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Vultures, Hyenas, and African Debt: Private Equity and Zambia

*Olufunmilayo B. Arewa**

TABLE OF CONTENTS

I. The Globalization of Private Equity	643
A. Donegal v. Zambia: Vulture Funds in Africa.....	643
B. Private Equity in International Perspective	647
II. Governance and Scavenging: Vultures and Hyenas in Africa.....	651
A. African Institutional Frameworks: Sovereigns, Performance, and Tyranny	651
B. The Slave Trade, the Colonial State, and African Institutions.....	655
C. African Sovereigns and Commerce: Business History, Models, and Current Conditions.....	660
III. Vulture Investors and Secondary Markets for African Sovereign Debt.....	663
A. Vultures, Hyenas, and Odious Debts	663
B. Vulture Investors and Markets for Change of Control: The Sovereign Difference and Tyrant Debt	666
C. Poor Country Debt: Lessons of Donegal v. Zambia	669

I. THE GLOBALIZATION OF PRIVATE EQUITY

A. Donegal v. Zambia: Vulture Funds in Africa

A 2007 U.K. court case involving Donegal, a private equity fund, and the Republic of Zambia, has contributed to an ongoing debate about the operation of so-called vulture funds in African and other developing

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countries.¹ Donegal sued Zambia for more than fifty-five million U.S. dollars in connection with a debt owed by Zambia to Romania for Zambia's acquisition of agricultural machinery from Romania pursuant to a credit agreement dated April 17, 1979.² Donegal acquired the Zambian debt from Romania in 1999.³ Although the face value of the debt was close to thirty million U.S. dollars in principal amount, Donegal acquired the debt at some eleven percent of face value, or approximately \$3.2 million U.S.⁴

Donegal's attempt to collect the full face value with twelve percent interest occurred during a time that global multilateral institutions and developed world governments were engaged in significant amounts of debt reduction for poor countries. The composition of debt of many developing countries is potentially complex and varied, and may include debt from private, government, and multilateral agency creditors.⁵ Further, some debt incurred by developing countries, particularly from official lenders, may effectively be commercial only in form, but more akin to a grant in substance.⁶

A number of countries, including Zambia, have received significant amounts of debt reduction from various creditors.⁷ The Heavily Indebted Poor Countries Initiative (HIPC), which began in 1996, has involved billions of U.S. dollars in debt relief for a number of countries, including Zambia.⁸ In 2005, for example, the International Monetary Fund determined that Zambia was eligible for \$2.5 billion in debt relief,⁹ which represented a 62.6% reduction in Zambia's public debt.¹⁰ Zambia has also

¹ Donegal Int'l Ltd. v. Zambia & Anor, [2007] EWHC (Comm) 197, [2007] 1 Lloyd's Rep. 397, available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2007/197.html> [hereinafter *Donegal Decision I*].

² *Donegal Decision I*, *supra* note 1, paras. 1–6.

³ *Id.* para. 6.

⁴ *Id.* paras. 79, 200.

⁵ Anna Gelpern, *Odious, Not Debt*, 70 L. & CONTEMP. PROBS. 81, 82, 90–100 (2007) (noting that recent cases involving odious debt have involved in large part other governments and public institutions rather than foreign private creditors).

⁶ *Id.* at 83 (noting that official debt given by government to developing countries is likely commercial in form only and given as loans due to domestic political opposition to outright grants or a desire to reinforce a long-term political relationship).

⁷ See *infra* notes 8–12 and accompanying text.

⁸ THE WORLD BANK, DEBT RELIEF FOR THE POOREST: AN EVALUATION UPDATE OF THE HIPC INITIATIVE vii (2006), <http://siteresources.worldbank.org/INTDEBTDEPT/Resources/ieghipcupdateevaluation2006.pdf> (noting HIPC aggregate debt reduction). See also Daniel Cohen, *The HIPC Initiative: True and False Promises*, 4 INT'L FIN. 363, 363 (2001) (noting that cancellation of poor countries' debt has been high on the policy agenda); *Donegal Decision I*, *supra* note 1, para. 331 (noting twelve percent interest rate sought in Donegal proceedings against Zambia in the British Virgin Islands).

⁹ Int'l Monetary Fund [IMF], *Zambia: Enhanced Initiative for Heavily Indebted Poor Countries—Completion Point Document*, at 3, IMF Country Report No. 05/137 (Apr. 2005).

¹⁰ *Id.* at 7.

negotiated debt reduction arrangements for debt incurred as a result of loans from other governments. Since 1983, Zambia has negotiated debt reduction arrangements with the Paris Club, an informal group of largely developed world creditor governments.¹¹ Attempts by private creditors to enforce and collect developing country debts are thought by many to compromise the potential effectiveness of governmental and multilateral debt reduction initiatives more generally.¹²

Donegal purchased Zambia's debt from Romania at the same time that Zambia itself was attempting to repurchase the debt.¹³ Donegal later entered into a Settlement Agreement with Zambia concerning the debt Donegal purchased from Romania.¹⁴ In the U.K. case,¹⁵ Zambia asserted that Donegal's purchase of the debt from Romania involved questionable practices. Further, Zambia argued that the Settlement Agreement was "tainted with illegality and corruption."¹⁶ Although the judge did not fully accept Zambia's theories in this regard, he noted on multiple occasions that he did not find the testimony of Donegal and its agents credible:

I regard the evidence in Mr Sheehan's witness statement . . . as so incomplete as to be deliberately misleading . . .

. . . .

. . . I am driven to conclude that he [Mr Sheehan] was misleading in his evidence at the American hearing. . . .

. . . .

. . . I have found that the complaint that Donegal provided the [British Virgin Islands] court with incomplete and misleading

¹¹ *Donegal Decision I*, *supra* note 1, paras. 39–47; Press Release, Paris Club, Paris Club Reduces Zambia's Debt Under the Enhanced HIPC Initiative (May 11, 2005), *available at* <http://www.clubdeparis.org/sections/services/communiques/zambie/switchLanguage/en> (noting the Paris Club's reduction of Zambian debt under the Enhanced HIPC Initiative).

¹² See *Time to Tame the Vultures*, JUBILEE DEBT CAMPAIGN, Jan. 2009, <http://www.jubileedebtcampaign.org.uk/?lid=2893> (follow "Time to tame the vultures, January 2009 briefing" hyperlink); see also David Bosco, *The Debt Frenzy*, 161 FOREIGN POL'Y 36 (July–Aug. 2007).

¹³ *Donegal Decision I*, *supra* note 1, paras. 65–72.

¹⁴ *Id.* paras. 1, 6–23.

¹⁵ Court hearings related to the Donegal-Zambia suit were heard in both the BVI and the United States. *Id.* paras. 11, 26 (noting that after signing of the Settlement Agreement, Donegal brought, but did not formally serve, proceedings against Zambia in the BVI, and that evidence was also given at a hearing before the U.S. District Court for the District of Columbia in May 2005 "under a subpoena issued pursuant to a request for mutual legal assistance made by Zambia to the United States, the request originating from the Zambian Task Force on Corruption.").

¹⁶ *Id.* para. 21(i).

information is justified in significant respects. . . .

. . . .

. . . I find Donegal's account of how the Government signed the agreement inherently improbable.¹⁷

The court's statements and findings in the Donegal case reflect its significant concerns about the behavior of Donegal and its agents in transactions surrounding Donegal's acquisition of the Zambian debt from Romania, as well as in Donegal's attempts to enforce the debt against Zambia. The court also found that Donegal had improperly sought and obtained Zambian confidential information related to the debt.¹⁸ The court struck some provisions of the Settlement Agreement and found clauses in the Settlement Agreement to constitute penal provisions that were not genuine pre-estimates of loss, thus rendering such provisions unenforceable.¹⁹ Further, at least in part as a consequence of Donegal's business practices, the court discharged freezing orders that Donegal had previously obtained, but permitted Donegal to present arguments about granting new freezing relief.²⁰ In a later decision in this case, the judge reduced Donegal's fifty-five million dollar claim by forty million dollars, awarding Donegal a judgment of just over fifteen million dollars plus interest.²¹ The judge also reduced Donegal's costs by one-third due to the dishonest evidence presented to the court by Donegal witnesses and reinstated narrower freezing relief.²²

Although the Donegal court explicitly limited its scrutiny to the legal questions raised by the case rather than questions of morality and humanity,²³ the moral and ethical considerations connected with the activities of vulture investors are significant. This is particularly true in Africa, which in the post-colonial period has experienced poor economic performance in both absolute and relative terms, as well as significant and even increasing levels of poverty.²⁴ Poverty has exacerbated political

¹⁷ *Id.* paras. 167, 186, 344, 409.

¹⁸ *Id.* paras. 282–83.

¹⁹ *Donegal Decision I*, *supra* note 1, para. 509 (“I therefore come to the argument that clauses 2.3(d) and (e) are penal. A sum payable on breach is not a penalty if it is a genuine pre-estimate of the loss that the innocent party is likely to suffer as a result of the breach.”).

²⁰ *Id.* paras. 544–47.

²¹ *Donegal Int'l Ltd. v. Zambia & Anor*, [2007] EWHC (Comm) 1016, [6] (2007).

²² *Id.* para. 21.

²³ *Donegal Decision I*, *supra* note 1, para. 2.

²⁴ Elsa V. Artadi & Xavier Sala-i-Martin, *The Economic Tragedy of the XXth Century: Growth in Africa 2* (Nat'l Bureau of Econ. Research, Working Paper No. 9865, 2003), available at <http://www.nber.org/papers/w9865>.

instability in Africa.²⁵ The political situation in much of the African continent is similarly tenuous, with sub-Saharan African states in many instances serving as exemplars of weak or failed states: “Black Africa’s forty-odd states are among the weakest in the world. State institutions and organizations are less developed in the sub-Saharan region than almost anywhere else.”²⁶ This African institutional, political, and economic context has bearing on the operation of so-called “vulture funds, which are typically private equity or hedge funds that seek to profit by repurchasing debt at a discount and then collecting from the debtor country at face value or an even higher amount. Vulture funds are not a new phenomenon.”²⁷ Although some assert that vulture funds serve an important market function by creating a liquid secondary market for developing country debt, the operation of vulture funds reflects an arbitrage of not only prices, but also legal, institutional, and political structures.²⁸ Further, the activities of vulture funds may in fact serve to exacerbate the weaknesses of African legal, institutional, and political structures. At a minimum, the extent to which commercial activities of vulture funds and other commercial actors contribute to or exacerbate economic and political instability should be better understood.

