE J. RULE OF L. 5 (2009), http://journals.cambridge.org

As with other global issues, the challenges arising from the spontaneous unfolding of globalization have left the rule of law without a "coherent frame of reference."[13] From a macro-view, rule of law efforts worldwide are scarred by a lack of coordination,[14] lack of local ownership,[15] and a perceived inability to demonstrate tangible results.[16] Many rule of law practitioners have failed to ask the hard questions about whether these programs are actually effective in the long run.[17] Worst of all, though the major international players[18]—states, international organizations, and non-state actors—are involved in rule of law efforts, none of these entities seems able to comprehensively define the rule of law or agree on how to achieve it.[19]

The rising challenges of the twenty-first century will require new ways of looking at the rule of law. The blurring of public and private authority and the resulting need for closer public-private cooperation, for example, may portend some previously unlikely rule of law partnerships.

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[13] GHANI & LOCKHART, *supra* note 11, at 10.

[14] Using the huge bureaucracy of aid to Afghanistan as an example, Ghani and Lockhart note: "The thousands of projects, each with their own rules, procedures, and requirements, fragment the rule of law." *Id.* at 100.

[15] *See* Wade Channell, *Lessons not Learned About Legal Reform* (2005), *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 139 (Thomas Carothers ed., 2006). Channell decries the "hasty transplant syndrome," where outside advisors plug in quick, externally-developed laws or legal solutions to local problems as a "critical problem in legal reform assistance." *Id.* at 139–40.

[16] As the authors Jane Stromseth, David Wippman, and Rosa Brooks lament, after detailing a brief history of interventions ranging from Haiti to Kosovo to Iraq and Afghanistan, "With so much consensus on the value of building the rule of law in troubled societies, why have rule of law promotion efforts been so disappointing?" JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 62–68 (2006).

[17] Thomas Carothers, *The Problem of Knowledge* (2003), *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 16 (Thomas Carothers ed., 2006).

[18] This article uses the term "major players" as a shorthand reference to the major spheres of influence in a multi-polar, disaggregated world: nation-states, international organizations, and non-state actors such as nongovernmental organizations (NGOs) and multi-national corporations. This shorthand is not meant to oversimplify the complex interrelationships at play in this globalized context, but rather to serve as a useful point of reference for the discussions in this article.

[19] Rachel Kleinfeld, *Competing Definitions of the Rule of Law* (2005), *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 32 (Thomas Carothers ed., 2006) ("Read any set of articles discussing the rule of law, and the concept emerges looking like the proverbial blind man's elephant—a trunk to one person, a tail to another."). *Id.*

Public-private partnerships (PPPs), when permitted to flourish with voluntary participation and clear intentions, can effectively provide rule of law solutions where government efforts alone would otherwise fail. This article suggests that one type of unlikely partnership, PPPs between nation-states and private entities such as multi-national corporations (MNCs), is emblematic of the new approaches needed for rule of efforts in the twenty-first century. On one hand, MNCs are widely present and hugely influential on the international scene, with a reach that exceeds sometimes even that of states.[20] On the other hand, MNCs are underappreciated and underutilized rule of law players, as very few rule of law scholars or practitioners have accounted for their significant influence. If states and MNCs can successfully partner to promote the rule of law, these successes may provide models for other types of rule of law partnerships, including in post-conflict military operations.

Part II of this article delves into the unfinished challenges of Iraq and Afghanistan to demonstrate why PPPs can and should be a part of post-conflict stability operations. Part III lays a conceptual foundation for PPPs by expanding on the challenges inherent in promoting the rule of law in the current world order. It then devotes considerable time to exploring the different ways that the major players define the rule of law. Even when addressed from a practical bent, a widely-accepted framework for understanding the rule of law is the minimum normative umbrella for any meaningful rule of law progress on an international scale. As this article suggests, networks[21] of PPPs could then help apply such a framework to particular rule of law projects or challenges. Part IV discusses practical theories on how to leverage the major rule of law players, in particular states and MNCs, to achieve cooperative rule of law progress. It delves both into the "soft power" increasingly utilized by MNCs, as well as the use of incentives for MNCs to partner in rule of law operations. By viewing MNCs as strategic actors, this article considers *why* MNCs, as well as any other actor, should care about the

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[20] According to a report released by the United Nations (U.N.) Conference on Trade and Development in 2002, twenty-nine of the world's largest one hundred largest economies entities were transnational corporations, as opposed to nation-states. Press Release, U.N. Conf. on Trade & Dev., Are Transnationals Bigger than Countries? U.N. DOC. TAD/INF/PR/47 (Dec. 8, 2002), *available at* http://www.unctad.org/Templates/webflyer.asp?docid=2426&intItemID=2079&lang=1 [hereinafter UNCTD Press Release].

[21] In the international relations field, "networks" refer to the groups of both state and non-state actors that converge through overlapping interests and objectives to resolve a particular issue. *See* Anne-Marie Slaughter, *America's Edge: Power in the Networked Century*, FOREIGN AFF., Jan.–Feb. 2009, at 94, 95.

rule of law. Part V analyzes practical examples of ongoing efforts, through various forms of PPPs, to promote the rule of law. Finally, Part VI briefly examines potential criticisms of PPPs, and makes a reasoned plea for further inquiry into the use of PPPs to promote the rule of law.

II. Post-Conflict Rule of Law: Opportunities and Shortcomings

If recent history is a reliable guide, then the United States will likely find itself involved in humanitarian and other military interventions for the foreseeable future.[22] Post-conflict societies often present some of the most compelling rule of law challenges, as efforts in Iraq and Afghanistan illustrate. After years of rule of law projects in both countries, unequivocal successes are still hard to find. Both interventions demonstrate that sheer volume of effort cannot substitute for unity of effort, or at least unity of purpose. These interventions help illustrate why a networked approach to rule of law efforts is especially important to achieving lasting progress in post-conflict environments.

A. Contractors in Iraq: A Missed Rule of Law Opportunity

The U.S. military already relies on a massive PPP of sorts to support its operations in Iraq: civilian contractors.[23] Deployed civilian contractors are likely to play a key role in any future U.S. military intervention, however infrequent one may hope that these interventions will be.[24] The sheer volume and extent of involvement by U.S. Government contractors in nearly every aspect of Iraq operations, military and non-military, should indicate that their operations will impact the rule of law. Civilian contractors' reach in Iraq goes far

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[22] *See* Ivo Daalder & Robert Kagan, Op.-Ed., *The Next Intervention*, WASH. POST, Aug. 6, 2007 at A17 (explaining that "Between 1989 and 2001, Americans intervened with significant military force on eight occasions—once every 18 months.").

[23] At the height of Iraq stability operations in December 2006, for example, the United States had an estimated 100,000 civilian contractors in Iraq, not including sub-contractors. Marc Lindemann, *Civilian Contractors Under Military Law*, PARAMETERS, Autumn 2007, at 83, 85.

[24] FRANK CAMM & VICTORIA A. GREENFIELD, HOW SHOULD THE ARMY USE CONTRACTORS ON THE BATTLEFIELD?, at xv (2005). Military contractors are, in fact, not only a U.S.-centric phenomenon; any military force involved in humanitarian interventions in the future is also likely to have large contingents of military contractors. *See, e.g.*, John Rossant, *Military Contractors: On the Defensive*, BUS. WK. ONLINE, Feb. 3, 2003, http://www.businessweek.com/magazine/content/03_05/b3818171.htm.

beyond a mere contractual relationship; they represent, at least in the eyes of some observers, "an unholy merger of two hated institutions: capitalism and warfare."[25] In the midst of concerted efforts to "win hearts and minds" and restore law and order, perceptions as to the behavior of outsiders go a long way. Even though they may be "paid" partners, a more deliberate emphasis on PPPs with contractors could help ensure that these contractors enhance, rather than take away from, rule of law efforts.[26]

High profile incidents with U.S. contractors in Iraq reveal the direct impact that poor decisions can have on efforts to promote the rule of law. One blogger who participated in a USAID-led rule of law mission to the Suleymania University College of Law, for example, recounts how the overbearing, gun-in-the-face approach of USAID contractor security guards resulted, ironically, in a chilling of efforts to further engage the university in rule of law efforts.[27] And in perhaps the most infamous incident, Blackwater contractors escorting a State Department convoy on 16 September 2007 were suspected of indiscriminately gunning down eleven Iraqi civilians.[28] The resulting scramble by both U.S. and Iraqi officials revealed just how little the role of such contractors had previously been considered. A joint U.S.-Iraqi panel launched an investigation into the matter.[29] The Iraqi Interior Ministry banished Blackwater from operating in Iraqi, but was soon overturned by the Iraqi Prime Minister.[30] The U.S. House Committee on Oversight and Reform

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[25] Andrew Garfield, Op-Ed., *The Rule of Law—Good for Blackwater and Iraqis*, SAN DIEGO UNION-TRIB., Oct. 3, 2007, http://www.signonsandiego.com/uniontrib/20071003/news_lz1e3garfield.html. The total number of contractors of all types exceeds the number of U.S. forces in Iraq. *See* Richard Lardner, *180,000 Private Contractors Flood Iraq*, USA TODAY, Sept. 19, 2007, http://www.usatoday.com/news/washington/2007-09-19-1477663470_x.htm.

[26] Accountability for U.S. contractors in Iraq has been so haphazard that the United States did not even have an accurate account of their numbers during the first three years of Operation Iraqi Freedom. Lindemann, *supra* note 23, at 85.

[27] Haider Ala Hamoudi, The Rule of Law and Lawless Contractors, http://opiniojuris.org/2008/06/18/the-rule-of-law-and-lawless-contractors/ (June 18, 2008, 9:51 EDT). As Hamoudi recounts, "[T]he Dean barred them [USAID] from campus thereafter, indicating he would rather lose funding than deal with the local consequences of another visit." *Id.*

[28] Sidney Blumenthal, *Red, White, and Mercenary in Iraq*, SALON.COM, Oct. 4, 2007, http://www.salon.com/opinion/blumenthal/2007/10/04/private_military_in_iraq/print.html.

[29] Garfield, *supra* note 25.

[30] Blumenthal, *supra* note 28.

launched its own hearings into Blackwater operations in Iraq.[31] Five Blackwater employees were criminally charged in the United States with seventeen killings related to the incident.[32] And on 27 November 2008, the Iraqi Parliament ratified the new U.S.-Iraq Security Agreement, which strips U.S. contractors of immunity from Iraqi criminal law for their actions.[33]

The haphazard way by which the aftermath of this incident was addressed suggests that a PPP, among at least the contractors and U.S. and Iraqi governments, could have laid the groundwork for managing expectations and operating constraints in a way that would contribute to the overall mission of restoring peace and security, rather than polarizing public opinion.[34] The U.S. Government could have, for example, initiated a PPP to bring together key players interested in the operations of contractors in Iraq, including Iraqi diplomatic and security officials, contractors' representatives, and even NGOs. The United States, as the predominant occupying power, had unique leverage to control the terms of the arrangement. At a minimum, the United States could have required contractors to adhere to specified rule of law standards as a condition of their contract. The United States, through a PPP, could also require regular disclosure and reporting by contractors of their activities. Such requirements could run parallel to any separate discussions about, for example, criminal liability. A PPP in this situation is premised on the idea that some dialog is better than none.

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[31] *See* Hearing on Private Security Contracting in Iraq and Afghanistan Before the H. Comm. on Oversight & Gov't Reform, 110th Cong. (2007); *see also* Hearing on Private Security contracting in Iraq and Afghanistan, Oct. 2, 2007, http://oversight.house.gov/story.asp?ID=1509 (providing links to documents related to the hearing).

[32] Ivan Watson, *Iraqi Forces Agreement Ends Contractor Immunity*, REUTERS.COM, Dec. 8, 2008, http://www.reuters.com/article/topNews/idUSTRE4B73YS20081208.

[33] Status of Forces Agreement, N.Y. TIMES, http://topics.nytimes.com/top/news/international/countriesandterritories/iraq/status-of-forces-agreement/index.html (last visited Mar. 14, 2009). A link to the agreement itself is available on the site.

[34] From the beginnings of the U.S. occupation of Iraq, the Coalition Provisional Authority's order granting contractors immunity from Iraqi law was controversial. *See* Blumenthal, *supra* note 28 (discussing CPA Order 17, the order which originally granted immunity).

B. Afghanistan: Incomplete Rule of Law Partnerships

The unsatisfactory, hodgepodge efforts to promote the rule of law in Afghanistan have led to much soul-searching among international and national entities alike. The U.S. Army documents the situation as well as any organization.[35] The U.S. Army Judge Advocate General's Corps' 2008 *Rule of Law Handbook*, for example, devotes forty-seven pages, nearly twenty percent of its total, to simply describing the huge number of national and international organizations involved in rule of law efforts in Afghanistan.[36] Responding to such challenges, the U.S. Secretary of State in 2005 created the Office of the Coordinator for Reconstruction and Stabilization (S/CRS), which is designed to take the lead in U.S. rule of law operations.[37] But as one researcher laments, "Unfortunately,

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[35] In post-conflict environments where the U.S. military is heavily involved, rule of law practitioners and scholars often overlook the fact that substantial rule of law work is done by U.S. military lawyers. This work is often done by default, rather than choice. Simply put, in dangerous environments like Iraq, often only the military possesses enough security and transportation assets to regularly engage in business outside of secure compounds. The U.S. military seems to cautiously recognize this reality. The Preface of the U.S. Army Judge Advocate General's Corps' *Rule of Law Handbook* states:

> There are divergent, and often conflicting, views among academics, various USG agencies, US allies and even within the Department of Defense (DOD) as to whether to conduct rule of law operations, what constitutes a rule of law operation, how to conduct a rule of law operation, or even what is meant by the term "rule of law."

THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH. & CTR. FOR LAW AND MILITARY OPERATIONS, RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES, at i (2008) [hereinafter ROL HANDBOOK]. It continues:

> While acknowledging the above challenges, the Judge Advocate General's Corps leadership still recognizes the inevitability that Judge Advocates on the ground under extraordinarily difficult conditions will be called upon to support, and even directly participate in and lead, rule of law operations.

Id.

[36] *Id.* at 23–70.

[37] Office of the Coordinator for Reconstruction and Stabilization, http://www.state.gov/s/crs/ (last visited Dec. 6, 2009). Specifically,

> The Core Mission of S/CRS is to lead, coordinate and institutionalize U.S. Government civilian capacity to prevent or prepare for post-conflict situations, and to help stabilize and reconstruct societies in transition from conflict or civil strife, so they can reach a sustainable path toward peace, democracy and a market economy.

neither the establishment of S/CRS nor any other initiative by [the] Department of Defense, Department of State, or any other agency has been sufficient to create a synchronized approach to rule of law in Afghanistan, even after almost seven years of rule of law operations."[38]

The United States' most direct attempt at fostering a rule of law PPP in Afghanistan occurred in 2007, when U.S. Secretary of State Condoleezza Rice launched the Public-Private Partnership for Justice Reform in Afghanistan (Afghan PPP).[39] The Afghan PPP invites the U.S. private sector to "extend a hand of friendship by joining the United States to support Afghanistan's vision for a free, democratic, and prosperous state based on the rule of law."[40] The Afghan PPP is currently co-chaired by the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs and Mr. Robert C. O'Brien, a partner at the U.S. law firm Arent Fox LLP.[41] The Department of State welcomes financial "donations at all levels" to the PPP, but no real progress is documented on the website.[42] It is still unclear, unfortunately, whether the Afghan PPP will amount to more than a token effort. Only a few press releases, and very little additional information, are available on the Afghan PPP's State Department home page.[43] The

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Id.

[38] Eric T. Jensen & Amy M. Pomeroy, Afghanistan Lessons Learned: Army Rule of Law Operations 12 (Sept. 28, 2008) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1274963.

[39] Public-Private Partnership for Justice Reform in Afghanistan, http://www.state.gov/p/inl/narc/partnership/index.htm (last visited Dec. 6, 2009) [hereinafter Afghan Partnership]; *see also* Public-Private Partnership for Justice Reform in Afghanistan Hosts Afghan Women Lawyers Training Conference in United States (Jan. 7, 2009), http://www.innovations.harvard.edu/news/141931.html [hereinafter Afghan Training Program].

[40] Afghan Partnership, *supra* note 39.

[41] Afghan Training Program, *supra* note 39; *see also* Arent Fox's Robert C. O'Brien Speaks at United Nations on Legal Reform Mission in Afghanistan, http://www.arentfox.com/newsroom/index.cfm?fa=pressReleaseDisp&content_id=1542 (last visited Mar. 15, 2009).

[42] Afghan Partnership, *supra* note 39. The website goes on to say, "Partner firms and lawyers—those contributing $50,000 or more over two years—will join senior Department of State officials and other interagency partners for a press conference, regular briefings from the U.S. Coordinator for Counternarcotics and Justice Reform in Afghanistan, and various other special events." How to Donate, http://www.state.gov/p/inl/narc/partnership/c30625.htm (last visited Dec. 6, 2009).

[43] The most recent press release discusses the sponsorship of three Afghan legal professionals to complete LL.M. degrees at U.S. law schools. Press Release, Dep't of State, Afghan Legal Professionals to Study in the U.S. (Oct. 1, 2009), *available at* http://www.state.gov/r/pa/prs/ps/2009/oct/130166.htm.

most substantive project to date appears to be a three-week training project for sixteen Afghan prosecutors hosted at the University of Utah law school.[44] The Afghan PPP website offers no information as to what, if any, follow-on resulted from this training.

In a complex post-conflict situation like Afghanistan, a stand-alone partnership like the Afghan PPP is likely to achieve only limited success. Multiple levels of partnerships will likely be needed for large-scale advancement of rule of law objectives. Some efforts are underway. In addition to the Afghan PPP, for example, the U.S. Department of State also employs contractors as rule of law technical advisors.[45] Sub-national government networks, such as between the U.S. Department of Justice and Afghan Ministry of Justice, also collaborate to bring about legal reform.[46] International organizations, such as the U.N. and NATO, help provide the security and administration framework.[47] What is missing, however, is any significant crosstalk between these stove-piped missions. Both horizontal and vertical networks of PPPs are needed to help coordinate these efforts to achieve lasting solutions.

III. A Rule of Law Framework for the Changing World Order

As Iraq and Afghanistan illustrate, current rule of law challenges cannot be resolved using only traditional state tools like diplomacy and military force. In this information-intensive age, many global interactions are handled through regulatory or other means, at levels below that of traditional state diplomacy.[48] One leading scholar coins this networked approach the "real new world order,"[49] in which a complex web of interrelated and interconnected organizations project

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[44] Eric Ray, *Afghan Prosecutors Receive Training at U of U*, KPCW NEWS, June 26, 2008, https://kcpw.org/article/6232; *see also* Press Release, Univ. of Utah, Afghan Prosecutors Go to Summer Law School at the University of Utah (June 20, 2008), http://unews.utah.edu/p/?r=062008-1.

[45] Walter Pincus, *Private Contractors' Role in Afghanistan to Grow with Awarding of Latest Contracts*, WASH. POST, July 28, 2008, at A15.

[46] *See* U.S. DEP'T OF JUST., THE ACCOMPLISHMENTS OF THE U.S. DEPARTMENT OF JUSTICE 2001–2009 39–40 (2009).

[47] Note that even these international organizations in turn enter into their own networks, with components of the Afghan government, to accomplish their purposes.

[48] The opposite extreme, global *government,* seems to have fallen out of fashion both in academia and reality. There is, however, robust discussion about the rise of global *governance*. *See* SLAUGHTER, *supra* note 3, at 4.

[49] Slaughter, *supra* note 5, at 183.

power and influence in international affairs, beyond just the sovereign nation-state.[50] Although state sovereignty seems in no danger of going extinct, there also seems little doubt that states increasingly share power and influence with international organizations and non-state actors in certain spheres of influence.[51] Non-states, such as MNCs, bring their own sets of tools and leverage to these spheres of influence: soft law and soft power.[52]

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[50] Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283 (2004).

[51] *See generally* GLOBAL TRENDS 2025, *supra* note 1 (predicting the continued dispersion of power among not only nation-states, but also non-state actors ranging from businesses to criminal enterprises). World observers, ranging from journalists to international law scholars, have also noted this trend. *See, e.g.*, FAREED ZAKARIA, THE POST-AMERICAN WORLD 2 (2008) ("We are now living through the third great power shift of the modern era. It could be called 'the rise of the rest.'") (referring to the first power shift as the rise of the Western world, and the second shift as the rise of the United States). Zakaria continues:

> The "rest" that is rising includes many nonstate actors. Groups and individuals have been empowered, and hierarchy, centralization, and control are being undermined. Functions that were once controlled by governments are now shared with international bodies like the World Trade Organization and the European Union. Non-governmental groups are mushrooming every day on every issue in every country. Corporations and capital are moving from place to place, finding the best location in which to do business, rewarding some governments while punishing others. . . . Power is shifting away from nation-states, up, down, and sideways. In such an atmosphere, the traditional applications of national power, both economic and military, have become less effective.

Id. at 4; *see also* Daniel Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 2, 2 (2006) ("The current world order is characterized by an intricate mix of cross-border dealings between individuals and public entities. The sovereign nation-state, as we have come to know it for over three centuries, is not necessarily central to this picture."); James N. Rosenau, *Governing the Ungovernable: The Challenge of a Global Disaggregation of Authority*, 1 REG. & GOVERNANCE 88, 88 (2007) ("[T]he disaggregation of power into myriad spheres of authority is the central tendency in world affairs."); GHANI & LOCKHART, *supra* note 11, at 9 ("[T]oday's global networks and actors are wielding powers that had been held for generations by states. The weight and combination of these forces have overwhelmed our traditional frameworks of understanding.").

[52] SLAUGHTER, *supra* note 3, at 178. As one scholar notes, soft law is basically "everything that is not hard international law (namely treaties and state-sanctioned custom)." Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393, 413 (2007); *see also* Anna Di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 499 (2006) ("In its broadest scope, the formula 'soft law' labels those regulatory instruments and

Closely related to the trend toward multi-polarity is what has been called the "disaggregation" of state sovereignty.[53] Under this view, state sovereignty itself may not have diminished, but the way this sovereignty is exercised has changed. Under the Westphalian model, nation-states were "unitary" sovereigns that spoke with only one voice on the international scene—that of their heads of state.[54] Under a disaggregated state, the picture is more complicated. State actors at the sub-national level, such as ministers, judges, and legislators, utilize global networks to regularly reach across borders, sometimes on their own authority, to plan, negotiate, share information, and even create precedents.[55] Non-state actors likewise exercise their own networks. While there may be issues, such as security, for which the state must speak with one voice, there are many other areas where non-state actors also exert influence.

In such a complicated global system, it makes sense to view the major players as strategic actors committed to advancing their respective positions.[56] One scholar convincingly demonstrates how, in the negotiations leading to a PPP to promote human rights in the extractives industry, which encompasses international oil and gas corporations, each of the players involved stayed true to their organizational characteristics in the negotiated positions they held.[57] Nongovernmental organizations (NGOs) in general, for example, may have some "private moral authority" when they advocate for a "socially progressive cause," but they nonetheless "operate as strategic actors aiming at particular policy outcomes."[58] Transnational (multinational) corporations, for their part,

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mechanisms of governance that, while implicating some kind of normative commitment, do not rely on binding rules or on a regime of formal sanctions."). Joseph S. Nye describes power as "the ability to alter the behavior of others to get what you want." Joseph S. Nye, *Think Again: Soft Power*, FOREIGN POL'Y, Feb. 2006, http://www.foreignpolicy.com/story/cms.php?story_id=3393. Soft power, then, is essentially the power of attraction. *Id.* Both states and non-states use soft power.

[53] SLAUGHTER, *supra* note 3, at 5.

[54] *Id.*

[55] *Id.*

[56] *See* Thomas H. Hansen, Governing the Extractive Industries: The Extractive Industries Transparency Initiative and the Voluntary Principles on Security and Human Rights 5, Feb. 15, 2009 (unpublished manuscript), *available at* http://research.allacademic.com/one/www/research/).

[57] *Id.*

[58] *Id.* Military planners also recognize the influential role of NGOs. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, CIVIL MILITARY OPERATIONS IV-14 (8 July 2008) ("The sheer number of lives they affect, the resources they provide, and the moral authority conferred by their humanitarian focus enable NGOs to wield a great deal of influence within the interagency and international communities."). The U.S. Army's doctrine on civil-

are "not moral entities," and "CSR [Corporate Social Responsibility] is secondary to the pursuit of profits."[59] States, for their part, can have any number of motivations, and "use global governance mechanisms as a means of expanding their problem-solving capabilities."[60] To generalize then, NGOs leverage their moral authority, MNCs leverage their profit motive, and states leverage their political and strategic ends. None of these motives are necessarily morally suspect. It could be argued, for example, from a shareholder perspective, that MNCs should indeed be committed to the relentless pursuit of profit. In the rule of law context then, a PPP should be targeted not to change these ingrained organizational character traits, but rather to leverage them where interests converge, to achieve the maximum possible common good.[61]

A. Defining the Rule of Law

It is an open secret that the rule of law, while spurring a growth industry among governments and development organizations alike, remains singularly difficult to define.[62] Some scholars have called for an

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military operations (CMO) also extensively incorporates the need to engage NGOs in order to achieve U.S. objectives when interacting with civilian populaces. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.40, CIVIL AFFAIRS OPERATIONS 1-3, 1-7 (Sept. 2006) [hereinafter FM 3-05.40].

[59] Hansen, *supra* note 56, at 6. Corporate Social Responsibility (CSR), a widely-used term in academic discussions of corporations' social responsibilities, refers to "actions voluntarily taken by a company beyond what is legally required and which meets societal expectations under dynamic sociopolitical conditions." S. Prakash Sethi, *Defining the Concept of Good Corporate Citizenship in the Context of Globalization: A Paradigm Shift from Corporate Social Responsibility to Corporate Social Accountability*, *in* HANDBOOK OF RESEARCH ON GLOBAL CORPORATE CITIZENSHIP 74–75 (Andreas G. Scherer & Guido Palazzo eds., 2008). The two major scholarly arguments for *why* corporations should apply heightened standards of corporate responsibility, which can be related to rule of law concerns, are "intrinsic rightness," (a normative approach) and "business case," (which seeks to empirically prove that more responsible businesses yield higher profits). Klaus A. Leisigner, *Capitalism with a Human Face: The UN Global Compact*, J. CORP. CITIZENSHIP, June 2007, at 1, 12. Intrinsic rightness, like any normative standard, can be argued in circles until some broader consensus emerges. Business case, for its part, is "far from easy" to establish empirically. *Id.* at 13.

