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War and the Business Corporation

Eric W. Orts*

ABSTRACT

This Article addresses the relationship between modern warfare and business corporations. The Article begins by considering the nature of war, emphasizing the effects of globalization and the changing importance of national boundaries. The Article reviews leading theories of war and focuses on how the growth of multinational corporations in economic and political power has begun to rival the power of nation-states. Next, the Article addresses the nature of the business corporation in the context of modern war by surveying standard legal, ethical, and economic understandings of corporate governance. The Article concludes by arguing that the recognition of the moral and political issues of war and peace and their connection to corporate governance requires a qualification of the shareholders-only law-and-economics view of the corporation. Far from an "end of history," contemplating the interactions between business corporations and modern warfare suggests that much work remains to be done to construct the institutions needed to achieve the elusive goal of global peace as well as economic prosperity.

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*If looks could kill, they probably will,
In games without frontiers—war without tears.*

Peter Gabriel¹

This Article addresses the topic of war, which is not ordinarily considered germane to academic studies of corporate law.² A few cases from the Vietnam era are sometimes included in contemporary corporation law casebooks.³ In an academic milieu dominated by considerations of economic costs and benefits, however, mainstream corporate law teachers tend recently to avoid thinking seriously about issues of business ethics and social responsibility. Two of our most prominent professors of corporate law, for example, have gone so far as to claim that “the recent dominance of a shareholder-centered ideology of corporate law among the business, government, and legal elites in key commercial jurisdictions” has resulted in a world in which “[t]here is no longer any serious competitor” to this view of the corporation.⁴ “The triumph of the shareholder-oriented model of the corporation over its principal competitors,” these two authors conclude, “is now assured, even if it was problematic as recently as twenty-five years ago.”⁵ They therefore declare “the end of history in corporate law” and predict that “the ideological and competitive attractions of the standard model will become indisputable” with “convergence in most aspects of the law and practice of corporate governance . . . sure to follow.”⁶

1. PETER GABRIEL, *Games Without Frontiers*, on PETER GABRIEL (3) (Charisma Records, Ltd. 1980).

2. Cf. Bert S. Prunty, Jr., *Love and the Business Corporation*, 46 VA. L. REV. 467, 467-68 (1960) (discussing changes in public and judicial attitudes that brought about a shift in corporate law to allow corporations to make charitable donations).

3. E.g., *State ex rel. Pillsbury v. Honeywell, Inc.*, 191 N.W.2d 406 (Minn. 1971) (refusing a shareholder's right to corporate records regarding weapons and munitions manufacture when request is made for a political purpose, namely, opposing U.S. involvement in the Vietnam War); *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972) (addressing SEC's decision on allowing Dow Chemical Company's refusal to submit a shareholder proposal on the use of napalm “on or against human beings” on grounds of a securities regulation exception for “ordinary business” matters).

4. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001).

5. *Id.* at 468.

6. *Id.* at 439, 468. The unspoken reference is to the controversial claim in social theory more generally of “an end of history” after the Cold War. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1993); HOWARD WILLIAMS ET AL., *FRANCIS FUKUYAMA AND THE END OF HISTORY* (1999). Other leading academics in corporate law agree that a convergence in corporate governance regimes is likely to occur globally, but disagree about the form of this convergence. See, e.g., John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 650-53 (1999) (arguing against “formal convergence,” but predicting “functional convergence” through securities regulation); Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 333-34 (2001) (arguing against Hansmann and Kraakman's thesis of “formal

The triumphalist view of shareholders *über alles* in business corporations should be one of the first casualties of a serious consideration of the nature of war in our modern, increasingly global society.⁷ The modern nature of war so forcefully brought home in the terrorist attacks on the United States on September 11, as well as the ensuing Allied military action in Afghanistan and elsewhere, should remind scholars that corporations do not exist separately from the problems of human society. We must consider the role that business corporations play in the great games of international war and peace, as well as less deadly economic competition.

This Article proceeds as follows. Part I considers the nature of war, with an emphasis on the effects of globalization and the changing importance of national boundaries. It reviews some leading theories of war and how they relate to the business corporation. In particular, it focuses on the fast, recent growth of large multinational corporations and their ascent to economic and political power to rival many nation-states in comparative size and influence. Economic globalization and the multinational corporations that support it have significant implications for theories of modern war.

Part II reconsiders the perennially important topic of the nature and purposes of the business corporation in the context of modern war. It reviews the standard understanding of corporate governance involving not only economic obligations, but also legal constraints and ethical

convergence," but identifying other trends toward "functional," "contractual," or "hybrid" convergence that may achieve similar results). For a more direct challenge to Hansmann and Kraakman's end-of-history-in-corporate-law thesis, see Douglas M. Branson, *The Very Uncertain Prospect of "Global" Convergence in Corporate Governance*, 34 CORNELL INT'L L.J. 321, 330-31 (2001) (arguing that this view is "chauvinistic," "Americanocentric," and supported largely only by "bald assertions").

7. Not all commentators share the reductionist "shareholders only" model of the firm. See, e.g., Mark J. Roe, *Rents and their Corporate Consequences*, 53 STAN. L. REV. 1463, 1468, 1480 (2001) (observing that "players *inside* the firm—shareholders, managers, employees—compet[e] to get a piece" of the economic action and noting the existence, at least in some countries, of an "anti-shareholder-value ideology"); Robert B. Thompson, *Shareholders as Grown-Ups: Voting, Selling, and Limits on the Board's Power to "Just Say No,"* 67 U. CIN. L. REV. 999, 1005-06 (1999) (noting that "shareholder wealth maximization remains at the center of the purpose and objective of the corporation," but recognizing competing theories and arguing for "more precise articulation" of the meaning of "shareholder primacy" in different situations). In previous work, I have argued for a view of the business firm that includes owners—both of equity and credit—as well as managers and others with legal authority, including employees. Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL'Y REV. 265, 298-314 (1998). I have also argued for theories of corporate law that include considerations beyond those of shareholders, including other constituent groups and ethical considerations. See Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992); Eric W. Orts, *The Complexity and Legitimacy of Corporate Law*, 50 WASH. & LEE L. REV. 1565 (1993). For a typology of different theories of "social and economic organization" that remains relevant to competing theories of corporate law, see Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 925-50 (1984).

considerations. Accepted restatements of the fundamental principles of corporate law are not, as some academic commentators might prefer, enclaves to the single-minded pursuit of economic values. Instead, they recognize the importance of law and ethics as components to the development of corporate purposes. In this context, the legal and ethical obligations of business corporations with respect to issues of war and peace are considered.

Part III draws some conclusions from this consideration of the nature of war and business corporations. Briefly, it argues that a serious consideration of the moral and political importance of issues of war and peace in modern society requires a major qualification to the standard law-and-economics, shareholders-only view of the corporation. An understanding of the important interconnections between modern war and the business corporation reveals that theories of the social nature and purposes of business corporations have not yet reached an historical end. The Article concludes with some suggestions about future directions for interdisciplinary research at the social intersections of war and business corporations.

To expand on Peter Gabriel's lyrics quoted at the outset, economic globalization has meant that businesses increasingly play in "games without frontiers."⁸ Enhanced technological capabilities, as well as a hardening of hearts arguably made possible by evolution of modern forms of social organization, have also made possible "war without

8. GABRIEL, *supra* note 1. As Joseph White has pointed out, the metaphor of the "game" is very commonly used in business settings. B. Joseph White, Remarks at Conference on Corporate Governance, Stakeholder Accountability, and Sustainable Peace, University of Michigan Business School, Nov. 3, 2001. War is also often conceived in terms of game theories and studied through war games. See, e.g., KENNETH N. WALTZ, *MAN, THE STATE, AND WAR: A THEORETICAL ANALYSIS* 203-07, 223 (republished ed. 2001) (1959) (describing war as one game among others played by states in international politics).

By referring to war and business as "games," I do not mean to trivialize either activity. A colleague points out to me correctly that it is dangerous as well as misleading to think of war and business merely as games. Both war and business are more serious than children's games, as Peter Gabriel's ironic song lyrics suggest:

Hans plays with Lotte, Lotte plays with Jane;
Jane plays with Willi, Willi is happy again.
Suki plays with Leo, Sacha plays with Britt;
Adolf builds a bonfire, Enrico plays with it.

* * *

Andre has a red flag, Chiang Ching's is blue;
They all have hills to fly them on except for Lin Tai Yu.
Dressing up in costumes, playing silly games;
Hiding out in tree-tops shouting out rude names.

Gabriel, *supra* note 1. Although it may therefore be helpful for analytic purposes to think about military and business strategy through the use of game theories or models, it is important also to remember that real lives and livelihoods are at stake. Dealing in strategic abstractions can—and often does—result in a rational and emotional disconnection from practical realities.

tears.”⁹ This Article argues that human society should strive against the economic, moral, and political outcome of perpetual global war, and building the institutions necessary for peace should include attention to the social structure of modern business corporations.

I. ON THE NATURE OF MODERN WAR

One basic principle that has not changed is that “war [is] not healthy for children and other living things.”¹⁰ A recent documentary estimates that two million children have been killed in wars in the last ten years.¹¹ Tragically, as seen in Afghanistan, Africa, and elsewhere, the use of children as soldiers is “more and more common.”¹² Surely, “the love of children, with their need for attention and care, is a moral bond that should transcend every local and national barrier.”¹³ Leo Tolstoy’s view remains true today: “War is not polite recreation, but the vilest thing in life, and we ought to understand that and not play at war. We ought to accept it sternly and solemnly as a fearful necessity.”¹⁴

Carl von Clausewitz probably remains the leading social theorist of war, at least since the ancient Chinese writer, Sun Tzu, and the ubiquitous European political theorist, Machiavelli.¹⁵ “War,” according to Clausewitz, “is an instrument of policy.”¹⁶ It is, in fact, “policy itself, which takes up the sword in place of the pen.”¹⁷ For Clausewitz, writing in the early nineteenth century, war is simply extreme politics. War is a “political instrument, a continuation of political commerce, a carrying out of the same by other means.”¹⁸

9. One might even argue that the history of military organization into armies, navies, and other disciplined organizational forms is the story of divorcing moral sensibilities from warfare. For an argument that Western superiority on the battlefield lies precisely in its moral ability to inflict maximum destruction on enemies, see VICTOR DAVIS HANSON, *CARNAGE AND CULTURE: LANDMARK BATTLES IN THE RISE OF WESTERN POWER* (2001).

10. This slogan was an anti-war protest in the 1960s. See, e.g., George Packer, *The Way We Live Now: Recapturing The Flag*, N.Y. TIMES, Sept. 30, 2001, § 6 (Magazine), at 15.

11. Wendy J. William, *Listening to the Children of War*, BOSTON HERALD, Jan. 28, 2000, at S32 (reviewing the HBO documentary “Children in War”).

12. Herbert M. Howe, *Global Order and the Privatization of Security*, 22 FLETCHER F. WORLD AFF. 1, 1 (Summer/Fall 1998).

13. ROBERT F. DRINAN, *THE MOBILIZATION OF SHAME: A WORLD VIEW OF HUMAN RIGHTS* 50 (2001).

14. LEO TOLSTOY, *WAR AND PEACE* 732 (Constance Garnett trans., Modern Library 1940) (1864).

15. See, e.g., SUN TZU, *THE ART OF WAR* (Samuel B. Griffith trans., 1963); NICCOLÒ MACHIAVELLI, *THE ART OF WAR* (Ellis Farnsworth trans., 2001).

16. CARL VON CLAUSEWITZ, *ON WAR* 410 (Anatole Rapoport ed., J.J. Graham trans., Penguin Books 1968) (1832).

17. *Id.*

18. *Id.* at 119.

