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HAMILTON'S LAW AND FINANCE—BORROWING FROM THE BRITS (AND THE DUTCH)

Christian C. Day*

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ABSTRACT

We live in an era when Modern Monetary Theory[1] has gained purchase. Deficits do not seem to matter to nations or their finance ministers. States believe they can print their way to utopia without a reckoning; this is a scheme freighted with disaster.

This article centers on the achievements of America's greatest finance minister, whose grasp of political economy was without equal. Alexander Hamilton charted the course for American economic power. His work is timely and worthy of study.

Late eighteenth-century America sought commercial growth and new manufacturers yet feared monopolistic economic power. Hamilton's economic program, centered on a national bank and program for manufacturing, provided the framework for the finance-led transformation of America. In a short time, Hamilton's elegant solutions (based upon the English financial model) transformed America from a defaulting debtor to a magnet that attracted immense amounts of capital in the nineteenth century. The burden of the Revolutionary War debt needed to be resolved. Hamilton's program: the assumption of the states and Confederation debt, its monetization, the establishment of the Bank of the United States, and *Report on Manufactures* laid the foundation for a vibrant economy. The article demonstrates how Hamilton's prudent program strengthened the new federal government while providing the blueprint for the commercial society that emerged in the nineteenth century.

"That an adequate provision for the support of the Public Credit is a matter of high importance to the honor and prosperity of the United States."[2]

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1. See for example, a liberal American take on Modern Monetary Theory: Policy and business circles these days buzz about something called modern monetary theory (MMT). Many claim it explains why budget deficits do not matter and why monetary ease, "printing money," can cover the difference between spending and taxes and never produce inflation. It has allowed Bernie Sanders and other politicians on the progressive left to dismiss establishment concerns about Medicare for all or the Green New Deal or other proposals that would involve vast expansions of federal spending. *See* Milton Erzati, *What is Modern Monetary Policy?*, FORBES (May 28, 2019), *available at* https://www.forbes.com/sites/miltonezrati/2019/05/28/what-is-modern-monetary-theory/#4faf72a53186 (last visited Oct. 13, 2019). For a more detailed overview, *see* Peter Coy, Katia Dmitrieva & Matthew Boesler, *Warren Buffett Hates It. AOC Is for It. A Beginner's Guide to Modern Monetary Theory*, BLOOMBERG (Mar. 29, 2019), *available at* https://www.bloomberg.com/news/features/2019-03-21modern-monetary-theory-beginner-s-guide (last visited Oct. 13, 2019).

2. *Alexander Hamilton, Report Relative to a Provision for the Support of Public Credit* (1790), *reprinted in* 2 ANNALS OF CONG. 2043 (1790) [hereinafter *Report on Public Credit*]. Hamilton understood that once the United States announced it was going to stand by its war debt the nation's credit would be established and America would be on the road to prosperity. *Id.* Hamilton's plans, detailed *infra*, were able to create that sound credit.

"A national debt, if not excessive, will be to us a national blessing. It will be a powerful cement to our union. It will also create a necessity for keeping up taxation to a degree, which without being oppressive will be a spur to industry."[3]

I. INTRODUCTION

This article demonstrates the importance of Alexander Hamilton's critical economic and nationalist vision.[4] Hamilton's plan was an American adaptation of the British "square": the Excise (easily raised taxes capturing trade and technology-based wealth); Parliament (popular support for government action and programs); the National Debt (a source of funds for national defense as well as for internal improvements like canals, harbors and wharves and roads); the Bank of England (lender to the government and liquefier of the National Debt). The British "institutional square of power" proved to be superior to any of its rivals.[5]

In Hamilton's plan, revenue was raised from tariffs and excise taxes (tariffs initially being less controversial), the Congress (imposing taxes on the people to fund the national debt and meet the needs of government), the National Debt (refunding it establishes American credit and provides a capital base for further government needs), and the Bank of the United States (lender to the government and monetizer of debt). Hamilton augmented the power of the "square" with his visionary *Report on Manufactures* that presaged a commercial empire funded by a flood of European and domestic capital. The article explains the plan's

3. Letter from Alexander Hamilton to Robert Morris (Apr. 30, 1781), *in Report Relative to a Provision for the Support of Public Credit* (1790), *reprinted in* 2 ANNALS OF CONG. 2043 (1790). This letter shows Hamilton's thinking about national economic policies, a decade before he assumed office at the Treasury. He was about twenty-four years of age when he penned the letter! Hamilton saw the economic policies of the federal government binding the nation together and creating a powerful union. There are several things happening here. As you will see, Hamilton understood how the British were able to use their national debt to build a great power. England, a nation with one-half the population of France, its chief rival, was able to use its national debt to leverage its economic power and become a world power. Hamilton believed the United States could become the colossus of the Americas by using the national debt and prudent fiscal policy to become an economic and military power. The debt liquefied the money supply with conservative fiat money; and a sensible revenue policy would fund the debt and build industrial might. We pretty much have done it, following what the Dutch and the British so successfully accomplished.

4. For an excellent modern biography of America's greatest finance minister, *see* RON CHERNOW, ALEXANDER HAMILTON (2004) [hereinafter ALEXANDER HAMILTON].

5. *See* NIALL FERGUSON, THE CASH NEXUS: MONEY AND POWER IN THE MODERN WORLD, 1700-2000 (2002) [hereinafter CASH NEXUS]. The square of power is tax being efficiently collected, Parliament, the Bank of England (national bank), and robust financial markets. For a concise exposition of the square of power, *see id.* at 10-20.

development, its scope and operation, and its triumph for union and commercial empire against the backdrop of rough and tumbles early Republic politics.