[60] Hansen, *supra* note 56, at 7.

[61] As U.S. Army CMO doctrine recognizes, "Rule of law operations will rarely, if ever, be exclusively a military or even a USG activity. Rule of law operations must be a collaborative effort . . . ." FM 3-05.40, *supra* note 58, at 2-18.

[62] *See*, *e.g.*, Carothers, *supra* note 17, at 19, *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 16 (Thomas Carothers ed., 2006) ("Rule-of-law

end to the Western-centric effort to arrive at a consensus or normative definition of the rule of law and instead urge practitioners to focus on local definitions suited to local problems.[63] Yet public and private actors in the international community, including those from vastly different perspectives, seem to agree that the rule of law as broadly defined is a desirable, and perhaps necessary, trait of modern governance.[64] Prominent public and private organizations such as the United Nations Development Programme and the American Bar Association have even formally partnered to promote the rule of law.[65] At least in the West, the rule of law is said to be "enjoying a new run as a rising imperative of the era of globalization."[66]

The elusive search for an overall normative definition of the rule of law, if it even exists, is not unlike the ongoing effort to standardize

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aid practitioners know what the rule of law is supposed to look like in practice, but they are less certain what the essence of the rule of law is.").

[63] *See, e.g.*, Peerenboom, *supra* note 12, at 7 ("It is time to give up the quest for a consensus definition or conception of rule of law and to accept that it is used by many different actors in different ways for different purposes."); *see also* Kleinfeld, *supra* note 19, at 32 ("[T]he phrase is commonly used today to imply at least five separate meanings or end goals.").

[64] The 2006 United States' National Security Strategy, for example, mentions the "rule of law" sixteen times. *See* OFFICE OF THE PRESIDENT OF THE UNITED STATES OF AMERICA, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1–49 (2006). Private organizations such as Amnesty International also call for the rule of law. *See, e.g.*, Press Release, Amnesty International, Justice and Rule of Law Key to Afghanistan's Future Prosperity (June 29, 2007), *available at* http://www.amnesty.org/en/library/asset/ASA11/007/2007/en/dom-ASA110072007en.html.

[65] *See* ABA-U.N. DEV. PROGRAM INT'L LEGAL RES. CTR., 2007 ANNUAL REPORT (2007). The report opens:

> The International Legal Resource Center (ILRC) was established in December 1999, based upon the common commitment of the United Nations Development Programme (UNDP) and the American Bar Association (ABA) to advocate for democratic governance and the rule of law on a global scale. . . . The ILRC, which is housed within the ABA Section of International Law, identifies experts for UNDP requests relating to technical legal assistance projects, knowledge management, and advisory services worldwide. The ILRC also conducts assessments of draft and current legislation, gauging its compliance with international standards where appropriate, and provides substantive advice to governments on policy formulation.

Id. at 2.

[66] Thomas Carothers, *The Rule-of-Law Revival* (1998), *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3 (Thomas Carothers ed., 2006).

international human rights. Over sixty years after the Universal Declaration of Human Rights made history,[67] the world still lacks consensus on how to promote or enforce human rights on the international level.[68] A widely-accepted understanding of the rule of law, which shares some of the language and fundamental concepts of human rights, is arguably even further behind on this trajectory. Similar to human rights, the international community should continue to seek consensus on fundamental rule of law standards that apply in every situation. The details of implementing these standards will require coordination among the major rule of law players.

The ongoing challenges in defining the rule of law seem to be part practical confusion, part politics. Rule of law practitioners tend to vociferously promote the rule of law, without being able to pin down exactly what this phrase means.[69] Nation-states such as China and Russia voice support for the rule of law, but seek to define it in a way that does not impinge on state sovereignty and their internal affairs.[70] Many rule of law scholars suggest that the rule of law encompasses both substantive components (i.e., the good that rule of law brings) and institutional components, such as democratic governments, courthouses, police forces, and free markets.[71] A one-size-fits-all definition of the rule of law is unlikely given these divergences. One solution is PPPs: by drawing together networks of the various players involved in a rule of law project, PPPs can act as an interface to work out competing views through information exchange, negotiation, and harmonization.

This article proposes a hybrid approach to the rule of law, to serve as a bridge between normative aspirations and on-the-ground realities. On the international level, the rule of law could simply be defined as any

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[67] *See* United Nations, 60th Anniversary of Universal Declaration of Human Rights, http://www.un.org/events/humanrights/udhr60/ (last visited May 19, 2009).

[68] As the Secretary-General said during the 10 December 2008 Human Rights Day celebration, marking the sixtieth anniversary of the Declaration, "The challenges we face today are as daunting as those that confronted the Declaration's drafters." U.N. Message of the Secretary-General on Human Rights Day (Dec. 10, 2008), *available at* http://www.un.org/events/humanrights/2008/statementssg.shtml.

[69] *See* Carothers, *supra* note 17, at 3, *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 16 (Thomas Carothers ed., 2006).

[70] *See, e.g.*, China's comments at a 2008 UN Generally Assembly Sixth Committee hearing, where it stated that "each Government had a right to choose the rule of law model most suited to conditions in its country." U.N. GAOR, 6th Comm., 63d Sess., 6th mtg. at 9, U.N. Doc. A/C.6./63/SR.6 (Oct. 29, 2008).

[71] Kleinfeld, *supra* note 19, at 33; *see also* STROMSETH, *supra* note 16, at 58.

rules-based framework for managing the rights, responsibilities, and interrelationships of individuals and institutions. Ideally, this framework should encompass minimum substantive components recognized by the international community; a rule of law definition that is entirely defined by the whims of local actors and local conditions is really no definition at all. But the details of this framework do need to be filled in by local actors, who understand the relevant social, political, cultural, and religious implications of a particular rule of law project. This is a coordinating task that PPPs on the ground could be well-suited to perform. It moves the rule of law from being a static end state to a multi-step process that is "more open-ended and tolerant of institutional innovations and differences in norms, practices, and outcomes."[72]

1. International Organizations and the Rule of Law

Applying a hybrid approach, international organizations are in the best position to implement a basic rule of law framework. A broad consensus on the meaning of the rule of law among major international organizations is an essential umbrella concept for real progress. As the preeminent international organization, the United Nations (U.N.) seems to be paying increasing attention to the rule of law. In 2004, then-U.N. Secretary-General Kofi Annan provided a heady definition of the rule of law:

> The "rule of law" is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty,

[72] Peerenboom, *supra* note 12, at 6.

> avoidance of arbitrariness and procedural and legal transparency.[73]

Secretary-General Annan's definition encompasses both procedural regularities, such as public transparency and equal enforcement, as well as normative aspirations, such as compliance with international human rights norms. Although the U.N. General Assembly never formally adopted the Secretary-General's proposed definition, it represents an authoritative view as to the commonly-understood rule of law components.

The U.N. seems poised to assume an even greater focus on the rule of law in the near future. Pursuant to a General Assembly Resolution issued after the 2005 World Summit, the Secretary-General formed the Rule of Law Coordination and Resource Group, to consolidate and coordinate U.N. rule of law programs and resources.[74] In 2007, members of the General Assembly's Sixth Committee (Legal), during debates on the rule of law, raised the need to define the rule of law on the national and international levels.[75] In 2008, the Secretary-General submitted three reports previously requested by the General Assembly, on how to better coordinate U.N. rule of law efforts.[76] But, even as the U.N. more frequently discusses the rule of law, no umbrella definition has yet been adopted.[77]

Another significant international organization, the World Bank, seems to increasingly incorporate rule of law research and analysis into its stated mission of alleviating poverty.[78] A 2006 informal World Bank

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[73] The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* 4, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter RoL Report].

[74] G.A. Res. 60/1, ¶ 134, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); *see also* The Secretary-General, *Report of the Secretary-General on Revised Estimates Relating to the Programme Budget for the Biennium 2008–2009 Related to the Rule of Law Unit* 1, U.N. Doc. A/63/154, at 1 (July 21, 2008).

[75] Press Release, General Assembly, As Legal Committee Begins Debate on Rule of Law, Delegates Discuss Differences in National, International Implications, U.N. Doc. GA/L/3326 (Oct. 25, 2007) [hereinafter U.N. Rule of Law Press Release].

[76] *See id.*; *see also* The Secretary-General, *Report of the Secretary-General on the Rule of Law at the National and International Levels*, U.N. Doc. A/63/64 (Mar. 12, 2008); The Secretary-General, *Report of the Secretary General on Strengthening and Coordinating United Nations Rule of Law Activities*, U.N. Doc. A/63/226 (Aug. 6, 2008).

[77] U.N. Rule of Law Press Release, *supra* note 75.

[78] *See, e.g.*, World Bank, Law and Development, http://web.worldbank.org/WBSITE/EX

working paper adopts a well-regarded scholarly definition of the rule of law: "(i) a government bound by law (ii) equality before the law (iii) law and order (iv) predictable and efficient rulings, and (v) human rights."[79] As another example, a 2009 World Bank report on development in Afghanistan makes repeated references to the rule of law, including an acknowledgement that "the rule of law has been repeatedly highlighted as a core driver of economic development."[80] The rule of law, therefore, seems integral to the World Bank's view of how to accomplish its mission, although it has never explicitly adopted a definition.

Even an international organization with an entirely different mission, the World Trade Organization (WTO),[81] can help advance rule of law concepts. The WTO's cornerstone document, the General Agreement on Tariffs and Trade (GATT), arguably reflects rule of law principles in Article 10 of its text:

> (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings . . . .
> (b) Each contracting party shall maintain, or institute as soon as practical, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement . . . .[82]

TERNAL/TOPICS/EXTLAWJUSTICE/0,,menuPK:445640~pagePK:149018~piPK:149093~theSitePK:445634,00.html (last visited Mar. 15, 2009) ("Effective legal frameworks and institutions are pivotal for alleviating poverty."). The World Bank also releases rule of law-related publications through its Law, Justice, and Development Series. *See* the World Bank, Law, Justice, and Development Series, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:21085521~pagePK:210058~piPK:210062~theSitePK:445634,00.html (last visited Mar. 15, 2009).

[79] Kirsti Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt* 15 (World Bank, Working Paper No. 37, 2006) (quoting Kleinfeld, *supra* note 16, at 33).

[80] William Byrd & Stéphane Guimbert, *Public Finance, Security, and Development: A Framework and an Application to Afghanistan* 2 (World Bank, Pol'y Research Working Paper No. 4806, 2009).

[81] The WTO's mission is essentially to help regulate trade between nations. *See* Understanding the WTO, http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited May 19, 2009).

[82] General Agreement on Tarrifs and Trade art. 10, Oct. 30, 1947, 61 Stat. A5, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

These provisions, discussing uniformity, impartiality, reasonableness, and independent tribunals, "read a lot like law school textbooks on the Rule of Law."[83] In other words, these provisions help promote rule of law standards even if that is not their explicit goal. Even entities only indirectly concerned with the rule of law can end up promoting fundamental rule of law values through their own mechanisms. A universally regarded, rule of law framework could help synchronize international organizations' complementary and overlapping objectives.

2. Nation-States and the Rule of Law

Nation-states naturally have divergent views on the rule of law, sometimes even within their own governments.[84] Nonetheless, it is possible to identify common threads. The United States, China, and Russia, for example, each espouse support for the rule of law, though according to their own definitions. In response to a U.N. General Assembly resolution requesting him to do so, the Secretary-General in 2007 compiled the views of member states as to the rule of law and international efforts to promote it.[85] The United States, in its comments, noted its commitment to advancing the rule of law by reference to "the extensive resources we devote to assisting States in their efforts to *strengthen their legal, judicial and law enforcement institutions*. These programs, along with parallel efforts undertaken by the U.N. and other States, make significant contributions to advancing the rule of law."[86] Therefore, the rule of law includes, in the U.S. view, certain institutions. Collaboration is also a necessary component of rule of law advancement.

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[83] Martin G. Hu, *WTO's Impact on the Rule of Law in China*, *in* RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM 101, 102 (2000), *available at* www.mansfieldfdn.org/programs/program_pdfs/08hu.pdf.

[84] *See, e.g.*, Major Tonya L. Jankunis, *Military Strategists are from Mars, Rule of Law Theorists are From Venus: Why Imposition of the Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform*, 197 MIL. L. REV. 16, 30 (2008) (explaining that various U.S. government agencies define the rule of law differently, and comparing and contrasting USAID and DoD definitions).

[85] The Secretary-General, *Report of the Secretary-General on the Rule of Law at the National and International Levels: Comments and Information Received from Governments* 2, U.N. Doc. A/62/121 (July 11, 2007).

[86] *Id.* at 34 (emphasis added).

The Russian Federation, as part of a rule of law discussion during a 2008 hearing of the U.N. General Assembly's Sixth Committee (Legal), urged the Committee to consider the topic of "the importance of the implementation of international obligations through technical assistance and capacity-building."[87] As to providing technical assistance to States, "Tangible progress could be made by structuring the services offered and fostering cooperation among all partners."[88]

At an earlier session of the same Committee hearings, China noted, "With regard to the rule of law at the national level, each Government had a right to choose the rule of law model most suited to conditions in its country."[89] States could, China stated, "Swap experiences and learn from each other how to make the models work better."[90] While maintaining due regard for the principles of "sovereign equality" and "non-interference in the internal affairs of other countries," States could "strengthen cooperation with a view to enhancing the rule of law at the national level."[91] China seems to be promoting cautious rule of collaboration, though in the context of protecting national sovereignty.