The theories of war advanced by Clausewitz, as well as Sun Tzu and Machiavelli, remain popular today as they are applied in the field of business strategy.¹⁹ Presciently, Clausewitz described war “as a kind of business competition on a great scale.”²⁰ In his original theory of war, Clausewitz subsumes private interests of business under the larger rubric of “the interests generally of the whole community,” though he recognizes that “policy may take a false direction” and “promote unfairly the ambitious ends” of “private interests.”²¹

Business firms—to the extent that they were just beginning to develop independent social identities in the nineteenth century—were properly considered instruments of the nation-states in which they were based.²² In the time of Clausewitz, the size and influence of business corporations independent of the nation-states that chartered them were for the most part negligible.²³ For much of the twentieth century as well, this view of the subordinate relationship of business corporations

19. See, e.g., CLAUSEWITZ ON STRATEGY: INSPIRATION AND INSIGHT FROM A MASTER STRATEGIST (Tiha von Ghyczy et al. eds., with commentary 2001); THE RUTHLESS LEADER: THREE CLASSICS OF STRATEGY AND POWER (Alistair MacAlpine ed., 2000) (including Machiavelli's *The Prince* and Sun Tzu's *The Art of War*). See also ANTONY JAY, MANAGEMENT AND MACHIAVELLI: DISCOVERING A NEW SCIENCE OF MANAGEMENT IN THE TIMELESS PRINCIPLES OF STATECRAFT (1994) (advancing a theory of business management based on Machiavelli's political theory); MARK MCNEILLY, SUN TZU AND THE ART OF BUSINESS: SIX STRATEGIC PRINCIPLES FOR MANAGERS (2000) (adapting Sun Tzu's theory to modern business strategy); Survey of Management, *The Return of von Clausewitz*, ECONOMIST, Mar. 9, 2002, at 18 (describing return of Clausewitz and Sun Tzu to popularity in strategic management thinking).

20. CLAUSEWITZ, *supra* note 16, at 202-03.

21. *Id.* at 404.

22. For general historical accounts of the development of business enterprises, including corporations, see STUART BRUCHEY, ENTERPRISE: THE DYNAMIC ECONOMY OF A FREE PEOPLE (1990); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 (1970).

23. The modern corporate form of business organization traces its roots to the government-chartered Dutch and English trading companies in the sixteenth and seventeenth centuries and the unchartered joint-stock companies of late seventeenth century England. See, e.g., Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 589 (1999). Only in the late nineteenth century did business corporations begin to acquire significant legal and constitutional independence from the nation-state. For a good general history of this development in the United States, see HURST, *supra* note 22; Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593 (1988). See also Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1303-04 (2001) (observing that “at least until the late nineteenth century the corporation was considered a public entity, in that it arose from a concession by the state”); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1443-44 (1987) (noting that “[u]ntil nearly the end of the nineteenth century business was generally conducted by single proprietorships or partnerships rather than corporations” and that the “challenge that private corporations posed to the sovereignty of the state . . . was not fully apparent until about the 1880s because, before that time, the vast majority of corporations were affairs limited in scope and capacity”).

under the nation-states that were seen to create them may have been generally accurate, though even relatively early in the twentieth century concerns began to arise about the possibility of corporate "war merchants" influencing national politics in a belligerent direction.²⁴ Historical evidence also suggests that wars have sometimes been fought for "a minority of financial and industrial interests" that may reap "great profit" as a result, even though overall national interests are rarely advanced by aggressive war.²⁵ In general terms, the problem of war in the days of Clausewitz, and perhaps through most of the twentieth century, could be conceived adequately as a problem of "the state system" of international politics.²⁶

Today, however, business corporations can no longer be so easily compartmentalized, and neither can the problem of modern war. Increasingly, business corporations act internationally and transnationally, citizens of the world rather than any particular nation-state.²⁷ In about twenty years, from 1969 to 1990, the number of multinational firms more than tripled, from seven thousand to twenty-four thousand.²⁸ By 2000, the number of multinational firms had more than doubled again to sixty thousand, with 800,000 foreign subsidiaries.²⁹ Multinational business now accounts for approximately one-quarter of world economic output.³⁰ Sales of multinational-affiliated corporations are twice the value of global exports of all goods and

24. See, e.g., ANTHONY SAMPSON, *ARMS BAZAAR: FROM LEBANON TO LOCKHEED* (1977) (providing an overview of the international arms trade). The fear of corporate influence on policy favoring war profits is still palpable today. See, e.g., <http://www.moveon.org/warprofiteering> (last visited Oct. 31, 2001) (lobbying against alternative corporate tax change on this ground).

25. WALTZ, *supra* note 8, at 145 (citing John Hobson's historical study of the Boer War, but criticizing the thesis of "imperialism" as a general cause of war). Some wars may well result when "certain well-organized business interests are able to outweigh the weak, diffused interest[s]" in a country, but such wars of "imperialism" are "an especially expensive form of folly" for "the nation as a whole." *Id.* at 145-46 (citing and quoting Hobson).

26. *Id.* at ix. Some scholars, however, have argued that capitalist state formation may encourage war. For a collection of anthropological essays along these lines, see DEADLY DEVELOPMENTS: CAPITALISM, STATES AND WAR (S.P. Reyna & R.E. Downs eds., 1999).

27. For an overview setting up the general problem, see Eric W. Orts, *The Legitimacy of Multinational Corporations*, in PROGRESSIVE CORPORATE LAW 247-79 (Lawrence E. Mitchell ed., 1995); see also PHILIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATE LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* (1993) (describing the difficulty that globalization poses for traditional legal conceptions of the business corporation).

28. Eric W. Orts, *The Future of Enterprise Organization*, 96 MICH. L. REV. 1947, 1963-64 (1998).

29. Stephen J. Kobrin, *The End of Globalization?* 6 (unpublished manuscript, on file with author) (citing UN statistics).

30. *Id.*

services.³¹ Although the number of cross-border mergers and acquisitions fell by about fifty percent in 2001, especially after the events of September 11, the slowdown followed a three-year surge in international combinations, and the trend toward global companies is likely to resume.³² Two U.S.-based companies exemplify this changing reality of global corporate governance. General Electric today classifies more than thirty-five percent of its assets as foreign—up from only 13.5 percent in 1994—and IBM now has more than half of its total assets located overseas.³³ The recent German-U.S. hybrid, DaimlerChrysler, also illustrates this trend in its recent advertising campaign featuring a single flag sewing together a group of smaller national flags and boasting that the company calls over two hundred different countries “home.”³⁴ As a result, the concept of global “corporate citizenship” has entered the business lexicon, even if the contours of this idea are not yet clearly determined.³⁵

Many large multinational corporations have indeed become much larger, in terms of overall economic wealth and political influence, than some nation-states. Although comparing the economic size and political muscle of business corporations with nation-states is to compare apples with oranges, one can nevertheless observe in general terms that the relative size and influence of business corporations have increased dramatically in recent years compared with nation-states. According to one recent study, fifty-one of the one hundred largest integrated economic entities in the world today are business corporations; the remaining forty-nine entities are nation-states.³⁶ More than twenty

31. *Id.* For additional empirical evidence of the “importance and recent acceleration of corporate globalization,” see Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9, 14-21 (1999).

32. Joseph Quinlan, *No Stopping the Global M&A Train*, FIN. TIMES, Nov. 12, 2001, at 24.

33. *Id.*

34. http://www.daimlerchrysler.de/index_e.htm (last visited Nov. 14, 2001).

35. For recent treatments in the business literature, see CORPORATE GLOBAL CITIZENSHIP: DOING BUSINESS IN THE PUBLIC EYE (Noel M. Tichy et al. eds., 1998); MALCOLM MCINTOSH ET AL., CORPORATE CITIZENSHIP: SUCCESSFUL STRATEGIES FOR RESPONSIBLE COMPANIES (1998).

36. NOREENA HERTZ, *THE SILENT TAKEOVER: THE RISE OF CORPORATE POWER AND THE DEATH OF DEMOCRACY* (2002) (forthcoming). See also John Kay, *Choice as Control: Corporations Have Power in our Society, as Does Posh Spice. Is it a Cause for Concern?* FIN. TIMES, Aug. 22, 2001, available at <http://www.johnkay.com/articles> (critically reviewing Hertz’s claim). As indicated in the text, this comparison should be used with caution because the metrics to determine the relative sizes of companies and countries are different. For an incisive critique of the claim that business corporations have become economically larger than nation-states, see Martin Wolf, *Countries Still Rule the World*, FIN. TIMES, Feb. 6, 2002, at 13. Even when the mistaken methodology is corrected, however, it remains true that in terms of a “value added” measurement, fourteen of the world’s largest one hundred economies are corporations rather than countries. *Id.* The economic and political influence of large business corporations is significant.

years ago, another observer argued that “the largest corporations overshadow all save about a dozen of the nation-states of the planet” in terms of “totality of assets.”³⁷ In terms of raw measurements of economic size and power, large corporations are equal to some of the smaller nation-states.³⁸ As a result, “significant decisions affecting people everywhere” are increasingly “made by corporate managers, not political officers.”³⁹ A large “void” with respect to business corporations has therefore opened “at the intersection of national boundaries that is very difficult to manage and control.”⁴⁰

Descriptively, then, we may criticize Clausewitz’s view of the world as too simple and old-fashioned. Economic, political, and cultural forces of globalization have created what Jürgen Habermas calls a “new postnational constellation.”⁴¹ Here, globalization means “a process” that “characterizes the increasing scope and intensity of commercial, communicative, and exchange relations beyond national borders.”⁴² Expanding networks of “satellite technology, air travel, and digitalized communication” characterize this process.⁴³ One might even say that globalization has become “a condition—a globality, a world economy in which the traditional and familiar boundaries are being surmounted or made irrelevant.”⁴⁴ As described by Selya Benhabib, “global integration in the sphere of economics, armament, finance, communication, information, and tourism [has] proceeded with a dizzying pace.”⁴⁵ New

37. ARTHUR SELWYN MILLER, *THE MODERN CORPORATE STATE* 233 (1976).

38. In 1999, for example, twenty-two U.S.-based corporations had a total market capitalization larger than the gross domestic products of twenty-two nation-states. Gretchen Morgenstern, *A Company Worth More than Spain?*, N.Y. TIMES, Dec. 26, 1999, § 3, at 1 (cited in LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA’S NEWEST EXPORT 2* (2001)). Again, these kinds of gross comparisons using different measurements must be employed with caution. See *supra* note 36. Market capitalization of a corporation means the value of the corporation’s total assets determined as a function of the price of its public securities, while the GDP of a nation-state includes contributions of its own business corporations. Nevertheless, the overall relative comparison is useful to give a ballpark conception of relative influence on a global scale.

39. MILLER, *supra* note 37, at 233.

40. Bradley, *supra* note 31, at 31.

41. See JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* 60-61 (Max Pensky trans., 2001); see also MARTIN L. VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* 336-421(1999) (describing the “decline of the state” in recent years and the need to confront a new political reality “beyond the state”).

42. HABERMAS, *supra* note 41, at 65-66.

43. *Id.* at 66.

44. DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD* 14 (1998). Little of substance seems to turn on a distinction between globalization as a “process” or “condition.” For two excellent collections of essays on the phenomenon, see *GLOBAL CAPITALISM* (Will Hutton & Anthony Giddens eds., 2000) and *GOVERNANCE IN A GLOBALIZING WORLD* (Joseph S. Nye & John D. Donahue eds., 2000).