II. THE SOURCES OF HAMILTONIAN ECONOMICS

Alexander Hamilton's life prepared him for his role as Washington's first minister, America's greatest Secretary of the Treasury, and the architect of its commercial empire. At an early age, Hamilton mastered finance, international trade, and business as a clerk in a counting-house in St. Croix. Hamilton's service as one of Washington's chief aides during the Revolution created bonds of trust and affection that served Washington and the Nation well during Hamilton's stewardship as head of the Treasury.[6] Hamilton's nationalism and keen sense of political economy led him to think profoundly about the new nation's grave economic problems. The national debt problem was destroying American credit and sapping its strength. Military and diplomatic weaknesses were byproducts of the unfounded nation debt. Hamilton had substantial experience as a commercial lawyer and founder of the Bank of New York (America's third bank!).[7] He was a friend and confidant of Robert Morris, the Superintendent of Finance under the Articles of Confederation and founder of the Bank of North America.

The Bank of North America (1782) attempted to act as a central bank in the early 1780s, clearing transactions, making loans to the various governments, and so on. It lacked capital and ultimate legal authority to be successful in its attempt to provide financial order in the new nation. It did prove that a commercial bank, if prudently managed, could offer financial services to both the private sector and the government. The bank demonstrated the potential for a much larger, federally

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6. Hamilton was Washington's chief of state and closest and most intimate advisor. He was acutely aware of the precarious state of the economy and government finance under the Articles of Confederation. The lack of money and failure to fund troops created extreme hardships that led to desertion and mutinies. Hamilton knew the nation could not survive long without sound finance. As early as 1779 he sketched out a detailed twelve-point program for the financial system in his letter to Congressman Duane. ALEXANDER HAMILTON, *supra* note 4, at 138.

7. Hamilton helped his brother-in-law organize the Bank of New York. RICHARD BROOKHEISER, ALEXANDER HAMILTON: AMERICAN 56 (1999) [hereinafter ALEXANDER HAMILTON: AMERICAN]. Hamilton and some of his wealthy clients formed The Bank of New York in 1784 in order to combat a land bank scheme organized by his rival, Livingston. FORREST MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY (1982) [hereinafter HAMILTON: A BIOGRAPHY] at 77-78.

chartered institution with the resources to influence the capital markets and, thus, the economy.[8]

Hamilton could draw on his vast knowledge of banking history, contemporary practices, and the success of the Bank of England. Further, as Secretary of the Treasury, the United States' largest and most important government department, he exercised his considerable powers to gather and survey the American economy in intimate detail. Hamilton was an administrative genius. He created standardized procedures and forms for his Treasury officers.[9] He kept up a two-way flow of information between his offices and customs officers in the field. Treasury officers were required to report weekly to him on their collections and payments (informing of the volume of trade and its goods). To gather the data he needed, Hamilton more or less invented a research technique: he conducted a large-scale socioeconomic research project using questionnaires. The first, dated October 15, 1789, was concerned with shipping and consisted of seven broad questions, each of which invited an essay as well as hard facts and figures. It went out to customs collectors and to everyone else Hamilton had reason to believe had useful information on the subject. The replies poured in, providing him a wealth of data and practical wisdom, much of which was contrary to common assumptions.[10]

Hamilton then used these data fashion realistic revenue proposals to raise the taxes necessary to fund the debt and operate the government. His estimates were remarkably accurate and contributed to the solvency of the young nation.

Finally, he modeled his administrative and work habits after the great French financial minister, Jacques Necker (1732-1804), the Swiss Director of Finance under Louis XVI. Necker's works informed him of the qualities of a great state minister: prudence, regularity, encyclopedic knowledge, and firmness. Hamilton reread Necker's three-volume memoirs several times. He grasped the entire sophisticated system. Regularity mandated time management and disciplined thinking. Prudence knew when to act and when to refrain. Firmness was inflexibility; better an inflexible finance minister than a weak one. Finally, the

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8. EDWIN J. PERKINS, AMERICAN PUBLIC FINANCE AND FINANCIAL SERVICES, 1700-1815, 114-36 (1994) [hereinafter AMERICAN PUBLIC FINANCE, 1700-1815].

9. Customs duties and excise taxes provided the bulk of federal revenue during peacetime periods in the nineteenth century.

10. HAMILTON: A BIOGRAPHY, *supra* note 7, at 77-78; *see also* WILLARD STERNE RANDALL, ALEXANDER HAMILTON: A LIFE 372-73 (2003) [hereinafter ALEXANDER HAMILTON: A LIFE].

finance minister must know detail upon detail of his realm and the world, not only events but technology as well.[11]

We now turn to a brief description of Hamilton's economic framework and vision.

A. Hamilton's Economic Framework and Vision

Alexander Hamilton "launched the country on its way to becoming a great commercial republic."[12] Hamilton saw American greatness—a strong, unified nationalistic state with expansive powers, powerful at the expense of the states, farmers and the planter class.[13] The republic's judiciary would check democratic excess. The strong executive and capable military would protect and defend its interests.[14]

He saw the United States as a formidable nation. The new nation would have an integrated and vigorous economy that would rival and surpass Europe. A diverse economy, he argued, develops society:

> The spirit of enterprise . . . must be less in a nation of mere cultivators, than in a nation of cultivators and merchants; less than in a nation of cultivators, artificers, and merchants . . . Every new scene which is opened to the busy nature of man to rouse and exert itself, is the addition of new energy to the general stock of effort.[15]

Equally important, a diverse economy develops individuals.

> Minds of the strongest and most active powers . . . fall below mediocrity, and labor without effect if confirmed to uncongenial pursuits, [But] when all the different kinds of industry obtain in a community, each individual can find his proper element, and call into activity the whole vigor of his nature.[16]

A sound banking system and government debt would be a foundation for investment. Capital would flow from banks and from foreign and domestic investors. The Government would encourage manufacturing bounties or subsidies.[17]

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11. ALEXANDER HAMILTON: A LIFE, *supra* note 10, at 373.

