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## Note from the Field

### **Internationalized Pro Bono and a New Global Role for Lawyers in the 21st Century: Lessons from Nation-Building in Southern Sudan**

**Maya Steinitz<sup>†</sup>**

*From 2004 to 2006, the author led the pro bono representation of the Sudan People's Liberation Movement ("SPLM"), assisting the SPLM in drafting and negotiating the National Interim Constitution of Sudan, the Interim Constitution of Southern Sudan, and the Constitutions of two "transitional" states. The representation was part of an emerging trend in pro bono representations. In small but increasing numbers, private law firms have begun to take on pro bono projects with global significance – assisting governments and civil society in post-conflict countries to deal on an even footing with foreign investors, for instance, or working with international criminal courts to prepare indictments of war criminals. This development within the legal community is connected to changes in the scope and ambition of the "corporate responsibility" initiatives of many of the multinational corporate clients of firms leading the internationalization of pro bono services.*

*The entry of law firms and multinational corporations into the 'market' of global affairs – long the exclusive domain of governments*

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<sup>†</sup> Dr. Maya Steinitz is a Senior Associate at Latham & Watkins. This Note was written while serving as a Visiting Scholar at Columbia Law School. I am indebted to Nathan Miller, Executive Director of Rule of Law International (RoLI), who designed and managed the project from Southern Sudan and to James Kearney, Senior Partner and head of the global pro bono practice at Latham & Watkins who oversaw the representation and without whom this representation would not have been possible. I am also grateful to Nathan Miller for many of the descriptions of the reality in Southern Sudan at the time of the peace and constitutional negotiations included in this Note and for his comments on earlier drafts. I am equally grateful to the dozens of attorneys at Latham & Watkins who dedicated their time and effort to the representation of the SPLM. I thank Tzung-Lin Fu, Tom Giblin and Viravynne Chhim for [INCOM]their research assistance. This paper is based on a lecture given at Duke Law School and at the New York City Bar's International Law Section. Maya.Steinitz@gmail.com.

*and inter-governmental organizations – offers many advantages to clients in developing and post-conflict countries, but also poses dangers which can and should be mitigated. One of the foremost benefits private law firms offer a unique ability to ensure – even to guarantee – local ownership of the process and its content, due to the strict requirements of the attorney-client relationship. These include attorneys’ obligations to follow the directives of their clients, to keep the confidences of the clients, and to act independently of any third party. Unlike other players in the field of international aid (such as foreign donor governments, inter-governmental organizations (IGOs), non-governmental organizations (NGOs), and private foundations), private lawyers providing pro bono services do not receive donations, do not have “mandates” other than those dictated by the client within the bounds of ethical regulations, and are not accountable to real or imagined “constituencies” other than the client. Yet the enforceability of the ethical code that gives rise to those advantages is questionable in a transnational representation. A lack of regulation raises questions about legitimacy and accountability, and may suggest the specter of legal imperialism.*

*A practical approach to mitigating those disadvantages can be gleaned from the novel work of an increasing number of scholars writing within the Global Administrative Law (GAL) paradigm. GAL scholars have analyzed the myriad ways in which disparate national administrative standards have been synchronized, though not necessarily harmonized, in various contexts (such as environmental concerns and accounting standards). A key concept in GAL scholarship is that of transnational networks – patterns of regular and purposive relations (and institutions) among like regulatory bodies working across borders and demarcating the “domestic” from the “international.” This Article will draw on this and other concepts and principles of GAL scholarship in proposing ways to bring accountability to transnational pro bono activities (indeed to transnational lawyering in general) that respect the domestically self-regulated legal profession and which cannot (and should not) be harmonized across jurisdictions. Rather, the article suggests that regulation of global pro bono service should graduate from “accidental distributed administration” to “deliberate transnational network administration.” Without some attention paid to the way law firms operate in this arena, there is a risk that the ethical obligations of attorneys will become little more than a cover for advancing Western corporate interests.*

## INTRODUCTION

*Fixing the world's problems has become an increasingly elite affair – a matter between C.E.O.'s[sic] and celebrities. It's noblesse oblige on a large scale.<sup>1</sup>*

*The most interesting test for humanitarianism comes precisely when we realize we must remain uncertain about where virtue lies and what costs we impose – but when we nevertheless step forward to govern. . . . I propose that those who share my impulse to make the international world a more just and humane place join in building a humanitarian practice which embraces the freedom and responsibility that comes with an ongoing awareness of the dark sides of humanitarian governance.<sup>2</sup>*

From 2004 through 2006, Latham & Watkins LLP represented, on a pro bono basis, the Sudan Peoples Liberation Movement (SPLM) in its post-peace agreement constitutional process. The aim of this Note, based on the author's experience leading the representation of SPLM, is threefold: (1) to contextualize the growing movement of pro bono representations by "mega law firms" in the field of international rule of law development and to theorize about this growing phenomenon; (2) to document the author's observations and insights into the unique characteristics of international aid in the form of pro bono legal representations, with an emphasis on the unique benefits of providing international aid through the establishment of an *attorney-client relationship* between the "aid donor" and the "aid recipient; and (3) to provide practical suggestions on how to maximize the benefits of this trend and how to minimize its downsides.

The Note begins with a brief overview of the Sudanese peace process as it relates to the provision and scope of pro bono legal representation to the SPLM, as an illustration of the potential scope and impact of the trends to be discussed. The Note goes on to discuss the benefits of introducing the attorney-client relationship into the "toolbox" of international aid mechanisms,<sup>3</sup> applying the emerging scholarship on Global Administrative Law (GAL) to the phenomenon described. Practical means are suggested through which thoughtful and self-conscious implementation of the GAL paradigm can help maximize the benefits and minimize the possible

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1. Patricia Cohen, *Free-Market Mischief in Hot Spots of Disaster*, N.Y. TIMES, Sept. 10, 2007, at E4 (quoting Naomi Klein, Address Before the American Sociological Association Conference (Summer 2007)).

2. DAVID KENNEDY, *THE DARK SIDE OF VIRTUE* xx (2004).

3. It is not the intention of this Note to advocate the supremacy of this form of international aid. Rather, the intention is to describe and analyze the nature of this new tool as one of many mechanisms of international aid.



downsides of providing international legal aid by way of forging attorney-client relationships.

### I. BACKGROUND

Sudan has been embroiled in the longest-running civil war of the twentieth century, lasting from 1954 to 2005 with a break from 1972 to 1983.<sup>4</sup> On January 9, 2005, the Khartoum-based national Government of Sudan ("GoS"), dominated by the National Congress Party, and Southern Sudan, represented by the Sudan Peoples Liberation Movement (SPLM), signed a Comprehensive Peace Agreement (CPA).<sup>5</sup> The core arrangements of the CPA included a re-structuring of the Sudanese federal system into a form of "asymmetrical federalism," wherein northern Sudan would have two levels of government – the national level and the state level.<sup>6</sup> By contrast, Southern Sudan would be governed by three federal levels – the national level, the state level, and a new, sub-national, quasi-autonomous Government of Southern Sudan ("GoSS").<sup>7</sup> Also at the heart of the CPA were the notions of decentralization and devolution of power from the political center (the national Government of Sudan in Khartoum) to the local levels (the GoSS, the states, and local communities), as well as the sharing of wealth among the Sudanese communities.<sup>8</sup> In order to achieve this new and complex political structure, the Sudanese were required to

4. For a comprehensive history of Sudan's civil war, see DOUGLAS H. JOHNSON, *THE ROOT CAUSES OF SUDAN'S CIVIL WARS* (2003) and INT'L CRISIS GROUP, ICGAfrica Report No. 39, *GOD, OIL AND COUNTRY: CHANGING THE LOGIC OF WAR IN SUDAN* (2002), available at [http://www.crisisgroup.org/library/documents/report\\_archive/A400534\\_28012002.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400534_28012002.pdf) (last visited Mar. 2, 2009).

5. The CPA is comprised of a series of six agreements: (1) The Protocol of Machakos (PM) (signed on July 20, 2002), in which the parties agreed on a broad framework setting forth the principles of governance, the transitional process, and the structures of government, state and religion, as well as the right to self-determination for the people of Southern Sudan; (2) The Protocol on Security Arrangements (signed on Sept. 25, 2003); (3) The Protocol on Wealth-Sharing (signed on Jan. 7, 2004); (4) The Protocol on Power-Sharing (signed on May 26, 2004); (5) The Protocol on the Resolution of Conflict in Southern Kordofan/Nuba Mountains and the Blue Nile States (signed on May 26, 2004); and (6) The Protocol on the Resolution of Conflict in Abyei (signed on May 26, 2004). The Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, Jan. 9, 2005, available at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/EVIU-6AZBDB?OpenDocument> [hereinafter CPA] (last visited Mar. 2, 2009); see also U.S. Institute of Peace, *Comprehensive Peace Agreement*, available at [http://www.usip.org/library/pa/sudan/cpa01092005/cpa\\_toc.html](http://www.usip.org/library/pa/sudan/cpa01092005/cpa_toc.html) (last visited July 30, 2008) (containing ancillary updates and amendments); INT'L CRISIS GROUP, *AFRICA REPORT NO. 106, SUDAN'S COMPREHENSIVE PEACE AGREEMENT: THE LONG ROAD AHEAD* (2006) (containing an in-depth analysis of the CPA), available at [http://www.crisisgroup.org/library/documents/africa/horn\\_of\\_africa/106\\_sudan\\_comprehensive\\_peace\\_agreement\\_long\\_road\\_ahead.pdf](http://www.crisisgroup.org/library/documents/africa/horn_of_africa/106_sudan_comprehensive_peace_agreement_long_road_ahead.pdf) (last visited July 30, 2008).

6. The Protocol on Power-sharing, in CPA, *supra* note 5, at sec. 1.3.

7. Since Southern Sudan is a sub-national entity, whereas northern Sudan is a political designation, this Note capitalizes the term "Southern Sudan" but not the term "northern Sudan."

8. The Implementation Modalities of the Framework Agreement on Wealth Sharing (Jan. 7, 2004), in CPA, *supra* note 5, at sec. 1.

rewrite the constitutions of Sudan. Specifically, the CPA called for the re-writing of the national constitution, a brand new constitution for the new GoSS, and new state constitutions.<sup>9</sup>

The resources available to the Southern Sudanese in order to meet these daunting tasks, after more than twenty years of civil war, were almost nil. When the CPA was signed, the entirety of Southern Sudan's legal community consisted of approximately 100 lawyers, including the *de facto* Minister of Justice, the future or *de facto* Supreme Court judges, civil society lawyers, and the "private sector" lawyers.<sup>10</sup> The Secretariat of Legal Affairs and Constitutional Development ("SoLA"), the proto-Ministry of Justice – the body charged with protecting the legal interests of Southern Sudan and managing the legal aspects of the transition to the GoSS – had six lawyers, none of whom were paid. SoLA had no material resources of any kind, neither office nor vehicle, and functioned without any support staff.<sup>11</sup> Despite the immense research and drafting demands placed on them, no SoLA staff had computers or access to either the Internet or print references. Southern Sudan had forty-two laws, most of which were never distributed to judges or lawyers.<sup>12</sup>

Hearings were conducted in buildings that were structurally incomplete. Courts were not equipped with water, electricity, or the basic office supplies that make the recording and dissemination of judgments possible. In fact, a total of twenty-six trial courts and eight appeals courts, along with a handful of support staff, served the entire Southern Sudanese population of approximately eight million people.<sup>13</sup>

In short, Southern Sudan had no modern rule of law structures<sup>14</sup> and no other infrastructure to speak of. Conversely, the territory of the North remained free of conflict, leaving the GoS free to collect taxes, develop infrastructure, and exploit some oil reserves. GoS maintained relations with the world at large and was able to retain the services of high-end

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9. See The Protocol of Machakos (establishing self-determination for the people of Southern Sudan and right to succeed through a referendum); PM Preamble and Part B Sec. 2.1(f) (mandating the establishment of the Constitutional Framework for the Peace Agreement and the institutions enumerated therein); PM Part C Sec. 3.1.1 (declaring "[t]he National Constitution of Sudan is the Supreme Law of the land."); The Protocol on Power Sharing ("PPS") Part I, Sec. 1.5.1.1 (establishing decentralization and devolution of powers); PPS Part I, Sec. 1.5.1.2 (declaring that the Interim National Constitution "[s]hall be the Supreme Law of the land and the Southern Sudan Constitution," and state constitutions must comply with it); PPS Part I, Sec. 1.5.1.3, Sec. 3 (establishing the GoSS); PPS Sec. 4 (establishing the institutions of the State level); PPS Schedules A: National Powers, PPS Schedule B: Powers of the Government of Southern Sudan, PPS Schedule C: Powers of the States (establishing asymmetrical federalism), in CPA, *supra* note 5.