3. Private Sector Views of the Rule of Law

For their part, MNCs seem willing to publicly voice support for and even help define the rule of law, when it suits their business objectives. In a November 2005 symposium hosted by the American Bar Association, the General Counsel of General Motors (GM), the former General Counsel of Microsoft, and the General Counsel of the multinational Swiss corporation ABB, Ltd., shared their companies' views on the rule of law. The former Microsoft General Counsel proposed the following working definition: "a rules-based system of self-government which includes a strong and accessible legal process featuring an independent bench and bar."[92] This process, he believes, should be adapted to the "unique characteristics of the various

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[87] U.N. GAOR, 6th Comm., 63d Sess., 7th mtg. at 11, U.N. Doc. A/C.6/63/SR.7 (Nov. 11, 2008).
[88] *Id.*
[89] U.N. GAOR, 6th Comm., 63d Sess., 6th mtg. at 9, U.N. Doc. A/C.6./63/SR.6 (Oct. 29, 2008).
[90] *Id.*
[91] *Id.*
[92] *How the Private Sector Can Promote the Rule of Law—The General Counsel Perspective*, METROPOLITAN CORP. COUNSEL, May 2006, at 38.

communities."[93] The GM General Counsel, in turn, remarked that, from a Western point of view, the rule of law included "respect for contracts, protection of private property and a protection of basic human rights."[94] But acknowledging different preferences across the world, he expressed the bottom-line goal of the rule of law as "promoting predictability, codification of laws and a judiciary that, while not necessarily independent, has integrity in terms of resolution of specific disputes."[95] The ABB, Ltd. General Counsel, in turn, advocated moving away from "one model" when describing the rule of law.[96] He also noted that MNCs are "in for the long and not the short term," which suggests a view that MNCs ought to maintain a basic modicum of social responsibility, even if only for their own interests.[97]

But, other than the occasional symposium, the "rule of law" as a term of art is not part of the everyday language of business. State and non-state rule of law actors should recognize that, in the business world, the "rule of law" can better be implemented through the language of business—best practices, principles of Corporate Social Responsibility,[98] and the like—rather than as a grand normative concept.[99]

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[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *See* Sethi, *supra* note 59.
[99] The 2006 U.S. congressional hearings concerning Google in China are one example where MNCs tried to frame rule of law-related concepts in more practical terms. Earlier that year, Google in China was ordered by the Chinese Government to hand over certain files after a Chinese dissident forwarded an anti-government message to an NGO overseas. The U.S. Congress held scathing public hearings criticizing Google's actions as possible human rights violations, and implicating other major technology corporations. Tom Zeller, Jr., *Web Firms Are Grilled on Dealings in China*, N.Y. TIMES, Feb. 16, 2006, http://www.nytimes.com/2006/02/16/technology/16online.html?pagewanted=print. Representatives of these MNCs made statements espousing their companies' respective positions on promoting human rights and related concerns. One persistent theme of these representatives was that government must play a prominent role in these efforts. The Senior Vice President and General Counsel of Yahoo!, for example, acknowledged that companies must identify appropriate practices to promote positive principles specific to particular markets, but also stated that there is a vital role for government-to-government dialogue. *The Internet in China: A Tool for Freedom or Suppression? J. Hearing Before the Subcomm. on Africa, Global Human Rights, and Int'l Operations and the Subcomm. on Asia and the Pacific of the H. Comm. on Int'l Relations*, 109th Cong. 55–57 (2006) [hereinafter China Hearing] (testimony of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc.). Although MNCs could engage in collective action and adhere to compliance practices, the greatest leverage lies with governments. *Id.* The

One organization that could help close the rule of law gap between the public and private sectors is the International Organization for Standardization (ISO). As a private entity with multiple public entities among its membership, the ISO is uniquely poised to help shape perceptions on corporate responsibility and respect for the rule of law.[100] As a self-described "bridge between the public and private sectors,"[101] the ISO publishes thousands of International Standards for everything from goods to services. With a network in 157 countries, no organization has greater reach. [102]

Interestingly, the ISO is now moving toward the realm of Corporate Social Responsibility with a non-binding standard (ISO 26000) due to be released in 2010.[103] This new, voluntary standard is intended to, among other goals, "assist organizations in addressing their social responsibility while respecting cultural, societal, environmental and legal differences and economic development conditions."[104] The ISO 26000 standard is intended for "organizations of all types in both public and private sectors, in developed and developing countries."[105] While this ISO standard is not explicitly about the rule of law, it advances complementary objectives. Given the ISO's pervasive influence, this new standard will hopefully move MNCs toward business practices that favorably support the rule of law.

Associate General Counsel of Microsoft Corporation, in turn, noted that "cultural and political values may clash with standards of openness and free expression." *Id.* at 65 (statement of Jack Krumholtz, Managing Director of Federal Government Affairs and Associate General Counsel, Microsoft Corporation). Microsoft, he continued "cannot substitute itself for national authorities in making the ultimate decisions on such issues." *Id.* Google's Vice President for Corporate Communications and Public Affairs, for his part, acknowledged that there is a role for joint industry action to promote common principles such as disclosure and transparency, but that government also plays a key role. *Id.* at 67 (testimony of Elliot Shrage, Vice President for Corporate Communications and Public Affairs, Google, Inc.).

[100] About ISO, http://www.iso.org/iso/about.htm (last visited May 19, 2009).

[101] *Id.*

[102] *Id.*

[103] ISO Social Responsibility, http://isotc.iso.org/livelink/livelin/feth/2000/2122/83049/3934883/3935096/home.html (last visited May 19, 2009).

[104] ISO Social Responsibility, About the Standard, http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/07_gen_info/aboutStd.html (last visited May 19, 2009).

[105] INT'L STANDARDS ORG., ISO AND SOCIAL RESPONSIBILITY 1 (2008), *available at* http://www.iso.org/iso/socialresponsibility.pdf.

4. A Networked Definition of the Rule of Law

Analogous to the recognition of fundamental human rights, the world needs a basic consensus definition of the rule of law to provide a framework for future progress. A framework definition of the rule of law, like the Universal Declaration of Human Rights, could begin with a statement of objectives to be pursued by governments, rather than binding international law.[106] Networks of the major rule of law players could then fill in the details with definitions and understandings that account for their competing interests and perspectives of the major players. Under a networked model, various players in a PPP, while all adhering to the same overall rule of law definition, may contribute different inputs to achieve the ultimate desired income.[107]

A recent rule of law event exemplifies the effort to define the rule of law in a way that accounts for all of the major players. In July of 2008, the American Bar Association launched the World Justice Project (WJP) in Vienna, Austria.[108] The initial forum was attended by leaders ranging from former heads of state, to U.S. Supreme Court justices, to global

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[106] U.N. Association in Canada, Questions and Answers About the Universal Declaration, http://www.unac.org/rights/question.html (last visited May 19, 2009). The Universal Declaration of Human Rights entreats "[E]very individual and every organ of society . . . to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance . . . ." The Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 pmbl., *available at* http://www.un.org/en/documents/udhr/ (last visited May 19, 2009).

[107] Along these lines, another panel during the previously mentioned 2005 American Bar Association symposium brought informal spokespersons from three major interests into one room to discuss the rule of law: nation-state, international organization, and private sector. Thomas Pickering, former U.S. Ambassador to Russia and India, suggested in his comments that in addition to the usual mantra of predictability, the rule of law also required legitimacy. *Beyond the Rule of Law: The Route to Sustainability*, METROPOLITAN CORP. COUNSEL, Dec. 2006, at 76 [hereinafter *Beyond the Rule of Law*]. The former World Bank General Counsel, Robert Danino, noted that even though the World Bank is a financial and not political institution, that the World Bank's de facto mandate to alleviate poverty by necessity entailed social equity, including human rights. *Id.* Samuel Fried, Senior Vice President of Limited Brands, Inc., noted that globalization has made the worldwide economy "less transactional, and more strategic." He went on to say that "[g]lobal corporations have a much larger stake in being a socially responsible part of the civil society of the countries in which they have a long-term presence." *Id.*

[108] The World Justice Project, https://www.abanet.org/wjp/about.html (last visited Dec. 25, 2009).

business leaders.[109] The WJP identifies itself as a "multinational, multidisciplinary initiative to strengthen the rule of law worldwide," by "mainstreaming the rule of law into the thinking and activities of a broad range of fields."[110] Sponsors of the WJP include major MNCs such as the Boeing Company, Intel Corporation, and Microsoft Corporation.[111] Under the WJP's "Universal Principles," the rule of law has four principle components:

> [1] The government and its officials and agents are accountable under the law;
> [2] The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property;
> [3] The process by which the laws are enacted administered and enforced is accessible, fair and efficient; [and]
> [4] The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.[112]

This four-part definition seems to offer something for everyone, as it includes both substantive and institutional components. Whether the World Justice Project will wield substantial impact or simply become a rule of law vanity project among many others is beside the point. This forum, like others, recognized the need for a workable framework understanding of the rule of law. The U.N. General Assembly should seek to adopt this or a similar definition of the rule of law as a way to harmonize basic rule of law efforts worldwide. The implementing details of such a definition would of course vary depending on the

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[109] *Id*. The second World Justice Forum was held recently held in Vienna, Austria, from 11–14 November 2009. *See* http://www.worldjusticeproject.org/ (last visited Dec. 25, 2009).
[110] About the World Justice Project, https://www.abanet.org/wjp/about.html (last visited Mar. 15, 2009).
[111] World Justice Project Supporters, https://www.abanet.org/wjp/supporters.html (last visited Mar. 15, 2009).
[112] About the WJP, http://www.worldjusticeproject.org/about (last visited Mar. 15, 2009). For additional background information, see *The World Justice Project: A Sustained Commitment to the Rule of Law*, METROPOLITAN CORP. COUNSEL, Oct. 2008, at 14.

players involved in the project. As will be discussed below, networked PPPs are well-suited to achieve these localized solutions.

B. Public-Private Partnerships

Public-private partnerships are organizational vehicles that are uniquely suited to bring together public and private interests in promoting the rule of law. In its broadest form, a Public-Private Partnership (known as a PPP or P3) is a contractual arrangement between the public and private sector, whereby each side contributes its unique assets to accomplish a mutual goal.[113] Each side in turn shares in the risks and rewards of the arrangement.

The idea of using PPPs to promote social or development reform is not new, and is an initiative discussed at all levels of governance, including the U.N.[114] Given the rise of trans-border social awareness as a result of globalization, this trend seems set to continue.[115] Some U.S.

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[113] The National Council for Public-Private Partnerships (NCPPP), How Partnerships Work, http://www.ncppp.org/howpart/index.shtml#define (last visited Mar. 15, 2009). The NCPPP offers the following definition of a PPP:

> A contractual agreement between a public agency . . . and a private sector entity. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or facility.

Id.

[114] The U.N. Office for Partnerships, for example, "serves as a gateway for partnership opportunities with the United Nations family. It promotes new collaborations and alliances in furtherance of the Millennium Development Goals (MDG) and provides support to new initiatives of the Secretary-General." U.N. Office for Partnerships, http://www.un.org/partnerships/ (last visited Mar. 15, 2009).

[115] The Institute for Public-Private Partnerships (IP3), for example, has since 1994 "advised over 175 countries on economic, financial, legal, and technical aspects of public-private partnerships. . . ." IP3, President's Welcome, http://www.ip3.org/about/a_president.htm (2008). The IP3 President states:

> At IP3, we believe that the resources of the public and private sectors fused in partnership represent the new paradigm for economic development in the 21st century. Public-private partnerships are increasingly being used as a policy tool to transform the role of national and local governments in public service delivery,

Government agencies, such as the Department of State, have already delved into this area.[116] Some corporate leaders also seem to recognize the value of partnerships across all sectors.[117] In the rule of law context, the goal of PPPs is to bring these interests together both through horizontal networks of peer organizations, and vertical networks with states and international organizations.[118]

The cornerstone of PPPs is their voluntary nature. The goal of PPPs is not negative, to deter undesirable conduct, but rather positive, to proactively engage MNCs in dialog and practices that promote the rule of law. Public-private partnerships, when applied against the definition of the rule of law provided above, can help overcome rule of law reform's greatest critique: its lack of results. Too often, rule of law projects strive under timelines or standards that never seem to be met. Multi-national companies, on the other hand, are "in it for the long

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> infrastructure development, poverty alleviation, capital market development, and governance around the world.

Id.

[116] For example, the U.S. Department of State website, through its Bureau of International Narcotics and Law Enforcement (INL), calls for private sector investment and partnership for justice reform in Afghanistan, in areas such as supporting the Afghan bar, supporting Afghan prosecutors, and helping to expand legal aid services. *See* Afghan Partnership, *supra* note 39.

[117] For example, at a 2005 American Bar Association Symposium, Mr. Samuel P. Fried, a Senior Vice President for Limited Brands, Inc., a global corporation with over 90,000 employees and products in over forty countries, predicted a new era of cooperation between corporations and non-governmental organizations (NGOs):

> The good news is that after ten years of a fierce fighting between global businesses and anti-globalization NGOs and activists, a new synthesis seems to be developing. Very serious, very responsible, very credible NGOs–both international NGOs and NGOs on the ground in developing countries–recognize that business could pave the way for a better future. . . . Private sector actors ought to find NGOs to partner with on projects in developing countries. I believe we have a moral obligation to do this for poverty alleviation, as well as for our own security.