12. STEPHEN F. KNOTT, ALEXANDER HAMILTON AND PERSISTENCE OF MYTH 201 (2002) [hereinafter PERSISTENCE OF MYTH], *citing* Walter Berns, *On Hamilton and Popular Government*, 109 PUB. INT. 109 (Oct. 1992).

13. HAMILTON: A BIOGRAPHY, *supra* note 7, at 77.

14. PERSISTENCE OF MYTH, *supra* note 12, at 6-7.

15. ALEXANDER HAMILTON, WRITINGS 664 (2001) [hereinafter WRITINGS] (this quotation is from Hamilton's *Report on Manufactures*).

16. ALEXANDER HAMILTON: AMERICAN, *supra* note 7, at 95.

17. *Id.* These plans are detailed in the *Report on Manufactures*, WRITINGS, *supra* note 15, at 647-734.

One of Hamilton's many gifts was that he understood how to harness speculation. He turned the self-interest of rich Americans into support for the Union. Hamilton was intelligent enough to borrow excellent ideas from smart people and successful institutions. Robert Morris had explained to Congress:

> It is ... an advantage peculiar to domestic loans that they give stability to Government by combining the interests of moneyed men for its support and consequently in this Country a domestic debt would greatly contribute to that Union, which seems not to have been sufficiently attended to, or provided for in the forming the national compact.[18]

Morris had also planned a program for consolidating the national debt, as he knew the relationship between the debt and a strong national government.[19] We were fortunate indeed to have men like Morris and Hamilton, who harnessed private wealth in the national interest.

Unlike the Bourbons before the French Revolution, who were unwilling and unable to accommodate the rising capitalist class and turn it into a friend of the government, both England and the United States had learned that useful trick. They co-opted investors into public good — building a strong United States.[20] His vision joined the interests and capital of the merchants and the developing capitalist class to those of the new federal government. Morris facilitated this without creating a cancerous system like the French tax farming which linked economic interests to the state at the cost of hatred and ultimate insurrection and revolution. The Bourbons never quite managed to align France's interests with capital or the rising bourgeoisie.[21]

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18. E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790 124 (1961) [hereinafter THE POWER OF THE PURSE], citing *Robert Morris, Journals* XXII, 436.

19. *Id.* at 16-17.

20. *Id.* at 17. DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN 287 (Jefferson and His Time Vol. 2 1951) (Professor Malone, viewing the world through the eyes of Jefferson, does not necessarily see this as a virtue).

21. *See generally*, ANDREW LAMBERT, SEAPOWER STATES: MARITIME CULTURE, CONTINENTAL EMPIRES AND THE CONFLICT THAT MADE THE MODERN WORLD (2018) [hereinafter SEAPOWER STATES] (the ability of some nations to leverage commerce and finance and punch above their weight is neatly developed in a recent book on maritime states. Commerce, trade, and finance stimulate innovation, creating more wealth than land-based continental empires. This wealth is more readily and fairly captured by the state through taxation. Land-based empires are not able to generate as much revenue for their governments. The Dutch and English took full advantage of this strong economic foundation in building their sea-based empires. The newly created United States was in position to borrow heavily from Dutch and English ideas of government finance and political economy).

Banks were his "nurseries of wealth." Great national banks facilitated federal operations, strengthen the economy and union.[22] Merchants and investors provided "active capital," creating a great economic power.[23]

Hamilton was an apostle of the eighteenth century notion employment of national debt.[24] He observed the money machine that was the Bank of England and its role in English expansion and strength.[25]

He foresaw that prudently-managed public finance could provide "perpetual revenues."[26] Hamilton sought to innovate, to create fluid capital deliberately. He linked the Revolutionary War debt solution to commerce and revenue powers of the new nation. Hamilton recognized that the orderly disposition of the war debt would unite the states.[27]

Finally, he laid plans for the national bank. It would be "an institution that combined government funds with funds from private investors, creating a much-needed capital pool for the use of American entrepreneurs."[28] The bank was to set America on course as a commercial, industrializing nation. The bank would demonstrate the critical role the central government would play in plotting the trajectory of the national economy.[29] The next subsection describes how modern banks became vital to developing capitalist economies.

B. Banking Alchemy and Modernity

Hamilton's plans for monetizing the national debt, and hence creating much-needed liquidity and ultimately vibrant capital markets, depending upon sound banking principles and institutions. To understand how and why his plans succeeded, we must first understand the miracle of modern banking and its importance to commerce and economies.

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22. HAMILTON: A BIOGRAPHY, *supra* note 7, at 89.

23. *Id.*

24. ALEXANDER HAMILTON: A LIFE, *supra* note 10, at 374.

25. *See generally*, DAVID K. ALLISON & LAURIE D. FERREIRO, THE AMERICAN REVOLUTION: A WORLD WAR 18 (2019) ((Britain's "advanced financial institutions and abundant investment capital" (from trade and commerce) allowed England "to borrow and spend more money" than Spain and France in the Seven Years' War. The British won a wildly successful world war, fighting in India, West Africa, the West Indies, the North American Continent, and Europe. National debt almost doubled from £74 million to £133 million during the war)).

26. Hamilton proposed a constitutional convention that would give Congress the power to collect "perpetual revenues." ALEXANDER HAMILTON: AMERICAN, *supra* note 7, at 44.