10. Nathan Miller, Focal Point Team on Justice, Police, and Prisons, Framework for the Building and Establishment of the Rule of Law in New Sudan 14 (Sept. 12, 2003) [hereinafter Framework for Building the Rule of Law] (unpublished manuscript on file with author); Interview with Nathan Miller, Executive Director of Rule of Law International (RoLI) in New York, NY (February 1, 2008) [hereinafter Miller Interview].

11. Framework for Building the Rule of Law, *supra* note 10, at 21.

12. *Id.* at 15.

13. *Id.* at 6.

14. Southern Sudan has, of course, robust traditional tribal law.

private sector lawyers to advise it on the negotiations of the CPA. As a result, like the peace negotiations, the constitutional negotiations were marred by a severe inequality of arms between the Southern Sudanese and the GoS.

Sudan has been at war for thirty-eight of the last fifty years. The most recent round of conflict – a civil war between the GoS and the SPLM that lasted twenty-two years, cost two million lives, and displaced four million people – devastated Southern Sudan.<sup>15</sup> Furthermore, the civil war itself was a continuation of a pattern of political and military oppression, unequal distribution of resources, and uneven development that stretches back decades, if not centuries. The combination of historical inequality with twenty years of violence and military rule has left Southern Sudan with a total lack of physical and communications infrastructure, a drastic shortage of human resources, and nearly nonexistent civilian legal and political institutions.<sup>16</sup>

The signing of the CPA brought with it the possibility for a just and sustainable peace, reconstruction, and development for the impoverished South, but it also placed exceptionally high demands on the handful of legal professionals from the SPLM. The agreed-upon political structure of Sudan includes an Interim National Government (ING), a semi-autonomous sub-national GoSS, and twenty-five states. Each of these levels of government is to have its own constitution and laws.<sup>17</sup> In addition, the CPA mandates a number of key national institutions such as the National Petroleum Commission, a National Human Rights Commission, and a National Land Commission.<sup>18</sup> In order to consolidate the peace and avoid future conflict, the interests of both parties would have had to be fully represented in the negotiation of all constitutional, legislative, and regulatory frameworks.

Since the completion of the constitutions, the implementation of the CPA, and with it the stability of the fledgling peace agreement, is coming undone. The collapse is most visible in Abyei, where President Bashir endorsed Arab militias who carry out Darfur-style scorched-earth tactics, including burning Abyei to the ground in May 2008, as part of an ongoing dispute between the North and the South on the implementation of the Abyei Protocol.<sup>19</sup> Often considered the most pressing humanitarian crisis on the planet, the northwestern state of Darfur continues to be ravaged by the violence of militias armed and supported by the Khartoum government.<sup>20</sup> The International Crisis Group warns of a military build-up of Darfur rebels followed by northern soldiers in the sensitive, oil-rich

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15. Framework for Building the Rule of Law, *supra* note 10, at 3.

16. *Id.* at 3, 16; Miller Interview, *supra* note 10.

17. The Protocol on Power Sharing, *supra* note 5, sec. 2.14, 3.2, 4.3.

18. The Protocol on Power Sharing, *supra* note 5, sec. 2.10.1.2; The Protocol on Wealth Sharing, *supra* note 5, sec. 2.6, 3.2.

19. Eliza Griswold, *The Man for New Sudan*, N.Y. TIMES MAG., June 14, 2008, at 54.

20. Lydia Polgreen, *Peacekeeping in Darfur Hits More Obstacles*, N.Y. TIMES, Mar. 24, 2008, at A1.

transitional state of Southern Kordofan, which straddles Northern and Southern Sudan.<sup>21</sup> “All of Sudan’s wars involve the handiwork of a small group in the center waging campaigns against those who live at the periphery. To hold onto power and resources, the center fights its own edge.”<sup>22</sup>

While the Bush administration has kept Khartoum under sanctions, acquiesced in the Security Council’s referral of Darfur prosecutions to the International Criminal Court, and led several large-scale diplomatic initiatives to push for peace in the region, “pressure for comprehensive peace in Sudan is flagging, in part because America’s wars in Iraq and Afghanistan have hamstrung its ability to call Khartoum on its myriad abuses against its own people.”<sup>23</sup>

## II. INTERNATIONALIZED PRO BONO IN CONTEXT

Given the severe lack of resources described above, Latham & Watkins offered to assist the Southern Sudanese in the Constitutional Process.<sup>24</sup> At the time of this writing, this remains the only instance in which a law firm has undertaken the pro bono representation of an emerging government in a constitutional process.<sup>25</sup> But this innovative form of legal aid must be viewed as part of a larger trend: international “mega law firms,” as well as other sections of the Anglo-American private law sector, are increasingly undertaking ambitious and cutting-edge pro bono legal representations in post-conflict situations, emerging democracies, and emerging markets.

Another vanguard of the trend, for example, is DLA Piper’s “New Perimeter” initiative – a nonprofit subsidiary established by the

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21. Posting of Ingrid Jones to Sudan Watch,, <http://sudanwatch.blogspot.com/2008/12/sudans-south-kordofan-next-darfur.html> (Dec. 7, 2008) (reporting on the mounting crisis in Southern Kordofan).

22. Griswold, *supra* note 19.

23. *Id.* at 55.

24. Latham & Watkins was not alone in providing assistance in the constitutional process. The Max Planck Institute for Comparative Public Law and International Law (“MPI”), funded by the European Union (EU), which had been involved since it helped broaden the Machaos Protocol in 2002, provided both North and Southern Sudan with constitutional lawyers. The National Democratic Institute for International Affairs, with funding from USACO, also worked with the Southern Sudanese.

25. This is as opposed to other forms of international assistance or intervention. See KIRSTI SAMUELS, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, CONSTITUTION BUILDING PROCESSES AND DEMOCRATIZATION, <http://www.idea.int/conflict/cbp/upload/IDEA%20CBP%20Comparative%20paper%20by%20Kirsti%20Samuels.pdf> (last visited July 30, 2008) (studying twelve cases of recent constitution building undertaken during transition from conflict or authoritarian rule). See also NOAH FELDMAN, WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING (2004) (containing an account of the author’s involvement in the drafting of the US occupation-led Transitional Authority Law in Iraq). It has even been argued that in post-conflict constitutional processes there exists “a double compact: ‘A compact between rulers and their people and a compact between the government and the international community.’” Kirsti Samuels, Paradoxes and Compromises in the Design of Post-Conflict Constitutions \*18 (unpublished manuscript) (on file at <http://state-building.org>).

international firm and dedicated exclusively to long-term international pro bono work. An example of the work carried out by the subsidiary includes "work[ing] closely with a Kosovar advisory group to successfully structure and draft new laws to introduce an independent judiciary and system of prosecution in Kosovo . . . [and working with] the interim government to approve the legislation they helped draft and provide technical assistance directly to the new Ministry of Justice regarding the implementation of these laws."<sup>26</sup> The law firm of Paul Hastings reports supporting legal reform in Cambodia by working "with the Bar Association of the Kingdom of Cambodia (BAKC) in an effort to improve and reform Cambodia's existing legal system . . . including the set up of a BAKC lawyers' training center and a local legal clinic, in developing a continuing legal education program and in addressing gender equality laws."<sup>27</sup> In addition, White & Case attorneys volunteered to review pending legislation in the area of elder law in South Africa,<sup>28</sup> and Sherman & Sterling regularly sends associates to support the prosecutor at the U.N. International Criminal Tribunal for Rwanda.<sup>29</sup>

In fact, pro bono rule of law development initiatives around the world have become so prevalent that the American Bar Association recently consolidated its rule of law pro bono initiatives, many of which are carried out in cooperation with practitioners and law firms, under the ABA Rule of Law Initiative.<sup>30</sup> Some new non-governmental organizations (NGOs), such as the International Senior Lawyers Project<sup>31</sup> and Lawyers Without Borders,<sup>32</sup> have been established with the model of matching lawyers who

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26. DLA Piper, DLA Piper's International Pro Bono Initiative Completes Projects and Establishes New Priorities in its Second Year (May 22, 2006), available at [http://www.dlapiper.com/new\\_perimeter\\_2nd\\_year\\_release/](http://www.dlapiper.com/new_perimeter_2nd_year_release/). An interview about New Perimeters named many reasons why law firms engage in broad, international pro bono initiatives, such as helping to "differentiate the firm from competitors and to attract new clients," branding the firm on the global stage, and retaining young lawyers through "promoting internal camaraderie." Thomas Adcock, *Firm Launches Major Pro Bono Effort*, N.Y. L.J., Mar. 11, 2005, at 16. One could argue that such reasons are not altruistic reasons to undertake philanthropic projects. That, however, is arguably the case with philanthropy in general.

27. Paul Hastings, Tokyo Office Opens Doors to Humanitarian Efforts and Legal Reform in Cambodia, [http://www.paulhastings.com/community\\_involvement\\_detail.aspx?OfficeId=7837](http://www.paulhastings.com/community_involvement_detail.aspx?OfficeId=7837) (last visited July 30, 2008).

28. Mary P. Gallagher, *Taking Pro Bono to Jo'burg*, N.J. L.J., Apr. 29, 2004, <http://www.law.com/jsp/article.jsp?id=1082923359383> (last visited Mar. 2, 2009).

29. Susan Littwin, *Rushing to Help When Bad News Breaks*, CORP. BOARD MEMBER, July/Aug. 2006, at 112.

30. The Initiative's website provides a good view of the breadth and nature of projects undertaken by the ABA, law firms and individual lawyers. See ABA Rule of Law Initiative, <http://www.abanet.org/rol/programs/>; then follow "Access to Justice and Human Rights," "Anti-Corruption and Public Integrity," "Criminal Law Reform and Anti-Human Trafficking," "Judicial Reform," "Legal Education Reform and Civic Education," "Legal Profession Reform and Women's Rights" hyperlinks (last visited Mar. 2, 2009).

31. See International Senior Lawyers Project, <http://www.islp.org/aboutus>; then follow "Human Rights and Social Welfare," "Equitable Economic Development" and "Access to Justice" hyperlinks (last visited Mar. 2, 2009).

32. See Lawyers Without Borders, <http://www.lwob.org/>; then follow "Our Projects" hyperlink (last visited Mar. 2, 2009).

wish to provide international pro bono services with opportunities for assistance in post-conflict and developing countries. To the best of the writer's knowledge, however, none of the above initiatives have been structured as an attorney-client relationship, which would impose unambiguous duties and obligations on attorneys.<sup>33</sup> This is a critical point that will be revisited in the following section.

First, however, more background would be informative. The trend of international mega law firms undertaking pro bono representations concerning rule of law development should be understood as part of an even larger phenomenon – that of the growing and changing nature of the “corporate responsibility” movement.<sup>34</sup> Multinational corporations are the clients of mega law firms. Attorneys in mega law firms discuss (and sometimes cooperate with) corporate general counsels regarding their corporate responsibility programs, thus creating a certain self-reinforcing culture of corporate transnational community involvement.<sup>35</sup> Corporations

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33. Based both on research and on numerous conversations with pro bono counsels at various law firms.