B. Private Equity in International Perspective

The international activities of vulture funds reflect the greater global reach of private equity funds, which a 2007 McKinsey & Co. report

Today, per capita GDP for Sub-Saharan Africa is 200 dollars smaller than it was in 1974, a decline of nearly 11% over a quarter of a century. This evolution is especially worrisome if we consider that Africa was already extremely poor in 1974. . . . The African growth performance is dismal in absolute terms, but it is worse if we take into account that, during this same period, the rest of the world has been growing at an annual rate of close to 2%.

Id.

²⁵ SUSAN E. RICE & STEWART PATRICK, INDEX OF STATE WEAKNESS IN THE DEVELOPING WORLD 4, 13 (2008), http://www.brookings.edu/reports/2008/~media/Files/rc/reports/2008/02_weak_states_index/02_weak_states_index.pdf (noting that poorer states are often weaker ones and that “[f]ailed and critically weak states are geographically concentrated in sub-Saharan Africa . . .”).

²⁶ Robert H. Jackson & Carl G. Rosberg, *Why Africa’s Weak States Persist: The Empirical and the Juridical in Statehood*, 35 WORLD POL. 1,1 (1982).

²⁷ Jay Krasoff & John O’Neill, *The Role of Distressed Investing and Hedge Funds in Turnarounds and Buyouts and How This Affects Middle-Market Companies*, 9 J. PRIV. EQUITY 17, 17 (2006) (noting the long history of distressed investing).

²⁸ See Bosco, *supra* note 12 (noting vulture funds focusing on poor and frequently corrupt countries).

characterizes as a new global financial market power broker.²⁹ In the late 1990s, private equity constituted the fastest growing segment of corporate finance markets.³⁰ In the mid-2000s, investments in the private equity arena totaled \$832 billion, which at the time was equal to the nominal gross domestic product (GDP) of Mexico or India and forty times larger than the GDP of Kenya.³¹ Activities of private equity funds are typically subject to little regulatory or other oversight, even in their home jurisdictions. Private investment vehicles such as hedge funds and private equity funds are generally structured to avoid securities and other regulatory and reporting requirements.³² Private equity funds may also be formed in offshore jurisdictions such as the British Virgin Islands (BVI), the Cayman Islands, and the Channel Islands.³³ Although subject to potentially varied definitions, the term private equity is generally used to refer to private investment funds that are not classified as hedge funds and may include three primary types of funds: venture capital funds, leveraged buyout funds,

²⁹ MCKINSEY & COMPANY, *THE NEW POWER BROKERS: HOW OIL, ASIA, HEDGE FUNDS AND PRIVATE EQUITY ARE SHAPING GLOBAL CAPITAL MARKETS* 19 (2007) (discussing hedge funds and private equity as two new power brokers in global financial markets).

³⁰ Stephen D. Prowse, *The Economics of the Private Equity Market*, ECON. REV. (FED. RES. BANK OF DALLAS) 21, 21 (3d Q. 1998), <http://ideas.repec.org/a/fip/fedder/y1998iqiip21-34.html> ("Over the past fifteen years, it has been the fastest growing market for corporate finance, far surpassing others such as the public equity and bond markets and the market for private placement debt.").

³¹ Harry Cendrowski & Adam A. Wadecki, *The Private Equity Process*, in *PRIVATE EQUITY: HISTORY, GOVERNANCE, AND OPERATIONS* 3, 3 (Harry Cendrowski et al. eds., 2008).

³² GOV'T ACCOUNTABILITY OFFICE, *PRIVATE EQUITY: RECENT GROWTH IN LEVERAGED BUYOUTS EXPOSED RISKS THAT WARRANT CONTINUED ATTENTION* 38 (Sept. 9, 2008), <http://www.gao.gov/new.items/d08885.pdf>.

Private equity funds typically are organized as limited partnerships and structured and operated in a manner that enables the funds and their advisers (private equity firms) to qualify for exemptions from some of the federal statutory restrictions and most SEC regulations that apply to registered investment pools, such as mutual funds.

Id.

³³ Nick Stevens & Heather MacCallum, *Image Counts for Offshore Private Equity Industry*, *PRIVATE EQUITY WIRE SPECIAL REPORT: JERSEY PRIVATE EQUITY SERVICES 2007*, http://www.privateequitywire.co.uk/articles/detail.jsp?content_id=238538&livehome=true (discussing private equity funds in Jersey); Sophia Harris, *Cayman Islands: Is It an Offshore Sham? A Balanced Perspective is Welcomed*, *MONDAQ*, Jan. 25, 2009, http://www.mondaq.com/article.asp?article_id=72754&lk=1; Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles* 35–36 (U. Ill. L. & Econ., Working Paper No. LE08-020, 2009), available at <http://ssrn.com/abstract=875026> (discussing hedge fund offshore jurisdictions).

and other types of funds.³⁴

Private equity as an asset class has grown significantly due to increasing investor demand for “alternative” asset classes that generate high returns.³⁵ Private equity funds are often structured as limited partnerships in which investors participate as limited partners (LPs), while the persons managing the private equity fund are generally principals in the limited liability entity that serves as the private equity fund’s general partner (GP).³⁶ LPs in private equity funds are usually institutional investors such as private and public pension funds, banks, and insurance companies, or high-net-worth individuals.³⁷ The operation of private equity funds tends to be “shrouded in secrecy.”³⁸ As a result, private equity funds lack transparency, which some see as contributing to potential market risk.³⁹ In the typical private equity fund, LPs make a pledge to contribute a certain amount of capital to the fund (a “capital commitment”) but do not typically contribute the full amount at the time they make this commitment. Investors are then required to make capital contributions to the fund whenever the GP issues a capital call, an explicit request for funds, upon receipt of which an LP is required to forward the requested pledged funds.⁴⁰ Most private equity funds call one hundred percent of committed capital within their first three or four years.⁴¹

General partners of private equity funds typically receive significant compensation for their management and investment activities. In addition to receiving standard management fees ranging from 1.25 to 3% per annum based on capital commitments to the fund made by its LPs, GPs also receive a share of fund profits, called the carried interest or carry, that typically ranges between fifteen and twenty five percent.⁴² This compensation structure has generally led to private equity professionals being highly compensated, with total compensation of private equity professionals increasing by twenty-seven percent between 2006 and 2007.⁴³

³⁴ MCKINSEY & COMPANY, *supra* note 29, at 131.

³⁵ *Id.* at 138.

³⁶ Cendrowski & Wadecki, *supra* note 31, at 5, 6.

³⁷ *Id.* at 5.

³⁸ *Id.* at 3–4.

³⁹ MCKINSEY & COMPANY, *supra* note 29, at 128 (noting that private equity (LBO) may amplify market risk).

⁴⁰ Cendrowski & Wadecki, *supra* note 31, at 6 (noting that LPs must adhere to GP capital calls).

⁴¹ *Id.* at 24.

⁴² *Id.* at 7–8.

⁴³ Jennifer Rossa, *Compensation Soars, but PE Execs Keep Close Tabs on Their Wallets*, PRIVATE EQUITY ANALYST, Sept. 1, 2008, available at <https://www.fis.dowjones.com/article.aspx?aid=DJFPEA0020080829e4910000q&r=wsjblog&s=djfp&ProductIDFromApplication=22> (noting that total equity compensation of private equity professionals,

The growth of private equity has contributed to the privatization of significant segments of economic activity.⁴⁴ As private equity has grown in scale and geographic reach, significant questions have been raised, even in developed country capital markets, concerning the potential impact of private equity funds on employment, corporations, and the broader economy.⁴⁵ The increasing scrutiny of private equity funds in developed country financial markets reveals a lack of full understanding of the activities of such funds in developed country capital markets. Not surprisingly, the activities of such funds in emerging markets are even less well understood. Private equity funds have increasingly identified sovereign debt markets as a lucrative source of profits for fund managers and their LPs. Such funds purchase the debt of countries that are “usually poor and frequently corrupt,”⁴⁶ which may actually exacerbate problems of both poverty and corruption. Private creditors now hold an estimated one billion dollars in judgments against “some of the world’s poorest countries.”⁴⁷ Investors dealing in collection of sovereign debt include: Greylock Global Opportunity, based in the BVI, which won a \$50.9 million judgment against Nicaragua; FG Hemisphere, based in the United States, which won a \$151.9 million judgment against Congo Republic and a \$81.7 million judgment against the Democratic Republic of Congo; Kensington International, based in the Cayman Islands, which won a \$118.6 million judgment against Congo Republic; and Grace Church Capital, based in the Cayman Islands, which has sought a \$39.7 million judgment against Cameroon.⁴⁸

The activities of Donegal in Zambia reflect many of the hallmarks of private equity fund operations, particularly with respect to secrecy. Donegal is a private equity fund that is part of a broader fabric of nontransparent entities associated with Debt Advisory International LLC

including salary, bonus, and carried interest components, rose by 27.3% from \$315,000 to \$401,000).

⁴⁴ Joseph L. Rice, III, *Letter on Behalf of the Advisory Board*, in THE GLOBALIZATION OF ALTERNATIVE INVESTMENTS WORKING PAPERS VOLUME 1: THE GLOBAL ECONOMIC IMPACT OF PRIVATE EQUITY REPORT v, v (World Economic Forum 2008), http://www.weforum.org/pdf/cgi/pe/Full_Report.pdf.

⁴⁵ Josh Lerner & Anuradha Gurung, *Executive Summary*, in THE GLOBALIZATION OF ALTERNATIVE INVESTMENTS WORKING PAPERS VOLUME 1: THE GLOBAL ECONOMIC IMPACT OF PRIVATE EQUITY REPORT vii, vii (World Economic Forum 2008), http://www.weforum.org/pdf/cgi/pe/Full_Report.pdf.

⁴⁶ Bosco, *supra* note 12, at 38.

⁴⁷ *Id.* See, e.g., *Af-Cap v. Republic of Congo*, 462 F.3d 417, 421 (5th Cir. 2006) (involving appeal in “ongoing battle by Af-Cap, Inc. to receive payment from the Republic of Congo on an outstanding debt.”).