27. JEFFERSON AND THE RIGHTS OF MAN, *supra* note 20, at 292.

28. CAROL BERKIN, A BRILLIANT SOLUTION: INVENTING THE AMERICAN 207 (2002).

29. *Id.*

Modern banks transform treasure into wealth. How does this occur? Before the Italian city-states invented modern banking in the thirteenth and fourteenth centuries, the transformation of wealth by institutions that became banks was impossible. What does a bank do that sets it apart from other important financial institutions? It leverages or multiples money. This can be illustrated by following the creation of a simple late-medieval Italian bank.[30] A merchant has 100 florins of gold that he stores under lock and key at his home. The 100 florins are treasures — it has value, but it does not profit the merchant while under his protection, and it does not lead to an increase in wealth. His precocious neighbor, another merchant, invents a bank by offering to store the florins and issue credit to the merchant in the form of documents. These receipts of deposit take on a life of their own. We call them banknotes, and they circulate freely (backed by the bank's credit), facilitating commerce and investment. The first merchant can now expand his trade using his banknotes. We now have 200 florins available for productive use—the merchant's 100 deposited in the bank vault and the 100 florins the banker will be able to use to extend credit to the merchant (against his own funds). Finally, our banker makes a fantastic economic leap and lends to creditworthy merchants the 100 florins in a strongbox. The banker can either do this by actually lending some of the coins or issuing paper that is backed by the 100 florins. He keeps some in reserve to meet the needs of his customers and prudently invests the balance. In this illustration, 100 florins have been transformed into 300 florins. In reality, if the banker is smart and trustworthy and if the ventures have been solid, there will be no run on the bank, and treasure will multiply as it is put to productive use.

The banks and banking in antiquity are not the same as modern banking.[31] The first bankers lived over three thousand years ago in

30. My example is a paraphrase of a common illustration of the birth of banking. *See* JOHN KENNETH GALBRATH, MONEY: WHENCE IT CAME, WHERE IT WENT 18-19 (1975). The word "bank" is derived from the Italian word *banco*, or bench. JANET GLEESON, MILLIONAIRE: THE PHILANDERER, GAMBLER AND DUELIST WHO INVENTED MODERN FINANCE 27 (1999) [hereinafter MILLIONAIRE]. The first modern bankers sat at their benches, exchanged money and created money through issuing banknotes and discounting financial documents like bills of exchange. Venetian bankers used bills of exchange in the late thirteenth century. FERNAND BRAUDEL, THE PERSPECTIVE OF THE WORLD: CIVILIZATION & CAPITALISM 15TH-18TH CENTURY 132 (Siân Reynolds trans., 1979) [hereinafter THE PERSPECTIVE OF THE WORLD].

31. FERNAND BRAUDEL, THE WHEELS OF COMMERCE: CIVILIZATION & CAPITALISM, 15TH-18TH CENTURY, VOL. II 390 (Siân Reynolds trans., 1982) [hereinafter THE WHEELS OF COMMERCE]. At several times from the late medieval period to 1750, important capital markets had created large capital surpluses that were not able to be effectively deployed. *Id.*

Babylon. Bankers in the fifth century B.C. Athens changed money and accepted deposits. Roman moneylenders were powers with which to reckon.[32] In the Middle Ages, before the invention of modern banking, there were Jewish moneylenders in Islam and in Christian nations—but they were not modern bankers. Many of the techniques and arrangements that bypassed traditional money or specie (gold and silver coins) were old inventions. However, they had to be re-discovered in the Renaissance.[33] The first bankers were currency exchange dealers. They first came on the scene in Barcelona, Genoa, Venice, and Florence. For example, Genoese merchants provided credit based upon bills of exchange.[34] Merchants would advance money based upon transactions (or documents) showing some future delivery.[35] Peasants sometimes used crude bills of exchange with respect to wool or corn.[36]

The bill of exchange is such an important device that it requires special note of its commercial use and advantages. The Italians devised the bill of exchange in the thirteenth century. It simplified transactions by eliminating the need to barter, face-to-face transactions to clear books, or payments made in bullion, coin or plate. Debts could be cleared easily in either direction. Here is how the bills worked: Alberto in Genoa buys goods from Bruno in Florence. He can pay for them on

at 392. Both the British and the Americans had the excellent fortune to have strong capital markets on the eve of the Industrial Revolution. These surpluses were put to effective use in revolutionizing production and society from 1750-1800. The cheap and seemingly endless capital built the industrial infrastructure and financed massive urbanization and increasingly broad world markets.

32. MILLIONAIRE, *supra* note 30, at 27. This biography of John Law demonstrates his financial genius and details his fall from grace when the Mississippi Company Bubble collapsed in the early eighteenth century.

33. FERNAND BRAUDEL, THE STRUCTURES OF EVERYDAY LIFE: CIVILIZATION & CAPITALISM, 15TH-18TH CENTURY, VOL. I 470-71 (Siân Reynolds trans., rev., 1981) [hereinafter THE STRUCTURES OF EVERYDAY LIFE].

34. *See* THE WHEELS OF COMMERCE, *supra* note 31, at 390-95.

35. The taker of the bill of exchange would be repaid from another market, *a future market*, several months later, at the exchange rate then in effect. This exchange merchant would calculate profit based upon risk and knowledge of the market and currencies. But contemporaries of these innovative merchants found this new-fangled money difficult to fathom. The bookkeeping appeared to the unsophisticated to be too complicated and a devilish juggling of accounts—not to be trusted. THE STRUCTURES OF EVERYDAY LIFE, *supra* note 33, at 471. Indeed, as late as 1752 David Hume, who was an historian as well as an economist and philosopher, was an ardent opponent of "'this new invention of paper bank-bills and chequer-notes'" (less mysterious financial instruments). *Id.* He was a hard money man and proposed suppressing £12 million of bank notes to attract hard currency back to England. *Id.* As we will see, Hume was no Governor of the Bank of England, and his thoughts were certainly not Hamiltonian!