34. The leading “corporate citizenship initiative” is the Global Compact under the aegis of the United Nations. Instructively, its homepage states that “[t]he Global Compact is a *network*” and that “[t]he Global Compact is not a regulatory instrument – it does not ‘police,’ enforce or measure the behavior or actions of companies. Rather, the Global Compact relies on public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based.” United Nations Global Compact, *What is the Global Compact*, <http://www.unglobalcompact.org/AboutTheGC/index.html> (emphasis added) (last visited July 30, 2008). Definitions of corporate social responsibility (CSR) vary:

CSR means different things to different groups... For some, CSR consists of voluntary activity or the implementation of international codes of conduct, while others see a role for regulations and hard law in the CSR landscape. CSR can demand direct engagement with local communities or simply require adoption of a particular philosophical approach to doing business. CSR can represent a free-market-friendly alternative to government regulation, or it can posit an obligation on the part of companies to assume responsibility for the consequences of their actions. Environmental and human rights protections tend to feature heavily in CSR agendas. Other common projects include the construction of health and education facilities, water treatment programs, and infrastructure projects such as roads and bridges.

Matthew Genasci & Sarah Pray, *Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice*, 11 *YALE HUM. RTS. DEV. L.J.* 37, 40 (2008) (discussing current trends in CSR, including a move away from headquarters-based programs towards engagement at the community level).

35. This is based on personal observation as there is no literature to date on the cooperation between law firms and their corporate clients. An aspirational discussion of this relationship can be found in a report published by the Swedish Partnership for Global Responsibility and the International Institute for Environment and Development. HALINA WARD, *CORPORATE RESPONSIBILITY AND THE BUSINESS OF LAW*, Sept. 2005, available at <http://www.iied.org/pubs/pdfs/G00195.pdf>. Ward provides examples of law firms that position themselves directly in relation to corporate responsibility. *Id.* at 29. Ward also states:

With a rise of ‘voluntary’ corporate responsibility tools such as corporate codes of conduct or ‘soft’ law norms such as the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, the norms that business lawyers draw on in giving their advice are shifting. There is increasingly

have recently taken on increasingly ambitious projects in areas previously considered the exclusive domain of the public sector, laying the groundwork for other private sector players (such as the international mega law firms) to enter the international and transnational public spheres and the domestic public sphere of post-conflict societies and developing countries.<sup>36</sup> Both of these converging trends reflect not only the general trend towards globalization but also the specific erosion of any distinction between the private and the public spheres in international affairs.<sup>37</sup>

Whatever one thinks about the desirability of these trends, they are here to stay and are, in fact, likely to expand given the current socio-economic characteristics of globalization.<sup>38</sup> Therefore, like so many other new phenomena in global affairs, the trend of mega firms' internationalized pro bono runs up against the problem of the global governance gap.<sup>39</sup> From this vantage point, Part III.1 of this Note describes

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an ethical case for business lawyers to maximize their contribution to corporate social responsibility beyond the 'business case' for action. There has been very little reflection on the nexus between corporate responsibility and the wider public functions of the legal profession. Yet that is precisely what may now be needed.

*Id.* at vi.

36. See Alison Warhurst, *Future Roles of Business in Society: The Expanding Boundaries of Corporate Responsibility and a Compelling Case for Partnership*, 37 *FUTURES* 151 (2005) (examining recent trends in global corporate responsibility and the rise in expectations that global businesses will work with others to provide solutions to humanitarian crises).

37. See, generally, VIRGINIA HAUFLE, A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY (2001) (providing an overview and analysis of the recent changes in the private sector's role in international affairs, with an emphasis on the self-regulatory aspect of this phenomenon); see also Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 *L. & SOC'Y REV.* 635 (2004) (providing a critical view of the self-regulatory nature of corporate social responsibility). Shamir's article contrasts the voluntary, self-regulatory agenda of corporations with a notion of global corporate *liability*, as it relates to state sovereignty:

As corporations emerge as global private authorities approximating the powers of national governments, we are back to the independent realm of economic action 'as a major locus of political power.' [Multinational corporations] are in a position to effectively escape local jurisdiction by playing one legal system against the other, by taking advantage of local legal systems ill adapted for effective corporate regulation. . . . At stake, therefore, is the widening gap between the transnational regulatory regimes that may be invoked to monitor and restrain corporations irrespective of the territory in which they happen to operate.

*Id.* at 637 (citation omitted).

38. Indeed, Harold Hongju Koh (a transnational legal scholar whose work is further discussed below) describes "the rise of transnational human networks of both public and private actors" who work together to promote democracy and human rights standards as the "third globalization." Harold Hongju Koh, *Introduction to 1999 U.S. DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES*, available at [http://www.state.gov/www/global/human\\_rights/1999\\_hrp\\_report/overview.html](http://www.state.gov/www/global/human_rights/1999_hrp_report/overview.html) (last visited Mar. 2, 2009). Koh explains that "corporations, banks, international financial institutions and private investors . . . serve as the transmission belts for human rights norms and advocates for human rights improvements," especially in transitional societies. *Id.* Absent from Koh's list are international "mega law firms," whose involvement in transnational human rights networks is a relatively recent addition, albeit an important one.

39. See *infra* Part IV.

the characteristics of internationalized pro bono that make private law firms – potentially, at least – immune to many of the traditional shortcomings of other international development actors. Part III.2 of the Note examines obstacles to realizing the full potential of internationalized pro bono services. Part IV of the Note suggests ways to overcome those obstacles by offering a framework for regulation on the global plane.

### III. THE BENEFITS OF AND IMPEDIMENTS TO THE ATTORNEY-CLIENT RELATIONSHIP IN INTERNATIONALIZED PRO BONO

#### A. Benefits: Duty of Loyalty and “Local Ownership”

What starkly distinguishes the legal representation of a stakeholder in the developing world from any other form of international aid is that legal representation is, first and foremost, a *relationship* – the *attorney-client relationship*. Because this relationship is both regulated and heavily socially-constructed, it has distinct characteristics with surprising consequences in the context of international development, particularly in the representation of sovereigns.

At the heart of the attorney-client relationship is the premise that the client is the ‘owner’ of his or her cause and the lawyer is partisan: “The lawyer is conventionally seen as a professional devoted to his client’s interests and as authorized, if not in fact required, to do some things (though not anything) for that client which he would not do for himself.”<sup>40</sup> This axiom creates the greatest advantage for representing pro bono clients in the developing world: *the retention of local ownership over the cause and the process.*

In contrast, “local ownership” is one of the basic but elusive goals of international development and human rights intervention by NGOs and intergovernmental organizations (IGOs): “An absence of local ownership as the predominant characteristic of any such strategy tends to indicate a

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40. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976). See also Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 623 (1985) (noting critically that “[w]hen pressed for moral justifications of its amoral stance, the bar often invokes *client sovereignty* as an ultimate recourse”) (emphasis added). Fried too focuses on the attorney-client relationship as a emphasis on *relationship*, as a certain type of association (although not a certain type of *authority relationship* as I suggest here) but as a certain type of friendship: the lawyer as a “special-purpose legal friend.” He argues, from the *morality of role*, that

it is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of his client’s interests . . . in [certain] relations – friendship, kinship – we recognize an authorization to take the interests of particular concrete persons more seriously and to give them priority over the interests of the wider collectivity. One who provides an expensive education for his own children surely cannot be blamed because he does not use these resources to alleviate famine or to save lives in some distant land.

*Id.* at 1976.



colonial attitude in the intentions of the international community.”<sup>41</sup> The World Bank, for example, has summarized its consensus on ownership issues as follows:

Typically, assistance programmes that the recipient country perceives as being imposed end in failure or have only a small development impact. Governments and beneficiaries do not feel they have a stake when they have not contributed to the development of a programme. Furthermore, “home grown” programmes may be more effective in incorporating institutional capacity, reflecting the needs of different domestic constituencies and addressing constraints.<sup>42</sup>

Instead of characterizing it as a goal, local ownership can more precisely be described as the El Dorado, the unattainable golden standard of international aid.

Humanitarianism begins as an impulse – and becomes known as a practice. . . . I know this humanitarianism well enough to have felt the pleasures of engagement and the disappointments of a faith betrayed. . . . It can be unsettling to think of humanitarians, whether activists or policy makers, as participants in the world of

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41. CAROLYN MCCOOL, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, THE ROLE OF CONSTITUTION-BUILDING PROCESSES IN DEMOCRATIZATION: CASE STUDY AFGHANISTAN, at 23 (2004), available at <http://www.idea.int/conflict/cbp/upload/AFGfinalpaper.pdf>. McCool observes that

[t]he international community has been key at every stage of the [2004 Afghani constitutional] process. The relationship of international initiatives to national peace-, nation- and institution-building processes is always extremely complicated. The mere presence of foreigners can help to create a space and the opportunities for opposing elements to learn to work together. At best these collective efforts are characterised by what is known as ‘local ownership’ or ‘national ownership’, in which the international community ‘leads from behind’ and supports the emergence of local or national leadership at all levels and in all sectors. . . . This quality of local ownership is critical to the integrity and to the sustainability of any peace- or nation-building strategy.

*Id.* at 23.

42. Gerry Helleiner, *External Conditionality, Local Ownership and Development*, in TRANSFORMING DEVELOPMENT: FOREIGN AID FOR A CHANGING WORLD 82, 85 (Jim Freedman ed., 2000) (discussing the critical literature which makes clear that the failure to achieve local ownership is inherent to the donor-donee relationship); see also David Mosse, *Global Governance and the Ethnography of International Aid*, in THE AID EFFECT 10 (David Mosse & David Lewis eds., 2005) (viewing the rhetoric of ownership as disguise of more, not less, intrusion of donors noting that “[s]ome anthropologists emphasise the way policy rhetoric on ‘ownership’ or ‘partnership’ conceal the actual working of aid, ‘dispossessing’ its agents of their own rationales and true instrumentalities”); Alan Fowler, *Beyond Partnership: Getting Real about NGO Relationships in the Aid System*, in THE EARTHSCAN READER ON NGO MANAGEMENT 241 (Michael Edwards & Alan Fowler eds., 2002) (arguing critically that the promotion of “partnership” is the currently politically-correct mode of interacting in the context of international aid and analyzing the sources and the winners and losers of this state of affairs).

power and influence. . . . Once we see international humanitarians as participants in global governance — as rulers — it seems irresponsible not to be as attentive as possible to the costs, as well as the benefits, of our work.<sup>43</sup>

What does “local ownership” entail? First and foremost, as a matter of legal ethics, *attorneys* who are representing pro bono *clients* (as opposed to, for example, *lawyers* who are providing legal assistance or advocacy) must solicit client input and must defer to client decision-making and direction.<sup>44</sup>

Second, and as a matter of deep socialization, attorneys are trained to refrain from passing judgment on their clients; indeed, the commercial viability of their practice depends to a large extent on such restraint.<sup>45</sup> It matters not whether an attorney agrees or disagrees with the position of the client: as long as it is not unethical or illegal, he or she will advocate that position. This is a vantage point from which no international aid or human rights player operates. Rather, international NGOs and aid agencies tend to perceive themselves as being accountable to multiple “constituencies,” such as the “international community,”<sup>46</sup> or to a home-

43. See KENNEDY, *supra* note 2, at xiv-xv, xvii-xviii.

44. See *infra* Part III.1.

45. Coming from a background of human rights activism, the private sector attorneys’ deep sense of non-judgmentalism and refusal to work without clear direction from and approval of the client was, for me, the most striking feature of the representation of SPLM and provided the initial impetus for this Note.