Beyond the Rule of Law, supra note 107, at 76; *see also* Limited Brands, About Our Company, http://www.limitedbrands.com/about/index.jsp (last visited Mar. 15, 2009). The company is, according to its website, "committed to being a responsible member of the global community." Limited Brands, Social Responsibility, http://www.limitedbrands.com/social_responsibility/index.jsp (last visited Mar. 15, 2009).

[118] SLAUGHTER, *supra* note 3, at 13.

term."[119] Public-private partnerships can help redefine rule of law progress as a process and not just an absolute end-state, such as by establishing monitoring and compliance regimes. Most importantly, PPPs, when arranged in the context of global networks, recognize the reality that the rule of law does not really take root until local conditions are ready for it. Public-private partnerships can help identify and respond to these local conditions.

IV. Leveraging the Major Rule of Law Players

The major players in the current world order, regardless of how the distribution of power may shift, still have ingrained organizational character traits that are unlikely to change significantly in the near future.[120] Understanding how these players wield power in accordance with their organizational character traits is crucial in deciding how to structure and approach rule of law PPPs.

A. Soft Law and Its Use by MNCs

As "non-states," MNCs, by definition, do not have direct access to the sovereign tools of "hard" diplomatic pressure and hard law. But it would be a mistake to assume that soft power and soft law are ineffective means of exercising private authority.[121] Soft law often develops independently of state actors and can create its own norms, often through the use of networks.[122] On the other hand, when strategic interests

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[119] *Beyond the Rule of Law*, *supra* note 107, at 76.

[120] *See supra* pp. 217–18.

[121] Private authority refers to "an individual or organization not associated with government institutions exerting decision-making power which is regarded as legitimate over a particular issue area. Private institutions can become authoritative because of perceived expertise, historical practice, or an explicit or implicit grant of power by states." Stephen J. Kobrin, *Private Political Authority and Public Responsibility: Transnational Politics, Multinational Firms and Human Rights*, BUS. ETHICS Q. (July 2009).

[122] Private law can exert a "state-breaking" function by de-emphasizing the vertical subordination of citizens to their sovereigns, and pointing towards horizontal relations between equally situated actors. Caruso, *supra* note 51, at 3. As Caruso continues: "Network theory postulates that private legal orders generate new regulatory dynamics in a global economy, where spontaneous law-making replaces state-based hierarchies of norms." *Id.* at 3 n.4. And MNCs can and do function as autonomous actors in international politics. In the 1994 World Trade Organization negotiations over intellectual property (known as the Agreement on Trade Related Aspects of Intellectual

interact, private law does not operate completely independently of state power.[123] Private law can, in fact, lend support to centralized institutions, by helping ensure the "uniform and predictable enforcement of individual promises."[124] In other words, voluntary adherence to an agreed-upon principle can help bolster the underlying legitimacy of the public entities involved. This bolstering also works in the other direction, from state to private entity. Whereas soft law agreements are based on the "binding force of consent," states provide the enforcement tools necessary to establish such soft law as binding law.[125]

The inherent strategic interests of the major players also shed light on how they wield their power. If MNCs are driven by the profit motive, for example, then the soft power they exert must mean the ability to access markets, and stimulate investment and development. Focused

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Property Rights (TRIPS), private organizations participated directly in negotiations. Essentially, "twelve corporations made public law for the world." Kobrin, *supra* note 121, at 13. Multi-national corporations could presumably also become lobbyists or even direct actors in areas such as human rights, labor practices, and environmental standards. For discussions on the trend toward increasing use of non-binding norms, see Dinah Shelton, *Introduction* to COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 8–9 (Dinah Shelton ed., 2000) [hereinafter COMMITMENT AND COMPLIANCE] ("The half century since the end of the Second World War has witnessed the proliferation of international norms, not only in traditional areas of international regulation, but in new fields once thought in the exclusive domestic jurisdiction of states.").

[123] Caruso *supra* note 51, at 8.

[124] *Id.* at 9. As Shelton explains, it is often hard to draw the line between hard and soft law:

> The line between law and non-law may appear blurred. Treaty mechanisms are including more 'soft' obligations, such as undertakings to endeavor to strive to cooperate. Non-binding instruments in turn are incorporating supervisory mechanisms traditionally found in hard law texts. Both types of instruments may have compliance procedures that range from soft to hard. The result seems to be a dynamic interplay between hard and soft obligations similar to which exists between international and national law. . . . This is part of an increasingly complex international system . . . . with the common purpose of regulating behavior within a rule of law framework.

COMMITMENT AND COMPLIANCE, *supra* note 122, at 10.

[125] Caruso, *supra* note 51, at 64. Private law can also evolve into more than just voluntary commitments. In an effort to preserve "efficient" and "desirable" products of private law arrangements, these products are often later codified, or at least permitted to develop into a persistent norm (such as business "best practices"). *Id.* at 65.

through the lens of a PPP, the soft power assets of MNCs—their ability to negotiate locally and think globally—in turn become useful assets for promoting the rule of law. In a world economy, where any company or individual with enough dollars (or Euros or yen) to do business overseas can likely find an opportunity to do so, money, and the cooperation it brings, will find places to flow. Even a country such as China, which holds a non-interventionist view of the rule of law,[126] finds itself very open to foreign investment. This places MNCs in an ideal position to wield positive influence. When leveraged for positive benefit through a PPP, the profit motive can help MNCs gain access in instances where other actors cannot. Public-private partnerships can help avoid a "state-centered, 'top-down'" approach to rule of law reform that often minimizes support for civil society or capacity-building.[127] The goal is not to back-door rule of law progress to evade authoritarian regimes, but rather to engage key interests of such regimes, including business interests, in ongoing dialogue to help render them as part of the solution, rather than part of the problem.

It is by engaging strategic interests that MNCs, through PPPs, can best contribute to rule of law efforts. Two rule of law thresholds can be applied to MNCs or other private actors through such partnerships. At the most basic level, such partnerships can ensure that the partner organizations themselves adhere to overall, as well as agreed-upon, rule of law principles. At a higher, and more desirable level, these partnerships can help ensure that the efforts of MNCs actually help advance the rule of the law in the areas where they are operating. Multi-national corporations will be most effective in PPPs when they have freedom to leverage their own solutions within these boundaries. MNCs espouse, and should be allowed to utilize, "a ground-up approach, [through which] globalization can contribute to advancing the rule of law and a just government."[128]

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[126] *See supra* Part III.A.2.

[127] Stephen Golub, *A House Without a Foundation* (2003), *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 105 (Thomas Carothers ed., 2006). Even former Secretary-General Annan seemed to recognize that the rule of law, however it is defined, cannot be applied as a universal template. As he stated, "We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation, and national needs and aspirations." RoL Report, *supra* note 73, at 1.

[128] *Beyond the Rule of Law, supra* note 107, at 76.

B. Networked for Rule of Law Reform

Networks form when state and non-state actors converge due to overlapping interests and objectives to resolve a particular issue.[129] This theory of networks is a useful model for explaining how interests can converge to promote the rule of law in PPPs.[130] Although the leading network scholar, Anne Marie-Slaughter, focuses in her book on three types of trans*governmental* networks,[131] these categories are equally useful constructs for the private sector. Interactions among the major players do not only happen through formal channels. In a globalized world where power and influence travel "up, down, and sideways,"[132] even state power does not always travel in a linear fashion. No single state has the power, reach, or influence to affect the outcome of every global situation.[133] Increasingly, the interactions of the major players are understood in terms of networks among counterparts in governments, international organizations, and industry.[134]

The precise organization of networked PPPs for rule of law projects will naturally vary tremendously depending on the type of project, the location of the project, and the particular players involved. The three most recognized types of networks—information networks, enforcement networks, and harmonization networks—often also overlap. This section

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[129] Anne-Marie Slaughter, for example, explains how everything from war, to the media, to business, and even religion are networked to achieve their aims. As she states, "In this world, the measure of power is connectedness." Anne-Marie Slaughter, *America's Edge: Power in the Networked Century*, FOREIGN AFF., Jan.–Feb. 2009, at 94, 95.

[130] Even when not explicitly described as "networks," the concept of multiple competing interests on the international and domestic scene is widely recognized in international relations. *See, e.g.*, Rosenau, *supra* note 51, at 88–89 (discussing "spheres of authority").

[131] SLAUGHTER, *supra* note 3, at 10.

[132] ZAKARIA, *supra* note 51, at 4.

[133] These networks are both horizontal and vertical. On the horizontal plane, for example, governments do not only communicate through formal channels, through representatives of heads of state. Ministers talk to ministers, legislators to legislators, judges to judges, all across borders on the sub-national level. Domestically, what we think of as "government" is actually an "aggregate of different institutions," ranging from the courts, to Congress, to regulatory agencies, to the White House. SLAUGHTER, *supra* note 3, at 13. The same concept applies on the international scene. In what we think of as the "global economy," MNCs, for example, cooperate with other MNCs, states, and local entities to reach local business solutions. On the vertical plane, international institutions communicate with governments on all matters ranging from human rights to trade harmonization.

[134] *Id.*

introduces these several types of networks, and suggests how networked PPPs could help advance the rule of law.

1. Information Networks

An information network is fundamentally about the exchange of information and ideas,[135] which is a recurring challenge in rule of law projects. Rule of law practitioners often seem to suffer from a poverty of knowledge about local conditions.[136] Even worse, is that when information is gained, it is often transmitted inefficiently, if at all, among organizations involved in rule of law efforts.[137] Under a networked model, organizations of governments, international institutions, NGOs, and MNCs could share their databases of knowledge and information gained over time. Public-private partnerships could act as a bridge to transmit and disseminate knowledge among all of the relevant players.[138]

The most basic information networks simply compile information as their goal.[139] Some information networks also "actively collect and distill information about how their members do business," resulting in codes of best practices.[140] Information networks can cooperate to "uncove[r] new information of value to all members," as well as exchange information about each other.[141] As a result of this information exchange, the reputation of members matters. Compliance so as not to harm one's reputation can be a powerful motivational tool for members of the group.[142] Information networks can also exert external influence

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[135] *Id.* at 52.
[136] *See generally* Carothers, *supra* note 17, *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 16 (Thomas Carothers ed., 2006) (discussing shortcomings and challenges of current rule of law practice).
[137] *Id.*
[138] For an example of an existing rule of law network, see Welcome to the International Network to Promote the Rule of Law (INPROL), http://www.inprol.org/visitorhome (last visited May 17, 2009) (describing INPROL as a project of the U.S. Institute of Peace that is designed to act as an information exchange for rule of law practitioners).
[139] *See, e.g.*, Global Legal Information Network, http://www.glin.gov/search.action (last visited May 17, 2009) ("The Global Legal Information Network (GLIN) is a public database of official texts of laws, regulations, judicial decisions, and other complementary legal sources contributed by governmental agencies and international organizations."). The GLIN network counts thirty-five nation-states as contributing members, including the United States. *Id.*
[140] SLAUGHTER, *supra* note 3, at 53.
[141] *Id.* at 54.
[142] *Id.*

by attempting to use information they gather to "shame" their external targets into compliance.[143]

The private sector can also wield the power of information to achieve positive reform. Even in cautiously protective states like China, MNCs can effect local change when those changes are couched in "business logic."[144] For example, the U.K. consulting firm IMPACTT concluded after a three-year study in China that "more progressive standards in electronics and apparel factories actually improved productivity, while allowing manufacturers there to reduce hours and increase pay."[145] Such information-sharing gives local partners a vested interest in change. Public-private partnerships between states and MNCs could help facilitate information exchange about these types of benefits.

2. Enforcement Networks

Enforcement networks focus on "enhancing cooperation . . . to enforce existing . . . laws and rules."[146] While enforcement is largely the purview of governments, such networks can certainly affect the private sector. Enforcement networks are a useful dovetail of hard and soft power.

Although it still has far to go, the U.N. Global Compact is the most prominent example of a voluntary, self-enforcement network. The Global Compact is the "largest corporate citizenship and sustainability initiative in the world," with 7700 corporate participants, and stakeholders in over 130 countries.[147] Membership is entirely

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[143] *See, e.g.*, Business Human Rights Resource Centre, A Brief Description, http://www.business-humanrights.org/Aboutus/Briefdescription (last visited May 17, 2009) (describing the Centre as a non-profit, collaborative partnership that tracks the positive and negative effects of over 4000 companies worldwide).

[144] *Beyond the Rule of Law*, *supra* note 107, at 76.

[145] *Id.* The actual IMPACTT report, entitled *Changing Over Time: Tackling Supply Chain Labour Issues Through Business Practice*, is available for download at http://www.impacttlimited.com/resources/changing-overtime-tackling-supply-chain-labour-issues-through-business-practice (last visited Mar. 15, 2009).

[146] SLAUGHTER, *supra* note 3, at 55.