36. *Id.* at 470-71.

bill of exchange drawn on Claude in Venice (this bill represents goods sold to Dirk in Bruges). Claude draws a bill on Dirk; he collects money by selling for local currency to Alberto in Genoa, often through an exchange dealer. Alberto then sends the bill to Bruno for payment of the goods. Bruno collects from Dirk upon the bill's maturity. The goods move from Bruno to Alberto and from Claude to Dirk. Alberto pays Claude; Dirk makes payment to Bruno.[37]

Bills could be sold and assigned but lacked negotiation because there was no recourse against previous holders in the transaction chain until the seventeenth century. Bills could not be discounted in the Middle Ages because of the Church's prohibition against usury and interest. Merchants gained the equivalent of interest paying an amount below the exchange rate, compensating them for future risk. The "profit" was justified because of the future uncertainty. Because of slow post and rudimentary roads, credit could be granted even if the payment was in the near future. The success with bills of exchange led to finance notes, promissory notes. Alphonse could then draw on Brutus, often an affiliate or branch, and sell the finance bill to a dealer to provide foreign money to pay the merchant's debt.[38]

When the West re-discovered the bills of exchange in the thirteenth century, trade was opened up throughout the Mediterranean using these instruments.[39] The bill of exchange advanced commerce and trade because it permitted the merchant to receive funds immediately (albeit at a discounted rate). Bills of exchange leveraged trade and commerce further when the instruments were *endorsed* or signed and sold. Further advances occurred when bills of exchange moved from market to market. Hence credit was both prolonged and expanded. It ultimately became commonplace for merchants to draw upon their own credit.[40]

Another key to the creation of this modern system of banking was a fruit of specialization. At the onset, these early bankers serviced merchant companies and provided credit for one another.[41] Such merchants were the "active" partners who were seeking credit for their trade ventures. Eventually the merchants and bankers discovered the utility of "sleeping" partners who placed funds on deposit, which could be re-lent

37. This example is based upon one by Professor Kindleberger. CHARLES P. KINDLEBERGER, A FINANCIAL HISTORY OF WESTERN EUROPE 39 (1984) [hereinafter A FINANCIAL HISTORY OF WESTERN EUROPE].

38. *Id.* at 39-40.

39. THE STRUCTURES OF EVERYDAY LIFE, *supra* note 33, at 472.

40. *Id.*

41. *See* THE WHEELS OF COMMERCE, *supra* note 31, at 393.

on favorable terms.[42] These sleeping partners were indirect participants in the ventures and helped leverage economic activity by putting to productive use funds that normally would have remained otherwise dormant in the bank storehouse.

In a nutshell, this is the miracle of banking. Banks transform treasure into wealth by monetizing it. These crucial financial institutions spread into Holland, the Hanseatic ports, France and England. Those states profited by expanding the money supply and the increased power of the economy. Braudel states "All those bank promoters and eventually the Scot, John Law, gradually realized 'the business potentialities of the discovery that money – and hence capital in the monetary sense of the term – can be manufactured or created.'"[43]

As a student of finance, commerce, and history, Hamilton surely absorbed the lessons of early banking and the mechanics of banks. The Bank of England profoundly influenced him.[44] Before the Bank of England was founded in 1694, public banks handled only transfers and deposits.[45] The Bank of England's innovation, beyond its superb functioning as a depository and clearinghouse, was its deliberate organization as an issuing bank; the Bank of England could issue banknotes, providing ample credit. The total value of these banknotes greatly exceeded the deposits of the state. Braudel notes: "[b]y doing this, said Law, it did the greatest good to trade and the state, because it 'increased the quantity of money.'"[46] Not only did the Bank of England create money through its use of banknotes, it monetized the national debt—creating even money and financing England's wars and commercial expansion during the eighteenth century. Hamilton was well aware of the power of the Bank of England and its splendid performance. The next section provides a brief historic sketch of that institution and the financial revolution.

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42. *Id.* at 390.

43. THE STRUCTURES OF EVERYDAY LIFE, *supra* note 33, at 475 (citing J.A. SCHUMPTER, HISTORY OF ECONOMIC ANALYSIS 321 (1986)).

44. The Bank of England served as a model for Hamilton's Bank of the United States and his expansive economic program. Its features were not slavishly copied, and Hamilton's bank contained a number of features that were required by the American economy and politics. *See infra* Section IV(a).

45. THE WHEELS OF COMMERCE, *supra* note 31, at 390. Private banks did make loans and advances, as we have seen!

46. THE STRUCTURES OF EVERYDAY LIFE, *supra* note 33, at 473.

III. THE FINANCIAL REVOLUTION, THE BANK OF ENGLAND, AND THE EXPANSION OF BRITISH POWER[47]

In the sixteenth century, Spain was the greatest power in Europe. She was buttressed by the wealth of the West Indies and the Americas. Huge convoys of gold and silver brought immense wealth to Spain, but she was overstretched by ruinous debt.[48] England had been a marginal player on the European scene, but things were to change with the Glorious Revolution of 1688. The English borrowed heavily from the sophisticated banking and commercial schemes of the Dutch Republic.[49] The Bank of England funded government power through successful issues of debt. Government securities provided rock-solid collateral for domestic industry and merchants as well as overseas trade. A relatively honest and professional administrative state secured growing tax receipts as England substituted the old land tax for taxes on the dynamic sectors of trade and commerce. By the late 1780s, "Britain had become the linchpin of European politics, the Royal Navy was supreme at sea around the world, and the sun had stopped setting on the British Empire."[50]

A. The Bank of England

The Bank of England played a vital role in the creation of Britain's global empire in the eighteenth century.

> More important even than military and diplomatic alliances, however, was the system of public borrowing developed in the first half of the period [1694-1750], which enabled England to spend on war out of all proportion to its tax revenue, and thus throw into the struggle with France and its allies the decisive margin of ships and men without

47. For a thorough history of the Bank of England, *see generally* the classic JOHN CLAPHAM, THE BANK OF ENGLAND: A HISTORY, VOL. I, 1694-1797 (1966) [hereinafter THE BANK OF ENGLAND: A HISTORY].