Writing critically of the socialization of lawyers, Rhode notes of the ABA’s code of conduct: “Where a threat of formal sanctions is remote, as is generally the case in professional contexts, the most significant function of official codes will be symbolic and pedagogic.” Rhode, *supra* note 40, at 647. According to another critic, it is particularly the Anglo-American mega law firms (who, I argue, are pushing the trend of internationalized pro bono) that place the client’s interest above all other considerations: “[C]ompetition puts loyalty to clients at a premium. It would be professional suicide for a global firm lawyer to exercise independent professional judgment at the expense of the client’s perceived best interests.” Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 VAND. J. TRANSNAT’L L. 931, 945 (2001). This critic notes, however, that “[t]he CCBE [i.e., European] Code . . . has reinforced the duty of loyalty. It added the words ‘and fearlessly’ to its original formula: A lawyer must ‘defend clients [sic] interests honorably and fearlessly without regard to his own interests or to any consequences to himself or to any other person.’” *Id.* (citations and quotation marks omitted).

46. Consider, for example, the mission statements of two of the world’s leading international NGOs, Amnesty International and Human Rights Watch:

Amnesty International is a worldwide movement of people who campaign for internationally recognized human rights for all. Our supporters are outraged by human rights abuses but inspired by hope for a better world — so we work to improve human rights through campaigning and international solidarity. We have more than 2.2 million members and subscribers in more than 150 countries and regions and we coordinate this support to act for justice on a wide range of issues.

Amnesty International, *Who We Are*, <http://www.amnesty.org/en/who-we-are> (last visited Mar. 2, 2009); and:

Human Rights Watch is one of the world’s leading independent organizations dedicated to defending and protecting human rights. By focusing international attention where human rights are violated, we give voice to the oppressed and hold oppressors accountable for their crimes.

base (such as the United States Agency for International Development, which operates on behalf of and for the benefit of the American public,<sup>47</sup> and the United Kingdom's Department for International Development, which acts on behalf of the British public).<sup>48</sup>

Unlike such players, practitioners in private practice do not have "constituencies," real or imagined, nor do they attempt to fulfill "mandates," whether actually conferred (as is the case with some IGOs) or self-imposed (as is the case with many NGOs).<sup>49</sup> Rather, as stated before, private practitioners' only "constituents" are clients and their only "mandates" are clients' directives. In other words, NGOs have causes, attorneys have clients.<sup>50</sup>

A closely related point is that of funding. NGOs and IGOs are funded by — and therefore accountable to — various donors.<sup>51</sup> By contrast, pro bono representations operate on a model in which service providers (the attorneys and the law firms) receive no outside funding and are therefore accountable to no third party.<sup>52</sup> This independence allows the preservation

Our rigorous, objective investigations and strategic, targeted advocacy build intense pressure for action and raise the cost of human rights abuse.

Human Rights Watch, About Us, <http://www.hrw.org/en/about> (last visited Mar. 2, 2009).

47. United States Agency for International Development (USAID), About USAID, [http://www.usaid.gov/about\\_usaid/](http://www.usaid.gov/about_usaid/) (last visited July 30, 2008) (stating that "U.S. foreign assistance has always had the twofold purpose of *furthering America's foreign policy interests* in expanding democracy and free markets while improving the lives of the citizens of the developing world") (emphasis added).

48. Department for International Development (DFID), About DFID, <http://www.dfid.gov.uk/aboutdfid/> (last visited July 30, 2008) (noting that "[i]n a world of growing wealth, such levels of human suffering and wasted potential are not only morally wrong, *they are also against our own interests*. We are becoming much closer to people in faraway countries. We trade more and more with people around the world.") (emphasis added).

49. See *supra* notes 46–48.

50. This is known in the literature of professional responsibility as the attorney's duty of loyalty. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2008) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."); *Id.* at 1.8 cmt. 5 ("Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty."):

51. My observation over years of working in international human rights and development has been that there are a small number of repeat players who fund a very large portion of the international human rights and development operations. These can be generally grouped into two categories. One is comprised of North American and European governments (largely the UK and the Scandinavian governments) and the other is made up of Western-based private foundations such as George Soros' Open Society Institute and the Ford Foundation. There are also, of course, corporate monetary and in-kind donations to NGOs, which blur the distinction between private interest and public interest. See also Shamir, *supra* note 37, at 647:

"Some such organizations are subtly created by, sponsored, or backed by corporations. These market-based NGOs are actively distributing corporate versions concerning the adequate scope and meaning of [Corporate Social Responsibility] . . . . The single most distinctive common denominator of these corporate-oriented and corporate-inspired notions of social responsibility is the voluntary, nonenforceable, and self-regulatory meaning of the term."

52. Three entities assisted the SPLM in the *per se* legal aspects of the constitutional process: MPI, the National Democratic Institute for International Affairs (NDI), and Latham & Watkins LLP. These three entities were funded by and are accountable to, respectively, the European

of the confidentiality of the attorney-client communications which, in turn, fosters more open communication between the stakeholder and the aid provider. Therefore, this enables the provision of assistance in areas which simply cannot be broached by other aid providers, who are (self) bound by a commitment to transparency and by accountability to other “constituencies” and/or to donors.<sup>53</sup>

A closely related observation pertains to the advocacy function of the attorney-client relationship. Attorneys are trained and obligated to advocate *unequivocally* on behalf of one side of a dispute – the client’s – and are at ease when and if it is necessary to conceptualize a situation in adversarial terms.<sup>54</sup> For example, in the context of the representation of SPLM, the attorneys *representing* the GoSS had no hesitations about adopting the position that they were advocating for the Southern Sudanese and only for the Southern Sudanese. Rather than following a ‘mandate’ to try and reach a compromised conciliation, they advocated for one position unequivocally. This notion of partisan intervention is almost anathema to public sector players, such as the MPI, which received funding from the EU in the context of the CPA and the consequent constitutional negotiations, and was therefore prohibited by EU policy from offering assistance to the South that it did not also offer to the North. Most of the international aid scholarship disapproves of the idea of “taking sides.” The fashionable commitment to relativistic approaches means that the traditional aid paradigm falls short in situations in which partisan advocacy and assistance are called for because of moral asymmetry (a clearly aggrieved party and a clear violator) or severe inequality-of-arms. The attorney-client relationship provides a much-needed solution to this gap. Indeed, at the close of the representation of SPLM, one member of the peace and constitutional negotiation team noted, half-jokingly, that “in some cases we found that [Latham & Watkins] was becoming more Southern Sudanese

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Union, the United States government, and no one.

As a general matter, nonprofits engaged in international development receive donations and are accountable, on numerous levels, to their donors. They have to meet performance benchmarks and adhere to donors’ mandates, principles and ideologies. They also have reporting obligations, and their work is periodically reviewed and can be discontinued for failure to follow the policies, guidelines, agendas or personal and institutional politics of their donors. In contrast, the representation of SPLM was governed by only one document – the engagement letter between Latham & Watkins and its client. Like all engagement letters (contracts which rules of professional responsibility require to be signed between attorneys and their clients) this engagement letter placed obligations on the service provider *to its client* (and, unlike in commercial relationships, did not include a corresponding obligation by the client to pay for the services). Law firms are partnerships and the partnerships’ activities, including pro bono programs, are funded by the partnerships themselves, which, in turn, are capitalized through the individual partners’ capital contributions.

53. For example, consider Senator Coleman’s demand for transparency in connection with his attempt to persuade the U.S. to cut off funding for the U.N. Human Rights Council due to the latter’s focus on Israel. *See infra*, note 59.

54. *See* ABA MODEL RULES OF PROF’L CONDUCT (2008), Preamble: A Lawyer’s Responsibilities, available at [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html) (“As an advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

than us," referring to the firm's commitment to the zealous advocacy of Southern interests.<sup>55</sup>

Similarly, not having "constituencies" and "mandates" and being free from the need to raise funds<sup>56</sup> means practitioners have more freedom to take on unconventional positions within a given context and, more broadly, to take on *causes* that are unpopular, not trendy, or that do not comport with the interest or ideology of the small, well-established network of funders of the international public sector described below.<sup>57</sup> An example is the very offer of assistance to the Southern Sudanese at a time when the Sudan-related international focus is almost exclusively on the devastation in Darfur.<sup>58</sup>

The attorney-client relationship also inherently provides a new model for authority relationships in the world of aid providers and aid recipients. In this new relationship, the aid recipients, now conceived of as *clients*, are in a position of authority. Whatever the good (or bad) intentions of individual international aid workers, a structural imbalance of authority between local/international actors exists, and the imbalance naturally favors those holding the purse strings. Much posturing may be done by both sides, but ultimately the local aid recipient has but two choices: accept assistance on terms agreeable to the donor or refuse both assistance and terms. There is little possibility, outside the attorney-client relationship, for an outcome where the donor strongly disagrees with local priorities but — respecting the role of a sovereign to organize its own affairs — nonetheless provides the requested aid.<sup>59</sup> These interactions, and the authority

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55. Videotaped interview with a member of the peace and constitutional negotiation team (Aug. 2005) (on file with author).

56. See *supra* note 52.

57. See *supra* note 45. Southern Sudan is one such example. While the Southern Sudanese suffered approximately two million deaths during the decades-long civil war, including a genocide in the Nuba region in the early 1990s, their cause did not, at the time of Latham & Watkins' representation of SPLM, have any "celebrity" as compared with the full attention of the international community to the current devastating humanitarian crisis in the Darfur region of Sudan. See ALEX DE WAAL, AVERTING GENOCIDE IN THE NUBA MOUNTAINS, SUDAN, DEC. 22, 2006, SOCIAL SCIENCE RESEARCH COUNCIL (SSRC) (Dec. 26, 2006), available at [http://howgenocidesend.ssrc.org/de\\_Waal2](http://howgenocidesend.ssrc.org/de_Waal2) (last visited Mar. 2, 2009).

58. I leave it for another time to ponder why some humanitarian crises (e.g., Darfur) received tremendous public attention while others (such as the genocide in the Nuba region of Sudan in 1995, the civil war between Southern and North Sudan, or the ongoing war in the Congo which has so far cost an estimated three million lives) do not.

59. As an example of the strings that are often attached to funding consider the following report:

Sen. Norm Coleman is pushing for the United States to cut off funding for the U.N. Human Rights Council, saying the watchdog group's focus on Israel and failure to investigate other countries made it a "disaster". . . . A Senate Foreign Relations Committee panel will take up the Human Rights Council's performance at a hearing Thursday. The committee last month approved legislation Coleman proposed to end U.S. funding of the council. The House last month approved similar legislation by Rep. Ileana Ros-Lehtinen, R-Fla . . . . Last month, the [Council] angered the United States by continuing its scrutiny of Israel while halting investigations into Cuba and Belarus. . . .

Coleman was further quoted as stating that "[t]his is a statement about the concerns we have

relations they give rise to, are very different than the kind of relationships that the “local owners” of the cause usually have with any other international player.<sup>60</sup>

Last but not least, a foundational benefit of operating under the attorney-client model is that the work of attorneys is regulated. Attorneys are accountable to their local bar associations and operate under strict ethical rules and constraints.<sup>61</sup> This starkly contrasts with other international players who strive for accountability, but do not have the formal mechanisms to secure it.<sup>62</sup> The term “foundational” is used deliberately because the regulation and accountability of attorneys underpins all the other benefits enumerated above. I shall return to this point shortly, but it is worth noting in brief some additional benefits to the attorney-client relationship model beyond those that relate to local ownership.

One benefit already alluded to is material resources. Mega law firms have exceptional resources, such as state-of-the-art technology, which often cannot be matched by public sector players who are not endowed with similar technology budgets. For example, Latham & Watkins was able to furnish GoSS representatives with satellite-powered communication technology that enabled real-time communication with counsel. Another example is legal translation services, which are highly specialized and costly. During the representation of SPLM, Latham & Watkins’ team procured such services. In one instance, entire constitutional drafts were translated on an expedited basis from Arabic to English and vice versa. The expedited translation allowed the constitutional teams in the contentious border states of South Kordofan and Blue Nile to draft and negotiate in a language which did not disadvantage them, and also emphasized the cultural right to have one’s language represented in governance. Yet another example is a privilege mega firm attorneys take for granted: printing and shipping with little or no budgetary constraints.