⁴⁸ *Funds in Sovereign Debt Business*, PORTFOLIO.COM, July 2008, <http://www.portfolio.com/news-markets/international-news/portfolio/2008/06/16/Funds-in-Sovereign-Debt-Business>.

(DAI), a Delaware LLC based in Washington, D.C. that was established around 1995, and its owner, Mr. Michael Sheehan.⁴⁹ DAI specializes in debt counseling on emerging market corporate and sovereign debt.⁵⁰ DAI incorporated Donegal in the BVI in December 1997.⁵¹ At the time *Donegal* was being heard by the British High Court, Donegal was described as being owned by Select Capital Limited (Select Capital), an entity registered in the BVI in June 1997.⁵² Select Capital specializes in acquiring distressed or defaulted emerging market, sovereign, or corporate debt.⁵³ Although the ultimate ownership of Select Capital is obscure,⁵⁴ Select Capital “appears to be an offshore vehicle for investors,” the identities of whom are not known.⁵⁵ In a U.S. court hearing requested by the Zambian Task Force on Corruption with respect to the Zambian-Donegal dispute, Sheehan described Select Capital investors as “hedge fund investors and high net worth individuals, principally in New York.”⁵⁶ In Donegal’s case in the United Kingdom, Sheehan stated that Select Capital had three principal shareholders and a “few individual shareholders with very small positions.”⁵⁷ Sheehan used DAI and another Delaware LLC called DS Partners to manage the business of Select Capital.⁵⁸ Donegal was originally formed to acquire Zambian debt from Romania; this debt constituted Donegal’s only asset.⁵⁹

II. GOVERNANCE AND SCAVENGING: VULTURES AND HYENAS IN AFRICA

A. African Institutional Frameworks: Sovereigns, Performance, and Tyranny

The complexity and secrecy of Donegal’s organizational and operational structure and actual owners raise issues of significant concern in

⁴⁹ *Donegal Decision I*, *supra* note 1, paras. 24–28.

⁵⁰ *Id.* para. 24.

⁵¹ *Id.* (noting that Sheehan, then a twenty percent owner, bought out other investors in DAI in August 1998).

⁵² *Id.* para. 25.

⁵³ *Id.* para. 26.

⁵⁴ *Id.* para. 27.

⁵⁵ *Donegal Decision I*, *supra* note 1, para. 27 (“The ultimate ownership of Select Capital is rather obscure, but it appears to be an offshore vehicle for investors.”).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* para. 25.

⁵⁹ *Id.* paras. 25, 528 (noting that Donegal was incorporated as a special purpose vehicle specifically to acquire the Zambian debt held by Romania, was acquired by Select Capital due to its ownership of the Zambian debt, and had done no other significant business other than with respect to the Zambian debt).

the African context. The weakness of states in much of sub-Saharan Africa and the lack of robust institutional frameworks form a poor foundation for the types of transactions in which private equity funds might engage.⁶⁰ Assessing the operations of private equity funds that have been deemed vultures in African contexts requires consideration of the role African institutional structures may play in the creation of investment “opportunities” for such funds. The manners, transparency, and integrity of transactions that surround enforcement and collection of debt purchased by vulture investors are also relevant factors that must be considered.

Continued poor performance of many African countries by most measures of economic, political, and human welfare status draws attention to significant inadequacies in African institutional frameworks.⁶¹ Moreover, conditions in much of sub-Saharan Africa are evidence that institutional frameworks that have thus far developed may in fact foster inequality and other negative factors that underlie such conditions.⁶² This raises questions about not only institutions, but also broader concerns about governance and the fundamental legal relationships that institutions and policies are intended to promote. Governance in this context has been defined as the “traditions and institutions by which authority in a country is exercised.”⁶³ As such, governance is a “broader, more inclusive” term than government and “refers to the general manner in which a people is governed . . . [and] can apply to the formal structures of government as well as to the myriad institutions and groups which compose civil society in any nation.”⁶⁴

Sub-Saharan African countries generally have a poor record of both

⁶⁰ John Mukum Mbaku, *Entrenching Economic Freedom in Africa*, 23 CATO J. 217, 221–22 (2003) (noting lack of institutions that can guarantee long-term security of property rights in Africa).

⁶¹ *Id.* at 221 (noting that the real problem in Africa is weak institutions and perverse incentives, rather than a lack of resources, ignorance, or incompetence); Mancur Olson, Jr., *Distinguished Lecture on Economics in Government: Big Bills Left on the Sidewalk: Why Some Nations are Rich, and Others Poor*, 10 J. ECON. PERSP. 3, 22 (1996) (asserting that poor countries may not realize gains from specialization and trade due to a lack of impartial institutions to enforce contracts).

⁶² Cf. Kenneth L. Sokoloff & Stanley L. Engerman, *History Lessons: Institutions, Factors Endowments and Paths of Development in the New World*, 14 J. ECON. PERSP. 217, 224–28 (2000) (discussing how the path of institutional development affected relative growth among New World economies).

⁶³ Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters III: Governance Indicators for 1996, 1998, 2000, and 2002*, 18 WORLD BANK ECON. REV. 253, 254 (2004) (noting that governance “includes the process by which governments are selected and replaced, the capacity of the government to formulate and implement sound policies, and the respect of citizens and the state for the institutions that govern economic and social interactions among them.”).

⁶⁴ The Carter Center, *Perestroika Without Glasnost in Africa*, 2 CONF. REP. SERIES 1 (1989).

governance and political, economic, and social performance as measured by varied criteria.⁶⁵ Poor economic performance in many African countries is compounded by the fact that Africa's disastrous economic conditions may actually benefit those in power:

As [] is the case for most [of] Africa, the lower part of the Nigerian income distribution constantly shifts to the left reflecting the fact that the incomes of the lowest 80% of the population deteriorate over time. The shocking thing about this figure is that the upper part of the distribution moves to the right. In other words, the richest citizens of Nigeria actually benefit from the current disastrous economic situation. From a political economy point of view, the problem is these individuals whose incomes are improving are probably the decision makers.⁶⁶

This income disparity underscores significant agency problems that may exist in many African contexts. The fact that those in power may benefit from disastrous economic, political, and social conditions indicates a severe misalignment of incentives. Conditions in Africa during much of the post-colonial era also reflect the rise of what has been characterized as illiberal democracy, which in many instances entails having elections without the liberal governance structures that have typically characterized liberal democracy in the West.⁶⁷ As Amartya Sen has noted, successful development in Africa, as elsewhere, requires "the removal of major sources of unfreedoms: Poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states."⁶⁸ The widespread presence of tyranny in Africa raises significant issues of consent in contexts of commercial transactions that are far too often ignored. Such issues of consent, however, are of critical importance because commercial relationships have helped determine patterns of relationships within many African countries as well as the terms and conditions of relationships between African countries and the rest of the world.

The statist development model adopted by most African countries in the post-colonial era has generally led to extensive government control of African economies.⁶⁹ The African statist model has given African states significant power to control resources, resource allocation, and private

⁶⁵ Artadi & Sala-i-Martin, *supra* note 24, at 5.

⁶⁶ *Id.*

⁶⁷ Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFF. 22, 28 (Nov/Dec 1997) (noting the wave of recent democratization in Africa without the basic tenants of liberal governance).

⁶⁸ AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (1999).

⁶⁹ Mbaku, *supra* note 60, at 218.

exchange.⁷⁰ This model has thus led to significant state dominance of the economy in most African countries.⁷¹ The dominance of the public sector in many African countries has magnified the effects of the lack of alignment of incentives, particularly since political office and control of the state have been an important means of access to wealth in many African countries.⁷² This misalignment of incentives facilitates scavenging behaviors and contributes to the continuing fragility and vulnerability of African institutional structures. As a result, many sub-Saharan African countries have encountered difficulty in creating sustainable institutions that are properly governed. Further, scavenging behaviors by internal hyenas have created conditions and transactional circumstances that have drawn the attention of vulture funds.

The nature and forms of legal and business transactions undertaken by both hyenas and vultures give evidence that existing legal institutions do not operate as they ideally might: to help instill good governance and align incentives so that those who govern do so for the benefit of the broader society. Looking at historical experience in other regions of the world may shed light on what institutions worked in those particular contexts.⁷³ However, understanding the importance of institutions in other contexts does not necessarily clarify how to translate such institutional frameworks into African contexts or the nature of the relationships that need to exist accordingly. Such prior models, may, however, provide information about better ways to provide for incentives and relationships that are more likely to be successful.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 219 (noting that African statism has enhanced “the ability of politicians and civil servants to turn governance structures into instruments of plunder to enrich themselves at the expense of society.”); RAYMOND W. BAKER, *CAPITALISM’S ACHILLES HEEL: DIRTY MONEY AND HOW TO RENEW THE FREE MARKET SYSTEM* 51–52 (2005) (noting the apparent disappearance or theft of significant sums of money during varied governments in different African countries, including \$12.4 billion in Nigeria from 1990–1991, two to five billion dollars in Nigeria from 1993–1998, seven billion dollars in the Ivory Coast, \$4.2 billion in Angola, and millions of dollars in Kenya and Gabon); MARTIN MEREDITH, *THE FATE OF AFRICA: A HISTORY OF FIFTY YEARS OF INDEPENDENCE* 220 (2005) (noting that access to the government spending process became the gateway to fortune in Nigeria, where patronage politics and corruption reached new heights); ECON. COMM. AFR., *PUBLIC SECTOR MANAGEMENT REFORMS IN AFRICA I* (2004), available at http://www.uneca.org/eca_resources/Publications/dpmd/public_sector_mangt.pdf (“[G]overnance in Africa has been marked by authoritarianism and state privatization for the benefit of the ruling elite, resulting in institutional disintegration rather than development.”).

⁷³ Kenneth W. Dam, *Institutions, History and Economic Development* 1 (U. Chi. L. & Econ., Olin Working Paper No. 271, 2006), available at <http://ssrn.com/abstract=875026>.