48. *See also* JOHN STEELE GORDON, HAMILTON'S BLESSING: THE EXTRAORDINARY LIFE AND TIMES OF OUR NATIONAL DEBT 2 (1997) [hereinafter HAMILTON'S BLESSING]. *See generally* PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000 (Kruzel ed., 1st ed. 1987) [hereinafter THE RISE AND FALL OF THE GREAT POWERS].

49. *See generally* JAN DE VRIES & AD VAN DER WOUDE, THE FIRST MODERN ECONOMY: SUCCESS, FAILURE AND PERSEVERANCE OF THE DUTCH ECONOMY, 1500-1815 (1997) [hereinafter FIRST MODERN ECONOMY] (excellent history of the development of the modern economy and state fiscal power).

50. HAMILTON'S BLESSING, *supra* note 48, at 3.

which the previously committed resources might have been committed in vain.[51]

As we will see its practices and policies enabled Great Britain to increase its national debt that was £16.7 million at the close of the Nine Year's War to £245 million in 1789.[52] During this extraordinary period the British economy doubled in size.[53] England enjoyed an astounding breakthrough in public finance. Between 1680 and 1783 England fought five major wars against her chief rival, France.[54] Thirty-six of those ninety-four years were engulfed in conflict. Sixty-seven percent of government expenses were devoted to war.[55] The Seven Years' War (1756-1763) was the most expensive.[56] The war spanned three continents and two oceans.[57] England expended more than £160 million, twice its gross national product in 1760![58] This war could be compared to the United States fighting a $10 trillion war on a global scale.[59] The

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51. *See* P.G.M. DICKSON, THE FINANCIAL REVOLUTION IN ENGLAND: A STUDY IN THE DEVELOPMENT OF PUBLIC CREDIT 1688-1756, at 9 (1967) [hereinafter THE FINANCIAL REVOLUTION IN ENGLAND] (for the definitive study of England's extraordinary capital markets).

52. HAMILTON'S BLESSING, *supra* note 48, at 1-2.

53. *Id.* at 3. Per capita income and wealth rose during this period, making the English a wealthier and more robust people than the French. The cessation of hostilities with the Dutch enabled the English to devote more resources to commerce. *See* THE FINANCIAL REVOLUTION IN ENGLAND, *supra* note 51, at 9.

54. The English fought the French in the Anglo-French War (known in the North America as King Williams's War and in Europe as the War of the Grand Alliance) (1689-1697), the War of Spanish Succession (1702-1713), the War of Jenkin's Ear (1739-1748), the Seven Years' War (1756-1763), and the American Revolutionary War (1775-1783). *See* DOUGLAS EDWARD LEACH, ARMS FOR EMPIRE: A MILITARY HISTORY OF THE BRITISH COLONIES IN NORTH AMERICA 1607-1763 80-115 (1973) for King William's War. *See* BRENDAN SIMS, THREE VICTORIES AND A DEFEAT: THE RISE AND FALL OF THE FIRST BRITISH EMPIRE (2008) [hereinafter THREE VICTORIES AND A DEFEAT] for the eighteenth century wars.

55. NANCY F. KOEHN, THE POWER OF COMMERCE: ECONOMY AND GOVERNANCE IN THE FIRST BRITISH EMPIRE 4 (1994).

56. *Id.* at 5.

57. *Id.*

58. *Id.*

59. "De Pinto's opinion, for instance, was that the capture of Havana in 1762, which astonished Europe, would not have been possible if one-third fewer troops and ships had been assigned to the task." THE FINANCIAL REVOLUTION IN ENGLAND, *supra* note 51, at 9 (*citing* Isaac de Pinto, *Traité de la Circulation et du Crédit*, 66-67 (1771). Recent foreign adventures such as the Iraq War and the prolonged conflict in Afghanistan are approaching that gigantic number. Economic growth is being frustrated by the unabated increase in the national debt and an economy that is considerably less productive than it could be. *See generally,* BRINK LINDSEY & STEVEN M. TELES, THE CAPTURED ECONOMY: HOW THE

Seven Years' War was financed by state borrowing facilitated by the Bank of England.[60] The British borrowed from the successful Dutch system of financing war by selling low-interest bonds to the public.

The French by contrast, were reduced to begging or stealing. As Bishop Berkeley put it, credit was "the principal advantage which England hath over France." The French economist Isaac de Pinto agreed: "It was the failure of credit in time of need that did mischief, and probably was the chief cause of the late disasters." Behind every British naval victory stood the National Debt; its growth from £74 million to £133 million during the Seven Years' War was the measure of Britain's financial might.[61]

As a result, it was able to raise more money for men and arms, not only keeping its rivals at bay but also greatly expanding its empire.[62] The shift from the land tax to an excise tax further assisted this rise to power by yielding an exponential increase in revenues as commerce expanded.[63] Britain's honest tax bureaucrats and its comparatively fair system of taxation outperformed the corrupt system of tax farming.[64]

The major European nations of this era collected revenue from similar sources: direct taxes (by officials), loans from groups, institutions and persons aligned with the sovereign's interest, and indirect taxes administered bureaucrats or private individuals, some of whom advanced funds in anticipation of collections.[65] French public finance was administered by a number of bodies — the clergy, municipal governments, provincial estates, and tax farmers. Tax farmers were officials who collected and supervised the collection of taxes for the crown. They advanced the anticipated revenues for a very lucrative rate of interest. Each level of tax farmers exacted a tribute of 5% the price paid to obtain the office. The operation was haphazard and corrupt with considerable "slippage."[66] Worse than the inefficiency and the slippage was the unequalled hatred for the system from all segments of society.