[147] Overview of the U.N. Global Compact, http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Nov. 22, 2009) [hereinafter Overview of the U.N. Global Compact]. On 10 December 2008, nearly 250 corporate chief executives signed a statement in support of the Global Compact, which was published in all editions of the Financial Times. *See* 250 CEOs Issue Global Human Rights Statement, http://www.un

voluntary.[148] The Global Compact has two objectives. First, to "mainstream" its ten principles of corporate responsibility,[149] which include human rights, labor, environment, and anti-corruption standards derived from key U.N. documents, such as the Universal Declaration of Human Rights. [150] The Global Compact's second objective is to "catalyze actions in support of broader U.N. goals."[151] The Global Compact posts updates on its website, at least annually, as to whether members have voluntarily self-reported compliance with the Global Compact.[152] This is again a useful tool for managing reputations. As an example that reputation does matter, Microsoft Corporation maintains its own website detailing its commitment to corporate citizenship, affirming its commitment to the Global Compact and compliance with its measures.[153]

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globalcompact.org/NewsAndEvents/news_archives/2008_12_10.html (last visited Mar. 15, 2009). The statement itself is available through a link on this page same web page.

[148] Overview of the U.N. Global Compact, *supra* note 147.

[149] *Id.*

[150] *Id.* The ten principles are:

> Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights;
> Principle 2: make sure that they are not complicit in human rights abuses;
> Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
> Principle 4: the elimination of all forms of forced and compulsory labor;
> Principle 5: the effective abolition of child labor;
> Principle 6: the elimination of discrimination in respect of employment and occupation;
> Principle 7: Businesses should support a precautionary approach to environmental challenges;
> Principle 8: undertake initiatives to promote greater environmental responsibility;
> Principle 9: encourage the development and diffusion of environmentally friendly technologies; and
> Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

The Ten Principles, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited Mar. 15, 2009).

[151] Overview of the U.N. Global Compact, *supra* note 147.

[152] *Id.*

[153] Microsoft, Responsible Leadership, http://www.microsoft.com/About/Corporate Citizenship/US/ResponsibleLeadership/HumanRights.mspx (last visited Mar. 15, 2009).

The Global Compact's corporate-oriented principles illustrate how attempts to define the rule of law can and should move beyond a narrow focus on legal institutions. The Global Compact's principles are different from traditional rule of law definitions, but advance complementary objectives. Multi-national corporations who respect the Global Compact will in turn respect the rule of law in many aspects. From a networked point of view, MNCs should be oriented toward contributing to the rule of law in areas they impact, as opposed to broader normative goals un-rooted in any business models. [154] Networked organizations such as the Global Compact can help translate rule of law principles into business practices.

Ultimately, voluntary enforcement networks help fill gaps where hard law does not exist, and would perhaps preferably be avoided. For example, a growing academic discussion concerns whether, and how, corporations as international legal personalities should be held liable for human rights abuses under some universal standard.[155] Although accountability may be necessary in some cases, the ultimate goal of PPPs is to help avoid such violations in the first place. None of the traditional enforcement regimes, whether host states, home states, or international law, currently provides a holistic, satisfactory mechanism for governing the conduct of corporations.[156] By actually involving MNCs in the compliance process along the way, networked PPPs could help establish self-compliance as a first and best resort.

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[154] Another type of network not discussed here concerns "capacity-building." SLAUGHTER, *supra* note 3, at 57. In the rule of law context, where the phrase is often used, capacity-building means assistance to help bring legal systems up to an expected baseline standard, such as the capacity to investigate and try criminal cases. As MNCs interact through legal and economic channels, they can also contribute to capacity-building.

[155] *See, e.g.*, Kobrin, *supra* note 121, at 3–4 (arguing that transnational corporations should be held liable for human rights violations, ideally through a hybrid regime of public and private actors using soft law enforcement mechanisms).

[156] Simon Chesterman, *Oil and Water: Regulating the Behavior of Multinational Corporations Through Law*, 36 N.Y.U. J. INT'L L. & POL. 307, 308 (2004) ("The recent turn to voluntary codes of conduct . . . are an admission that efforts to regulate multinational corporations through legal regimes have failed.").

3. Harmonization Networks

Networks also form to harmonize standards.[157] For governments, this often includes regulatory standards, such as product-safety standards.[158] For private organizations, the ISO is the best example of harmonization, as it promulgates thousands of standards that enable cross-border business to be done with uniformity and predictability. The upcoming ISO 26000 corporate responsibility standard is the latest frontier.[159] From a rule of law perspective, harmonization networks could be used to set appropriate standards for rule of law reform, given local conditions. The U.S. Institute of Peace-founded International Network to Promote the Rule of Law (INPROL), for example, purports to play a harmonization role for on-the-ground practitioners.[160] But truly effective harmonization needs both public and private input to account for the full range of state and non-state actors.

Carefully networked PPPs could help overcome many of the communication and coordination problems that currently plague rule of law efforts. Rule of law programs in post-conflict environments provide a poignant example. These efforts tend to be dominated by foreign governments and NGOs. Because both groups feel political or donor-led pressure to demonstrate "results," there is often an overemphasis on humanitarian relief versus a real emphasis on reconstruction of the society and infrastructure.[161] In the worst cases, donor agencies even end up essentially doing projects themselves, rather than instilling real capacity in local institutions. [162] Charity aid work by NGOs can unwittingly remove critical functions from the developing state to outside agencies, depriving the state of its legitimacy.[163] The net result of this international activity is often a "web of relationships" that actually undermines, rather than supports, the rebuilding of state institutions.[164]

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[157] SLAUGHTER, *supra* note 3, at 59.
[158] *Id.*
[159] *See supra* Part III.A.3 (discussing the ISO and upcoming ISO 26000 corporate responsibility standard).
[160] *See supra* note 138 (describing INPROL).
[161] *See* AHMED RASHID, DESCENT INTO CHAOS: THE UNITED STATES AND THE FAILURE OF NATION BUILDING IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA 177 (2008).
[162] *Id.*
[163] GHANI & LOCKHART, *supra* note 11, at 28. The budget of the largest NGOs exceeds the GDP of many African countries and even some European countries. *Id.* at 62.
[164] *Id.* at 97–98.

Public-private partnerships in such rule of law operations should involve both international and local actors to better share the inherent sense of urgency. By facilitating the exchange of information and harmonization of standards and practices, networked rule of law PPPs must strive to overcome the tendency toward parallel bureaucracies, where aid or rule of law donors in a country work inside an intellectual and physical cocoon, insulated from the real needs of the very country where they are located to assist.[165] Public-private partnerships could help structure projects in ways that incorporate local interests and concerns.

C. Leveraging Incentives for Rule of Law Participation

If MNCs are viewed as strategic actors, then a greater focus on incentives could help leverage their compliance with rule of law objectives. If MNCs' primary motive is profit, then at least four incentives can be leveraged against this motive: reputation, the desire to continue business, enhancing profitability, and avoiding liability. All of these incentives can be structured into PPPs to promote the rule of law.

The incentive of enhanced reputation is the one most often incorporated into partnerships that affect the rule of law. The U.N. Global Compact, for example, incentivizes the enhanced reputation that comes from voluntary membership.[166] Other existing PPPs respond to the incentive to simply keep doing business. This is especially true when political or other outside interests threaten to restrain MNCs' behavior due to perceived human rights or other violations.[167] Entering into voluntary PPPs is a way to ease scrutiny and enable MNCs to continue to engage in profitable activities.

The remaining incentives, enhancing profitability and avoiding liability, have the most opportunity for further development in the context of PPPs. If and until greater international consensus emerges on how to regulate the behavior of MNCs, these incentives are best advanced by domestic efforts of individual states. Transgovernmental

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[165] *Id.* at 19.
[166] *See supra* Part IV.B.2.
[167] *See infra* Part V.1–2 (discussing voluntary networks in the extractives industry, and the formation of the Global Network Initiative in the aftermath of the Google in China hearings).

networks could, in turn, assist in efforts to harmonize incentives among like-minded states.

In the United States, the Overseas Private Investment Corporation (OPIC) is ideally situated to leverage MNC involvement in ways that both enhance profitability and advance rule of law objectives. The stated mission of OPIC is to facilitate economic and social development in over 150 countries, including Iraq and Afghanistan.[168] OPIC incentivizes MNC involvement in its projects through three primary means: financing, political risk insurance, and investment funds.[169] In addition to offering favorable terms in these areas, OPIC's statutory investment policy requires that it work with MNCs to ensure that all OPIC-sponsored projects apply "consistent and sound environmental standards," "consistent and sound worker rights standards," "observe and respect human rights," have "no negative impact on the U.S. economy," and "encourage positive host country development effects."[170] These standards are important, but vague. The 2007 Annual Report for OPIC outlines projects with a combined billions of dollars throughout the world, and is deliberately devoted to expanding its reach.[171] OPIC could

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[168] *See* OPIC, About Us, http://www.opic.gov/about/index.asp (last visited Mar. 15, 2009) [hereinafter About Us]; Doing Business with Us, List of All Countries, http://www.opic.gov/doingbusiness/ourwork/countrylist.asp (last visited Mar. 15, 2009). In its dealings, OPIC also acts as a sort of intermediary between host governments and overseas investors, which is an ideal role for involvement in PPPs. The OPIC has completed similar agreements with the respective Ministries of Commerce in Iraq and Afghanistan, for example, regarding its investment activities in these countries. Its terms include, for example, that investors in OPIC projects "shall be accorded tax treatment no less favorable than that accorded to the investment support of any other national or multilateral development institution which operates in [Afghanistan]." Investment Incentive Agreement Between the Government of the United States of America and the Government of the Islamic Republic of Afghanistan, U.S.-Afg., art. 2, Apr. 17, 2004, *available at* http://www.opic.go/doingbusiness/ourwork/asia/documents/Afghanistan 2004.pdf; *see also* Investment Incentive Agreement Between the Government of the United States of America and the Government of the Republic of Iraq, U.S.-Iraq, July 11, 2005, *available at* http://www.opic.gov/doingbusiness/ourwork/africa/BL_Iraq-07-11-2005.pdf. As a next step, such agreements could be used to incorporate basic human rights or rule of law principles.

[169] About Us, *supra* note 168.

[170] Doing Business with Us: Investment Policy, http://www.opic.gov/doingbusiness/investment/index.asp (last visited Mar. 15, 2009).

[171] *See* OVERSEAS PRIVATE INV. CORP., 2007 ANN. REP. 26–31 (2007). One example of OPIC's growing outreach is the Enterprise Development Network (EDN), initiated in 2007. The EDN is "a strategic alliance with qualified financial institutions, business consultants, associations, law firms, and regional investment promotion agencies, all of

further enhance its role in rule of law PPPs by requiring more explicit commitments to human rights and the rule of law in its contracts, at the same time that it sweetens the pot by offering favorable terms for investment.

The final incentive, avoiding liability, is currently the least addressed in the context of PPPs, even in the midst of growing discussion about whether and how MNCs should be held responsible for human rights violations.[172] Because international consensus on this issue seems less than imminent, states are best positioned to take the lead on ways to incentivize good behavior that avoids liability. One possibility, currently unexplored in the context of rule of law partnerships, is domestic safe harbor legislation, which could limit the liability of MNCs involved in rule of law projects, provided they adhere to certain conditions. The intent is not to avoid responsibility, but rather to encourage responsible behavior in a way that avoids poor behavior that could lead to liability in the first place.

A relatively recent environmental safe harbor provision in the United States offers a good comparative example. In 1995, a U.S.-based NGO, the Environmental Defense Fund, and the U.S. Fish and Wildlife Service (FWS) developed a safe harbor program to "encourage private landowners to restore and maintain habitat for endangered species without fear of incurring additional regulatory restrictions."[173] Under this program, landowners can voluntarily enter into safe harbor agreements to ensure that if, for example, they conserve their land in a way that may attract endangered species, they will not then be subject to additional restrictions under the Endangered Species Act if such species do in fact enter their land.[174] This regulatory solution is designed to avoid "punishing" landowners for doing good deeds that benefit conservation.[175]

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whom have been trained in how to originate more projects for OPIC's consideration." *Id.* at 4.

[172] *See, e.g.*, Kobrin, *supra* note 121, at 3–4.

[173] Environmental Defense Fund, Safe Harbor (May 16, 2008), http://www.edf.org/page.cfm?tagID=87 [hereinafter Environmental Defense Fund].

[174] *Id.*; *see also* Fish and Wildlife Service, Safe Harbor Agreements Program (Mar. 12, 2009), http://www.fws.gov/ventura/endangered/safeharbors. An accompanying fact sheet is available at the same link.

[175] Environmental Defense Fund, *supra* note 173.

In the rule of law setting, an analogously designed program could offer contractual assurances to MNCs operating in risky environments, where there has historically been less observance of human rights, labor, or other standards that concern the project. Like in the FWS safe harbor program, a state and an MNC involved in such a PPP could first determine a "baseline" for current conditions, such as labor standards, in the operating environment. Participating MNCs could be offered safe harbor protection as long as their behavior did not dip below this baseline. These MNCs could then qualify for incentives for behavior that actually encouraged improving the baseline. Particular safe harbor provisions could include, for example, reduced liability under U.S. domestic law, such as the Foreign Corrupt Practices Act, as long as the MNC concerned exercised due diligence, operated in good faith, or performed to some other established standard. The intent, though, is not to shelter bad behavior. In cases where MNCs become suspected of activity that could invoke civil or criminal liability, safe harbor provisions could include agreements to jointly investigate such allegations, and/or first refer such allegations to arbitration before any civil or criminal penalties are pursued.