B. The Slave Trade, the Colonial State, and African Institutions

Institutional structures in Africa have been significantly affected by historical experience, particularly related to the slave trade and colonialism, both of which helped give shape to distinctive conditions in Africa that have remained influential long after the end of colonialism. Much has been written concerning the post-colonial African economic, political, and social conditions. Although decolonization brought independence to former colonies, “it did not, as a rule, change the underlying social and economic structures of their societies.”⁷⁴ Consequently, although authoritarian in nature,⁷⁵ the colonial state, as a legally constituted and administered state, became a basis for post-independence legal structures.⁷⁶ Colonial rule, however, did not offer a good preparation for the emergence of post-independence democratic states:⁷⁷ colonial governments focused on having minimal colonial administration and sought to make colonial territories self-governing.⁷⁸ As a result, education was typically handled by Christian missionaries and economic activities by commercial companies.⁷⁹ The colonial powers saw little need for rapid development: “In much of Africa, therefore, the colonial imprint was barely noticeable In northern Nigeria, Frederick Lugard set out to rule 10 million people with a staff of nine European administrators and a regiment . . . consisting of 3,000 African troops under the command of European officers.”⁸⁰

Current conditions in many African countries are at least in part a consequence of circumstances and laws that were created during and prior to the colonial era.⁸¹ In the political sphere, for example, “Africa inherited liberal democracy . . . from the accelerated and panicky process of rapid decolonization. It was only in the last decade of colonialism, when independence became a certainty, that the imperialist powers gradually

⁷⁴ Yash Ghai, *The Role of Law in the Transition of Societies: The African Experience*, 35 J. AFR. L. 8, 8 (1991).

⁷⁵ *Id.*; James S. Read, *Studies in the Making of Colonial Laws: An Introduction*, 23 J. AFR. L. 1, 6 (1979) (noting that colonial subjects were scarcely consulted at all in the process of colonial law-making).

⁷⁶ Ghai, *supra* note 74, at 8 (noting that despite its authoritarianism, the colonial state “was a legally constituted and administered state.”).

⁷⁷ Barry Munslow, *Why Has the Westminster Model Failed in Africa?*, 36 PARLIAMENTARY AFF. 218, 224 (1983) (“Colonial rule was by no means a preparation for post-independence democratic government. It was extremely hierarchical, at best paternalist and at worst authoritarian.”).

⁷⁸ MEREDITH, *supra* note 72, at 5.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See, e.g., Joanna Stevens, *Colonial Relics I: The Requirement of a Permit to Hold a Peaceful Assembly*, 41 J. AFR. L. 118, 132 (1997) (discussing contemporary legal treatment of questionable laws of colonial or other origin).

began to institute democratic reforms in what had hitherto been structures of exploitation, despotism, and degradation.”⁸²

Not surprisingly, such imperialist models of democracy disintegrated rapidly.⁸³ What was left following such disintegration was characterized by few successes that were often “precarious, temporary, and crippled by . . . class and ethnic limitations.”⁸⁴ The failures were “egregious, massive, and tragic” and any remaining civil liberties “fragile, vulnerable, and under constant threat of death.”⁸⁵ This fragile and precarious state reflects the extent to which institutional structures designed to support liberal democracy and customized to fit the African political and economic reality did not emerge in Africa in the post-colonial era.⁸⁶ This is often interpreted as a matter of failed institutions and institutional framework and the fault is often attributed to Africans and interpreted as failures in competence and capacity.⁸⁷ However, the factors underlying many failed African political and economic models are quite complex and rooted in the unique historical experiences of African countries not only with respect to colonialism,⁸⁸ but also in relation to the slave trade and pre-colonial institutions.⁸⁹ These circumstances have contributed to elements of tyranny in many African countries.

Recent empirical studies suggest that state legitimacy in African countries today is in part dependent on the congruence between pre-colonial and post-colonial political structures.⁹⁰ This congruence was significantly

⁸² Robert Fatton, Jr., *Liberal Democracy in Africa*, 105 POL. SCI. Q. 455, 457 (1990) (discussing the emergence of modern authoritarianism in Africa).

⁸³ *Id.* at 458.

⁸⁴ *Id.* at 459.

⁸⁵ *Id.*

⁸⁶ See generally Fatton, *supra* note 82.

⁸⁷ Munslow, *supra* note 77, at 219 (“When failures took place like a collapsing house of cards, reasons were sought in the Africans’ unpreparedness for democracy, with a reversion to the traditional systems.”).

⁸⁸ See James Robinson, *States and Power in Africa by Jeffrey Herbst: A Review Essay*, 40 J. ECON. LIT. 510, 512 (2002) (“Africa is different because the structural conditions that led to the path of state formation and institution building in Europe were absent in Africa.”).

⁸⁹ See Daron Acemoglu, Simon Johnson & James Robinson, *Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution*, 117 Q. J. ECON. 1231, 1279 (2002) (noting that European colonization led to institutional reversal and a reversal in relative incomes among countries that were relatively rich in 1500 that are now relatively poor); Daron Acemoglu, Simon Johnson & James Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369, 1370 (2001) (using settler mortality rates to demonstrate that colonies with higher European mortality rates are today substantially poorer than colonies that were more healthful for Europeans, suggesting that in colonies where Europeans settled, colonial powers established different institutional frameworks as contrasted at the other extreme with “extractive” institutional models exemplified in the Belgian Congo).

⁹⁰ See, e.g., Pierre Englebert, *Pre-Colonial Institutions, Post-Colonial States, and*

influenced by the slave trade, which led to significant political fragmentation in large swathes of sub-Saharan Africa prior to the formal creation of African colonies at the Conference of Berlin in 1884–1885.⁹¹ The Conference of Berlin has been described as “the biggest Monopoly game in history.”⁹² The divisions made at the Conference of Berlin were based on inaccurate, little, or no information:

The maps used to carve up the African continent were mostly inaccurate; large areas were described as *terra incognita*. When marking out the boundaries of their new territories, European negotiators frequently resorted to drawing straight lines on the map, taking little or no account of the myriad traditional monarchies, chiefdoms and other African societies that existed on the ground. Nearly one half of the new frontiers imposed on Africa were geometric lines, lines of latitude and longitude, other straight lines or arcs of circles In all, the new boundaries cut through some 190 culture groups. In other cases, Europe’s new colonial territories enclosed hundreds of diverse and independent groups, with no common history, culture, language or religion. Nigeria . . . contained as many as 250 ethnolinguistic groups. Officials sent to the Belgian Congo eventually identified six thousand chiefdoms there Kingdoms that had been historically antagonistic to one another, such as Buganda and Bunyoro in Uganda, were linked into the same colony.⁹³

The consequences of such methods of division and the colonial policies that followed were profoundly important for present conditions and the development of institutions in sub-Saharan Africa: “Because, of all

Economic Development in Tropical Africa, 53 POL. RES. Q. 7, 14 (2000) (noting that congruence between pre-colonial and post-colonial political structures is an important determinant of state legitimacy in Africa today).

⁹¹ RUTH WATSON, ‘CIVIL DISORDER IS THE DISEASE OF IBADAN’: CHIEFTAINCY AND CIVIC CULTURE IN A YORUBA CITY 4 (2003) (noting the disruption and political turmoil in contemporary southwestern Nigeria from the 1820s onward, connected to the combination of the collapse of the Oyo Empire, the expansion of the Sokoto Caliphate and the prohibition and disruption of the Atlantic slave trade); A.G. Hopkins, *Economic Imperialism in West Africa: Lagos, 1880–92*, 21 ECON. HIST. REV. 580, 586–87 (1968) (noting that the slave trade led to civil disorder and inter-state warfare and encouraged the rise of a warrior class that exerted significant influence over the policies of Yoruba states, including Ibadan, which was formed as a war camp); Nathan Nunn, *The Long-Term Effects of Africa’s Slave Trades*, 123 Q. J. ECON. 139, 142 (2008) (noting that unlike previous slave trading, the African slave trades had “particularly detrimental consequences, including social and ethnic fragmentation, political instability and a weakening of states, and the corruption of judicial institutions.”).

⁹² NIALL FERGUSON, *EMPIRE: HOW BRITAIN MADE THE MODERN WORLD* 235 (2003) (noting that “[t]he biggest game of Monopoly in history was about to begin. Africa was the board.”).

⁹³ MEREDITH, *supra* note 72, at 1–2.

regions, sub-Saharan Africa has the largest concentration of arbitrary postcolonial states, with little or no embeddedness into precolonial institutions and preexisting norms of political authority, its economic performance tends to be weaker even after controlling for other variables known to differ between Africa and other regions.”⁹⁴ The colonial power under which a country was formed may also have had an influence on post-colonial economic performance.⁹⁵

The current performance of African countries is closely related to questions of political fragmentation and legitimacy that relate in turn to the African experience with the slave trade and colonialism.⁹⁶ Further, states with greater legitimacy among developing countries have significantly better economic performance and have grown at five times the rate of states with less legitimacy.⁹⁷ Legitimacy plays an important role in the development of the effective institutional frameworks that were so important in the economic development of Europe, for example.⁹⁸

The lack of legitimacy of many African states has manifest consequences in Africa today and is reflected in patronalism, for example.⁹⁹ In the political realm, the trend toward authoritarian rule in post-independence Africa has been extensively discussed.¹⁰⁰ In the first two decades of independence, forty successful coups occurred in Africa with countless attempted coups.¹⁰¹ The political situation in much of Africa is closely related to Africa’s continuing economic troubles.¹⁰² From an

⁹⁴ Pierre Englebert, *Solving the Mystery of the AFRICA Dummy*, 28 WORLD DEV. 1821, 1822 (2000).

⁹⁵ Robin Grier, *Colonial Legacies and Economic Growth*, 98 PUBLIC CHOICE 317, 326–28 (1999) (noting that former French colonies in Africa have poorer economic performance and finding that duration of colonization and British identity of the colonial power are positively correlated with education indicating that the British left a more educated population in Africa after colonialism).

⁹⁶ Nunn, *supra* note 91, at 140 (finding a “robust negative relationship between the number of slaves exported from each country and subsequent economic performance”).

⁹⁷ Englebert, *supra* note 94, at 1828–29.

⁹⁸ Daron Acemoglu, Simon Johnson & James Robinson, *The Rise of Europe: Atlantic Trade, Institutional Change and Economic Growth*, 95 AM. ECON. REV. 547, 550, 561–62 (2005) (noting that the post-1500 economic development of Europe was facilitated by the indirect institutional consequences of the Atlantic trade, which included the development of political institutions that limited and constrained state power, as well as direct profits from the colonialism and slavery associated with this trade).