45. Selya Benhabib, *Political Theory and Political Membership in a Changing World* 5 (unpublished manuscript on file with author) (forthcoming in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE* (Ira Katznelson & Helen Milner eds., 2002)).

risks come with this process of globalization, including not only the advent of new and potent brands of international terrorism, but also global ecological challenges, global financial risks, and other collective action problems for social organization.⁴⁶

Mark Duffield describes these emerging patterns as “paradoxes of globalization.”⁴⁷ The “changing competence of the nation-state,” according to Duffield, results in “a shift” from a reliance on hierarchical national governments to “wider and more polyarchal networks, contracts and partnerships of governance.”⁴⁸ Globalization raises problems of political accountability and democratic legitimacy.⁴⁹ Considerations of economics become elevated over politics in many areas.⁵⁰ In addition, globalization seems to occur in tandem with an increase in “cultural, ethnic, linguistic, [and] religious separatisms and demands for local and regional autonomy.”⁵¹

Globalization thus transforms the nature of war.⁵² According to Martin van Creveld, the post-Westphalian period of the dominance of nation-states and the paradigm of war as primarily involving conflict among nation-states is now ending.⁵³ In van Creveld’s words:

The state, which since the middle of the seventeenth century has been the most important and most characteristic of all modern institutions, is in decline. From Western Europe to Africa, many existing states are either combining into larger communities or falling apart. . . . Globally speaking, the international system is moving away from an assembly of distinct, territorial, sovereign, legally equal states toward different, more hierarchical, and in many ways more complicated structures. As far as individual states are concerned, there are good reasons to think that many of them will soon no longer be either willing or able to control and protect the political, military, economic, social, and cultural lives of their citizens to the extent that they used to. Needless to say, these developments affect each and every individual now living on this planet. In some places, these will proceed peacefully, but in others they are likely to result in—indeed are already leading to—upheavals as profound, and possible as bloody, as

46. *Id.* See also Ulrich Beck, *Globalization’s Chernobyl*, FIN. TIMES, Nov. 6, 2001, at 15 (surveying the global risks that the events of September 11 exposed).

47. Mark Duffield, *Geography and the Boundaries of Confidence: Globalization and War Economies: Promoting Order or the Return of History?*, 23 FLETCHER F. WORLD AFF. 21, 21 (Fall 1999).

48. *Id.* at 23.

49. *Id.*

50. *Id.* For a description and analysis of the recent “shift” in emphasis from political states to economic markets, see YERGIN & STANISLAW, *supra* note 44, at 11-17, 125-51, 369-91.

51. Benhabib, *supra* note 45, at 5.

52. For a leading recent treatment of this topic, see MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* (1991); see also ROBERT D. KAPLAN, *THE COMING ANARCHY: SHATTERING THE DREAMS OF THE POST-COLD WAR WORLD* 43-49 (2000) (discussing van Creveld’s theory of war and its influence on the Pentagon’s thinking about war in the twenty-first century).

53. See KAPLAN, *supra* note 52, at 46 (describing van Creveld’s views).

those that propelled humanity out of the Middle Ages and into the modern world.⁵⁴

In a globalized society, simplified versions of Clausewitz no longer apply. Instead, nation-states are losing their grip on their monopolies of violence. Global society may be returning to a world characterized by complex struggles in which “political, social, economic, and religious motives” become “hopelessly entangled.”⁵⁵ If so, then we may well expect the return to prominence of “mercenaries” and “swarms of private armies” such as those that characterized the period of the Reformation and the Thirty Years’ War in Europe.⁵⁶

Perhaps the leading contemporary theorist of war, John Keegan, agrees with the premises of this diagnosis. According to Keegan, war has become too expensive for modern rich states to wage against each other in its “full potentiality,” but it has also “become, paradoxically, a cheap and deadly undertaking for poor states, for enemies of the state idea, and for factions in states falling apart.”⁵⁷ Rather than states, we therefore face new kinds of enemies.⁵⁸ “The rogue ruler, the terrorist and the fundamentalist movement, the ethnic or religious faction,” Keegan writes, “are all enemies as serious as any, in an age of junk weapons, as civili[z]ation has ever faced.”⁵⁹ If anyone doubted Keegan’s forecast, the events of September 11 must surely have convinced them otherwise. New technologies and political challenges have significantly changed the nature of war in a modern, globalized world. In this new world of more constant threats, limited rather than total war becomes the rule, rather than the exception.⁶⁰ As General Wesley Clark writes, military actions in this “difficult region” are “not quite war, not quite peace.”⁶¹

At the same time that Keegan recognizes technological and political changes in the nature of modern war, however, he criticizes Clausewitz’s traditional conception on normative grounds.⁶² Keegan sees Clausewitz as producing “the most pernicious philosophy” of war “yet conceived” because Clausewitz views war as “a value free activity, outside the moral sphere.”⁶³ The history of the catastrophes of the “short” twentieth

54. VAN CREVELD, *supra* note 41, at vii.

55. KAPLAN, *supra* note 52, at 46 (quoting van Creveld).

56. *Id.*

57. JOHN KEEGAN, WAR AND OUR WORLD 68 (1998).

58. *Id.*

59. *Id.*

60. WESLEY K. CLARK, WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT 418-19 (2001) (describing NATO’s intervention in Serbia and Kosovo as a “limited war” of a kind likely to be repeated in the future).

61. *Id.* at 458. In this middling region between unlimited war and international criminal police actions, Clark includes unlimited war, pre- and post-conflict operations, and “nation building.” *Id.*

62. KEEGAN, *supra* note 57, at 41-43.

63. *Id.* at 41-42.

century and its two global wars provide graphic evidence that Clausewitz was mistaken in thinking that the "rational" calculations of national interests by states would limit warfare.⁶⁴

Important implications for a contemporary moral perspective on war follow from its new globalized character. War changes over time.⁶⁵ "Like a disease," again according to Keegan, "it exhibits the capacity to mutate, and mutates fastest in the face of efforts to control or eliminate it."⁶⁶ Keegan defines war broadly as "collective killing for some collective purpose."⁶⁷ It retains "a scourge-like nature . . . to threaten the very survival of civilization itself."⁶⁸

From the perspective of the business corporation, this account of the modern, globalized nature of war suggests several important issues. First, business corporations have increasingly become "detached" from nation-states in their everyday operations. The driving force of this process of globalization is fundamentally economic rather than political.⁶⁹ "Nation-states do not trade with one another," as two commentators argued recently, "enterprises do."⁷⁰ Because business corporations are fundamental to the globalization process, they are also key to understanding the changed nature of the disease of modern war and its possible antidotes.

Second, the central role of business enterprises in globalization means that they cannot avoid becoming implicated in global issues of

64. For Keegan, Clausewitz's theory therefore at least implicitly provided a justification for the totalitarian state. *Id.* at 42. For an account of "the short twentieth century" as including the "catastrophe" of two world wars, see HABERMAS, *supra* note 41, at 37-57. See also Eric Hobsbawm, *War and Peace in the 20th Century*, LONDON REV. BOOKS, Feb. 21, 2002, at 16 (observing that the twentieth century, taken as "having begun in 1914," was "the most murderous in recorded history" and "a century of almost unbroken war, with few and brief periods without organized armed conflict somewhere"). As Waltz argues, Rousseau had, prior to Clausewitz, made a convincing theoretical case that nation-states acting in their own self-interests—even as aggregated in a "general will"—have inadequate incentives to maintain peace. WALTZ, *supra* note 8, at 165-86 (critically discussing Rousseau's theory).

65. See KEEGAN, *supra* note 57, at 72 ("War is a protean activity, by which I mean it changes form, often unpredictably . . .").

66. *Id.*

67. *Id.*

68. *Id.* at 1.

69. See *supra* notes 41-45, 50 and accompanying text. An adequate historical description of the rise of semi-autonomous corporations would include political and especially legal dimensions. But a full historical description of what may be called in sociological terms the "differentiation" of economic enterprises from political society remains beyond the scope of this Article. For some references to this process, however, see *supra* note 23.

70. Michael A. Almond & Scott. D. Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. INT'L. & COMM. REG. 389, 402 (1997). This view is somewhat overstated because nation-states set the rules for trade between and among internationally organized enterprises. But the basic point is correct given an underlying political and legal infrastructure that supports international commerce.

war and peace. If not to the same extent as the nation-states that field great armies, business corporations often have occasion to ally with states in using force and even hire military help independently of states. If nation-states cannot protect business interests, then businesses will find other ways to protect themselves. An example is found in contemporary Russia, where hiring a private security agency and even paying organized crime for protection are counted as the normal course of doing business.⁷¹ Indeed, the rise of private security companies in the world at large is an immense growth industry, which seems to illustrate both a decline of the protective powers of political states and an increase in business responses to social insecurity.⁷²

Third, the decline of the relative influence of nation-states means that the "new enemies" of international society, including terrorists, as well as organized crime, may use corporate and other business organizational forms for illicit ends.⁷³ A chilling recent example is the "corporate" organization of the Al Qaeda terrorist network.⁷⁴ International channels and methods of business may be employed for illicit political and economic purposes, and new organizational responses to these threats are required.

Fourth, the nature of modern war highlights the fact that business corporations are not only abstract economic entities but social institutions. As organized institutions composed of human beings, they have moral and political as well as economic responsibilities. Like states, business corporations must therefore develop their own foreign and domestic policies, either implicitly and unconsciously or, much better, explicitly and with awareness. This does not mean that large, global corporations should appoint new vice presidents of war or defense,

71. Executives at Phillip Morris, for example, admit that men armed with Kalashnikovs must accompany shipments of cigarettes from Moscow to other parts of Russia. CarrieLyn Donigan Guymon, Note, *Mars Bars and Marlboros: Cultural Aspects of Foreign Investment in Russia*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 495, 525 (1997). According to one recent estimate, half of all new businesses in Russia reported that they paid some form of protection money to organized crime. *Id.* at 502. See also Scott D. Syfert, *Capitalism or Corruption? Corporate Structure, Western Investment and Commercial Crime in the Russian Federation*, 18 *N.Y.L. SCH. J. INT'L & COMP. L.* 357 (1999) (describing the massive problems of business crime and corruption in contemporary Russia and how foreign investors deal with them).

72. For statistics on the exponential growth of the private security business in Europe and the United States, see VAN CREVELD, *supra* note 41, at 404. See also *infra* text accompanying notes 90-102 (discussing the rise of "private military companies").

73. See, e.g., Edgardo Rotman, *The Globalization of Criminal Violence*, 10 *CORNELL J.L. & PUB. POLY* 1 (2000) (describing the general phenomenon of the increasing use of global organizations for criminal and terrorist ends). See also JOHN KERRY, *THE NEW WAR: THE WEB OF CRIME THAT THREATENS AMERICA'S SECURITY* 16-19 (1997) (describing new network of international criminal organizations that "function like transnational corporations" and employ methods of modern global business enterprise).

74. See Kurt Eichenwald, *Terror Money Hard to Block, Officials Find*, *N.Y. TIMES*, Dec. 10, 2001, at A1; Don Van Natta, Jr., *Running Terrorism as a New Economy Business*, *N.Y. TIMES*, Nov. 11, 2001, at 5.

but it does require corporate leaders to take the larger global issues of war and peace seriously from a moral as well as an economic perspective. In a “postnational” world, business corporations can no longer simply rely on nation-states to take care of problems of international security, if, indeed, they ever could delegate this responsibility entirely.

II. ON THE NATURE OF BUSINESS CORPORATIONS

Milton Friedman has memorably expressed one common understanding of the nature and purposes of the modern business corporation. In general, according to Friedman, corporate executives have the responsibility “to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.”⁷⁵ Unpacking this approach into a more formal analytical framework, the American Law Institute’s *Principles of Corporate Governance* states that the “objective” of a corporation is “the conduct of business activities with a view to enhancing corporate profits and shareholder gain,” though legal and ethical considerations qualify this economic objective.⁷⁶ Specifically, there are at least three qualifications. First, even if economic objective is not “enhanced,” corporations are “obliged, to the same extent as a natural person, to act within the boundaries of the law.”⁷⁷ Second, corporations “[m]ay take into account ethical obligations that are reasonably regarded as appropriate to the responsible conduct of business.”⁷⁸ And third, corporations may “devote a reasonable amount of resources to public welfare, humanitarian, educational, and

75. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32.

76. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (1994). Although intended to be “consistent with case law,” § 2.01 has “sparked controversy” among commentators. Bradley et al., *supra* note 31, at 48. As my colleague, Alan Strudler, emphasized in discussions with me, the ALI’s restatement of the corporate objective as “enhancing corporate profits and shareholder gain” is not synonymous with Friedman’s injunction “to make the most money possible.” The latter seems to lead to an imperative of “shareholder value maximization,” while the softer verb “enhance” seems to allow for non-maximizing value strategies—including profit “satisficing”—and perhaps even the addition of multiple objectives, including what the ALI formally structures as exceptions to the economic objective, namely, socially responsible objectives of following the law and acting ethically. The ALI’s “enhancing corporate profits and shareholder gain” language is probably best interpreted as a compromise between contending views of the business corporation in society. If correct, this interpretation would provide further evidence that the “end of history” in corporate law has not been reached. Academic debates can and should continue about the proper place of corporate governance within the larger society.

77. AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01(b)(1).

78. *Id.* § 2.01(b)(2).

philanthropic purposes.”⁷⁹ Modern war raises concerns on all three levels related to the corporate objective: economic, legal, and ethical.⁸⁰

A. *War and the Economic Objective*

On the purely economic dimension, private corporations may seek to make profits and enhance shareholder value by engaging in the business of war, that is, manufacturing and selling weapons, munitions, and military services. Recent activities in this industry give a sense of the scale of the business. On October 27, 2001, the U.S. Defense Department awarded the largest military contract in U.S. history to Lockheed Martin Corporation in the amount of \$200 billion for the building of a new Joint Strike Fighter supersonic stealth jet.⁸¹ Recent acquisitions by U.S.-based Northrop Grumman Corporation give an indication of the increasing size of defense-related corporations. In 2001, this company acquired, among other purchases, Litton Industries for \$5.1 billion and Newport News Shipbuilding for \$2.6 billion.⁸² In February 2002, Northrop Grumman offered \$5.9 billion for TRW Corp. and subsequently announced a hostile takeover bid in approximately the same amount.⁸³ News of the September 11 attacks on the World Trade Center and the Pentagon sent military stocks upward.⁸⁴ Similar, though perhaps smaller, connections between business corporations and national military budgets apply to both companies and countries outside the United States.⁸⁵ Clearly, there is much money still to be made in

79. *Id.* § 2.01(b)(3).

80. Although my analysis in this part will draw primarily on U.S. examples, the general issues are relevant also for law and business corporations in other countries with appropriate amendments.

81. Edward Alden, *Lockheed Wins \$200bn US Fighter Project*, FIN. TIMES, Oct. 27/28, 2001, at 1; James Dao & Laura M. Holson, *Lockheed Wins \$200 Billion Deal for Fighter Jet*, N.Y. TIMES, Oct. 27, 2001, at A1. The loser was Boeing Corporation. See also Alexander Nicole, *Aerospace Companies Scramble in Their Biggest Dogfight Yet*, FIN. TIMES, Oct. 23, 2001, at 8.

82. *Military Intelligence: Northrop Grumman Sets Its Sights on TRW's High-tech Jewels*, ECONOMIST, Mar. 9, 2002, at 62.

83. Laura M. Holson, *Northrop Grumman Bids \$5.9 Billion for TRW*, N.Y. TIMES, Feb. 23, 2002, at B1; *Military Intelligence*, supra note 82. At this writing, the outcome of the Northrop Grumman and TRW contest had not yet been decided.

84. JAMES DAO, *Beneficiaries of Military Buildup Await Their Orders*, N.Y. TIMES, Sept. 22, 2001, at C1 (noting, for example, double-digit percentage gains in the stock prices of General Dynamics, Lockheed Martin, and Raytheon).

85. The United States leads the world by a large margin in military spending. In February 2002, President Bush proposed a fourteen percent increase in the defense budget. Dana Milbank & Bradley Graham, *Bush Calls Defense Top Budget Priority; Proposed 14 Percent Hike Is Largest Since Reagan Era*, WASH. POST, Feb. 5, 2002, at A7. This would yield an increase of forty-eight billion dollars, and this additional amount alone would be more than either the combined total military budgets of France and Britain or the combined budgets of the other twelve NATO members. Richard Norton-Taylor, *Top Gun—and the Rest: The Gap Between US Military Capability and that of the Rest of the World Is Now So Big that It Raises Serious Questions about the Transatlantic Alliance*,

war, and today business corporations act as the primary vehicles for the purpose.

Special issues of law and ethics arise in military contracting. Billion dollar contracts must create great temptations for corporate executives or other employees to fudge the rules on political lobbying and fair economic competition. The regulation of government procurement contracts has therefore been traditionally very detailed.⁸⁶ In the United States, a large Defense Contract Auditing Agency oversees defense procurement.⁸⁷ Companies themselves recognize the special nature of the legal and ethical problems they face, and the defense industry in the United States has organized a voluntary Defense Industry Initiative on Business Ethics and Conduct.⁸⁸

Another important issue involves the regulation of financial contributions to political campaigns.⁸⁹ Although it is not illegal for business corporations to contribute to the political process, the question arises whether a military contractor should, as a matter of policy, have significant influence in choosing political leaders. At least arguably, the economic objective should not allow corporations in the business of war to support candidates with particularly aggressive foreign policy agendas.

GUARDIAN, Feb. 13, 2002, at 19. Even before the post-September 11 increase, the total annual U.S. military budget exceeded the combined annual defense budgets of all other NATO countries as well as Russia and China! *Id.* Even so, military spending by other countries is not paltry. China, for example, recently announced that it also would increase its military spending by more than seventeen percent to about twenty billion dollars next year, though some experts consider this official figure to be low. Erik Ekholm, *China Is Increasing Its Budget For Military Spending by 17.6%*, N.Y. TIMES, Mar. 7, 2002, at A13. Much Chinese military spending will go to government-organized military companies. To give a few other examples, Germany's defense budget in 2002 of twenty-two billion dollars is approximately of the same order of magnitude as China's. Victor Homola, *Germany: Military Funds To Increase*, N.Y. TIMES, Sept. 26, 2001, at A6. Even Canada, which one would think relatively safe, spends more than eleven billion dollars on defense and expects to increase this amount. David Gamble, *Defence Budget Hike; Feds Expected to Give Forces \$1.2b Boost*, TORONTO SUN, Dec. 9, 2001, at 10.

86. For a good overview of the regulation of the federal government procurement contracting process, with criticism of Clinton administration reforms, see Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627 (2001).

87. See <http://www.dcaa.mil> (last visited Oct. 29, 2001).

88. See <http://www.dii.org> (last visited Dec. 14, 2001). The Defense Industry Initiative includes "a set of six principles drafted by the representatives from eighteen defense contractors that called for specific compliance procedures, policies, and programs, e.g., codes of ethics, ethics training, and internal reporting practices." William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1348 (1999).

89. For general treatments of the jurisprudence of regulation of corporate campaign contributions, which involves First Amendment restrictions, see Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail*, 32 WM. & MARY L. REV. 587 (1991); Thomas J. Woo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1 (2001).

Before going on to consider other legal and ethical constraints on the economic objective of business corporations, it is worth devoting some attention to one particularly troubling trend that raises the question of whether some business corporations should be banned from engaging in military profit-making. This trend relates to the recent increase in what have been called "private military companies" (PMCs).⁹⁰

In June 1997, the Pentagon held a conference on the "privatization of security" in sub-Saharan Africa.⁹¹ Members of a new growth industry of PMCs were on display, as well as the private security representatives of some large oil companies, such as Texaco and Exxon.⁹² For example, Military Professional Resources, Inc. (MPRI) claims "the greatest corporate assemblage of military expertise in the world," including seventeen retired U.S. generals and hundreds of former U.S. Special Forces personnel.⁹³ Vinnell Corporation is another example. It employs approximately one thousand former U.S. military personnel in training sixty-five thousand members of the Saudi National Guard, the personal security contingent protecting the Saudi Royal family.⁹⁴ Executive Outcomes (EO) was a South African company that supplied combat soldiers in sub-Saharan Africa until it closed for business in 1999.⁹⁵ EO's air capabilities included a fleet of helicopters and MIG fighter jets.⁹⁶

The existence and use of PMCs raises a central question with respect to the economic objective of corporate law. Unlike informal or ad hoc networks of mercenary armies in the past, PMCs today have developed a "distinct corporate nature," including "a desire for good public relations."⁹⁷ Should these new corporate "soldiers of fortune" be accepted as just another way of doing business? At least, the issue of the

90. Craig Forcese, *Deterring "Militarized Commerce": The Prospect of Liability for "Privatized" Human Rights Abuses*, 31 OTTAWA L. REV. 171, 174 (1999/2000). See also David Shearer, *Outsourcing War*, FOREIGN POL'Y, at 68 (Fall 1998) (describing the rise of private military companies).

91. Forcese, *supra* note 90, at 174.

92. *Id.* Not surprisingly, the private security business has been a growth industry in the post-September 11 world. See Al Baker, *Fear Feeds Bull Market in Private Security*, N.Y. TIMES, Oct. 29, 2001, at D1. A distinction should be drawn, however, between private security firms operating within the legal framework of a nation-state and military firms with transnational scope.

93. Howe, *supra* note 12, at 2. See also Matthew J. Gaul, Note & Comment, *Regulating the New Privateers: Private Military Service Contracting and the Modern Marque and Reprisal Clause*, 31 LOY. L.A. L. REV. 1489, 1493-96 (1998) (describing MPRI).

94. *Id.* Vinnell is a subsidiary of TRW Corporation based in Fairfax, Virginia. See <http://www.vinnell.com> (last visited Oct. 29, 2001). See also Gaul, *supra* note 93, at 1496-99 (1998) (describing Vinnell).

95. Bonile Ngqiyaza, *Mercenaries a Global Growth Industry: Former Apartheid Military Men Are in Great Demand*, BUS. DAY (South Africa), June 30, 2000, at 2 (available on Lexis/Nexis).

96. Howe, *supra* note 12, at 2.

97. *Id.*

intrinsic legitimacy of these kinds of businesses arises. A primary aspect of the claim to legitimacy by political states involves the assumed monopoly on military force that they exercise. Private military companies threaten to erode this monopoly of coercive force. The economic objective of maximizing shareholder value does not compare favorably with theories of political democracy as a legitimate basis for the use of military force. A good argument can be made, therefore, for an international agreement to ban PMCs, though the social forces of globalization may make such an agreement difficult to achieve. At the same time, it is accurate to observe that the rise of PMCs responds to “the pullback of western nations and the United Nations from peacekeeping and peace enforcing” missions, especially in poor or developing countries.⁹⁸ At least, the international community should seek to regulate the actions and behavior of PMCs, probably through an international treaty, in other words, through the development of morally informed legal constraints.⁹⁹ Already in the United States, for example, some regulation is provided under the Arms Export Control Act and the Export Administration Act.¹⁰⁰ The Arms Export Control Act provides conditions for the foreign sale of U.S. military equipment or services, and the Export Administration Act regulates the export and sale of so-called “dual-use” material that has both civilian and military applications.¹⁰¹ Other countries regulate PMCs more directly, such as under the Regulation of Foreign Military Assistance Act adopted in South Africa in 1998.¹⁰² But effective international regulation of private companies engaged in the actual provision of military services as “modern mercenaries” is lacking, if not entirely absent.¹⁰³

98. *Id.* at 5.

99. *Id.* at 7. See also Kevin O'Brien, *Leash the Dogs of War*, FIN. TIMES, Feb. 20, 2002, at 15 (arguing that private military companies require “effective regulation, at both the national and international levels”).

100. Howe, *supra* note 12, at 7.

101. *Id.* n.18; Jonathan T. Stoel, Note, *Codes of Conduct on Arms Transfers—The Movement Toward a Multilateral Approach*, 31 LAW & POL'Y INT'L BUS. 1285, 1292-93 (2000). For an overview of defense-related export control law, see also Berne C. Kluber, *Global Distributions: The Effect of Export Controls*, 23 HOUS. J. INT'L L. 429 (2001); Jere W. Morehead and David A. Dismuke, *Export Control Policies and National Security: Protecting U.S. Interests in the New Millennium*, 34 TEX. INT'L L.J. 173 (1999).