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about the Human Rights Council” and that “I have always stated that we need the United Nations to be effective, we need it to be credible, we need it to be transparent.” Fred Frommer, *Coleman Wants to Revoke U.S. Funding for U.N. Human Rights Council*, ASSOCIATED PRESS, (Jul. 26, 2007) available at <http://minnesota.publicradio.org/display/web/2007/07/26/colemanun/>.

60. I have elsewhere elaborated on the robust social-psychological meaning of face-to-face interactions and inter-personal authority relations and their impact on the social construction of the authority of international legal institutions and on the social-psychological meaning of citizenship in the emerging international polity. See, generally, Maya Steinitz, *The International Criminal Tribunal for Rwanda as Theater: The Social Negotiation of the Moral Authority of International Law*, 5 U. PENN. J. INT’L L. & POL’Y 1 (2007); Maya Steinitz, ‘The Milosovic Trial – Live!’: An Iconical Analysis of International Law’s Claim of Legitimate Authority, 3 OXFORD J. INT’L CRIM. JUST. 103 (2005); Maya Steinitz, *The Ad Hoc International Criminal Tribunals and a Jurisprudence of the Deviant*, 7 INT’L L. F. DU DROIT INT’L 119 (2005).

61. See, e.g., ABA Model Rules of Professional Conduct (2008), available at [http://www.abanet.org/vpr/mrpc/model\\_rules.html](http://www.abanet.org/vpr/mrpc/model_rules.html) (which serves as the model for the ethics and rules of most U.S. states).

62. Remarks at the Second Conference on International Investment at Columbia University (Oct. 30, 2007) (transcript forthcoming 2008).

As part of the standard deliverable work product, the legal team mailed the client numerous binders – one for each negotiating delegate, containing extensive research and reference material along with constitutional language. Latham & Watkins had the binders delivered by Federal Express from its European offices to the SPLM's office in Rumbek (the then-capital of Southern Sudan), where international courier services had only been made available, for the first time ever, in the preceding month. In a manner wholly unexpected by the attorneys, several members of the constitutional team were visibly excited to receive the printed material. They indicated that the binders, in addition to serving the constitutional process, would seed a law library and become part of the GoSS' permanent collection of reference material, thus contributing on an ongoing basis to the legal development of Southern Sudan.

A more interesting resource that mega law firms bring to the table is human resources: the quality, subject-matter expertise, and diversity of backgrounds of their attorneys. Mega law firms have a global presence and employ attorneys from a variety of socio-legal cultures specializing in a variety of fields including, importantly, expertise in areas that the public sector lawyers rarely possess, such as finance, banking, and investment law.<sup>63</sup> As a result, Latham & Watkins' diverse team of attorneys tailor nuanced and complex legal arrangements, such as structuring a dual banking system in which the north operates a Muslim, *shari'a*-based finance system and the South a Western-based finance system; creating a Future Generations Fund (trust funds to preserve gains from natural resources for future generations); and designing a complex revenue-sharing mechanism for oil profits. That diversity also allowed land use and environment specialists on the legal team to work with one of the most prominent Africa land-use experts to develop highly-detailed and refined proposals relating to land law which, although not adopted in the constitutions for political reasons, were universally acclaimed by members of the Southern Sudanese delegation. The language allowed delegates, for the first time, to envision a non-military solution to the war-inducing land-related challenges of the Sudan.<sup>64</sup>

Moreover, the intimate familiarity of attorneys practicing at mega-firms with the inner workings, perspectives and business methods of

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63. For example, Latham & Watkins had attorneys who previously served as constitutional and international law professors as well as human rights lawyers. The global presence of the mega firms, the diverse personal and professional backgrounds of their attorneys, and their subject-matter expertise can be gleaned from their website. See, e.g., Clifford Chance, About Us, [http://www.cliffordchance.com/about\\_us/about\\_the\\_firm/](http://www.cliffordchance.com/about_us/about_the_firm/) (last visited Mar. 2, 2009) ("The firm has unrivalled scale and depth of legal resources across the three key markets of the Americas, Asia and Europe and focuses on the core areas of commercial activity: capital markets; corporate and M&A; finance and banking. . . . Clifford Chance has 30 offices in 21 countries and 3,800 legal advisers.").

64. I would like to give a special acknowledgement to Lou Leonard for his work on land and environment issues as well as his pivotal role in the representation of SPLM. I would also like to acknowledge the contribution of Dr. Liz Weily who transcended institutional politics and lent her one-of-a-kind expertise to the representation of SPLM.

multinational corporations is invaluable, because multinational corporations are among the most influential players encountered by pro bono clients in the developing world.<sup>65</sup> The training afforded to attorneys who represent oil companies in dealings with governments, for example, allowed for a pragmatic and effective approach to the design of the CPA-mandated petroleum commission. Such attorneys understand the interests, concerns, strategies and tactics of oil companies, and how they tend to view government officials in the developing world. The attorneys were able to advise clients on the substance of the law, as well as on negotiation strategies and tactics, based on this understanding.

Mega firms also bring to the table human resources in the narrower sense of sheer legal manpower and, notoriously, an institutional culture in which consecutive long-hour workdays are the norm. Usually, the benefit of almost-unlimited legal manpower is a luxury reserved for time-sensitive corporate work, but this "luxury," which can change the dynamic of any negotiation, is provided to pro bono clients as well.<sup>66</sup> In the course of the representation of the SPLM, Latham & Watkins was able to provide "emergency" legal services: when an urgent need for a complex, nuanced and multi-disciplinary work product was created unexpectedly due to political circumstance, a mega law firm was the only international player with the necessary resources and infrastructure. For example, Latham & Watkins was able to complete comments on a draft of a key contested document within forty-eight hours by recruiting the entire team representing SPLM – comprising fifty attorneys working in twelve jurisdictions around the world – thus leveraging the different time-zones of their respective jurisdictions. There is no other international player with the kind of institutional norms, coupled with vast human resources, that would enable it to provide the level of legal services necessary to level the playing field in post-conflict contexts.

## B. Impediments

What, then, are the potential downsides of providing international legal aid through the attorney-client model? First, it should be acknowledged that the general critiques that apply to international aid generally apply to this form of international aid as well. The list of grievances launched against the international aid sector includes critiques

65. See, e.g., *South Sudan Villagers, Environment Suffer from Oil Boom*, SUDAN TRIB. (Mar. 2, 2009) available at <http://www.sudantribune.com/spip.php?article26231> (reporting about the arrival of oil companies to Southern Sudan):

Activists also warn that the 2006 arrival of White Nile Petroleum Company (WNPOC), a consortium led by Malaysia's Petronas, in Unity State threatens the Sudd wetlands, the world's largest maze of swamps, lagoons and tributaries. Villagers say thousands were forcefully evicted to make way for a low-sulphur crude oil venture in south-central Sudan. They say they lost venerated ancestral homes, died from contamination and saw livelihoods jeopardized.

66. See *supra* notes 26-27.



from cultural relativism, legitimacy deficit, and neo- and legal imperialism to name but a few.<sup>67</sup>

One unique downside to the involvement of the private legal sector is that of business conflicts and competing business interests. Unlike other international aid players, law firms are for-profit businesses first and foremost, and they may find themselves in business conflicts with certain players they encounter in the pro bono context. This risk is exacerbated in the case of mega law firms where, given the size of the firms, some lawyers may have different interests than those guiding the specific lawyers who take on a given pro bono representation. Business conflicts may lead to limiting the scope of a representation, or even to withdrawing altogether.<sup>68</sup> They may also tempt the rogue attorney to fail to meet his obligation to his pro bono client. Given that law firms are partnerships, not corporations, and therefore that power within them is diffused horizontally as well as vertically, internal politics can be harder to surmount than internal politics in purely vertical NGOs and IGOs.<sup>69</sup> For example, one partner or practice group may wish to prevent a certain representation suggested by another partner or practice group because it is perceived as competing or otherwise hurting the former's business model.

Another possible obstacle is that of professional myopia, which is the flipside of the benefits of the special subject-matter expertise discussed above, as well as the risk of the intimate familiarity with the multinational corporations' mindset. Even with the best intentions, corporate lawyers may be too invested in the corporate perspective to fully step outside of a professional paradigm designed to serve corporate interests.

Private sector attorneys are also ethically constrained from "playing

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67. For the most powerful overview of these critiques, based on thirty years of work in the international aid "industry," see, e.g., KENNEDY, *supra* note 2.

68. While ethical conflicts are regulated by ethics codes and rules of professional responsibility, "business conflicts" relate to client-relationship sensitivities — usually, situations in which a client or a category of clients may not wish to see their attorneys represent other parties, even though there are no ethical conflicts involved. In such situations, attorneys often refrain from taking on specific representations or categories of representations in order to preserve existing or anticipated client relationships. A pertinent example could be when an attorney or a firm represents, or wishes to represent in the future, certain governments that may be in conflict with other governments who may benefit from a pro bono representation. Another example would be an attorney or a firm that represents, or wishes to represent, certain multi-national corporations which, in turn, anticipate negotiating with actors in the developing world and therefore may not wish to see their lawyers provide pro bono assistance to those developing world actors. Yet another example would be an attorney or firm that wishes to provide certain services for a fee and would therefore not want the same services provided pro bono so as not to set an expectation that such services can be found without a fee. In order for a pro bono representation to be approved it has to pass a firm's intake process, a process which looks, among other things, at both ethical and business conflicts.

69. Law firms usually provide a legal statement regarding their form of incorporation on their websites. See, e.g., Latham & Watkins, Legal Notices, available at <http://www.lw.com/AboutLatham.aspx?page=LegalNotices> (last visited Mar. 2, 2009); Clifford Chance, Legal Statement, available at <http://www.cliffordchance.com/disclaimer/default.aspx?LangID=UK&> (last visited Mar. 2, 2009); Shearman & Sterling, LLP Status, <http://www.shearman.com/disclaimer/lip/> (last visited Mar. 2, 2009).

ball" with some of the other international players by virtue of attorney-client confidentiality.<sup>70</sup> For example, attorneys representing the GoSS found that sharing information provided by the client while maintaining the attorney-client privilege is only possible if certain relationships, such as retaining the other player as an expert and requiring it to adhere to the confidentiality requirements, are formed and formalized. However, these modes of cooperation were designed for the litigation and transactional contexts and do not work well in the international aid context, because potential partners who are NGOs and IGOs may need or want to take primary credit for joint projects to show outputs to their donors and to reap the reputational gains.<sup>71</sup> Taking credit often requires divulging the contents of communications, sharing drafts and final work products, and openly discussing the nature of the work and of the relationship with the stakeholder or client. None of these are appropriate, or in some cases allowed, in the context of the attorney-client relationship.<sup>72</sup> Therefore, since many players are either unfamiliar or uncomfortable with the kind of relationships attorneys must form in order to cooperate and coordinate, law firms can be alienated, and alienating, players.

Finally, a key concern, alluded to above, is that while the work of the attorneys is domestically regulated, this regulation is largely theoretical when practicing law across national-jurisdictional borders. When working with clients in the developing world, it is highly unlikely that the client will ever invoke the domestic regulatory mechanisms.

Thus, while the extent to which professional responsibility norms are internalized and self-enforced by practitioners<sup>73</sup> can bring the aforementioned benefits of the attorney-client relationship to global pro bono representation, this regulation should not be left to loose mechanisms such as socialization and internalization.

The unique benefits of the attorney-client relationship hinge on the level to which professional responsibility norms have been internalized, exacerbated by the fact that the attorney-client relationship is an unnatural relationship. One does not naturally put aside all of one's value judgments and moral outlook and advocate those of another. The context in which professional responsibility skills are acquired and maintained is the context in which socialization is coupled with formal regulation by bar

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70. See *supra* note 54.