POWERFUL ENRICH THEMSELVES, SLOW DOWN GROWTH, AND INCREASE INEQUALITY (2017) [hereinafter THE CAPTURED ECONOMY].

60. THE FINANCIAL REVOLUTION IN ENGLAND, *supra* note 51, at 9. *See also* NIALL FERGUSON, EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER 36 (2002) [hereinafter EMPIRE].

61. *Id.* at 36, 38.

62. *Id.* at 8, 9.

63. *Id.* at 7.

64. THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 4.

65. SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION 70 (1989) [hereinafter CITIZENS].

66. THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 82.

"[T]hose who taxed in the King's name were the enemies of the people."[67] The foundation of the French state was built upon precarious footings indeed.

Thus, by the mid-1750s the British had developed an "institutional 'square of power'[68] superior to any alternative arrangement—notably the French system of privatized tax collection,"[69] or tax farming.[70] British taxation was a general system that efficiently captured income. It was "invisible" (excise on only a few products) and seemed to hurt foreigners (customs). The taxes were based upon consent of the Commons.[71] Unlike France, England had no internal taxes.[72]

French internal taxes hobbled trade and markets.[73] They meddled exquisitely in the French economy, were very inefficient, and provoked

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67. CITIZENS, *supra* note 65, at 71. At the simplest level of society, this execration fell on the head of the unfortunate individual who had been saddled with the job of parish collector of the *taille* [salt tax-ed]. Should he fail to produce the portion allotted to his assessment by the bureau of the intendant, his own property and even his own freedom might stand brutal forfeit. But if he was too efficient at his work, an even worse fate might befall him, meted out by his fellow villagers in the dead of night. *Id.* This hatred was also leveled at the plutocratic money merchants, the *gens de finance*. The *financiers* were called "bloodsuckers [*sang-sues*] fattening themselves off the substance of the people." *Id.*France under the monarchy never succeeded in 'nationalizing' state finance. Perhaps it was never seriously tried, despite the efforts of the Abbe Terray, Turgot and above all Necker. But this failure proved to be the death of the monarchy... ; J.F. Bosher has rightly remarked ... that what mattered in the long history of the Crown's finances was less the balance between receipts and expenditure, which did play its part, than the structure of a system where for centuries on end, private interests prevailed.In fact, France had no public finances at all, no centralized system; so neither control nor forecasting was possible. All mechanisms were beyond any real governmental control, since the finances effectively depended upon the intermediaries who saw to the collection of taxes, dues and loans. These intermediaries were the towns, above all Paris (with *rentes sur L'Hotel de Ville*) and Lyon; the provincial estates; the Assembly of the Clergy; the tax farmers who collected indirect taxes; and the finance officers who collected direct taxes . . . What was supposedly the central fund, that of the Royal Treasury, in fact only received about half the king's revenues. If the king needed money, he had to assign a given expenditure to a given fund, but as the proverb put it, 'when the chest is empty, the king has no rights.' THE WHEELS OF COMMERCE, *supra* note 31, at 537-38.

68. *See* CASH NEXUS, *supra* note 5, at 2.

69. *Id.* at 14.

70. Perhaps because France was a civil law nation based upon Roman law, tax farming came to be the system of revenue collection. Tax farming was employed by the Roman Empire.

71. The French system of public finance was a chaotic "system" with layer upon layer of self-interested parties siphoning off revenue and competing with each and the Crown. *See* THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 82; CITIZENS, *supra* note 65, at 71.

72. THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 79.

73. *Id.* at 7.

a fatal, consuming hatred of the collectors and the State.[74] The British land tax allowed no privileged exceptions. It, too, was "invisible" to most of society.[75] British taxes were able to sustain the expansion of commerce and military by both funding government operations and raising sufficient revenue to pay interest on the debt.[76]

One last English advantage involved the surplus the economy produced. In Britain, the wealthy were encouraged to invest in commerce. The French often used their surplus to purchase offices or annuities from the crown.[77] The advantage of the English patriotic self-interest should be obvious. The surplus was invested in the London Stock Exchange to great effect.

From the outset the Bank of England had great ambitions; those in favor of a Bank of England had their eyes on the prize. Sir William Petty summed it nicely: "[W]e must erect a Bank, which well computed doth almost double the effect of our coined Money; and we have in England, materials for a Bank which shall furnish Stock enough to drive the trade of the whole Commercial World."[78]

B. The Influence of the Dutch

The Glorious Revolution of 1688 brought William of Orange to the throne. His continental base, Holland, and his wars with France, compelled England to find reliable sources of funds.[79] The British looked to the success of the Amsterdam Wisselbank and Dutch capital markets, the most successful and developed in Europe at the time. The Amsterdam Wisselbank and the Dutch national debt, funded through the Stock Exchange (long-term debt found a liquid market), bottomed Dutch

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74. For example, tolls were collected at the gates of cities. *See* CITIZENS, *supra* note 65. While this may have led to the employment of gatekeepers and toll collectors, it could not have stimulated licit commerce. Thus, the French system was highly inefficient, susceptible to contempt of law, and bothersome. *See* EMPIRE, *supra* note 60.

75. *Id.* It was also a heavy tax and bred resentment. THE FINANCIAL REVOLUTION IN ENGLAND, *supra* note 51, at 10. Since agriculture was not increasing wealth and income dramatically, the land tax could not capture the value of trade and technology in the manner of the excise and tariff.

76. During the period from 1660-1815, a significant percentage of all government funds came from loans. *See generally* THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 73-86. Hamilton noted the efficiency of the British revenue system and patterned the new American system after it. *Id.*

77. *Id.* at 82, 83.

78. *See* Sir William Petty, *Quantulumcumquw concerning Money* (1682), quoted in R.D. RICHARDS, THE EARLY HISTORY OF BANKING IN ENGLAND, frontispiece (1965).