⁹⁹ Fatton, *supra* note 82, at 459.

¹⁰⁰ *Id.* at 456.

¹⁰¹ MEREDITH, *supra* note 72, at 218.

¹⁰² Michael Bratton, *Beyond the State: Civil Society and Associational Life in Africa*, 41 WORLD POL. 407, 409 (1989) (noting that political and economic crises in Africa are interrelated and that a “self-perpetuating cycle of change” exists in which “weak states engender anemic economies whose poor performance in turn further undermines the capacity of the state apparatus”).

economic perspective, Africa has been characterized by continuing economic crises and an increasing gap in economic performance with the rest of the world.¹⁰³

On a broader social level, current conditions in many African countries reflect the negative consequences of centuries of slave trading, which had a tremendous negative impact on African institutional development.¹⁰⁴ The slave trade had significant legal implications as well, particularly since legal systems began to be used to enslave people: "Judicial penalties that formerly had taken the form of beatings, payment of compensation or exile, for example, were now converted to enslavement. The slave trade became a way of getting rid of enemies and unwanted people."¹⁰⁵ The slave trade may have also contributed to a general lack of trust in Africa,¹⁰⁶ which may have had significant continuing implications for the economic development and the establishment of business and legal relationships based on trust within and among African countries.

The existence of the slave trade and colonialism in Africa has led to institutional structures that are distinctive as compared with the structures that accompanied European economic development. For example, the distinction between the public and private is one of fundamental importance in the economic, political, and social development of Europe.¹⁰⁷ Although certainly not always clear-cut and definitive in shape, the distinction between public and private is a fundamental one shaped by the historical experience of many countries in the West.¹⁰⁸ In many countries in Africa, distinctions between the state realm and "civil society" are "far from

¹⁰³ John Ravenhill, *Africa's Continuing Crises: The Elusiveness of Development*, in AFRICA IN ECONOMIC CRISIS 1, 2 (John Ravenhill ed., 1986) (noting that per capita incomes might fall below levels at the time of independence and that the welfare gap between Africa and the rest of the world has widened).

¹⁰⁴ Nunn, *supra* note 91, at 141 ("My results show that not only was the use of slaves detrimental for a society, but the production of slaves, which occurred through domestic warfare, raiding, and kidnapping, also had negative impacts on subsequent development.").

¹⁰⁵ Martin A. Klein, *The Slave Trade and Decentralized Societies*, 42 J. AFR. HIST. 49, 59 (2001); Walter Hawthorne, *The Production of Slaves Where There Was No State: The Guinea-Bissau Region, 1450-1815*, 20 SLAVERY & ABOLITION 97, 119 (1999) (noting that decentralized and stateless coastal groups produced slaves in a number of ways, including by "refashioning the judicial institutions that structured intra-group relations").

¹⁰⁶ See Nathan Nunn & Leonard Wantchekon, *The Slave Trade and the Origins of Mistrust in Africa* (Working Paper, 2008), available at http://www.economics.harvard.edu/faculty/nunn/files/Trust_v6.pdf (establishing in an empirical study that the slave trade had a negative influence on trust, which had significant long-term implications for economic development in Africa).

¹⁰⁷ JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 11, 43-51 (1962) (discussing the modern separation between the private and public spheres in Europe in which the "public" became a contrast to everything "private").

¹⁰⁸ *Id.*

clear.”¹⁰⁹ In addition, although African states are typically weak, the public sector has been quite large in many African countries as compared with Western countries.¹¹⁰ The relative dominance and concentration of the public sector in Africa magnifies the consequences of corruption.¹¹¹ The magnitude of the public sector in Africa is also a negative factor in economic growth.¹¹²

C. African Sovereigns and Commerce: Business History, Models, and Current Conditions

African institutional structures reflect historical forces with continued resonance today and serve as a backdrop for contemporary commercial relationships. The benefits and proceeds of such relationships may in many instances provide fuel that furthers tyranny and other elements of oppression. Considering the broader implications of commercial and business transactions is important in both absolute and relative terms, particularly given the globalized and increasingly privatized business environment in which many countries and businesses may now operate.

Looking at African conditions from the perspective of business history can be quite illuminating for two reasons. First, the development of corporate forms was important in the development of political and economic institutions in Europe.¹¹³ These corporate forms provided a broader institutional framework for the operation of commercial actors in a broad range of arenas, including limited liability entities such as private equity funds. The corporate forms that existed prior to the nineteenth century were distinct from current corporate forms in important ways,¹¹⁴

¹⁰⁹ Ernest Harsch, *Accumulators and Democrats: Challenging State Corruption in Africa*, 31 J. MOD. AFR. STUDIES 31, 34 (1993). See also John Mukum Mbaku, *Bureaucratic Corruption in Africa: The Futility of Cleanups*, 16 CATO J. 99 (1996), available at <http://www.cato.org/pubs/journal/cj16n1/cj16n1-6.pdf>.

¹¹⁰ Herbert H. Werlin, *The Consequences of Corruption: The Ghanaian Experience*, 88 POL. SCI. Q. 71, 77 (1973) (noting that “by the end of 1964, nearly 70% of Ghanaian wage earners were public employees, who were responsible for nearly all of the significant sectors of the economy and for 27% of manufacturing output”).

¹¹¹ *Id.*

¹¹² Artadi & Sala-i-Martin, *supra* note 24, at 15 (noting that more public spending is bad for economic growth and that if Africa had had levels of public spending similar to the OECD over the last forty years, annual growth rates would have been 0.40% points larger).

¹¹³ See FERNAND BRAUDEL, *THE WHEELS OF COMMERCE: CIVILIZATION & CAPITALISM—15TH TO 18TH CENTURY* v. 2, at 434–46 (1982) (discussing the evolution of trading merchants from maritime firms to large trading companies that became dominant in European international trade by the eighteenth century); Acemoglu, Johnson & Robinson, *supra* note 98, at 561–62 (discussing the importance of the Atlantic trade in the development of European political and economic institutions).

¹¹⁴ Abbott Payson Usher, *Monopoly in the Colonial Trade and in the Expansion of Europe Subsequent to 1800*, 38 AM. ECON. REV. 54, 56–57 (1948) (discussing the varieties

including with respect to questions of company monopolies and the role of states in such enterprises.¹¹⁵ Despite these differences, the merchant trading entities that developed between the sixteenth and nineteenth centuries in Europe are in some respects precursors to the modern multinational corporation.¹¹⁶ Such entities also played an important role in the delineation of the public and private sectors in Europe, particularly in connection with the determination of the proper role of the state in economic activities.¹¹⁷

Further, the history of the great European trading companies such as the Dutch East India Company involved the determination of a trading zone to be exploited, which had significant implications for the regions of the world in which such trading companies operated.¹¹⁸ This underscores the fact that European imperialism and colonialism included significant commercial aspects, which typically focused on extractive activities.¹¹⁹ In addition to chartered trading companies, smaller merchant firms played an important role in Africa. The picture of the operation of such enterprises in

of charters granted by European states to companies that operated in Africa such as the Royal Niger Company (chartered in 1886) and the British South Africa Company (chartered in 1889)).

¹¹⁵ BRAUDEL, *supra* note 113, at 443–44 (noting that the great trading companies were borne of trade monopolies and included state involvement).

¹¹⁶ See JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 5–27 (2004) (connecting the modern corporation and the great European trading companies such as the Dutch East India Company); GEOFFREY JONES, *MERCHANTS TO MULTINATIONALS: BRITISH TRADING COMPANIES IN THE NINETEENTH AND TWENTIETH CENTURIES* (2000) (noting the emergence in Britain of complex multinational business groups that controlled large investments in natural resources, processing, and services in Asia, Latin America, and Africa); K.N. Chaudhuri, *Treasure and Trade Balances: The East India Company's Export Trade, 1660–1720*, 21 *ECON. HIST. REV.* 480, 480 (1968) (noting that in the late seventeenth century the English East India Company was just beginning to exercise significant influence over English business life as centered in the City of London).

¹¹⁷ Harold Demsetz, *The Theory of the Firm Revisited*, 4 *J. L. ECON. & ORG.* 141, 142 (1988) (noting the debate between mercantilists and free traders about the role of the government in the economy in Europe during the eighteenth century).

¹¹⁸ BRAUDEL, *supra* note 113, at 444.

¹¹⁹ A.G. Hopkins, *Imperial Business in Africa, Part I: Sources*, 17 *J. AFR. HIST.* 29, 29 (1976) (acknowledging the importance of expatriate trading firms in the business history of Africa, but noting that sources of information with respect to the activities of such firms remain scarce and understudied); A.G. Hopkins, *Imperial Business in Africa, Part II: Interpretations*, 17 *J. AFR. HIST.* 267, 280 (1976) [hereinafter Hopkins II] (noting that the nineteenth century was “made for freebooters and frontiersmen who excelled at a type of slash and burn or ‘swidden’ commerce” in which windfall gains generated by extractive activities were not atypical); Hopkins, *supra* note 91, at 583 (noting that the commercial link had been dominant in relations between Africa and Europe since the beginning of the slave trade in the fifteenth century); W.M. Mathew, *The Imperialism of Free Trade: Peru 1820–70*, 21 *ECON. HIST. REV.* 562, 565 (1968) (noting the ways in which British political and commercial interests were intermixed in its relationship with countries such as Peru).

Africa is understudied and at times reflects conflicts between business firms and European colonial administrators.¹²⁰ However, the operation of such business interests in Africa in some instances can be tied directly to economic and political weaknesses that exist today. For example, understanding the operation of chartered companies during Portuguese rule is essential for understanding economic weaknesses that exist in Mozambique today.¹²¹

Informal imperialism rooted in business activities played a significant role in the operation of European states and firms in Africa and elsewhere in the world.¹²² Understanding the structure of relationships that developed through the activities of such actors in Africa prior to independence is important for understanding the nature of the incentives that may still be operative in Africa. The operation of European firms and states in Africa were based on structural models that in many respects are an important element in the structural and institutional problems that have been so prevalent in Africa in the post-colonial era. The trading relationships between Africa and Europe were typically driven by European demands.¹²³ Further, the firms that operated in Africa did not operate for the benefit of the colonized.¹²⁴ The firms that engaged in such trading were owned by external stockholders and typically acted in the interests of such stockholders. This was the case of the Mozambique Company, which was chartered by the government of Portugal in part for economic development purposes.¹²⁵ Rather than reinvesting funds in Mozambique, the Mozambique Company engaged in stock speculation and invested funds in European banks to draw interest.¹²⁶ In addition to starving the local administration of funds, the Mozambique Company engaged in policies that

¹²⁰ Hopkins II, *supra* note 119, at 272 (discussing occurrence of friction between the Colonial Office and expatriate firms).