71. For a glimpse into the fundraising world, see The Foundation Center's website, <http://foundationcenter.org/getstarted/nonprofits/> (last visited Mar. 2, 2009). For an example of an NGO's promotional materials (which, in turn, are usually abbreviated versions of donor reports that are not publicly available) review the International Senior Lawyers 2007 Annual Report, available at <http://islp.org/Annual%20Report/2007%20Annual%20Report%20Web%20Version.pdf> (last visited Mar. 2, 2009).

72. See *supra* note 54.

73. Such internalization is emphasized by the transnational legal scholar Harold Hongju Koh when he writes that "[a]s transnational actors interact, they create patterns of behavior and generate norms of external conduct which they in turn internalize." *Transnational Legal Process*, 75 NEB. L. REV. 181, 204 (1996).

associations.<sup>74</sup>

Nor is it natural for such clients to believe – and risk much in so doing – that a stranger will listen to them dispassionately, keep their confidences, and advocate for them zealously and at their sole discretion. Without such a belief and willingness to act on behalf of the “client,” a law firm becomes just another international assistance provider swept up in an endless dance wherein the local recipients try to divine the firm’s objectives and determine how to squeeze from those objectives some measure of local benefit. So long as the relationship is on these terms, and the “client” will not share even a modicum of its confidential thinking, none of the “local ownership” benefits of the attorney-client relationship will inhere.

One evident solution to lawyers who may be adrift without formal Bar oversight, and to “clients” who may not understand themselves as such, is non-domestic regulation of the practice of law. However, as the growing body of literature regarding the general topic of cross-border lawyering suggests, non-domestic regulation of lawyering must overcome a two-pronged objection: for one, that such regulation cannot be achieved; for another, that it should not be achieved.<sup>75</sup> Specifically, the first prong refers to the fact that international governance is not simply domestic governance intensified; rather, it is different in important ways, as discussed at length below. The second prong stems from the general critique that it is undesirable to harmonize legal systems, including ethical codes, across borders; rather, diversity of legal and regulatory regimes should be preserved to reflect the diversity of the cultures in which they operate. One is therefore confronted with the question posed at the outset of this Note: how do we maximize the unique benefits conferred by the attorney-client relationship while minimizing its downsides?

#### IV. TOWARDS A GLOBAL ADMINISTRATIVE LAW OF PRO BONO REGULATION

The above-mentioned dual challenge is not unique to the regulation of pro bono services in the rule of law development context, or even to the regulation of lawyering more generally. Rather, it is a subset of the more general challenges to the design of *global governance*. The “globalization paradox” – needing more government yet fearing it – has been described as resulting from the fact that:

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74. See *supra* note 54.

75. See Mark S. Ellis, *Developing a Global Program for Enhancing Accountability: Key Ethical Tenets for the Legal Profession in the 21<sup>st</sup> Century*, 54 S.C. L. REV. 1011, 1026 (2003) (calling for the development of a global program for enhancing accountability through an internationally accepted code of ethics); John M. Townsend, *Clash and Convergence on Ethical Issues in International Arbitration*, 36 U. MIAMI INTER-AM. L. REV. 1 (2005) (discussing the effect of a cohesive ethics-regulatory gap as it relates to the practice of international arbitration); Whelan, *supra* note 45, at 936 (discussing the accelerated trend toward universal standards of professional responsibility as a result of the globalization of law practice in the 1990s, surveying regulatory initiatives and literature on the trend, and discussing the critique of professional codes as an exclusionary practice and as privatized legislation).

[a] world government is both infeasible and undesirable. The size and scope of such a government presents an unavoidable and dangerous threat to individual liberty. Further, the diversity of the peoples to be governed make it almost impossible to conceive of a global demos. No form of democracy within the current global repertoire seems capable of overcoming these obstacles. . . . We need more government on a global . . . scale, but we don't want the centralization of decision-making power and coercive authority so far from the people actually to be governed.<sup>76</sup>

This Note argues that the new theoretical paradigm of Global Administrative Law, a branch of global governance studies, can provide a framework for any future efforts to foster regulation of international pro bono representations.

#### A. What is Global Administrative Law?

GAL is a new theoretical framework put forth by a group of scholars who examine the empirical, *de facto* emergence of transnational administrative law.<sup>77</sup> GAL scholarship is both descriptive — creating a

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76. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 8 (2004). Slaughter further states, "Addressing the paradox at the global level is further complicated by the additional concern of accountability. In the 1990s the conventional reaction to the problem of 'world government' was instead to champion 'global governance,' a much looser and less threatening concept of collective organization and regulation without coercion." *Id.* at 9. In response to critics of these spontaneous transgovernmental networks that arise outside of the framework of international organizations and executive agreements, Slaughter suggests a number of measures that would address accountability, such as a virtual network represented by a well-serviced website, global "information agencies," global "legislative networks" that would not only share information but also coordinate on the passage of "parallel domestic legislation," and the folding of transgovernmental networks into "mixed networks of governmental and private actors." Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1056-57 (2003). Anne-Marie Slaughter is a leading scholar in the liberal tradition of international relations, a strand of thought that ascribes to the notion that, in the realm of international politics, individuals and private groups are the fundamental actors whose interests are represented in the state. See Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 227-28 (1993). By contrast, the competing international relations realist tradition advances the view that the state is the primary actor in the international political realm; a realm which, realists argue, can only be understood in terms of differences in power between states. As a result, realists treat international rules and international institutions as mere epiphenomena, or reflection of existing power relations between states, rather than independent determinants of state behavior. See Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 92 AM. J. INT'L L. 361, 364-65 (1999).

77. See generally, Global Administrative Law Project, About the Project, [http://www.iilj.org/global\\_adlaw/index.htm](http://www.iilj.org/global_adlaw/index.htm) (last visited May 3, 2009) [hereinafter GAL Homepage] (describing GAL generally and the Global Administrative Law Project specifically). For additional background on the issues, see J.M. Migai Akech, *Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid*, 37 NYU J. INT'L L. & POL. 829 (2005) (discussing governance problems in

taxonomy of the kind of regulatory mechanisms that are, in fact, emerging in various areas of global social life – and normative, examining the value-laden aspects of global regulation. The GAL enterprise can be described as an exercise in creating a reflective equilibrium between the “is” and the “ought” in the field of global regulation. Scholars shuttle back and forth between the emerging patterns and institutions of global administration and the normative goals of administrative law. Their ultimate goal is to “identify, design, and help build transnational and global structures to fulfill functions at least somewhat comparable to those administrative law fulfills domestically, and to reform domestic administrative law to enable it to deal with the increasingly global character of regulation.”<sup>78</sup> In the process, GAL scholars seek to allow a “critical distance on general – and often overly broad – claims about democratic deficits in these institutions.”<sup>79</sup>

When calling attention to the fact of emerging patterns of global administrative law, the term “global” is used both to distinguish this body of law from classic international law and to reflect the “enmeshment of domestic and international regulation.”<sup>80</sup> This terminological choice, which invokes the more established term “global governance,” also invokes the notion that the law in question – administrative law on the global plane – is not simply national administrative law intensified:

Domestic law presumes a shared sense of what constitutes administrative action, even though it may be defined primarily in

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existing development assistance programs from the viewpoint of GAL); Benedict Kingsbury et al., *Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law*, 68 LAW & CONTEMP. PROBS., 1 (Summer/Autumn 2005) (articulating the legal theory and practice of GAL); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L LAW 1 (2006) (describing the possibilities and problems of GAL in the context of global governance). The description of GAL herein derives largely from the seminal GAL manifesto, Benedict Kingsbury, et al., *The Emergence of Global Administrative Law* (Institute for International Law and Justice, Working Paper No. 1, 2004) [hereinafter *Emergence of GAL*]. GAL is an example of transnational law, which Harold Hongju Koh describes as either “law that is ‘downloaded’ from international to domestic law . . . law that is ‘uploaded’ [from a domestic legal system to international law], then downloaded . . . into nearly every [domestic] legal system in the world. . . or law that is borrowed or ‘horizontally transplanted’ from one national system to another.” Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN. ST. INT'L L. REV. 745, 745-76 (2006). Transnational law was defined in the 1950s by Phillip Jessup to embrace all “‘law which regulates actions or events that transcend national frontiers’ and including ‘[b]oth public and private international law . . . [plus] other rules which do not wholly fit into such standard categories,’ and was adapted by legal scholars in the 1980s in lieu of the traditional public/private, domestic/international categories.” Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2626 (1997) (quoting PHILIP JESSUP, *TRANSNATIONAL LAW* 2 (1956)).

78. See *Emergence of GAL*, *supra* note 77, at 28.

79. *Id.* at 14-15.

80. Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L LAW 1 at 1, 5 (2006) (reviewing ABRAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH THE INTERNATIONAL REGULATORY AGREEMENTS* (1995) and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1997)).

the negative — as state acts that are not legislative or judicial — and even though the boundaries between these categories are blurred at the margins. Beyond the domain of the state, no such agreed functional differentiation prevails; the institutional landscape is much more variegated than in domestic settings.<sup>81</sup>

Given the unique attributes of the international global order, there is no way to transplant domestic administrative systems to the global level.<sup>82</sup> Global governance is different in kind. Its unique attributes include the absence of a central government, a lack of conventional enforcement mechanisms replaced by compliance incentives,<sup>83</sup> a “general dearth . . . of checks and balances,”<sup>84</sup> the non-delegated nature of the power of the most important actors,<sup>85</sup> and the lack of a defined global public.<sup>86</sup> These result in an accountability deficit supported by a fiction of “stretched” elective control and by reference to unclear constituencies on behalf of whom the regulators claim to regulate.

Closely related to the accountability deficit, and stemming from the same underlying characteristics, is a legitimacy deficit most often invoked in connection with the reluctance of powerful states to agree to mechanisms of global administrative law unless they see those mechanisms as furthering their own interests.<sup>87</sup> The legitimacy deficit is also fueled by the lack of participation, transparency, review, and rule-governed mechanisms, as well as by the unidentifiable or controversial sources of authority of the regulatory activity. These factors are all mentioned in the context of global governance generally and GAL specifically, and some have argued that they lead not merely to a legitimacy deficit but indeed to a legality problem.<sup>88</sup>

The two-pronged objection to the notion of regulating global pro bono legal services, namely that they either cannot be regulated or should not be regulated, is actually a subset of the challenges which lie at the very heart of global administrative law.

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81. *Emergence of GAL*, *supra* note 77, at 17.

82. See Daniel Berkowitz et al., *Economic Development, Legality and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003) (discussing the challenges and determinates of effective “transplantation” of legal arrangements more generally).

83. See *infra* notes 107-109 and accompanying text.

84. See *Emergence of GAL*, *supra* note 77, at 44 (citing Ruth Grant & Robert Keohane, *Accountability and Abuses of Power in World Politics* (Inst. for Int’l Law and Justice, Working Paper No. 7, 2004)).

85. GAL is an example of transnational legal process at work. Harold Hongju Koh, a leading scholar of transnational liberalism, notes that the “key agents in [the] transnational legal process are transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, interpretive communities and law-declaring fora, bureaucratic compliance procedures, and issue linkages among issue areas.” Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1409 (1999).

86. See *Emergence of GAL*, *supra* note 77, at 44.

87. Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, 68 L. & CONTEMP. PROBS. 319, 323-4 (2005).

88. See *Emergence of GAL*, *supra* note 77, at 16.

GAL scholars argue that these shortfalls are ameliorated, however, by a “global administrative space” populated by several distinct types of regulatory administrative institutions. These institutions offer several identifiable types of administration:<sup>89</sup> administration by formal international organizations; administration based on collective action by transnational networks of governmental officials; distributed administration conducted by national regulators under treaty regimes, mutual recognition arrangements or cooperative standards; administration by hybrid intergovernmental-private arrangements; and administration by private institutions with regulatory functions.<sup>90</sup>

Instead of command-and-control administration and a structure of delegation, which form the core of domestic administrative law, GAL scholars suggest that “anomalous forms of domestic administrative law – informality, networks, and cooperative structures – dominate the global level.”<sup>91</sup> Characteristic of all the emerging patterns and types is a multilayered structure with no identifiable center and no delegation structures. The absence of a central decision-making structure and the resulting multi-layered nature of diffused decision-making (which makes the attribution of responsibility for decisions difficult to establish) result in the dominance of informal cooperation among domestic regulators.