102. O'Brien, *supra* note 99. The South African law “regulates both the existence of the companies (by forcing them to be licensed even to operate) and their operations (by making them seek licensed approval for each contract undertaken).” *Id.* There is also some international effort to regulate mercenary activities, such as the International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries of 1989—which entered into force in 2001—but the vague definitions of mercenary activities render these restrictions “virtually unenforceable.” *Id.*

103. *Id.* The problem of regulating “privateers” is not, of course, new. See Gaul, *supra* note 93, at 1490, 1501-04 (1998) (describing “private military service contractors” as “modern day privateers” and giving historical background dating to the American Revolution). But the flexibility and global transportability of the corporate form add complexity to the problem.

B. *Legal Constraints on the Business of War*

Contrary to what one might assume from a strict shareholders-only view of the business corporation, the accepted general rule in the United States is that a corporation has an obligation to follow the law, in the words of the American Law Institute, "to the same extent as a natural person."¹⁰⁴ The Reporters' comments on this requirement make clear that "cost-benefit analysis," though it may have an appropriate role in government determinations about the adoption of legal rules, should not apply to a corporation's own decisions whether to comply with the law.¹⁰⁵

Because "the resulting legal rule normally represents a community decision that the conduct is wrongful as such," then "cost-benefit analysis whether to obey the rule is out of place."¹⁰⁶

This requirement to follow the law even if it is not economically convenient to do so is mandatory, in contrast to the permissively formulated ethical and philanthropic qualifications.¹⁰⁷ The *Principles of Corporate Governance* recognize, however, that the requirement to follow the law finds its own justification in the "moral norm of obedience to law."¹⁰⁸ The legitimacy of this norm derives in turn from the legitimacy of democratic governments that enact the law.¹⁰⁹ As Melvin Eisenberg, a Reporter for the American Law Institute's *Principles*, explains: "Ours is a society of law. We don't want a society in which [the] major players—that is, corporations—are lawless."¹¹⁰

Several complications with what Eisenberg calls this "legal-conduct principle" arise in practice.¹¹¹ First, in a globalized world, corporations will often find themselves subject to inconsistent regulations.¹¹² One may say, as Lockheed Martin does in its Code of Ethics and Business Conduct, that a corporation will "obey all the laws of the countries in

104. AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01(b)(1).

105. *Id.* § 2.01(b)(1) cmt. g.

106. *Id.*

107. A commentator on early drafts of § 2.01 made the point that it "consists of a mixture of mandates and aspirations." Donald E. Schwartz, *Defining the Corporate Objective: Section 2.01 of the ALI's Principles*, 52 GEO. WASH. L. REV. 511, 512 (1984). The obligation to follow the law is expressed as a "mandate," while the ethical and philanthropic provisions are "permissive." *Id.*

108. AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01(b)(1) cmt. g.

109. The legitimacy of law is a large and complex jurisprudential topic. For one of my attempts to grapple with the issue, see Eric W. Orts, *Systemic Legitimacy and Positive Law: A Comment on Hart and Habermas*, 6 RATIO JURIS 245 (1993). At least arguably, law may claim some degree of legitimacy even in undemocratic nation-states. For a normative argument along these lines in the case of contemporary China, see Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43 (2001).

110. Melvin Aron Eisenberg, *Corporate Conduct that Does Not Maximize Shareholder Gain*, 28 STETSON L. REV. 1, 3 (1998).

111. *Id.* at 3.

112. *Id.* at 3-4.

which we do business.”¹¹³ This promise, however, does not account for hard choices that need to be made when laws of different countries conflict. In the case of a major government contractor like Lockheed Martin, one assumes that loyalty to its “home country” of the United States outweighs conflicting laws of other countries, but this choice requires a moral judgment.¹¹⁴ It is not merely a technical question of conflicts of laws.

Second, even with respect to following one set of national laws, complex regulations may mean that it is practically impossible to comply with all regulations all of the time.¹¹⁵ One example comes from environmental law, in which corporate compliance officers find keeping abreast of changing regulations difficult and full compliance with them impossible.¹¹⁶ The same difficulty may arise in the complex legal environment of military contracting. To take Lockheed Martin again as an example, the corporation recognizes that “laws and regulations related to government contracting are far-reaching and complex, thus placing responsibilities on Lockheed Martin beyond those faced by companies without government customers,” but the company nevertheless promises to “conduct our business in accordance with all applicable laws and regulations.”¹¹⁷ Complying with potentially conflicting regulations in different countries also complicates these problems. In Lockheed’s recently awarded contract for the Joint Strike Fighter, the company will have to comply with both U.S. and U.K. laws.¹¹⁸

Third, the question of obeying the law “to the same extent as a natural person” raises the question of the scope of the comparative standard.¹¹⁹ If most “natural persons” disobey the law—speed limits on highways, for example—then may corporate decision makers follow the same strategy?¹²⁰ Many examples in this category are trivial, but

113. <http://www.lockheedmartin.com/exeth/html/code/print.html> (last visited Oct. 29, 2001).

114. At the time of this writing, Lockheed Martin’s homepage included a link to a series of patriotic video tributes as well as the announcement of a new Lockheed Martin American Spirit Fund to provide charitable contributions for relief to New York, Washington, and other regions affected by the September 11 attacks. See <http://www.lockheedmartin.com> (last visited Oct. 29, 2001). The site leaves no doubt about the company’s national loyalty.

115. See generally Eisenberg, *supra* note 110, at 3-6 (discussing corporations’ differing goals and obligations).

116. Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1240-41 & n.55 (1995) (surveys show most participants do not believe that full compliance with all environmental laws was even possible).

117. <http://www.lockheedmartin.com/exeth/html/code/print.html> (last visited Oct. 29, 2001).

118. See *supra* note 81 and accompanying text.

119. AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01(b)(1), cmt. g.

120. For a hypothetical along these lines involving setting corporate policy to comply—or violate—different state limits for the weight of trucks traveling on highways, see WILLIAM A. KLEIN, ET AL., *BUSINESS ASSOCIATIONS* 349-50 (4th ed. 2000).

“natural persons” certainly often take risks in not following the law, accepting the risks that if they get caught, they will pay the fine or penalty.¹²¹ Arguably at least, business corporations should enjoy a similar freedom of action.¹²²

Lastly, the moral obligation to obey the law does not always trump other more basic moral obligations.¹²³ The topic of potential conflicts between the obligations of law and morality is a very large one.¹²⁴ Suffice it to say here that a corporation engaged in the business of war may sometimes face serious moral considerations that require abstention from following a law or even affirmative civil disobedience of an unjust law or a tyrannical government.¹²⁵ To take one example, corporations doing business within Nazi Germany cannot claim simply to have been “following the law” to justify war profits.¹²⁶ Similarly,

121. AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01(b)(1), cmt. g. See generally KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 47-53 (1987) (discussing reasons people obey the law).

122. On the other hand, one can argue that corporate policies to disobey the law—even for a presumably trivial reason like speeding or parking tickets—should be treated more severely because of the organizational and deliberate nature of a decision about policy, rather than seat-of-the-pants decisions by natural persons to comply or not to comply with traffic laws. Encouraging one’s employees to break traffic laws, in other words, is worse than breaking them yourself or dealing with the consequences of your employees having decided to break the law on their own.

123. AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01 cmt. h; GREENAWALT, *supra* note 121, at 47-270.

124. For useful overviews of the basic issues, see GREENAWALT, *supra* note 121, at 47-61; *THE DUTY TO OBEY THE LAW: SELECTED PHILOSOPHICAL READINGS* (William A. Edmundson ed., 1999).

125. GREENAWALT, *supra* note 121, at 47-61. See generally AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01 cmt. g. (discussing reasons for not following a law).

126. Claims against firm that employed slave labor during the Nazi regime include not only prominent German corporations such as Bayer, BMW, Krupp, Siemens, and Volkswagen, but also American firms with German subsidiaries such as Ford, General Motors, Exxon-Mobil, and Kodak. See Kara C. Ryf, Note, *Burger-Fischer v. Degussa AG: U.S. Courts Allow Siemens and Degussa to Profit from Holocaust Slave Labor*, 33 CASE W. RES. J. INT’L L. 155, 156-58 (2001). See also John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 469 (2000) (noting that Bayer has admitted to using slave labor during the Nazi period, while BMW, Volkswagen, and Siemens have been accused of similar behavior); Stuart M. Kreindler, Comment, *History’s Accounting: Liability Issues Surrounding German Companies for the Use of Slave Labor by Their Corporate Forefathers*, 18 DICK. J. INT’L L. 343-44 (2000) (discussing the circumstances of various lawsuits filed against German companies in the United States); Kevin M. McDonald, *Corporate Civil Liability Under the U.S. Alien Tort Claims Act for Violations of Customary International Law During the Third Reich*, 1997 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 167. In one recent case, a court sustained a cause of action brought for Nazi-era crimes against a German subsidiary of Ford. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D. N.J. 1999).

In the Nuremberg Trials, a showing of “necessity” under compulsion or duress was allowed as a defense for some individual defendant businesses who employed slave labor to further the economic interests of the Nazi regime. But this defense was not permitted to defendants who had “embraced the opportunity” or expressed an “ardent desire” to employ slave labor. *Doe v. Unocal*, 110 F. Supp. 2d 1294, 1309-10 (C.D. Cal. 2000) (discussing three Nuremberg cases).

corporations today must make judgments about the morality of doing business with various nation-states and other actors for different purposes.¹²⁷ Following the law is not a sufficient reason to act immorally, and this principle applies even more strongly to fundamental problems of war and peace than other circumstances in which the stakes for human beings and their fundamental rights may be smaller.¹²⁸

Moral obligations to avoid complicity in unjust wars may also lead to changing legal standards for liability.¹²⁹ Thus, for example, the extension of liability under the Alien Tort Claims Act¹³⁰ and Torture Victim Prevention Act¹³¹ may reflect a general movement toward increasing international enforcement of basic human rights.¹³² Cases have begun to recognize causes of action for the breach of internationally recognized human rights—*jus cogens*—in the United States and elsewhere.¹³³ For example, the leading case of *Filartiga v. Pena-Irala*¹³⁴ held “deliberate torture perpetrated under color of official authority” to be actionable under the Alien Tort Claims Act as a violation of “universally accepted norms of international law of human rights.”¹³⁵ More recently, in *Kadic v. Karadzic*,¹³⁶ the U.S. Court of Appeals for the Second Circuit upheld a claim against a private citizen under the Alien Tort Claims Act for a violation of international legal prohibitions against war crimes and genocide.¹³⁷ Radovan Karadzic, a Bosnian-Serb, had been served process when he visited the United Nations in New York.¹³⁸ He was accused of genocide, war crimes, and other human rights

127. One interesting development has been the increasing tendency of political subdivisions of the nation-states—such as the “states” of the United States—to assert political restrictions on business operations. For examples and an overview of the constitutional issues involved, see Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1129-50 (2000).

128. See GREENAWALT, *supra* note 121, at 47-53 (discussing reasons people disobey the law).

129. See DRINAN, *supra* note 13, at 100-03 (discussing potential liability for failure to respect human rights).

130. 28 U.S.C. § 1350 (1982).

131. *Id.*

132. DRINAN, *supra* note 13, at 95-103; Anderson, *supra* note 126, at 491-96. See also Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 BYU L. REV. 1139 (arguing for use of class actions to enforce human rights violations by corporations abroad).

133. For a discussion of the general problem, see Christopher A. Ford, *Adjudicating Jus Cogens*, 13 WIS. INT'L L.J. 145 (1994). *But see* Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT'L L. 421 (2000) (arguing that a “second wave” of post-*Filartiga* private human rights actions based on customary international law have largely failed with respect to U.S. defendants). For a critique of the development of universal legal principles such as *jus cogens*, see Alfred P. Rubin, *Actio Popularis, Jus Cogens, and Offenses Erga Omnes?*, 35 NEW ENG. L. REV. 265 (2001).

134. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

135. *Id.* at 878.

136. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

137. *Id.* at 236.