Ideally, such safe harbor provisions could even incorporate host state authorities where the MNC is operating. They could, for example, include agreements to jointly investigate allegations in the state where they allegedly occurred or to resort to third-party arbitration as the first resort to minimize disputes and limit liability for operations in the host nation. In cases of disagreement, the sending state, such as the United States, could even agree to represent its MNC if charged with violations in the host country, as long as the MNC could demonstrate that it had adhered to the agreed-upon standards. Although such an arrangement could threaten to politicize PPPs, the goal would be to facilitate communication throughout the process, and thus minimize or eliminate surprises.

V. Exploring When and Where

The main benefit of PPPs is that, because they are inherently flexible, they can be adapted to any rule of law requirement, from post-conflict to non-conflict environments. It could be argued that external access to a state's public and private institutions bears an inverse relationship to the development status of that state. At one end of the spectrum are developed and developing countries, where the barriers to

private entry (such as foreign investment) tend to be lower, and barriers to direct foreign government influence (i.e., the need to use diplomacy rather than a stick) tend to be higher. At the other extreme are post-conflict societies,[176] where barriers to MNC entry are likely to be high (due to corruption and a lack of security) and the barriers to foreign government influence or control are comparatively low (due to the destruction of the country's infrastructure). All of these situations present opportunities for PPPs.

Some of the most successful examples of PPPs to date have occurred not in post-conflict environments, but in societies with relatively stable, functioning governments. These stable governments would presumably be the least receptive to outside efforts to reform their behavior, but PPPs have achieved success when they are able to narrow their focus to issues of mutual interest to all of the parties involved. One example concerns a foreign company investing in Russia, in which the public partner was a state-owned company and the private partner was an MNC. In this case, "the contract clauses negotiated by foreign investors dealing with largely state-owned Russian companies force[d] the Russian Government to embrace standards of corporate accounting and transparency that have no domestic equivalent in formerly soviet regimes."[177] A private standard, in other words, effectuated a positive change, transparency, that ultimately provides a positive rule of law benefit. This type of reform is soft law at its best.

1. Voluntary Measures in the Extractive Industry

The extractives industry, namely oil and gas companies, provide ideal case studies for PPPs in action. According to a 2002 U.N. Conference on Trade and Development ranking of the world's 100 largest economic entities (including nation-states), ExxonMobil, Royal Dutch/Shell and BP ranked 45, 62, and 68, respectively, meaning they dwarf the economies of many states.[178] At the same time, the wide involvement of oil and gas MNCs in developing countries has publically

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[176] For a discussion of U.S. efforts in post-conflict Iraq and Afghanistan, see *supra* Part II.

[177] Caruso, *supra* note 51, at 1 n.63 (citing Doreen McBarnet, *Transnational Transactions: Legal Work, Cross-Border Commerce and Global Regulation, in* TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES 98, 105–06 (Michael B. Likosky ed., 2002)).

[178] UNCTD Press Release, *supra* note 20.

implicated them in issues ranging from environmental degradation, to human rights violations, to the unfair distribution of wealth in "resource-rich-but-poor" countries.[179] The public and industry response to such criticisms has led to two innovative examples of PPPs.

The Voluntary Principles on Security and Human Rights[180] (Voluntary Principles) and the Extractive Industries Transparency Initiative[181] (EITI) are two separate, wide-ranging initiatives that could be considered PPPs. Although very different in their form and implementation, both initiatives exhibit several key traits that are probably important for any effective PPP. First, state involvement was necessary to motivate substantive development in both cases.[182] Second, both initiatives reflect a reality that all parties involved, including states, MNCs, and NGOs, are driven by clearly defined, and sometimes divergent, interests.[183] Rather than being aspirational documents, both arose, at least in the view of one scholar, from "interest-based bargaining" between the governments, MNCs, and NGOs involved.[184] And finally, both initiatives are arguably somewhat successful because they both narrowed their fields of agreement to issues that could be accepted by all parties involved.

The Voluntary Principles are unique in the extractives industry in that they are a direct attempt to regulate behavior.[185] The Governments of the United States and United Kingdom launched consultations leading to the Voluntary Principles in 2000, in light of rising concerns about the complicity of extractive industry MNCs in human rights abuses in countries where they operated.[186] For MNCs operating in often unstable

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[179] Cynthia A. Williams, *Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry*, 36 N.Y.U. J. INT'L L. & POL. 457, 458 (2004).

[180] Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org/ (last visited Mar. 15, 2009) [hereinafter Voluntary Principles Overview].

[181] Extractive Industries Transparency Initiative, http://eitransparency.org/ (last visited Mar. 15, 2009).

[182] Williams, *supra* note 179, at 480, 486.

[183] Hansen, *supra* note 56, at 5.

[184] *Id.* at 3.

[185] Williams, *supra* note 179, at 498. Currently participants include the Governments of the United States, United Kingdom, the Netherlands and Norway, eighteen companies including heavy-hitters such as Chevron, BP, ExxonMobil, and Shell, and influential NGOs including Amnesty International, Human Rights Watch, and Oxfam. Voluntary Principles Participants, http://www.voluntaryprinciples.org/participants/index.php (last visited Mar. 15, 2009).

[186] Hansen, *supra* note 56, at 11. Specific criticisms, largely from NGOs, were that these MNCs did not leverage their political clout to deter host governments from committing

environments, security was the overriding concern: the preamble to the Voluntary Principles states that their purpose is "to guide Companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms."[187]

One unique feature of the Voluntary Principles is that they explicitly incorporate reference to human rights and U.N. documents, including the Universal Declaration of Human Rights, the U.N. Code of Conduct for Law Enforcement Officials, and the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[188] The Voluntary Principles, by incorporating these documents, "clearly subject companies to the norms and treaty obligations and, thus, serve to advance the goals of international human rights protection."[189] In substance, the Voluntary Principles establish a regime of compliance and reporting, including requirements for MNCs to: conduct risk assessments in countries where they operate, which account for human rights and rule of law concerns; to regularly consult with host governments on the impact of public security arrangements and to report any credible human rights violations; and to ensure that any private security that they retain follow the policies of that MNC regarding ethical conduct and human rights, as well as international human rights standards.[190] In other words, the onus is heavily on participating MNCs for compliance with the Voluntary Principles.

According to a five-year overview prepared by the Voluntary Principles Information Working Group (IWG), this system of informal accountability has achieved some limited results.[191] The Voluntary Principles lack any empirical means to measure progress among

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violations; that MNC staff had direct involvement in human rights violations; and that the MNCs indirectly supporting human rights violations through security force operations. *Id.*

[187] Voluntary Principles Overview, *supra* note 180.

[188] The Voluntary Principles, http://www.voluntaryprinciples.org/principles/index.php (follow links on the right of the page to view the principles) (last visited Mar. 15, 2009) [hereinafter Voluntary Principles].

[189] Williams, *supra* note 179, at 481.

[190] Voluntary Principles Overview, *supra* note 180.

[191] *See generally* Five-Year Overview of the Voluntary Principles on Security and Human Rights, Executive Summary, http://www.voluntaryprinciples.org/reports/2005/index.php (last visited Mar. 15, 2009) [hereinafter VP Executive Summary].

participants, and, instead, focus on largely anecdotal assessments.[192] In compiling reports from all of the participating MNCs, the 2005 IWG report noted that the Voluntary Principles "are seen as genuinely filling a critical void for companies seeking guidance" about managing risks "related to their security and human rights practices."[193] As a first step, the Voluntary Principles simply helped put human rights on the agenda.[194] Other measured successes included an increased interest among MNCs in training the Voluntary Principles and human rights concerns and an increased emphasis on processes for anonymously reporting human rights abuses and providing "whistle-blower" protection.[195] As far as tangible results, the report noted an emerging best practice that the "Voluntary Principles are incorporated into all private security contracts, agreements with governments and standard company risk assessments."[196] Most impressively, the Voluntary Principles were explicitly incorporated in agreements with government representatives in Indonesia and Columbia.[197]

The Voluntary Principles are not, of course, without their shortcomings. The IWG report, itself, noted deficiencies such as the "lack of an audit mechanism," and the fact that most participating MNCs

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[192] The Voluntary Principles in fact seem intent on avoiding legally enforcement commitments. *See* Amendments Approved at VPs 2009 Oslo Plenary, http://www.voluntaryprinciples.org/files/vp_amendments_200905.pdf (last visited Nov. 22, 2009) ("Participants acknowledge that implementation of the Principles is continuously evolving and agree that the Voluntary Principles do not create legally binding standards. . . .").

[193] *Id.*

[194] As the report later notes, **"**Most companies had general social responsibility policies in place prior to implementing the Voluntary Principles, but few had specific extant human rights policies." Five-Year Overview, General Overview of Company Efforts to Implement the Principles, http://www.voluntaryprinciples.org/reports/2005/company-efforts-overview.php (last visited Mar. 15, 2009). Since then, "Some companies have specifically incorporated the Voluntary Principles into their policies and commitments, or plan to do so in the near future. A few companies have also adopted a security standard to provide specific guidance on their approach to managing security issues." *Id.*

[195] VP Executive Summary, *supra* note 191.

[196] *Id.*

[197] *Id.* The report notes, "Five energy companies involved in the Indonesian working group have signed MOUs with BP Migas, which is the Indonesian Government's oil and gas coordinating body, and the Area Police Command (Polda) that include adherence to the Voluntary Principles." *Id.* In Columbia, "[t]he Colombian Ministry of Defense agreed to include language on human rights protection, including a commitment to the Voluntary Principles, in agreements that the state-owned oil company, Ecopetrol, signs with the Colombian armed Forces to provide protection for oil operations with which it is involved." *Id.*

had not set specific timelines for the implementation of the Voluntary Principles.[198] The primary outsider critique of the Voluntary Principles is simply that they lack any real enforceability.[199] This critique, of course, applies to all voluntary compliance regimes, but this does not mean such regimes are without value. As one scholar notes, voluntary or soft law regimes can help "coordinate action towards a focal point," and through the use of shame and pressure have "much of the effect of hard law."[200]

One lesson of the Voluntary Principles is that they arose out of the crucible of necessity and politics, rather than any spontaneous, communal desire to better the cause of humanity. The Governments of the United States and United Kingdom, Hansen observes, "had the primary objective of ensuring continued oil company operations in problematic environments and the secondary objective of improving human rights in resource-rich regions."[201] Participating MNCs "shared an outcome preference of ensuring the sustainability and security of operations and minimizing political and reputational risks."[202] And NGOs, for their part, "shared an outcome preference for as binding a regulatory framework as possible that would then turn resource companies into promoters of human right vis-à-vis host state governments and private security providers."[203] One could observe that none of these positions, when juxtaposed with predictable organizational characteristics, is necessarily morally "wrong." The lesson is that even divergent or competing interests can be leveraged to achieve an end result that ultimately contributes to the common good, regardless of the initial triggering mechanism. Negotiating PPPs in this framework of reality is much more likely to account for the positions of all of the players involved, which in turn may increase the likelihood of their ultimate compliance.

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[198] *Id.*
[199] Hansen, *supra* note 56, at 22 ("The Voluntary Principles do not create 'legally binding standards' and failure to implement them cannot be used in legal proceedings according to the 2007 participation criteria text."). Hansen also criticizes the Voluntary Principles for shifting the onus for compliance too heavily toward participating MNCs, as opposed to host governments. *See id.* 21–24.
[200] Williams, *supra* note 179, at 496.
[201] Hansen, *supra* note 56, at 12.
[202] *Id.*
[203] *Id.*

Like the Voluntary Principles, the EITI was born out of politics and competing interests, though it represents a very different approach to voluntary compliance. The effort to launch the EITI was started by an NGO, although like the Voluntary Principles, negotiations did not make significant headway until the U.K. Government became seriously involved.[204] The EITI now enjoys fairly broad participation: as of 2008, 25 countries have achieved "EITI Candidate" status; "40 of the world's largest oil, gas and mining companies support and actively participate in the EITI process," major NGOs and international organizations including the World Bank are involved, and the United States and United Kingdom, among other governments, support the EITI.[205]

The EITI, rather than attempting to influence behavior, establishes a disclosure regime for payments made by extractive industry MNCs to host governments, to promote revenue transparency.[206] Unlike the Voluntary Principles, the negotiation of the EITI standards included participants from host governments, and the resulting standards put the onus on host governments for monitoring and enforcement.[207] The EITI is based on country-by-country implementation rather than a broad standard, which also leads to its primary shortcoming: its absolute reliance on host governments for compliance.[208] Like the Voluntary Principles, the noted "achievements" of the EITI are not empirical; they

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[204] *Id.* at 15.

[205] EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, FACT SHEET (2008), *available at* http://www.eitransparency.org/files/Fact%20Sheet.pdf.

[206] Williams, *supra* note 179, at 498; *see also* Hansen, *supra* note 56, at 15. As to its overall purpose, "[t]he Extractive Industries Transparency Initiative (EITI) supports improved governance in resource-rich countries through the verification and full publication of company payments and government revenues from oil, gas and mining." EITI Summary, Sept. 23, 2007, http://eitransparency.org/eiti/summary. The actual EITI criteria, which must be adopted by individual host states, are exceedingly broad, and include

> Regular publication of all material oil, gas and mining payments by companies to governments ("payments") and all material revenues received by governments from oil, gas and mining companies ("revenues") to a wide audience in a publicly accessible, comprehensive and comprehensible manner;" credible, independent audits, and that "Civil society is actively engaged as a participant in the design, monitoring and evaluation of this process and contributes towards public debate.

The EITI Criteria, Nov. 20, 2007, http://eitransparency.org/eiti/criteria.

[207] Hansen, *supra* note 56, at 15, 26.