In light of the above, the normative mission of the GAL paradigm is to address and suggest ways to increase “*accountability, transparency, participation, and review of exercises of power* in global regulation and governance [by] integrat[ing] international law, administrative law, and other disciplines.”<sup>92</sup> By suggesting the application of solutions contemplated by the GAL scholarship to the provision of global pro bono legal services, this Note seeks to do the same with respect to global pro bono legal services. When applying these principles to global pro bono legal services one needs to keep in mind, however, the unique attributes of lawyering and the way in which lawyering, including the provision of pro bono services, is regulated.

#### **B. The Current Situation: Accidental Distributive Administration of Global Pro Bono Legal Services**

In addition to the general challenges to global administrative law, and unlike in some of the other contexts in which global regulation emerges, there is no legal vacuum per se relating to the regulation of cross-border practice of law, pro bono or otherwise. Rather, attorneys in all jurisdictions are currently regulated by their local Bars and are thus subject to domestic regulation. More specifically and importantly, attorneys are subject to *self-*

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89. *Id.* at 18.

90. *Id.* at 8.

91. *Id.* at 42.

92. See GAL Homepage, *supra* note 77 (emphasis added).

regulation, a fact that heightens some of the general problems of GAL discussed above.

Carried over to the global administrative space, the domestic self-regulation amounts to accidental regulation — regulation which emerges through patterns of interaction rather than through a deliberate process. More specifically, it amounts to extra-jurisdictional, ineffectual regulation which hyper-extends the fiction of elective control and accountability.

While this form of regulation was never intended to apply to a transnational practice of law, and certainly not to provide recourse for unsophisticated, non-domestic pro bono clients who may wish to challenge the quality of the services provided to them, in practice it now amounts to what one might call “global distributive administration,” whereby “domestic regulatory agencies [i.e., domestic Bar associations] act as part of the global administrative space: they take decisions on issues of concern to other jurisdictions or globally.”<sup>93</sup> The (originally unforeseen) consequence is the exercise of (indirect) extraterritorial regulatory jurisdiction, in which self-regulatory organizations in one state seek to regulate activity primarily occurring elsewhere.<sup>94</sup>

When private actors assume regulatory functions in domestic contexts they usually do so under structures of delegation from public bodies (both administrative and legislative) that possess relatively effective means to control or correct private governance. The same is not true, however, of the transnational sphere. Thus, while the American legal profession operates under the model of a self-regulating guild, this guild derives its authority, and the ultimate legal source of its operation, from Congressional legislation. This link to an ultimate source of authority and legitimacy cannot be said to exist when, for example, the New York State Bar regulates the activities of a New York lawyer in Kenya. Nor can such a link exist on the international level because “such a public order is largely lacking, and yet, private bodies perform far-reaching tasks, often spurred by the absence of effective public regulation. In these circumstances, it is unclear how accountability for private governance can be organized.”<sup>95</sup>

### C. A Solution: From Accidental Distributed Administration to Deliberate Transnational Network Administration

A particularly helpful concept employed by GAL scholars is the concept of *networks*. A network, in the context of global governance, is “a

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93. See *Emergence of GAL*, *supra* note 77, at 9. As this definition makes explicit, the term “distributive administration” does not refer to some centralized or organized administration. Rather, it refers to the fact that increasingly, domestic regulatory agencies have the effect, whether deliberate or inadvertent, of regulating beyond their jurisdictions.

94. *Id.*

95. *Id.* at 43. The IBA stands in contrast to “global private governance organizations, such as ISO and international sports federations, [which] have adopted certain procedures of accountability and review in order to enhance their effectiveness and legitimacy.” *Id.*



pattern of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the 'domestic' from the 'international' sphere."<sup>96</sup> A major element of global governance and the globalization paradox has been "the rise of global policy networks celebrated for their ability to bring together all public and private actors on issues critical to the global public interest."<sup>97</sup> Governance networks contribute to world order by creating convergence and informed divergence, improving compliance with international rules, and increasing the scope, nature, and quality of international cooperation. Regulation by networks happens when such networks issue codes of conduct, provide training and technical assistance, regulate by information, and impose social costs for non-compliance. Regulatory networks can thus at times amount to enforcement networks replacing the traditional command-and-control governance familiar from the domestic context.<sup>98</sup> Networks are flexible, informal, and non-hierarchical. They confer prestige upon those who participate in them and they place costs on non-participation. In short, networks are *discursive*.

Given the discursive (participatory) nature of global policy and regulatory networks and given that governance networks "have domestic roots and directly engage the participation and the credibility of the individuals who must ultimately be responsible for addressing [the regulatory issues at hand],"<sup>99</sup> governance networks also mitigate the accountability and legitimacy deficits. Their role, thus described, renders them more effective than one might initially imagine.

Empirical GAL studies show that administrative law on the global scale does indeed happen, *inter alia*, through networks.<sup>100</sup> Specifically, networks create soft law and that soft law is enforced by soft power. Originally coined by Lord McNair to describe vague norms of international law,<sup>101</sup> the term "soft law" has come to mean non-treaty obligations or the

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96. SLAUGHTER, *supra* note 76, at 14. To further contextualize the phenomenon and concept of global governance through networks, it should be noted that these networks are viewed as the primary cause and effect of the newly disaggregated state. In a nutshell, "[t]he state is not disappearing, but it is disaggregating into its component institutions which are increasingly interacting principally with their foreign counterparts across borders." *Id.* at 18; *see also id.* at 12 "The desegregation of the state is a phenomenon. Government networks are a technology of governance that are probably both cause and effect of this phenomenon." *Id.* at 31.

97. *Id.* at 9. Slaughter offers a comprehensive taxonomy of networks and their attributes. These include, among others, horizontal networks and vertical networks which, in turn, can and do serve as information networks, enforcement networks, and harmonization networks. Examples abound, including the regulatory networks of central bankers, financial regulators and utilities commissioners, *id.* at 12-14, where Slaughter dubs the interfacing regulators "the new diplomats." While Slaughter does not go much beyond *government officials*, as captured by the term "the disaggregated state," GAL's taxonomy, and with it this Note, extend the conceptual framework to include domestically self-regulated industries which serve functions similar to those of governmental regulation.

98. *Id.* at 24-25.

99. *Id.* at 25.

100. *Id.* at 36.

101. Jean d'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal*

array of non-binding instruments under which parties choose to nonetheless assume obligations.<sup>102</sup> Classic examples of soft law include the body of governing standards created by the United Nations General Assembly through Resolutions and Declarations. In the context of corporate responsibility, the Organization of Economic Cooperation and Development Guidelines for Multinational Enterprises and the outputs of voluntary initiatives such as the Global Compact are viewed as soft law.<sup>103</sup>

Soft power, a term developed by international relations scholar Joseph Nye, describes the ability to indirectly influence the behavior or interests of others through persuasion and through cultural, sociological, and psychological means. It is “the power of information, socialization, persuasion and discussion.”<sup>104</sup> Regarding the soft power of nations, Nye writes:

Everyone is familiar with hard power. We know that military and economic might often get others to change their position. Hard power can rest on inducements (“carrots”) or threats (“sticks”). But sometimes you can get the outcomes you want without tangible threats or payoffs . . . . A country may obtain the outcomes it wants in world politics because other countries – admiring its values, emulating its example, aspiring to its level of prosperity and openness – want to follow it . . . . This soft power

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*Materials*, 19 EUR. J. INT’L L. 1075, 1081 (2008).

102. See ALISTAIR RIEU-CLARKE, INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 11 n.6 (2005) (citing A. D. MCNAIR, THE LAW OF NATIONS (1961)); see also Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT’L L. 499 (1999) (discussing the regime of international non-treaty obligations with which parties choose to bind themselves and which excludes the application of treaty or customary law); John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, AM. J. INT’L L. at 16, 21-23; Kennedy Sch. Of Gov’t, Harv. Univ. Corp. Soc. Resp. Initiative, Working Paper No. 31 (discussing the role of soft law in regulating multinational enterprises (i.e., corporate responsibility) which, as discussed above, should be seen as coextensive with the activities of mega law firms). John Gerard Ruggie (who also serves as the United Nations Secretary-General’s Special Representative for Business and Human Rights) is a leading scholar of constructivism, which rejects the notion implied by other international relations theories that states or other international actors have interests that can be objectively determined. Instead, constructivists believe that international actors operate in a context of socially constructed understandings and norms, which in turn determine the behavior of states and other international actors. Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT’L L. 361, 367-68 (1999). In addition, under Ruggie’s leadership as the Special Representative of the U.N. Secretary-General, transnational networks are already at work in the creation of soft law, as evidenced by the convening of academic experts, legal practitioners, and NGOs during a series of workshops and working papers around issues of transnational corporate responsibility for human rights and under international law. See generally Report of the Special Representative of the Secretary-General, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council,” Addendum 2, Corporate Responsibility Under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops, A/HRC/4/35/Add.2 (Feb. 15, 2007), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G07/108/45/PDF/G0710845.pdf?OpenElement> (last visited Dec. 2, 2008).

103. See Ruggie, *supra* note 102, at 21.

104. SLAUGHTER, *supra* note 76, at 27.

– getting others to want the outcomes that you want – co-opts people rather than coerces them . . . Soft power uses a different type of currency (not force, not money) to engender cooperation – an attraction to shared values and the justness and duty of contributing to the achievement of those values.<sup>105</sup>

The unique benefits that can be derived through the provision of global pro bono services, at the heart of which is local ownership, can be enhanced – and its potential downfalls avoided or at least minimized – through a move from accidental and distributive administration to *deliberate and deliberative* regulation through *transnational legal regulatory networks*.<sup>106</sup>

This can be achieved by using existing networks or creating new ones to *consciously* act as policy/regulatory networks in order to foster discourse and consensus on how pro bono services should be rendered, issue soft law (e.g., guidelines and best practices), monitor non-compliance, and make information on the same publicly available:

[N]etworks could be empowered to provide much more technical assistance of the kind needed to build governance capacity in many countries around the world. They could be tasked with everything from developing codes of conduct to tackling specific policy problems. They could be designated interlocutors for the multitudes of nongovernmental actors, who must be engaged in global governance as they are in domestic governance.<sup>107</sup>

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105. JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 5-7 (2004) (helpfully noting that “[i]n international politics, the resources that produce soft power arise in large part from the values an organization . . . expresses in its culture, in the examples it sets by its internal practices and policies, and in the way it handles its relation to others”). Joseph Nye is a leading scholar of the international relations theory known as institutionalism, which agrees with realism that states are the fundamental actors in international politics, but diverges from it on the importance of international institutions. Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 218, 221-22 (1993). In contrast to realists, institutionalists believe that international institutions -- which include formal organizations, codified rules and norms, and established or customary rules, norms and conventions – are as fundamental to state behavior as state power. *Id.*

106. In his explanation of soft power’s displacement of hard power and other traditionally recognized forms of power, Nye warns that the use of soft power by transnational actors is not necessarily harmonious. According to Nye,

interdependence does not mean harmony. Rather, it means unevenly balanced mutual dependence . . . . Further, interdependence is often balanced differently in different spheres . . . . Thus, creating and resisting linkages between issues . . . becomes the art of the power game. Political leaders use international institutions to discourage or promote such linkages; they shop for the forum that defines the scope of an issue in the manner best suiting their interests.