138. *Id.* at 237.

violations committed against Croatian and Muslim citizens of Bosnia-Herzegovina.¹³⁹ The court upheld the action against a motion to dismiss under the principles of *Filartiga*, finding with respect to the “state action” requirement that the plaintiffs had adequately alleged Karadzic to be acting either on behalf of an embryonic “state” or “in concert” with Serbia—the former Yugoslavia.¹⁴⁰ The court also noted in dicta that the U.S. Supreme Court had previously upheld claims against private individuals under the Alien Tort Claims Act.¹⁴¹ Pirates, slave traders, or other types of “*hostis humani generis*”—enemies of all humankind—have been held accountable for violations of international legal norms.¹⁴²

*Doe v. Unocal Corporation*¹⁴³ provides an example of how extraterritorial liability for violations of international law may apply to business corporations. In *Unocal*, the company and its officials were sued under the Alien Tort Claims Act for violations of human rights in a joint venture with a French oil company, Total N.A., in Myanmar (Burma).¹⁴⁴ The court granted summary judgment to the defendants on the ground that the official “state action” requirement of the Alien Tort Claims Act had not been met.¹⁴⁵ The facts of the case, however, suggest a close call. The U.S. State Department had warned Unocal of the use of forced labor—otherwise known as slavery—by Myanmar. And the Myanmar army which agreed to undertake a “security” role in the gas pipeline project had a history of violations of human rights.¹⁴⁶ One of Unocal’s own consultants had even written a letter warning that “egregious human rights violations have occurred, and are occurring

139. *Id.* at 236. The allegations included “various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign.” *Id.* at 237. Karadzic was alleged to have “ultimate command authority” over these military forces. *Id.*

140. *Id.* at 244-45.

141. *Id.* at 239 (citing early cases against piracy).

142. *Kadic v. Karadzic*, 70 F.3d 132 (2d Cir. 1995) (quoting *In re The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 213 (1844)). See also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794-95 (D.C. Cir. 1984) (Edwards, J., concurring) (arguing that individual liability was available under the Alien Tort Claims Act for some acts including piracy and slave trading). Pirates and their ilk, of course, are as old as human civilization. See, e.g., THUCYDIDES, *THE PELOPONNESIAN WAR* bk. I 37 (Rex Warner trans., ed., 1972) (recounting that Minos was “the first person to organize a navy” to combat “piracy,” which had become “a common profession” in ancient Greece).

143. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

144. *Id.* at 1295. In a separated proceeding, Total was dismissed from the action on grounds of lack of personal jurisdiction. *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001).

145. *Unocal*, 110 F. Supp. 2d at 1304-10. In its legal analysis, the court drew on questionable comparisons to the “state action” requirements in federal civil rights cases. *Id.* at 1305-07. The court does not explain why “state action” in the context of international violations of human rights should be compared with “state action” requirements in the enforcement of national civil rights. The “states” in question are quite different.

146. *Id.* at 1296-98, 1302. Unocal’s CEO admitted understanding that the Myanmar army would “provide general security” for the project, but denied any knowledge of “any contract” to this effect. *Id.* at 1301.

now, in southern Burma” including “forced relocation” and “forced labor.”¹⁴⁷ According to the consultant, “Unocal, by seeming to have accepted [the Myanmar army’s] version of events, appears at best naive and at worst a willing partner in the situation.”¹⁴⁸ Human Rights Watch, Amnesty International, and Greenpeace confronted Unocal executives about its complicity in the project and were ignored.¹⁴⁹ In the end, the district court granted summary judgment under a strict reading of the “state action” requirement of the Alien Tort Claims Act and concluded that the plaintiffs had presented “no evidence that Unocal ‘participated in or influenced’ the military’s unlawful conduct.”¹⁵⁰ No evidence revealed an explicit contract, agreement, or conspiracy between Unocal and the Myanmar government to violate human rights through forced labor and relocation.¹⁵¹ In reaching its result, the court discussed the Nazi-era Nuremberg cases against German industrialists to apply the relevant international legal principles.¹⁵²

At least, it appears from the facts found in the case that the Unocal executives stepped over the moral, if not the legal, edge of acceptable behavior by knowingly benefitting from human rights violations in the pursuit of its economic objectives.¹⁵³ Although *Doe v. Unocal Corporation* may be narrowly interpreted as a corporate victory against human rights claims, few business corporations would wish to have to rely on Nazi-era precedents and good lawyering to win summary judgment in similar circumstances.¹⁵⁴ If the case reached a jury, the outcome would most likely be unpleasant for shareholders as well as corporate executives. The holding of *Doe v. Unocal Corporation* is also arguably in tension with the Second Circuit’s recognition of the potential liability of private citizens without a state action requirement in *Kadic v. Karadzic*.¹⁵⁵

147. *Id.* at 1299-1300.

148. *Id.* Unocal’s counsel even argued that the forced “government services in lieu of payment of taxes” could be justified under a post-Civil War precedent that upheld a state’s requirement “to work on roads and bridges for ten hours a day for six days per year or pay \$3 [in tax].” *Id.* at 1308 (citing *Butler v. Perry*, 240 U.S. 328 (1916)). The court rightly rejected this argument as “hardly analogous.” *Id.*

149. *Id.* at 1300-04.

150. *Id.* at 1306.

151. *Id.* at 1306-10.

152. *Id.* at 1309-10. Three cases at Nuremberg involved prosecutions of German industrialists for war crimes. Defendants convicted were two executives in the German steel industry, five executives of the I.G. Farben chemicals company, and twelve member of the Krupp corporation. *Id.* at 1309-10 (citing Nuremberg cases).

153. *Id.* at 1304-10.

154. *Id.* at 1309-10.

155. *Supra* note 142 and accompanying text (noting private liability of *hostis humani generis* for human rights violations under international law). For further discussion of the *Unocal* case and its implications, see Craig Forcese, Note, *ATCA’s Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INT’L L. 487, 510-15 (2001); Greenfield, *supra* note 23, at 1285-87; Pia Zara Thadhani, Note, *Regulating Corporate Human Rights Abuses: Is Unocal The Answer?*, 42

Another recent case confirms that the concerns raised in *Doe v. Unocal Corporation* are not an aberration. In *Wiwa v. Royal Dutch Petroleum Company*,¹⁵⁶ the district court upheld an action alleging violations of international human rights involving activities of Royal Dutch/Shell in Nigeria against a motion to dismiss.¹⁵⁷ The plaintiffs claimed that Shell Nigeria had recruited Nigerian police and military personnel to repress political opposition to its development plans in the Ogoni region of Nigeria.¹⁵⁸ Substantive allegations included beatings, rapes, torture, and murder, including the well-known hanging of the human rights activist, Ken Saro-Wiwa.¹⁵⁹ As in *Unocal*, the plaintiffs in *Wiwa* brought their claims under the Alien Tort Claims Act and the Torture Victim Prevention Act.¹⁶⁰ The court went beyond *Unocal*, however, in stating firmly that “torture, summary execution, and arbitrary detention constitute ‘fully recognized violations of international law’” that support claims under Alien Tort Claims Act because they are inconsistent with the basic principles of “equal and inalienable rights of all members of the human family” recognized by the Universal Declaration of Human Rights.¹⁶¹ Moreover, the court recognized “cruel, inhuman, or degrading treatment” as well as “crimes against humanity” as violations of accepted international norms.¹⁶² Violations of international rights to “personal security” and “peaceful assembly and expression” also supported a cause of action.¹⁶³ With respect to the state action requirement emphasized in *Unocal*’s defense, the *Wiwa* court followed *Kadic* in holding that private actors could be liable without finding state action in two categories of international law violations: genocide and war crimes.¹⁶⁴ Allegations of “a substantial degree of cooperation between corporate defendants and the Nigerian government” were enough to support the state action requirement for other categories of international law violations.¹⁶⁵

WM. & MARY L. REV. 619, 632-43 (2000); Leslie Wells, *A Wolf in Sheep’s Clothing: Why Unocal Should be Liable Under U.S. Law for Human Rights Abuses in Burma*, 32 COLUM. J.L. & SOC. PROBS. 35, 65-71 (1998). For further general discussion and recommendations, see also David I. Becker, Note, *A Call for the Codification of the Unocal Doctrine*, 32 CORNELL INT’L L.J. 183, 200-07 (1998); Gregory G.A. Tzeutschler, Note, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359, 377-87 (1999).

156. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 28, 2002).

157. *Id.* at *2-3.

158. *Id.* at *1-5.

159. *Id.* at *5-7.

160. *Id.* at *8-15.

161. *Id.* at *17 (quoting *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) and the Universal Declaration of Human Rights, preamble and arts. 9-11).

162. *Wiwa*, *supra* note 156, at *21-32.

163. *Id.* at *33-36.

164. *Id.* at *37-38 (citing *Kadic*).

165. *Id.* at *40-41.

If any doubt remained after *Unocal*, *Wiwa* serves a clear warning to business corporations that they risk substantial liability if they participate in international violations of basic human rights in cooperation or coordination with a foreign government. *Wiwa* appears to expand the range of prohibited behavior to include a range of basic human rights. Business corporations in the future would therefore be well-advised legally as well as ethically to steer clear of business relationships with governments or military forces that operate outside the pale of international recognition and acceptability.

C. Ethical Constraints on the War Business

Even if *Unocal's* dealings with the Myanmar army did not rise to the level of a violation of international human rights as a legal matter, and even if Royal Dutch/Shell and its officers eventually prevail or settle in *Wiwa*, these cases illustrate that basic moral understandings should constrain corporate conduct.¹⁶⁶ It is difficult to see how *Unocal* can morally justify its actions in Myanmar given repeated warnings from government officials and nongovernmental organizations of persistent practices of slave labor, forced relocations, and other human rights violations.¹⁶⁷ *Unocal's* complicity may not reach the moral baseness of actively cooperating with Nazis, but the company's actions come close.¹⁶⁸ Although the facts have not yet been determined at trial or by a court in *Wiwa*, similarly shocking behavior and complicity seem to have characterized at least some of Royal Dutch/Shell's actions in Nigeria.¹⁶⁹ Moral shame and blame should therefore accrue.¹⁷⁰

If the pipeline in Myanmar were not enough, the *Unocal* Corporation also provides another lesson in how to choose the wrong business partner when it negotiated an arrangement with the Taliban in

166. A similar analysis may apply to the French company, Total, in *Unocal* as well, even though the company escaped legal liability. See *supra* note 144.

167. *Unocal*, 110 F. Supp. 2d at 1300-04.

168. See generally *id.* at 1309-10 (discussing Nazi cases).

169. For detailed accounts of the Nigerian activities of Royal Dutch/Shell and conclusions about them, see Ann Elizabeth Mayer, *Law and Ethics in Emerging Markets: Introduction*, 18 U. PA. J. INT'L ECON. L. 1153, 1161-63 (1997); William E. Newbury & Thomas Gladwin, *Case Study: Shell and Nigerian Oil*, in ETHICAL ISSUES IN BUSINESS: A PHILOSOPHICAL APPROACH 539-64 (Thomas Donaldson & Patricia H. Werhane eds., 6th ed. 1999); Ariadne K. Sacharoff, Note, *Multinationals in Host Countries: Can They Be Held Liable under the Alien Tort Claims Act for Human Rights Violations?*, 23 BROOK. J. INT'L L. 927, 958-63 (1998). For a general eye witness account of human rights problems in Nigeria, see also Okechukwu Oko, *Lawyers in Chains: Restrictions on Human Rights Advocacy under Nigeria's Military Regimes*, 10 HARV. HUM. RTS. J. 257 (1997); Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 VAND. J. TRANSNAT'L L. 573 (2000).

170. Cf. DRINAN, *supra* note 13; David A. Skeel, *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1858-66 (2001) (discussing the importance of shaming in corporate governance, but with different ends in view).