¹²¹ Leroy Vail, *Mozambique's Chartered Companies: The Rule of the Feeble*, 17 J. AFR. HIST. 389, 389 (1976).

¹²² FERGUSON, *supra* note 92, at 243–44 (referring to the “informal imperialism” involved in the economic reach of British capital in Argentina and Brazil in the late nineteenth and early twentieth centuries, despite the fact that these countries were not formally British colonies or even in the sphere of the British imperial shadow).

¹²³ Monday Efiang Noah, *Inland Ports and European Trading Firms*, 88 AFR. AFF. 25, 25–27 (1989) (discussing the transition in trade between West Africa and Europe from the slave trade to trade in palm oil and other products that supplied the need for light and soap with the advent of the European industrial age).

¹²⁴ ONWUKA DIKE, *TRADE AND POLITICS IN THE NIGER DELTA, 1830–1885: AN INTRODUCTION TO THE ECONOMIC AND POLITICAL HISTORY OF NIGERIA I* (1956) (noting the five centuries of trade between West Africa and Europe and the fact that such trade fluctuated in accordance with European policies and demands).

¹²⁵ Vail, *supra* note 121, at 395.

¹²⁶ *Id.*

inhibited local development, including forced labor.¹²⁷

The operation of European states and firms in Africa raises significant structural questions with respect to the incentives that were established prior to colonialism. Many of these incentive structures have survived the end of colonialism and formal rule of African countries by European states. Consequently, failures in governance and institutions today also relate to and are magnified by the patterns of relationships that were established prior to independence. The operation of private equity funds in Africa, as evident in the activities of Donegal, underscores some important consequences of failed African institutional infrastructures.

III. VULTURE INVESTORS AND SECONDARY MARKETS FOR AFRICAN SOVEREIGN DEBT

A. Vultures, Hyenas, and Odious Debts

Institutional models that have developed in many African contexts raise persistent questions with respect to lack of consent. Potential concerns are reinforced by webs of commercial relationships entered into by sovereigns and ruling elites who may operate with few restrictions and who may also receive a disproportionate share of the benefits of such relationships. These commercial relationships involve transactions that deal with debt, allocations of rights with respect to resources, purchase of tangible goods and services, and a myriad of other types of commercial transactions. Developing country debt transactions have received particular attention because they led a number of countries to incur high and in some instances unsustainable debt levels. Such developing country debts have received increased scrutiny in recent years, particularly with regard to the circumstances under which later governments might repudiate such debts. Some refer to debts incurred by many developing countries as odious debts.¹²⁸ Discussions in existing odious debt scholarship propose a broad range of potential solutions to deal with inequitable transactions entered into by tyrants or corrupt leaders, including changes in contract interpretations, changing legal doctrines and interpretations, and limitations in secondary markets for certain types of sovereign debt.¹²⁹ The extent to

¹²⁷ *Id.* at 395–96.

¹²⁸ See Joseph Hanlon, *Dictators and Debt*, JUBILEE RES., Nov. 1998, <http://www.jubileeresearch.org> (search “Hanlon,” then follow “Jubilee Research: Jubilee 2000: Report: Dictators debt” hyperlink).

¹²⁹ Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201 (2007) (discussing remedies based in contract); Seema Jayachandran & Michael Kremer, *Odious Debt*, 96 AM. ECON. REV. 82 (2006) (discussing repudiation of debt obligations based on theories related to benefit and consent); Ctr. for Int’l Sustainable Dev. Law [CISDL], *Advancing the Odious Debt Doctrine*, CISDL Working

which institutions and governance regimes within a country permit citizens to exercise consent to ruling authority should be a critical factor in determining whether and when debts may be repudiated. Identifying applicable transactions in the African context requires clearer fundamental principles governing delineation of the boundaries between transactions that may or may not be repudiated.

As legal scholar Anna Gelpern has highlighted, debt of developing countries given by official sources may be commercial in form but not in substance.¹³⁰ Much other legal commentary on odious debt has discussed remedies in the context of private creditors.¹³¹ The Donegal case highlights the importance of the form, regardless of the underlying substance of the original loan transaction. By creating a secondary market in what was originally government debt, Donegal was able to enforce a government-to-government debt as a private creditor, which may have potential implications for loans given by governments that are structured as loans in form but that are not actually loans in substance. As the Donegal judge notes, the effective transfer of the Romanian debt from a government creditor to a private creditor has significant legal implications, particularly with respect to commercial transactions and sovereign immunity.¹³² To the extent that secondary markets are created in debt given by government creditors, distinctions between official creditors and private creditors may be less pertinent. Further, differences between loan transactions in form as compared with substance may become less important. Secondary markets in developing country debt may also make attempts to identify and distinguish treatment of debts identified as odious more difficult.¹³³

Donegal and other so-called vulture funds have been significantly criticized on account of their activities in poor countries. Vulture funds have been awarded significant sums in recent years.¹³⁴ Such cases may even involve third parties, as has been the case with a series of cases

Paper No. COM/RES/ESJ, (Mar. 11, 2003) available at http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf; Odious Debts, <http://www.odiousdebts.org> (giving comprehensive overview of legal status and history of odious debt doctrine).

¹³⁰ Gelpern, *supra* note 5, at 90–100.

¹³¹ See *supra* note 129.

¹³² *Donegal Decision I*, *supra* note 1, paras. 261, 302. See also Robert Was, *The Commercial Activity Exception to Sovereign Immunity and the Boundaries of Contemporary International Legalism*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 213, 213 (Craig Scott ed., 2001), available at [http://osgoode.yorku.ca/osgmedia.nsf/0/6F3E8109135F324A852571B80073C79A/\\$FILE/The%20Commercial%20Activity%20Exception.pdf](http://osgoode.yorku.ca/osgmedia.nsf/0/6F3E8109135F324A852571B80073C79A/$FILE/The%20Commercial%20Activity%20Exception.pdf).

¹³³ CISDL, *supra* note 129, at 11 (“Any attempt to invoke the doctrine of odious debts is seriously complicated by the emergence of debt restructuring agreements and secondary markets for debt.”).

¹³⁴ See *supra* note 44 and accompanying text.

involving the Republic of Congo, which has enmeshed several international oil and gas companies as a result of vulture funds seeking to garnish royalty payments contractually owed from such companies to the Republic of Congo.¹³⁵ Some defend the activities of vulture funds by pointing out that as a legal matter sovereigns generally do take on the obligations of their predecessors.¹³⁶ Those who oppose the activities of vulture funds suggest that debts that constitute “odious” debts undertaken by corrupt governments, for example, should be able to be repudiated by successor governments.¹³⁷ Odious debt doctrine has been described as a “doctrine of public-international law aspiring to the status of customary international law.”¹³⁸ Odious debt has been defined as debt “contracted against the interests of the population of a state, without consent, and with the full awareness of the creditor.”¹³⁹ Consideration of developing country debt from varied perspectives would benefit from more explicit consideration of the assumed nature of the sovereign and institutional context of the sovereign’s operation with respect to transactions that are commercial in either substance or form.

Different readings of the Donegal-Zambia case may involve fundamentally divergent assumptions about sovereign states and the institutional contexts of the exercise of sovereign authority. The realities of government and governance in many African contexts suggest that legal interpretations of contracts by sovereign governments need to take better account of the institutional contexts within which such contracts are negotiated and put in force. Further, because sovereigns have been weak, if not failing, and ruling elites often corrupt in many post-colonial African contexts,¹⁴⁰ the post-colonial African condition has reflected varying

¹³⁵ *FG Hemisphere Assoc. v. Republique du Congo*, 455 F.3d 575 (5th Cir. 2006); Andrew Derman & William Katz, *Vultures in Congo*, ENERGY RISK 16–17 (Sept. 2006), <http://www.tklaw.com/resources/documents/Vultures%20in%20Congo-Derman,%20Katz%20&%20Melsheimer1.pdf>.

¹³⁶ Felix Salmon, *In Defense of Vulture Funds*, FELIXSALMON.COM BLOG, Feb. 24, 2007, <http://www.felixsalmon.com/000667.html>.

¹³⁷ Ashley Saegear, ‘Vulture’ Feeds on Zambia, GUARDIAN.CO.UK, Feb. 15, 2007, <http://www.guardian.co.uk/business/2007/feb/15/debt.development> (describing the reactions of Oxfam and Jubilee Debt Campaign to the February 2007 Donegal court decision); Larry Catá Backer, *Odious Debts and “Vulture Funds”: Making a Case for Repudiation of Sovereign Debt*, LARRY CATÁ BACKER BLOG, Feb. 16, 2007, <http://lcbackerblog.blogspot.com/2007/02/odious-debt-and-vulture-funds-making.html>.

¹³⁸ Gelpern, *supra* note 5, at 85.

¹³⁹ CISDL, *supra* note 129, at 13.

¹⁴⁰ Harsch, *supra* note 109, at 31 (“[S]imilar expressions of public outrage against corruption and corrupt officials have occurred in many an African country since the beginning of the 1990s, given greater rein by the eruption of pro-democracy movements that drew large numbers of people into political debate and organisation.”); Mbaku, *supra* note 109.

degrees of tyranny.¹⁴¹ Tyranny has in turn contributed to the seemingly endemic political and economic chaos that far too often characterizes conditions in many African countries. Tyranny in many African countries has facilitated scavenging by internal constituencies that echoes the predatory extractive behaviors common during the colonial era, as well as scavenging by external constituencies, at times in concert with internal scavengers.