[208] *Id.* at 28.

focus anecdotally on progress toward host nation implementation and validation of EITI requirements.[209] Citing the EITI's newness, some scholars have reserved ultimate judgment as to whether the EITI will ultimately be effective.[210]

Both the Voluntary Principles and the EITI managed to bring together diverse players and generate standards in areas that likely could not have been achieved through traditional hard law channels, such as treaty negotiation. When it comes to contentious or high-profile issues, self-regulation may be better than no regulation, as long as this self-regulation supports basic normative human rights or rule of law values. This, again, points to the need for a clear rule of law definition, ideally in the form of a U.N. resolution. Entities like the Voluntary Principles and the EITI can advance rule of law objectives in substance, even if they are not explicitly recognized as such. But bringing such efforts under the umbrella of a common understanding of the rule of law would help achieve more sustainable progress.

2. The Google in China Hearings: Coercion Versus Participation

The Google in China hearings present an example where politics trumped on opportunity for public-private cooperation on an important rule of law matter. State pressure extracted a desirable outcome, but one whose ultimate solution ironically excluded state participation. As described earlier, the U.S. Congress in 2006 threatened the Google parent company, which is headquartered in the United States, with sanctions for the actions of Google in China in handing over dissident files.[211] In a corresponding reaction, a member of the U.S. House of Representatives introduced the Global Online Freedom Act (GOFA).[212] The GOFA, if passed, would have imposed civil and criminal penalties[213]

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[209] *See generally* EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, PROGRESS REPORT 2007–2009 (2009), *available at* http://eitransparency.org/ (click on "Resources" at the top of the page, and then click on "Progress Report" in the middle of the page that loads) (describing achievements such as increasing the number of country participants, and the increase in validation reports produced).

[210] *See, e.g.*, Williams, *supra* note 179, at 502 (stating that as of her 2004 article, it was too soon to evaluate the EITI's effectiveness).

[211] Zeller, *supra* note 99.

[212] Global Online Freedom Act, H.R. 4780, 109th Cong. (2006) [hereinafter GOFA 2006]. A substantially similar act was recently reintroduced. *See* Global Online Freedom Act, H.R. 2271, 111th Cong. (2009).

[213] GOFA 2006 § 207.

for the very types of actions that Google in China engaged in, such as curtailing search engine results,[214] and handing over personally-identifiable user information to Chinese law enforcement pursuant to Chinese law.[215] The U.S. Department of Justice, opining from afar, would determine exceptions for "legitimate foreign law enforcement purposes."[216] Although never passed to date, such a bill would have "effectively preclude[d] U.S. information technology companies from operating in any countries with such internal restrictions."[217]

While the Google in China hearings and the GOFA's introduction ultimately amounted to little more than political sideshows, they did indirectly influence a desirable outcome. Not coincidentally, major participants in the hearings, including Google, Microsoft and Yahoo!, launched the Global Network Initiative (GNI) on 28 October 2008, after eighteen months of collaboration.[218] In addition to other Information Technology companies, GNI participants include academics, NGOs (including Human Rights Watch, which had also supported the GOFA), and a U.N. Observer.[219] The GNI does not, notably, include representatives from the U.S. or any other government.[220] The GNI is outlined in three core documents: Principles; Implementation Guidelines; and the Governance, Accountability, and Learning Framework.[221] The GNI's Principles are "based on internationally recognized laws and standards for human rights, including the Universal Declaration of Human Rights ('UDHR'), the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR')."[222] The GNI requires, notably, commitments from participating companies to "avoid

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[214] *Id.* § 202.
[215] *Id.* § 206.
[216] *Id.*
[217] Jade Miller, The Internet in China Hearing and The U.S. Technology Corporation: Soft Power and State-Firm Diplomacy 8 (Nov. 14, 2007) (unpublished manuscript, available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/9/3/7/4/p193746_index.html).
[218] Global Network Initiative, http://www.globalnetworkinitiative.org/ (last visited Mar. 15, 2009).
[219] Global Network Initiative Participants, http://www.globalnetworkinitiative.org/participants/index.php (last visited Mar. 15, 2009).
[220] *Id.*
[221] Global Network Initiative Core Commitments, http://www.globalnetworkinitiative.org/corecommitments/index.php (last visited Mar. 15, 2009).
[222] Global Network Initiative Principles, http://www.globalnetworkinitiative.org/principles/index.php (last visited Mar., 15, 2009).

or minimize the impact of government restrictions on freedom of expression," and to "respect and protect the privacy rights of users when confronted with government demands, laws or regulations that compromise privacy in a manner inconsistent with internationally recognized laws and standards."[223] It wisely, however, falls short of demanding civil disobedience.[224] Because the GNI is so new, the Government, Accountability, and Learning Framework will be implemented in three yet-to-be-completed phases, including the incorporation of independent reviews.[225]

The GNI is too new to yet measure its compliance or impact.[226] But its adoption illustrates the value of applying a multi-lateral, multi-stakeholder approach to problems of global concern, such as Internet censorship and privacy. Whereas the GOFA effort tried to force the U.S. Government into a politically infeasible, unrealistic role as the sole arbiter of a multi-lateral concern, the GNI casts a wider net that incorporates as many multi-lateral players as possible, though without state involvement. A voluntary association seems to have succeeded where heavy-handed government threats failed. Perhaps a next step would be for the GNI, like the EITI, to work to incorporate host-nation involvement. The GNI is ripe for further refinement over key issues, such as the involvement of Chinese joint venture partners, over which MNCs lack operational control.[227] China, or any nation, is likely to resist external attempts to legislate conduct within its own borders, such as the GOFA. The GNI's multiple-stakeholder approach, on the other hand, may stand a greater chance of gradually securing host government acceptance or compliance.

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[223] *Id.*

[224] The Global Network Initiative, http://www.circleid.com/posts/20081028_global_network_initiative/ (Oct. 28, 2008, 16:20 PDT).

[225] Global Network Initiative, Governance, Accountability, and Learning Framework, http://www.globalnetworkinitiative.org/governanceframework/index.php#36 (last visited Mar. 15, 2009).

[226] *But see* Anick Jesdanun, *Internet Companies Embrace Human Rights Guidelines*, USA TODAY.COM, Oct. 28, 2008, http://www.usatoday.com/tech/news/2008-10-28-net-human-rights_N.htm. As stated by Morton Sklar, Executive Director of the World Organization for Human Rights USA, "What's disappointing is that the amount of effort . . . didn't produce something more substantial." *Id.*

[227] Posting of Geoffrey A. Fowler to China Journal Blog, http://blogs.wsj.com/chinajournal/2008/10/28/parsing-the-google-yahoo-microsoft-global-network-initiative (Oct. 28, 2008, 8:10 EST).

VI. The Future of Public-Private Partnerships

Public-private partnerships can be an effective tool to promote the rule of law largely because they already exist, in the form of formal and informal networks.[228] The concerns of this article are less about suggesting something entirely new, and more about better leveraging the emerging governance tools of the twenty-first century. Part of the needed adjustment is a recognition that rule of law success stories may look different than initially expected. The rule of law is too vast of a concept to pursue in blanket fashion in a given country or problem set; depending on the need, the rule of law may mean criminal law, civil law, property rights, law-abiding labor practices, or other rules-based systems that meet immediate needs. Because PPPs are inherently flexible and situation-dependent, they are uniquely situated to respond to relevant regional, national, and local interests.[229] And in areas or projects where the rule of law may be a controversial concept, collaboration with local efforts can help dislodge resistance and work through concerns as they arise.

A. Overcoming Criticisms:

Public-private partnerships are ultimately a method to achieve progress, not a stand-alone solution. Critics of voluntary arrangements offer views that must be carefully assessed in light of the changing world order. When contrasting hard and soft law mechanisms, it may be time to recognize that in a networked environment, substance is more important than form, and that hard law measures must increasingly share space with other types of compliance regimes.

1. Meeting for the Sake of Meeting

In a networked, multi-polar world, it is crucial for all major players involved in the rule of law to recognize that communication and

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[228] *See supra* Part IV.B.

[229] As two scholars note, "[t]he the absence of effective national and intergovernmental regulation to ameliorate global environmental and social problems, "private" alternatives have proliferated, including self-regulation, corporate social responsibility, and public-private partnerships." Steven Bernstein & Benjamin Cashore, *Can Non-State Global Governance Be Legitimate? An Analytical Framework*, 1 REG. & GOVERNANCE 347, 347 (2007).

facilitation can themselves contribute to rule of law objectives, such as transparency, monitoring, and public accountability.[230] The point is not to avoid the hard questions of whether the rule of law is actually progressing in any particular situation, but rather to recognize that, in a networked world, solutions will only find their way when local conditions are ready for them. Networked PPPs can act as a sort of catalyst to help speed along local conditions.

2. Lack of Enforcement

Public-private partnerships could be criticized as a method for MNCs to avoid accountability, such as fines or prosecution, for issues such as human rights violations. But sanctions are a question of timing more than substitution. Rather than avoiding accountability, the goal of PPPs is to avoid questionable situations in the first place. If states feel inclined to punish MNCs for violations after a PPP fails, this is a process that should remain outside of, and be separate from, the PPP process itself. Public-private partnerships will be most effective if understood, and applied, in terms of soft power. Hard power and state sovereignty undoubtedly have their role in a multi-polar, disaggregated system. But to pin heavy-handed enforcement on PPPs risks upsetting the delicate balance that often only PPPs are able to achieve, between local and international interests.

B. Politicizing Business: Drawing the Line Between Individual and Corporate Responsibility

Apart from the narrower issue of enforcement, PPPs raise a broader concern about politicizing business. Multi-national corporations in PPPs should avoid becoming tools of state interests, and thereby compromising their legitimacy in the field of business. This is not to say that PPPs should not hold positions in important but sensitive areas such as human rights, but rather that these positions should be arrived at through negotiation and interaction in the forum of the PPP, rather than imposed externally. PPPs must avoid inhibiting the free movement of

[230] The U.S. Army Judge Advocate General's *Rule of Law Handbook*, for example, recognizes that rule of law projects must focus on bringing about particular effects, as opposed to merely institutional objectives. ROL HANDBOOK, *supra* note 35, at 21.

information, goods, and capital, which is the unique advantage that MNCs in PPPs have over governments.

VI. Conclusion

In the changing world order, states that lack the rule of law will likely fall even further behind in joining the global community. But these states also have the most to gain from the rule of law assistance of PPPs.

From a security perspective, the U.S. military simply cannot afford to ignore the need to leverage new types of partnerships in support of U.S. interests. The United States' competitors, most notably China, are already doing so in support of their own objectives.[231] Wars of the future may be waged not only for military superiority, but also for economic, social, and political influence.[232]

Some specific steps by each of the major players could help advance the use of PPPs to promote the rule of law.

First, international organizations should seek to act as clearinghouses of information and facilitators for indentifying global rule of law standards, rather than assuming a role as top-down enforcers. The U.N., for its part, should continue to seek a General Assembly resolution that reflects international consensus on a framework definition of the rule of law. The U.N. could also more explicitly recognize in its rule of law planning the role of PPPs in promoting the rule of law. An international framework for understanding the rule of law is desperately needed before serious harmonization and collaboration among networks can be expected.

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[231] *See*, *e.g.*, Chris Zambelis & Brandon Gentry, *China through Arab Eyes: American Influence in the Middle East*, PARAMETERS, Spring 2008, at 60, 61–71 (describing China's "soft power" effort to "establish a political, economic, and cultural foothold in the energy-rich and strategically central region" of the Middle East). *See also* Felix H. Chang & Jonathan Goldman, *Meddling in the Markets: Foreign Manipulation*, PARAMETERS, Spring 2008, at 43, 48–52 (discussing the security risk of market manipulation, and citing China as an example based on its growing economic power).

[232] One commentator, for example, analyzes modern insurgencies in the context of a "conflict market." *See* Steven Metz, *New Challenges and Old Concepts: Understanding 21st Century Insurgency*, PARAMETERS, Winter 2007–2008, at 20, 23 ("Contemporary insurgencies are less like traditional war where the combatants seek strategic victory, they are more like a violent, fluid, and competitive market.").

Second, states involved in rule of law promotion should further explore the use of safe harbor provisions and other methods to incentivize MNC involvement in PPPs. Safe harbor provisions would leave enforcement, if any need happen, at the state level. The goal of safe harbor provisions is not to avoid accountability, but rather to proactively avoid the issues that create violations in the first place. Harmonization networks could be particularly important for cross-border collaboration on safe harbor provisions. These networks could provide both uniformity, and predictability, two key conditions for encouraging MNC involvement. States who desire PPPs with MNCs need to find effective ways to encourage, rather than chill, participation.

For non-state actors, and MNCs in particular, industry should continue its voluntary, internal dialogue on corporate "best practices," and socially responsible investment. In particular, industry should consider broadening its participation in the U.N. Global Compact, as well as acceptance of the ISO 26000 standard, as significant first steps. From a self-interested point of view, this may help MNCs head off calls for hard law accountability, in areas such as human rights and labor practices. But from a broader point of view, such entities can go a long way toward actually instilling a corporate culture of linking sustainability with profits.

Although overall normative solutions for the rule of law may remain elusive, there is still ample opportunity for practical, on-the-ground action. Public-private partnerships are one method to achieve positive results. Although rule of law theory still has many unanswered questions, its pursuit, informed by day-to-day experience, is simply too important to ignore.