Afghanistan to help protect construction of a planned oil pipeline across the country in the 1990s.¹⁷¹ Fortunately for the company, this deal was abandoned by 1999, perhaps in part as a result of political pressure from feminist groups, but more likely as a consequence of the rising infamy of Osama bin Laden.¹⁷² Few, if any, corporations can maintain that it is ethical to make deals with terrorists.¹⁷³ Like pirates or Nazis, international terrorists belong to the category of *hostis humani generis*.¹⁷⁴ If doing business with terrorists is not a violation of international law, it arguably should be.

In addition to following the law, both Milton Friedman and the *Principles of Corporate Governance* recognize ethical constraints on business beyond formal legal requirements.¹⁷⁵ Ethical business practices do not begin and end with the law.¹⁷⁶ Again, as Melvin Eisenberg writes, section 2.01's discussions of "ethical considerations" express a common sense understanding about corporate governance: "We don't want a society in which people are encouraged to become amoral when they become corporate executives. We don't want a society in which managers check their ethics at the door."¹⁷⁷

Another example from an illustration in the *Principles of Corporate Governance*, adapted further by Eisenberg in a recent article, should be sufficient to prove the general point that compulsory moral obligations should sometimes constrain a corporate action even when it is not technically illegal:

Corporation D is a large publicly held corporation engaged in the manufacture of powerful computers, with annual earnings of \$60-70 million. D has been negotiating with a North African country for the sale of three computers. Negotiations were essentially complete, and a contract ready to sign, when the State Department announced that within the next few days the President would adopt an executive order prohibiting the shipment of certain high-technology products to that country, because its conduct was highly inimical to the United States and threatened the stability of the entire area. In other words, the State Department was going to add the country to a list of states that sponsored

171. AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL, AND FUNDAMENTALISM IN CENTRAL ASIA 170-75 (2000).

172. *Id.* But cf. Milton Bearden, *Afghanistan, Graveyard of Empires*, FOREIGN AFF. (Nov.-Dec. 2001), at 17, 26 (recognizing that U.S. firms had abandoned hopes of building an Afghanistan pipeline with Taliban support by 1997).

173. See MICHAEL WALZER, JUST AND UNJUST WARS 197-98 (discussing the methods and tactics of terrorism).

174. See *supra* note 142 and accompanying text. For the controversial argument that IBM knowingly stepped over the moral line in its business dealings with Nazi Germany, see EDWIN BLACK, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (2001).

175. Again, Friedman and the ALI do not use similar terms. See *supra* notes 75, 76 and accompanying text. Friedman's reference to "ethical custom" is much more general than the ALI's discussion of various ethical qualifications.

176. See generally AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01, cmt. g (discussing reasons for not following the law).

177. Eisenberg, *supra* note 110, at 5.

international terrorism. The State Department announced, however, that the formal legal prohibition would not be applied to contracts made before the order became effective, but urged voluntary compliance as of the date of the announcement. It was clear that when the executive order became effective it would apply to D's computers. D estimates that the sale would generate earnings of \$6 million, and that short- and long-term costs entailed by completing the sale would not be significant. D nevertheless decides not to sign the contract, because its officials believe that sale of the computers would contravene a strong and clearly announced national policy. D's action is not only proper but ethically compelled.¹⁷⁸

I have changed the facts in this illustration slightly, adding the ethical "hot button" of a State Department listing of the North African country as a state sponsor of international terrorism, and I have stated the ethical result more strongly than does the ALI or Eisenberg. But the basic moral lesson is the same. Although the American Law Institute's commentary suggests that D might be allowed to sign such a contract under the principle of following its economic objective,¹⁷⁹ it does not require much argument to convince most managers that entering such a contract would be morally prohibited.

This example also provides an illustration of how section 2.01 of the ALI's *Principles of Corporate Governance* does not exhaust the analysis required of corporate managers, especially high-level executives. Section 2.01 recognizes "ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business[,]"¹⁸⁰ which echoes Milton Friedman's allowance for "ethical custom."¹⁸¹ Notice, however, the circularity in both of these formulations. Someone must make the ethical decisions that eventually become "reasonably regarded" by the business community as "ethical customs."¹⁸² The example of Corporation D's computer sales to a country that knowingly "harbors terrorists," as well as many other real-world cases such as Unocal's investment in Myanmar or Afghanistan, indicate that much moral ground remains to be tilled to determine the appropriate ethical conduct required in transnational business.¹⁸³ Answers to tough moral business problems cannot rely solely on the experience of previous generations or entrenched customs. Previous moral answers themselves have sources in basic principles and reasoning, and new moral situations require fresh reasoning, if not new principles, to resolve. "Following the crowd" is not an acceptable ethical strategy.

178. Adapted from Eisenberg, *supra* note 110, at 7-8, adapted in turn from AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01, illus. 21, at 69.

179. AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01, illus. 22, at 69.

180. *Id.* § 2.01(b)(2).

181. *Supra* note 75 and accompanying text.

182. See AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01(b)(2); see Friedman, *supra* note 75.

183. See *supra* text accompanying notes 171-72; Doe v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

D. *Permissive Business Ethics and War*

The third and last exception to the economic objective provided in section 2.01 permits corporations to “devote a reasonable amount of resources [that is, donate] to public welfare, humanitarian, educational, and philanthropic purposes.”¹⁸⁴ This exception is recognized in so-called charitable contribution statutes in almost all states.¹⁸⁵ Commentators have added the limitation of “reasonableness,” presumably to curtail corporations from acting too lovingly, especially when the love for some is expressed by giving away other people’s money.¹⁸⁶

Again, Eisenberg gives a good example of the permissive ethical exception relevant to present circumstances: “[S]uppose America is at war. C Corporation devotes corporate resources for the purpose of furthering the war effort, rather than for maximizing the profits on the commodities it produces and then sells—for example, by holding down prices to prevent inflation.”¹⁸⁷ Eisenberg argues that corporate behavior supporting the war effort may have a rational economic justification if “it is in the economic interest of all American corporations that America should win the war.”¹⁸⁸ Then, business corporations would face a collective action problem, or prisoner’s dilemma, but if they coordinated their actions and “all devoted resources to the war effort, they would all be better off.”¹⁸⁹

This argument is correct, as far as it goes. Notice, however, that some complications arise on closer examination of Eisenberg’s example. The economic interests of different corporations may quickly diverge in a war economy. Different corporations may thus have different economic interests in going along with a collective effort to support a war. In part because economic interests will diverge in terms of wartime profit-making opportunities, collective action problems arise for the political effectiveness of moral exhortations to sacrifice profits for war.¹⁹⁰

More importantly, Eisenberg’s example of C Corporation provides an illustration of the permissive ethical principle.¹⁹¹ For a just war, a business corporation may provide a “reasonable” amount of support.¹⁹² Lockheed Martin, for example, again provides a contemporary example in having set up an “American Spirit Fund” initially supported with a corporate donation of one million dollars in the wake of the September

184. AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01(b)(3).

185. *Id.* § 2.01 Reporter’s Note, at 72.

186. *Id.*; *see also* Prunty, *supra* note 2.

187. Eisenberg, *supra* note 110, at 12.

188. *Id.*

189. *Id.*

190. For further discussion of these limitations, see WALTZ, *supra* note 8, at 193-96 & n.11.

191. *See* Eisenberg, *supra* note 110, at 12.

192. *See* AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01(b)(3).

11 attack.¹⁹³ Such permissive ethical behavior is within the standard ethical understanding of the nature and purposes of the corporation. Indeed, many state statutes explicitly authorize corporations to depart from the economic objective for the purposes of contributing resources to the public welfare “in time of war or other national emergency.”¹⁹⁴

The clear moral issues presented by the prospect of participating in war helps to clarify the moral issues faced by business corporations in section 2.01. Following the incisive analysis of Donald Schwartz, one should distinguish between (a) ethical constraints that are arguably imposed by section 2.01’s admonition that corporate managers “may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business” and (b) permissive ethical behavior that allows for a corporation affirmatively to contribute “a reasonable amount of resources” to charities, education, public welfare, or other philanthropic or humanitarian causes.¹⁹⁵ Although both ethical constraints and ethical permissions are exceptions to the profit-making economic objective, the distinction between them makes sense in terms of the gravity of different kinds of moral decisions.

In many situations, moral philosophers argue that it is worse to commit a serious wrong than to avoid doing a good act.¹⁹⁶ To put the idea in philosophical terms: other things being equal, directly causing harm is very often worse than allowing harm to occur.¹⁹⁷ A common example discussed in philosophy is the difference between “killing and letting die.”¹⁹⁸ Both are bad, but intentional killing is usually thought to be worse than various inactions that could have saved lives.¹⁹⁹ Murder, for example, is morally worse than failing to give a donation that may save the lives of starving people in Afghanistan.²⁰⁰ In the context of war and corporate governance, then, it seems worse to contribute weapons of war to a tyrannical regime that result in the unjustified deaths of many

193. See Lockheed Martin, *supra* note 114.

194. See DEL. CODE ANN. tit. 8, § 122(9) (2001) (corporations “shall have the power to . . . make donation for the public welfare . . . and in time of war or other national emergency in aid thereof. . . .”); N.Y. BUS. CORP. LAW § 202(a)(12) (McKinney 2001) (corporations have the power “to make donations, irrespective of corporate benefit, for the public welfare . . . and in time or war or other national emergency in aid thereof. . . .”). In addition, corporate constituency statutes in Florida, Ohio, and other states include “[t]he economy of the state and nation” as among the various interests that corporate directors and managers may consider in making business decisions. *E.g.*, OHIO REV. CODE ANN. § 1701.59(E)(2) (2001).

195. See *supra* note 107 and accompanying text.

196. See Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, GEO. L.J. 605, 659 (2001).

197. See, *e.g.*, WARREN QUINN, MORALITY AND ACTION 149-74 (1993).

198. For a recent collection of essays on the topic, see KILLING AND LETTING DIE (Bonnie Steinbock & Alastair Norcross eds., 2d ed. 1994).

199. The distinction between killing and letting die is often considered a specific instance of a more general distinction between doing and allowing. Alastair Norcross, *Introduction to the Second Edition*, in KILLING AND LETTING DIE, *supra* note 198, at 9.

200. See *id.*

people than to fail to make charitable contributions to a good cause in society—including the cause of a just war or good government.²⁰¹ The philosophical complications in this area are considerable and require references to specific situations to work out correctly, but here it is enough to show that section 2.01's division between what might be thought of as ethical duties and ethical permissions may well make substantive philosophical sense.²⁰² The world is morally complicated—as well as complicated in many other ways. Therefore, it makes sense to identify clear moral constraints as opposed to moral permissions. The former, of course, should be taken much more seriously when a person—or corporation—faces a choice of action.²⁰³

Still, one worries about the fact that section 2.01 refers to moral constraints themselves only as “permissive.”²⁰⁴ One might interpret this provision to allow for quite evil corporate acts as long as they are legal.²⁰⁵ Only a cursory reflection on the problems of war crimes, genocide, and other major human rights violations discussed above should be sufficient to dispel this notion. Section 2.01 probably should recognize that at least some moral requirements are imperative, not merely “permissive” or “voluntary.”²⁰⁶ The ALI's *Principles of Corporate Governance* err on the side of caution by avoiding a straightforward statement that corporations must adhere to ethical as well as legal constraints.²⁰⁷ This strategy of avoidance, however, is dangerous given

201. See *id.*

202. See *id.*; see also AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01(b).

203. The distinction between moral constraints and permissions does not correspond with a further subset of ethically “superogatory” behavior. This term is used to refer to unusually good or heroic behavior of a kind that most people cannot be expected to perform. Very brave acts for good ends in the face of grave risks of death, for example, are praised but not expected as a rule. See, e.g., Lewis A. Kornhauser, *A World Apart? An Essay on the Autonomy of the Law*, 78 B.U. L. REV. 747, 751 n.6 (1998) (describing “the familiar ethical distinction between required behavior and superogatory behavior that merits special praise as beyond the call of duty.”) In the terms employed here, a corporation could act in a “superogatory” fashion in promoting, for example, a peaceful world above and beyond the expectations of the public. But this would be an exceptional kind of permissive ethical behavior; other permissive ethical behavior may be expected—such as some form or amount of corporate charitable contribution toward peace or a just war—that is not superogatory.