B. Vulture Investors and Markets for Change of Control: The Sovereign Difference and Tyrant Debt

The magnitude of tyranny and scavenging in many African contexts clearly distinguishes repurchases of African sovereign debt from the types of distressed company transactions in which private equity firms have in the past have more typically engaged.¹⁴² Distressed debt secondary markets were created in the United States,¹⁴³ but form an increasingly important segment of global private equity markets.¹⁴⁴ Both hedge funds and private equity funds participate in distressed company investing.¹⁴⁵ One type of distressed company transaction structure involves direct investment in a distressed entity, often with a goal of control.¹⁴⁶ In such transactions, investors typically identify distressed companies that are undervalued, and invest in the stock or debt of such companies, usually at a discount, with the goal of achieving high returns once the distressed company emerges from bankruptcy or is reorganized.¹⁴⁷ Vulture fund activities are more closely analogous to private equity distressed company trading activities without the element of control. Distressed debt trading involves purchase of discounted, undervalued, or mispriced loans, loan portfolios or traded

¹⁴¹ GEORGE B.N. AYITTEY, *AFRICA BETRAYED* 293–304 (1993) (discussing tyrannical regimes in Africa).

¹⁴² Richard M. Bolton & William T. Burgess, *Private Equity Fund and Portfolio Company Investment*, in *PRIVATE EQUITY: HISTORY, GOVERNANCE, AND OPERATIONS* 335, 346–56 (Harry Cendrowski et al. eds., 2008).

¹⁴³ John Flood, *The Vultures Fly East: The Creation and Globalisation of the Distressed Debt Market*, in *ADAPTING LEGAL CULTURES* 257, 268 (David Nelken & Johannes Feest eds., 2001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=949581&rec=1&srcabs=1147643 (noting that distressed securities secondary markets were first established in the United States).

¹⁴⁴ Kelly DePonte, *An Overview of the Private Equity Distressed Debt and Restructuring Markets*, in *THE GUIDE TO DISTRESSED AND TURN-AROUND INVESTING* 17, 17 (Probitas Partners 2006), available at http://www.probitaspartners.com/pdfs/distressed_debt_kd_2006.pdf.

¹⁴⁵ Jay Krasoff & John O'Neill, *supra* note 27 (discussing distressed investment markets).

¹⁴⁶ *Id.*; DePonte, *supra* note 144, at 17–18.

¹⁴⁷ DePonte, *supra* note 144, at 17–18.

securities, with resale of such assets at a later time for a profit.¹⁴⁸ In public market contexts, distressed debt trading can serve the important market function of facilitating identification of arbitrage opportunities in mispriced securities and taking advantage of and profiting from this recognition, resulting in more rational pricing of debt.¹⁴⁹ In such instances, secondary markets may influence primary markets and create incentives for more rational pricing in primary debt markets.¹⁵⁰ In this manner, secondary market trading may improve and facilitate primary market activities and encourage greater and more efficient lending. Vulture investors in distressed company contexts also play an important role with respect to the market for change of control.¹⁵¹ The activities of vulture investors in distressed company contexts may effectively discipline managers of distressed firms by replacing them with new management or using control and the threat of a potential replacement to solicit improved performance from existing management.¹⁵²

In contrast, the potentially positive efficiency effects of secondary trading markets for distressed company debt do not necessarily extend to secondary markets in debts incurred by developing country tyrants. First and foremost, unlike the distressed company context, where company control can be wrested in many instances from poor managers or to

¹⁴⁸ *Id.* at 17; Beatty Barfield Page & Federico Arturo Goudie, The Distressed Loan Trading Market in the United States, Presentation at the International Conference on “Insolvency is Changing Globally—How and Why” (Apr. 17–20, 2004), available at http://www.hugheshubbard.com/files/Publication/41bf6cdf-cb57-48fa-8580-499abad24943/Presentation/PublicationAttachment/ad5b31c0-074b-462a-b9da-4c3466448f93/Distressed_Loan_April_2004.pdf (“Investments in distressed debt in the United States involve both the acquisition of publicly traded or privately held corporate bonds as well as the acquisition of loans and loan portfolios.”).

¹⁴⁹ See Edward I. Altman, *Distressed and Defaulted Debt Securities: Market Dynamics and Investment Performance*, 9 FIN. MARKETS & PORTFOLIO MGMT. 322 (1995) (describing distressed securities investment strategies and noting that distressed security investors are sometimes called vultures); Moe Ibrahim, *An Overview of Distressed Debt*, EUREKAHEDGE, 2006, http://www.theasiandebtfund.com/files/Finance_Asia_0901.pdf (“Distressed debt investors scour the market for undervalued debt securities . . . purchase the debt at deeply discounted prices, and adopt various strategies to enhance the debt’s value.”).

¹⁵⁰ Jeffery W. Gunther & Anna Zhang, *Hedge Fund Investors More Rational Than Rash*, 2 ECON. LETTER—FED. RESERVE BANK OF DALLAS 6, Aug. 2007, available at <http://www.dallasfed.org/research/eclett/2007/el0708.html> (noting that hedge funds, “[b]y seeking arbitrage opportunities associated with misaligned prices and exploiting them through short sales, derivatives and other leveraged trading strategies, hedge funds promote price discovery, resulting in more efficient markets and lower capital costs.”).

¹⁵¹ Edith S. Hotchkiss & Robert M. Mooradian, *Vulture Investors and the Market for Control of Distressed Firms* 5 (Working Paper, Mar. 1996), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883 (noting that vulture investors typically have an influence over the restructuring process for distressed companies).

¹⁵² *Id.* at 27 (finding in empirical study of vulture investors that “vulture investors serve to discipline managers of companies in financial distress.”).

facilitate improved performance from existing managers, tyrants are often difficult to dislodge. At least in part as a result of the lack of an effective market for change of control in cases of loans to tyrants, secondary markets in tyrant debt are not likely to have a positive impact from a control perspective. In fact, tyrant debt transactions likely need the reverse effect in that primary markets for such debt should be limited, particularly in the African context where tyrants have been almost uniformly predatory and ineffective. In many instances, African tyrants have also contributed to greater poverty, violence, and political instability.¹⁵³ Loans involving tyrants have in many instances facilitated repression by giving tyrants funds for purchases of weaponry intended for internal control purposes.¹⁵⁴ They also contributed to the consolidation and furtherance of tyrant control by providing funds that find their way to private accounts of tyrants and their cronies.¹⁵⁵

Although defining what constitutes a debt that can be repudiated is not always clear, future governments should not be accountable for the debts incurred by tyrants due to a lack of consent that renders tyrants internally unaccountable for their activities.¹⁵⁶ Requiring later governments to honor such loan obligations effectively forces the population of the country to bear the risk of loan transactions entered into by leaders over whom they had little choice in selecting and little or no ability to dislodge. Some discussions of sovereign debt incorporate implicit assumptions of sovereign accountability that do not take adequate account of the essential unaccountability of tyrants. To the extent that they are accountable to anyone, such tyrants may, in many instances, only be accountable to external parties, including those that lend to them. In loan contracts with tyrants, creditors should bear the risk of the transaction being repudiated.

¹⁵³ AYITTEY, *supra* note 141, at 293.

¹⁵⁴ Hanlon, *supra* note 128, § 1.

One-fifth of all developing country debt consists of loans given to prop up compliant dictators. Mobutu, Marcos, Suharto and other notorious dictators were propped up by massive loans. Even when they committed gross human rights violations, were notoriously corrupt, and blatantly transferred money to Swiss banks, the flow of loans continued.

Id.

¹⁵⁵ Festos O. Egwaikhide & Victor Adefemi Isumonah, *Nigeria Paralysed: Socio-Political Life under General Sani Abacha*, 26 WORLD DEV. 219 (2001), available at http://www.codesria.org/Links/Publications/ad3_2001/Isumonah.pdf; Elizabeth Olson, *Luxembourg Freezes Loot Abacha Took From Nigeria*, INT'L HERALD TRIB., May 10, 2000, <http://www.iht.com/articles/2000/05/10/abacha.2.t.php>.

¹⁵⁶ Jayachandran & Kremer, *supra* note 129, at 82 (describing odious debt doctrine as holding that "debt should not be transferable to successor regimes if (a) it was incurred without the consent of the people and (b) was not for their benefit . . .").

As a result, to the extent that a creditor seeks to enforce transaction terms against later governments, the creditor should bear the burden of demonstrating the substantive fairness of any underlying transactions and uses of funds. This requirement should not be waivable.

Determining what constitutes tyrant debt will depend on identification of characteristic features of tyrant governments. Indicia of tyranny in post-colonial African contexts have been evident in the absence of a number of institutions, including a free media, independent judiciary, and free expression.¹⁵⁷ Other indicators of tyranny in Africa have included widespread rule by military regimes and oppressive single-party state regimes.¹⁵⁸ Although the promise of greater security is at times used to rationalize tyranny, the ascension of despots in the post-colonial context has not, for example, significantly tempered violence in most contexts, and persistent violence and civil war have become pervasive features of the African sociopolitical topography.¹⁵⁹ From an economic perspective, tyranny in Africa has been accompanied by significant economic mismanagement, with a pattern emerging in many countries in which “elites [a]re raiding the national treasury.”¹⁶⁰

Circumstances in which governments are characterized by significant tyranny thus require fundamental reassessment of the role of sovereign commercial obligations. This is particularly true because in such instances, predatory tyrant behavior will in many cases pervade and reshape institutions and transactions to suit the goals of leaders’ predatory intent.¹⁶¹ Tyrannical regimes reflect a clear case in which the obligations of past governments with respect to debts should not necessarily bind future governments. The presence of tyranny in such instances should be measured by identifiable characteristics related to relative degrees of political freedom and repression, the presence or absence of political institutions that enable participation in or that effectuate actual transfer of power, the independence of the judiciary, and other relevant factors.

C. Poor Country Debt: Lessons of *Donegal v. Zambia*

The case for repudiation of odious debts is clearest in the case of

¹⁵⁷ AYITTEY, *supra* note 141, at 293.

¹⁵⁸ *Id.* at 293–94.

¹⁵⁹ Tony Addison, Philippe Le Billon & S. Mansoor Murshed, *Conflict in Africa: The Cost of Peaceful Behavior*, 11 J. AFR. ECON. 365 (2002); Ibrahim Elbaldawi & Nicholas Sambanis, *Why Are There So Many Civil Wars in Africa? Understanding and Preventing Violent Conflict*, 9 J. AFR. ECON. 244 (2000).

¹⁶⁰ AYITTEY, *supra* note 141, at 294. See *supra* notes 69–72 and accompanying text.