Joseph S. Nye, Jr., *Soft Power*, FOREIGN POLICY, 1990, at 153, 158, available at [http://www.foreignpolicy.com/Ning/archive/archive/080/SOFT\\_POWER.PDF](http://www.foreignpolicy.com/Ning/archive/archive/080/SOFT_POWER.PDF).

107. SLAUGHTER, *supra* note 76, at 26.

Such transnational administrative legal networks should embark on a mission to systematically exchange information, coordinate policy, cooperate on enforcement issues, collect and distill “best practices,” bolster their members in domestic networks, and transmit information about their members’ reputation as those relate to the members’ global pro bono activities.<sup>108</sup> Closely related, the transnational administrative legal network suggested will serve as an “epistemic community” to its members — a community of “professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.”<sup>109</sup>

Such deliberate self-regulation on the global plane will: (1) enhance domestic accountability; (2) enforce reasoned decision-making, (3) create a mechanism for review by national authorities using substantive standards (e.g., of proportionality, means-ends rationality, avoidance of unnecessarily restrictive means, legitimate expectations); and (4) increase procedural participation. Procedural participation is perhaps the most important of these effects; participants might include representatives of local Bars, NGOs, businesses and other civil society actors.<sup>110</sup>

An infrastructure of transnational legal networks already exists in the form of the International Bar Association, the International Law Association and the Council of the Bars and Law Societies of Europe (CCBE). There are also regional fora that have gained prominence as centers of deliberation on international law generally, such as the American Society of International Law and the European Society of International Law. While to some degree culturally non-neutral, they are nonetheless quite inclusive of non-Americans and non-Europeans respectively and already provide flexible, informal, and non-hierarchical fora in which soft law can be produced and disseminated. If these fora were to add to their agenda the regulation of attorneys who provide pro bono legal services, then they could help achieve the goals of maximizing the benefits of these kinds of international aid interventions and of minimizing the downsides.

In this vein, the following paragraphs offer a blueprint for action<sup>111</sup>

108. *Id.* at 40. “Equally important is the information that participants in a network exchange about each other — concerning competence, quality, integrity, and professionalism.” *Id.* at 54.

109. Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1, 3 (1992).

110. See *Emergence of GAL*, *supra* note 77, at 24-26. Kingsbury et al. recognize that we are in the realm of *non-ideal theory*; under current circumstances, no satisfactory democratic basis for global administration is available, but global administrative structures are nevertheless required to deal with problems national democracies are unable to solve on their own. In this non-ideal situation, global administrative law might take pragmatic steps towards a stronger inclusion of affected social and economic interests through mechanisms of participation and review open to NGOs, business firms, and other civil society actors, as well as states and international organizations. See *id.* at 36-37.

111. These suggestions derive some inspiration from the Beijing Conference on Women. Officially titled *The Fourth World Conference on Women: Action for Equality, Development and Peace*, the Beijing Conference is held under the auspices of the United Nations and convenes every five years to frame a discourse and foster connections and interactions. The 1995 Beijing

including three essential measures and a list of possible activities to be undertaken. This list is meant to spark a debate rather than be taken as a prescription.

In order to successfully systematize large-scale international pro bono work – which would match the vast untapped resources of attorneys in the developed world with the great need for rule of law development and other legal assistance in the developing world – and to allow for a regulatory function, the deliberate transnational administrative network should have the following basic features:

- *A high-visibility platform.* The initiative should be tied to an existing, high-visibility host organization which can provide essentials (such as loaned staff, office space, seed funding for the start-up phase,<sup>112</sup> telecommunications technology, and a website) and draw on its existing connections to ensure the robust participation of key global players.
- *Inclusion of the potential developing world counterparts.* It is imperative that potential pro bono clients in developing countries and local players who can reach out to potential clients be strongly represented. This includes staff attorneys at local NGOs, representatives of ministries of justice, public sector attorneys, members of parliament, and possibly members of the private bar associations. Given the capacity gap and the tendency of participants from the developed world to dominate international fora (usually inadvertently) it is recommended that participants from the host countries be represented in numbers greater than their proportion to ensure their voices are heard. A non-exhaustive list of additional participants might include pro bono counsel of firms wishing to engage in international pro bono, representatives of intermediary nonprofits (see below), and

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Conference brought together delegates from 189 governments, more than 30,000 women and men and representatives from 2,600 NGOs. United Nations, Division for the Advancement of Women, Department of Social and Economic Affairs, Background, <http://www.un.org/womenwatch/daw/followup/background.htm>. It resulted in the Beijing Declaration which, given the wide participation in its drafting, has a strong “soft power” pull. It also resulted in a Platform for Action, a global, agreed-upon agenda for change used as a touchstone by activists the world over. . See FOURTH WORLD CONFERENCE ON WOMEN, BEIJING 1995, <http://www.un.org/womenwatch/daw/beijing/platform/> (last visited Dec. 8, 2008).

Among other benefits, the suggested blueprint aims to grant greater access to pro bono services to a wider range of potential clients. Currently these services are distributed somewhat haphazardly, depending on the interests and access of the individual attorneys and firms interested in providing their services to indigent clients overseas. Similarly, it will allow attorneys from firms other than mega-firms to gain access to clients and offer their services, including the option of partnering with like-minded attorneys in other firms or solo practices.

112. Mega firms often make monetary contributions to intermediary nonprofits or “clearinghouses,” with which they partner for pro bono work. It can therefore be anticipated that some funding can come from this source.

representatives of bar associations in the developed world.

- *Foster the creation, sustainability and inclusion of field-based, in-country intermediaries.* As alluded to earlier, without the assistance of Rule of Law International, an in-country NGO which had the relationship with and trust of the SPLM, Latham & Watkins' representation of SPLM could not have occurred. Given the face-to-face nature of relationships in many post-conflict and developing countries, and the need for on-the-ground presence to acquire the in-depth cultural insight necessary for effective representations, it is unlikely that this form of assistance will flourish without a cadre of in-country intermediary NGOs setting up shop in the most difficult corners of the world.<sup>113</sup> The existence of such organizations must be deliberately fostered in order to be able to better identify, screen and serve indigent clients in the developing world.

Once a network is thus established, it is advisable that it undertake the following activities (though, of course, there could be others):

- *Conduct regular meetings.* The network should hold plenary meetings bringing all stakeholders together periodically, as well as country- or region-specific meetings. A network should also hold thematic conferences relating to specific subject matters (e.g., international criminal law, rule of law development, disability rights in the developing world, etc.) and focus on pragmatic and programmatic tools-of-the-trade.<sup>114</sup>
- *Establish and maintain permanent committees.* Small committees should be established with permanent staff — including both staff members with legal education and staff members with development work expertise — devoted to a continuous effort to coordinate pro bono work. For example, the network could establish a finance committee charged with fund-raising and outreach (see below). Another possibility would be to create a monitoring committee that makes periodic reports on global, regional,

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113. Latham & Watkins' representation of SPLM required deep knowledge of the local culture and local circumstances; close relationships with the local players (longstanding relationships with the relevant ministers and judges of the GoSS, for example); and frequent meetings to discuss client needs, disseminate lawyers' work product, and explain the work product to the client if necessary. As discussed, clients often have no access to modern technology (email, fax or even phone) and often there is a vast capacity gap between the attorneys and their clients. Since the firms and attorneys offering their pro bono services cannot travel frequently or for lengthy time periods, if at all, it is crucial to have an intermediary in the form of an in-country NGO or a branch of an IGO, preferably one with staff lawyers.

114. Where possible, conferences should award continuing legal education credits.

or country-specific issues and whose members travel for on-site fact-finding missions as well as receive reports from host countries and law firms.

- *Promulgate best practices.* An effective network should establish guidelines and best practices by which participants in the network should hold themselves accountable.
- *Take disciplinary action and issue ethics opinions.*<sup>115</sup> A committee should be established to fulfill a core regulatory function by vetting and hearing clients' complaints. The committee can be an elected one to ensure accountability and representativeness for this sensitive function. In all likelihood, sanctions would be symbolic (issuing opinions and denying membership in the network), thus levying reputational costs as an enforcement mechanism. The committee may also mediate disputes between clients and their attorneys. A committee can also issue interpretations and answer anonymous questions regarding ethical issues that arise.<sup>116</sup>
- *Create and maintain a website.* A website can facilitate online interaction and information sharing.<sup>117</sup>
- *Provide resources and publications.* The network should encourage the creation and dissemination of relevant professional literature, including disciplinary and ethics opinions, and providing a listing potential pro bono service providers so that prospective clients can choose among different firms.
- *Create and maintain referral services, mailing lists, directories and newsletters:* These are all online and offline tools that can help bridge the gap between those in need of pro bono services and those seeking to offer their services.
- *Fund and administer scholarships and outreach programs.* Funding for outreach activities and sponsorship of participation of representatives from the developing world in the activities of the network is imperative to increase participation and legitimacy. The network can also reach

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115. No doubt, this will be the most controversial suggestion in this paper. Most practitioners who have commented on drafts of this Note opined that any form of sanctions and, indeed, many went so far as saying *any* form of (self) regulation would stifle firms' willingness to provide pro bono services, citing regulation as a high cost on a voluntary, not-for-fee activity.

116. This is a common tool of self-regulatory organizations. Compare, for example, the New York State Bar Association and the Security and Exchange Commission. See New York State Bar Association, *Ethics Opinions*, available at <http://www.nysba.org>, then follow "Ethics Opinions" hyperlink (last visited Mar. 2, 2009); U.S. Securities and Exchange Commission, *Staff Interpretations*, <http://sec.gov/interp.shtm> (last visited Mar. 2, 2009).

117. See, e.g., the International Bar Association's website, <http://www.ibanet.org/> (providing a repository of publications and offering information about conferences, scholarships and training opportunities).

out to law schools, bar associations and clinics in both service-providing jurisdictions and in the jurisdictions where legal assistance is needed in order to both leverage resources as well as build local capacity and transfer knowledge in addition to taking on particular representations.

#### CONCLUSION

The globalization of pro bono services is here to stay and is likely to expand, given the current trajectory of globalization and the increasing scope of corporate responsibility initiatives. This globalization offers great potential, as exemplified by the emerging trend of pro bono international aid by mega law firms in the context of rule of law development. The inherent nature of the attorney-client relationship offers the unique benefits of local ownership for aid recipients, a new authority relationship between aid recipient as client and aid donor as servicer, and a body of self-regulated practitioners. Mega law firms, in turn, are not only immune to some of the shortcomings of traditional international aid donors, but also provide the distinctive benefits of exceptional material and human resources. Mega law firms also offer an intimate familiarity with multinational corporations, which is particularly useful when such corporations transact with clients in post-conflict societies.

However, the internationalization of pro bono legal representations may come at a cost. The intimate relationships that mega law firms maintain with multi-national corporate interests may cause professional myopia, as well as potential business conflicts and competing business interests vis-à-vis a firm's pro bono representation of developing and post-conflict societies. In addition, the unique attorney-client relationship constrains the necessary relationship-building with other players in the realm of international aid. Perhaps more worrisome is that the self-regulation of international legal practitioners results from loose mechanisms of socialization and internalization, and therefore its benefits may be largely illusory when transposed to the international pro bono context.

Luckily, such costs – in addition to any accountability or legitimacy deficits caused by a global governance gap – can be minimized and any benefits of pro bono legal representations maximized if the GAL framework of networks and soft power is appropriately applied to the globalized pro bono representation space; that is, if those offering their services move away from accidental and distributive administration and regulation, and instead accept – indeed, seek – the same level of accountability they offer their commercial clients at home for their overseas pro bono clients. As this Note has shown, the infrastructure already exists in the form of international legal organizations that can serve as platforms for deliberate and deliberative transnational network administration and



can help to regulate this novel form of international aid on the global plane. The theoretical framework within which to contemplate such a deliberative, discursive process is also at hand and a blueprint is offered herein upon which the international legal community and pro bono clients can begin to realize the full potential of internationalized pro bono services in the 21st century.