204. The ALI's official comment goes so far as to state explicitly that “Section 2.01(b)(2) does not impose a legal obligation to take ethical considerations into account.” AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01 cmt. h, at 64. It goes on to say that “the absence of a legal obligation . . . does not mean that corporate decisionmakers are not subject to the same ethical obligations of other members of society.” *Id.* But this double-negative construction does not make the statement in favor of corporate ethical obligations very strong. Moreover, in some cases, particularly when the support of wars may be involved, corporations may, in fact, have greater responsibilities than ordinary citizens in making ethical decisions whether or not to support military activities, given the likelihood of their decisions having a larger social impact.

205. See *id.*

206. See *id.*

207. See *id.*

that some business corporations inevitably face great ethical responsibilities in matters of war and peace.²⁰⁸ At least, corporate lawyers—and legal and business academics—should make clear that following the law, or even following the crowd, does not permit a corporation to transgress fundamental moral boundaries.

III. WAR AND ECONOMICS: TOWARD THE INSTITUTION OF PEACE?

Even the most hard-bitten law-and-economist must admit when pressed that stark moral choices posed by war should constrain business enterprises. In modern societies, a business corporation may have a primary objective of “enhancing corporate profit and shareholder gain,” but this objective is grounded on an implicit assumption of relative peace. In other words, the profit-seeking objective of a business corporation must find its limits in the political will of democratic states as expressed in positive law. When the peaceful legal framework is shattered by war, even the limits of law are insufficient. Doing business with pirates, slave traders, or terrorists cannot be morally justified, even if international law cannot yet reach these wrongs. Conspiring or cooperating with Nazis or Al Qaeda cannot be morally condoned, even if legally permitted.²⁰⁹

Even though the *Principles of Corporate Governance* say nothing directly about values and principles of political democracy, these values and principles are implicit in the exception to the “economic objective” given by the “boundaries set by law.”²¹⁰ The “ethical considerations” mentioned generally by the American Law Institute are also essential to determining the actions that business corporations should take when faced with situations of war or situations that are likely to involve fighting wars.²¹¹ These are principles that should find international scope and application.

Corporate decisions to participate in and profit from war—even for a just cause—carry moral as well as legal responsibility. In commenting

208. See generally *id.*

209. One can imagine circumstances that would morally permit transactions with “bad” actors, including even pirates or terrorists. For example, a corporation might knowingly cooperate with an intelligence agency of a “good” democratic government in order to penetrate a criminal or “enemy” organization—such as Al Qaeda. Even so, the corporation must observe moral limits. When private entities are recruited in this manner for public ends, morally gray boundaries often arise that demand conscious and thoughtful navigation. Similar moral problems arise easily, for example, in the context of private military companies. See *supra* text accompanying notes 90-103.

210. See AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01. For extended discussions of the importance of following the law in corporate governance—and establishing appropriate incentives to do so—see Deborah A. DeMott, *Organizational Incentives to Care about the Law*, 60 LAW & CONTEMP. PROBS. 39 (1997); Greenfield, *supra* note 23.

211. See AMERICAN LAW INSTITUTE, *supra* note 76, § 2.01(b)(2).

on U.S. military participation in the war against Serbia on behalf of Kosovo, a law professor perceptively observed: "As I read the national pulse, what Americans don't want is for their children to be sent into harm's way to guarantee higher profits for corporations. . . ."212 Wars and corporate participation in wars must have a higher moral and political justification than profit and shareholder gain.²¹³

The larger justifications for war include basic moral and political principles of freedom, democracy, security, and peace. I will not attempt to argue here which of these higher principles may be necessary or sufficient to justify violent conflict and intentional killing.²¹⁴ Contemplation of the truth of modern war and the participation of business corporations in it should convince even the most economically-oriented legal theorists that some higher moral values must play a significant role in contemporary corporate law and governance, at least when matters of war and peace are at stake. Business corporations, as well as nation-states and individual citizens, cannot avoid confronting important moral issues of responsibility when they participate actively in war.

Finally, to conclude on a more positive note, the institutions of business, including business corporations and the competition of organized markets, may contribute to a social psychological solution to the long-standing problem of war in human society. On one hand, modern business corporations supply the means of modern war. They may profit from war, and this fact raises a very difficult political issue of isolating the business interests of "the military industrial complex" from political decision making about war and peace.²¹⁵ On the other hand, business competition may also provide what William James called "the moral equivalent of war" needed for the permanent institution of peace.²¹⁶ Like sports and perhaps law, business competition may provide a social psychological substitute for human aggression.²¹⁷

212. Robert F. Turner, *Kosovo: Legal and Policy Implications*, 10 U.S.A.F. ACAD. J. LEGAL STUD. 67, 85 (1999/2000).

213. *See id.*

214. For leading treatments of the political and ethical problems of war, see generally WALTZ, *supra* note 8; see also MICHAEL WALZER, *JUST AND UNJUST WARS* (1977). For more recent discussions, agreeing with Walzer that even just wars must be fought with ethical restraint, see JAMES TURNER JOHNSON, *MORALITY AND CONTEMPORARY WARFARE* (1999); WARD THOMAS, *THE ETHICS OF DESTRUCTION: NORMS AND FORCE IN INTERNATIONAL RELATIONS* (2001).

215. Dwight D. Eisenhower, Farewell Radio and Television Address to the American People, Jan. 17, 1961, Public Papers of the Presidents of the United States: Dwight D. Eisenhower 1038 (1961).

216. William James, *The Moral Equivalent of War*, in *BEST AMERICAN ESSAYS OF THE CENTURY 45* (Joyce Carol Oates ed., 2000) (1910).

217. There is a debate in the literature on war about whether human aggression is a natural instinct or culturally learned. For a short review of competing accounts, see KEEGAN, *supra* note 57, at 18-27. Whatever its origins, however, modern war—as opposed to crime or other social violence—aims at specific objectives which are often predatory. To

According to James, “[h]istory is a bath of blood.”²¹⁸ Today, after two world wars have been fought since James wrote his famous essay, some still say “peace” when they mean “war expected” or even “permanent, unceasing” war.²¹⁹ Building a global civilization that includes competitive business enterprises and economic markets may, perhaps, point the direction toward a “substitute for war’s disciplinary function,” as well as for its psychological and even aesthetic attractiveness to human beings.²²⁰

William James also observed that “war-making is due to definite motives and subject to prudential checks and reasonable criticisms, just like any other form of enterprise.”²²¹ Business corporations have been instruments of war, but they can also serve the cause of “the institution of peace.”²²² If “war starts in the minds of men,” then “so does peace.”²²³ In a globalizing and increasingly interdependent world, there is a strong argument for “an intellectual duty to proclaim the inconceivability of war.”²²⁴ To do so, however, does not itself advance the practical conditions of peace.²²⁵ Building institutions of peace will require, again in the words of James, “a future when acts of war shall be formally outlawed as between civilized peoples.”²²⁶ New and improved structures of international law, including “institutionalized restraints and institutionalized methods of altering and adjusting interests,” will be required.²²⁷ This future civilization, however, will also need large business corporations not only to perform an economic objective, but also to abide by the law and to act ethically. Then, perhaps, we can hope to establish at least improved probabilities for “a reign of peace.”²²⁸

the extent that other social institutions can channel human desires for acquisitive competition—whether natural or cultural in origin—the temptations to resort to war might be diminished. Sports, law, and business may share in partly meeting this general social need.

218. James, *supra* note 216, at 46.

219. *Id.* at 47. Even Plato said that “peace” was only another name for “incessant” war. PLATO, LAWS, I.626A (quoted in VICTOR DAVIS HANSON, CARNAGE AND CULTURE, *supra* note 9, at 440).

220. *See generally* James, *supra* note 216, at 51.

221. *Id.* at 52.

222. *Cf.* MICHAEL HOWARD, THE INVENTION OF PEACE: REFLECTIONS ON WAR AND INTERNATIONAL ORDER (2001).

223. *Id.* at 5.

224. UMBERTO ECO, FIVE MORAL PIECES 16 (2001).

225. For a practical argument along these lines, see WALTZ, *supra* note 8, at 1-2.

226. James, *supra* note 216, at 53.

227. WALTZ, *supra* note 8, at 231.

228. *See generally* James, *supra* note 216, at 52. As Waltz argues, it may ask too much to hope for a true and everlasting peace on earth. But, we might at least improve the odds by “decreasing the incidence of war” and “increasing the chances of peace.” WALTZ, *supra* note 8, at 1.

IV. CONCLUSION

Sadly and tragically, peace will not come without the collective monopolization of force that makes war possible. The threat of new enemies, including international terrorists, "requires that the responsible powers, committed to . . . peace, must be able to deploy forces of the highest quality, human as well as technological, to any part of the globe at all times."²²⁹ Clausewitz wrote memorably that

If bloody slaughter is a horrible spectacle, then it should only be a reason for treating war with more respect, but not for making the sword we bear blunter and blunter by degrees from feelings of humanity, until once again someone steps in with a sword that is sharp and hews away the arms from our bodies.²³⁰

Many Americans feel that exactly this sort of direct and brutal blow occurred against its society on September 11. In the modern world, the state system remains essential to achieve peace.²³¹

Business corporations also have an essential role to play in the enterprise of peace, even as they contribute to the modern armories of war. Corporations—and the social and political institutions that regulate them—must take their responsibilities seriously and with the proper ethical gravity. War is not merely a game for business to play for profits. If war is a game, it is a very serious one that requires ethical restraint, political judgment, and legal regulation, as well as economic calculation.²³²

In this Article, many practical answers to the question of how business corporations can be better regulated or how business executives can make better moral decisions with respect to war have been left unanswered. I hope at least to have raised these issues as serious ones deserving of academic and practical attention. Useful future research might include the following list of topics:

- What current national and international regulations constrain corporate profit-making in supplying the goods and services of war? How can national laws such as the Arms Export Control Act and the Export Administration Act be improved or supplemented? What lessons may be learned from other countries? What would a comparative study of these laws

229. KEEGAN, *supra* note 57, at 68.

230. WALTZ, *supra* note 8, at 221 (quoting Clausewitz).

231. See HOWARD, *supra* note 222, at 103 (pointing out that "the trouble is that the state not only makes war possible, it also makes peace possible," because peace only "results from agreement between states").

232. See *supra* note 8.

recommend in terms of possible international regulation in this area?

- Should special laws constrain the participation of military-related businesses in political lobbying and campaign financing? If so, how?
- How should the Alien Tort Claims Act and Torture Victim Prevention Act be interpreted or amended with respect to claims against business corporations, as well as individuals, by victims of human rights violations? How would such interpretations or amendments either promote peace or be counterproductive to this end?
- Should the novel and growing form of “private military companies” that appear to be in the thriving business of providing mercenary military services be regulated at the international level? If so, how? Are there benefits to private military companies in a world in which the relative power of nation-states is declining?
- How should the law of corporate governance—both national and international—be changed to reflect a realistic and humane conception of the importance of business corporations in matters of war and peace, as well as the promotion of economic well-being? How can corporate executives be given the flexibility to act ethically on these issues, without giving them the latitude to abuse their power and authority in their own self-interests?
- What are the current best practices of corporations in the defense industry in terms of ethical and legal compliance programs? How can ethical and legal behavior in the defense industry be encouraged both nationally and internationally?
- What kinds of ethical issues do different companies in different businesses related to warfare face? What does the emerging discipline of business ethics offer in terms of rational approaches to solving these ethical dilemmas?
- How can business corporations act permissibly, within their legal power, to promote global peace as well as prosperity? How could superogatory or heroic corporate actions in promoting peace be recognized or rewarded?

Beginning to answer some of these important questions in theory and practice will bring human society closer to understanding how one of the great organizational inventions of our time—the business corporation—may better contribute to the goal of global peace.