¹⁶¹ Jan Kees van Donge, *The Plundering of Zambian Resources by Frederick Chiluba and His Friends: A Case Study of the Interaction between National Politics and the International Drive Towards Good Governance*, 108 AFR. AFF. 69, 70 (2008) (discussing behavior that is predatory on the state).

tyrannical regimes. African governments, however, even if not tyrannical, have in the post-independence period had tendencies towards significant predatory behaviors. The case for debt repudiation in such instances is less clear because hallmark characteristics of tyranny, including a lack of consent and representative government, may be absent or of less magnitude. However, a common tendency to predation and scavenging exists in tyrannical and non-tyrannical regimes in Africa and is manifest, for example, in widespread corruption in many African countries that led the African Union (AU) to adopt an African anticorruption convention in 2003.¹⁶² The AU Anticorruption Convention acknowledges the “negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples” and notes that “corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent.”¹⁶³ A number of African countries have adopted specific laws or other measures intended to ameliorate problems of corruption.¹⁶⁴

While Zambia has been a fairly stable country relative to others in Africa, it has reflected some characteristics of tyranny.¹⁶⁵ Kenneth Kaunda and the United National Independence party governed Zambia from the time of independence in 1964 for more than twenty years, ruling Zambia as a one-party state from 1972 to 1991.¹⁶⁶ In 1991, competitive party politics returned to Zambia with the election of Frederick Chiluba under the mantle of the Movement for Multiparty Democracy.¹⁶⁷ Chiluba ruled from 1991 to 2002, came to power as an anti-corruption fighter, but oversaw a highly corrupt regime.¹⁶⁸ In 2007, Chiluba and other defendants were found in

¹⁶² African Union Convention on Preventing and Combating Corruption, Maputo, July 11, 2003, available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf.

¹⁶³ *Id.* (setting forth rationale for Convention in preamble).

¹⁶⁴ ECON. COMM. AFR., *supra* note 72, at 35 (noting steps taken to curb corruption in a number of African countries, including Ethiopia, Ghana, Namibia, Nigeria, Tanzania, Sudan, Zambia, and Zimbabwe).

¹⁶⁵ Richard L. Sklar, *Democracy in Africa*, 26 AFR. STUD. REV. 11, 17 (1983) (noting tendency to development of developmental dictatorship in Zambia under Kenneth Kaunda).

¹⁶⁶ van Donge, *supra* note 161, at 73 (noting that the United National Independence Party ruled from the time of independence in 1964 until 1991, and as a one-state party from 1972 onwards).

¹⁶⁷ *Id.*; *Zambia v. Meer Care, & Desai & Ors*, [2007] EWHC (Ch) 952, [442], [2007] All E.R. (D) 97, available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2007/952.html&query=zambia+and+meer&method=boolean> (noting the election of Chiluba on an anticorruption ticket).

¹⁶⁸ van Donge, *supra* note 161, at 73–74 (noting significant economic decline in Zambia in post-independence period and implications of stealing from the government for foreign aid).

U.K. court proceedings to have stolen some forty six million dollars through two London law firms.¹⁶⁹ The Chiluba regime, although democratically elected, was manifestly corrupt. The U.K. court in the Zambian corruption case noted: “The people of Zambia will know that whenever FJT [Chiluba] appears in public wearing a smart handmade suit or a pair of his ‘signature’ shoes that they were acquired by stealing money from the people the vast majority of whom live at subsistence levels.”¹⁷⁰ Despite the presence of predatory rulers,¹⁷¹ however, Zambia has had a tradition of successful democratic protest in the post-independence era,¹⁷² that has implications for treatment of Zambian debt held by vulture investors.

The Donegal court’s interpretation of the relative obligations of Zambia and Donegal, in light of the facts of the case and applicable legal standards, is not unreasonable.¹⁷³ The Donegal case, however, suggests that better legal doctrine needs to be established with respect to transactions entered into by predatory and scavenging sovereigns. One potential avenue for challenging transactions made by predatory but non-tyrannical regimes could be based on a conception of negative duty as elucidated by Thomas Pogge and others.¹⁷⁴ Under such assumptions, legal doctrine governing transactions between predatory sovereigns and developed world actors would embed negative duties that could be violated in instances of transactions involving governments of affluent countries. This means that criteria for repudiation of debts should in some instances extend to transactions with non-tyrants. More specifically, negative duties could permit repudiation in circumstances in which actors such as vulture investors collaborate with ruling cliques in poor countries in certain types of transactions. Transactions that might merit greater scrutiny could include ones that exclude or divert benefits from the population, allocate benefits of commercial or other transactions disproportionately towards those in power or engage in other activities that serve to intensify poverty of many who

¹⁶⁹ *Meer Care*, *supra* note 167, at paras. 443, 1119–40 (noting claims against former president Chiluba of up to three million dollars in corruption case).

¹⁷⁰ *Id.* at para. 467.

¹⁷¹ Peter Burnell, *The Party System and Party Politics in Zambia: Continuities Past, Present and Future*, 100 AFR. AFF. 239, 251 (2001) (noting the ruling party’s ability to reinforce its position by manipulating public resources).

¹⁷² van Donge, *supra* note 161, at 73. See generally Lee M. Habasonda, *The Military, Civil Society and Democracy in Zambia*, 11 AFR. SECURITY REV. 1 (2002), available at <http://www.iss.co.za/PUBS/ASR/11No2/Habasonda.html> (noting the growing tradition of civil society activism in Zambia).

¹⁷³ Salmon, *supra* note 136.

¹⁷⁴ Thomas Pogge, *World Poverty and Human Rights*, 19 ETHICS & INT’L AFF. 1, 3–4 (2005). See also Ilan Benshalom, *The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law* (Nw. Pub. L. Res., Paper No. 08–43, 2008), available at <http://ssrn.com/abstract=1319465>.

live within the poor country, while benefiting a small minority of the powerful or connected.

Doctrine derived from obligations to the poor of such countries would no doubt apply to Zambia. Zambia annual per capita GDP, which was \$307 in 1999, \$314 in 2000, and \$391 in 2003, increased to \$917 in 2006.¹⁷⁵ Fluctuations in Zambia GDP have historically largely reflected changes in the world price of copper.¹⁷⁶ Each year between 1991 and 1998, the percentage of the Zambia population living in poverty ranged from 69.2% to 72.9% of the population, with 53.2% to 60.6% being categorized as living in extreme poverty.¹⁷⁷ The implications of even a payment as seemingly small as fifteen million dollars to Donegal by Zambia are potentially quite significant in magnitude in Zambia terms. Although not directly paid by the Zambia poor, payments of such amounts displace funding that could otherwise be spent on critical health care, education, infrastructure, and other needs. The Donegal debt award not including interest is approximately \$4.62 per capita based on 2006 Zambia population figures,¹⁷⁸ which is more than the \$3.68 per capita that Zambia households spent on health care in 2002.¹⁷⁹ The amount awarded to Donegal represented close to nine percent of total 2002 Zambia health expenditures of \$179 million.¹⁸⁰

At a minimum, relationships between creditors and poor nations in the African context require greater understanding and mechanisms intended to reduce incentives to scavenge by external vultures or internal hyenas. In addition, the identities of investors in private equity funds that seek to profit from secondary markets in sovereign debt should in all instances be revealed. The identity of the underlying owners who might profit from Donegal's collection of the Zambia debt remains unclear, for example, in

¹⁷⁵ International Monetary Fund, World Economic Outlook Database, October 2008, Zambia, <http://www.imf.org/external/pubs/ft/weo/2008/02/weodata/weorept.aspx?sy=1999&ey=2013&scsm=1&ssd=1&sort=country&ds=.&br=1&c=754&s=NGDPDPC&grp=0&a=&pr.x=55&pr.y=5#cs1> (last visited Apr. 23, 2009).

¹⁷⁶ Shantayanan Devarajan & Delfin S. Go, *The 123PRSP Model, in THE IMPACT OF ECONOMIC POLICIES ON POVERTY AND INCOME DISTRIBUTION: EVALUATION TECHNIQUES AND TOOLS* 291 (François Bourguignon & Luiz A. Pereira da Silva eds., 2003) ("Changes in Zambia's GDP can be traced almost completely to changes in the world price of copper (except for a brief period between 1970 and 1974).").

¹⁷⁷ SAVE THE CHILDREN SWEDEN & INST. FOR DEMOCRACY IN S. AFR. (IDASA), CHILDREN AND THE BUDGET IN ZAMBIA 10 (2004), available at www.idasa.org.za/gb/OutputFiles.asp?WriteContent=Y&RID=1138.

¹⁷⁸ U.S. DEPARTMENT OF STATE, BACKGROUND NOTE: ZAMBIA (Jan. 2009), <http://www.state.gov/r/pa/ei/bgn/2359.htm> (giving estimated 2006 Zambia population as 11.9 million).

¹⁷⁹ FELIX PHIRI & MARIE TIEN, ZAMBIAN NATIONAL HEALTH ACCOUNTS 2002: MAIN FINDINGS 7 (Zambia Ministry of Health 2004).

¹⁸⁰ *Id.*

the Donegal case. Secrecy in such instances can magnify scavenging by creating incentives for insiders to create seemingly independent third party entities as a new mechanism for exploitation. Consequently, a minimum requirement of transparency and disclosure of the structure of entities that own sovereign debt and all affiliates, including identity of all investors, should be required in any actions that seek to enforce sovereign debt obligations.

Commercial relationships with countries in Africa may embed legal interpretations concerning enforceability of contracts documenting loan transactions that in the worst instances may magnify conditions of tyranny and extreme poverty. The institutional contexts within which commercial transactions occur should be fully considered and more appropriate legal doctrine and interpretations developed to take account of the realities of such contexts. Discussions of odious debt reflect noteworthy and important attempts to use contract law interpretations and other legal doctrine to address legal issues presented in cases of tyrant and poor country debt.

The Donegal-Zambia case offers an example of a transaction that would likely be a simpler one in the context of a developed country distressed debtor. However, the operation of vulture private equity investors using tactics that might be similar in some respects to those used with distressed companies takes on radically different significance in the context of countries ravaged by internal scavengers that may include tyrant rulers and in some instances corrupt segments of ruling elites. In such contexts, commercial relationships with external parties should be structured and enforced so as to minimize opportunities to reproduce institutional structures that facilitate tyranny and egregious corruption that exacerbate or contribute to human suffering in the poorest regions of the world.