79. *See* JOHN GIUSEPPI, THE BANK OF ENGLAND: A HISTORY FROM ITS FOUNDATION IN 1694 8 (1966) [hereinafter THE BANK OF ENGLAND].

power. The Dutch government was able to funds wars and other large projects with relative ease because of the low interest rates.[80] Daniel Defoe, the great English writer, noted:

> Credit makes war, and makes peace; raises armies, fits out navies, fights battles, besieges towns; and, in a word, it is more justly called the sinews of war than money itself . . . Credit makes the solider fight without pay, the armies march without provisions . . . it is an impregnable fortification . . . it makes paper pass for money . . . and fills the Exchequer and the banks with as many millions as it pleases, upon demand.[81]

Throughout the sixteenth and seventeenth centuries the Dutch fought a number of wars constituting the Eighty Years' War of independence with Habsburg Spain.[82] A population of about 1.5 million held this great power at bay.[83] In the 1600s Habsburg Spain was the most powerful state in Europe. During the sixteenth century Charles V and Philip II absorbed Portugal, took possession of the Holy Roman Empire, conquered principal islands in the Caribbean, added Mexico as well as Peru to Spain's empire, and invaded the Philippines. They also attempted to squelch the Protestant Revolution, and hence became embroiled in costly wars, eventually sapping the empire. Spain's overstretch is seen in its battle with the upstart Netherlands, or Low Countries. Charles V inherited them through marriage and their cities became wealthy as their merchants exchanged luxury goods, clothing, naval stores, and food for gold and silver from the New World. Protestantism spread to the Netherlands in the 1560s and the Low Countries revolted. The northern Netherlands created the United Provinces, composed of the seven Dutch-speaking provinces, and the Dutch Republic was formed. Yearly, the Spanish forces burned Dutch cities and farms in a desperate attempt to destroy the rebellion. The Dutch frequently

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80. EMPIRE, *supra* note 60, at 24.

81. *Id.*

82. In battle, burghers hurling tulips bulbs did not dent Spanish armor. Dutch finance humbled the Spanish. The United Provinces made the most of what they had. The Dutch did not possess large quantities of treasure (gold and silver), resources that Spain employed as it climbed to the pinnacle of power in the West. The Netherlands leveraged its limited resources, its harbors, location at the crossroads of northwest Europe, and fertile soil (much of it below sea level). Holland had a sophisticated, urban people with a distinct feel for finance and commerce. Dutch victories were purchased with skill and financial power.

83. *See* ALEXANDER V. AVAKOV, TWO THOUSAND YEARS OF ECONOMIC STATISTICS, Vol. 2 (by Country) 15 (2015). *See also* PETER M. GARBER, FAMOUS FIRST BUBBLES: THE FUNDAMENTALS OF EARLY MANIAS 20-21 (2000) [hereinafter FAMOUS FIRST BUBBLES].

fielded armies and navies to turn back the Spanish.[84] It was an Anglo-Dutch fleet that saved Protestant England by wrecking the Spanish Armada in 1588.[85]

During the Thirty Years' War (part of the Spanish-Dutch Eighty Years' War), the Netherlands fielded armies as large as 100,000 men.[86] The Dutch supported large fleets and provided much of the strategic planning and finance for the Protestant forces.[87]

From 1620 to 1645, the Dutch established near monopolies on trade with the East Indies and Japan, conquered most of Brazil, took possession of the Dutch Caribbean islands, and founded New York. In 1628, the Dutch West India Company captured in a naval action the entire year's output of silver and gold from Spain's American possessions.[88]

During the Second Anglo-Dutch War, the Dutch fleet menaced London when its ships sailed up the Thames.[89] Later, that fleet, under

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84. *See* EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898 16-17 (1999). The Dutch fighters were dragons' teeth, much deadlier than those Jason faced!

85. The Spanish Armada had it succeeded would have changed the course of history with Catholic Spain conquering one its nemeses, Protestant England. However, to be successful, Spain had to overcome tremendous challenges. Command control was centered in El Escorial, Phillip II's palace in Madrid. The plan to conquer England was a two-pronged affair that required his admiral Medina Sidonia to bring his fleet of warships and transports from Spanish waters to the Spanish Netherlands (Flanders) where it would link up with the Duke of Parma's seasoned troops. They would be ferried across the English Channel, land, and capture London and the queen. The English were better sailors, had faster ships, better victuals, and much better naval gunnery. The Spanish had to fight a defensive battle and lure the English fleet to defeat. The English occupied Sidonia's force with devastating effect. The Dutch naval forces kept Parma's transports at bay on the continent because the Spanish could not risk having their troops massacred in the invasion barges by the pugnacious and deadly, shallow-draft Dutch warships. For the history of the armada and its aftermath, *see generally* BEN WILSON, EMPIRE OF THE DEEP 116-53 (2013) and N.A.M. RODGERS, THE SAFEGUARD OF THE SEAS: A NAVAL HISTORY OF BRITAIN 660-1649, 268-69 (1997) (the value of the Dutch naval forces).

86. *Id.*

87. *See* FAMOUS FIRST BUBBLES, *supra* note 83, at 20-21.

88. *Id.* A supreme advantage the Dutch had with their naval and land forces was that the armed forces could expect to be paid promptly and regularly. This helped to raise very reliable armies and navies. THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 67-68.

89. *See* JEREMY BLACK, THE BRITISH SEABORNE EMPIRE 89-94 (2004) (discussing a concise history of the Anglo-Dutch Wars); *see also* N.A.M RODGER, THE COMMAND OF THE OCEAN: A NAVAL HISTORY OF BRITAIN 1649-1815 Vol. II (2004) (elaborating on the Anglo-Dutch Wars). The financial burden of the war forced the English to lay up their larger ships in 1667 and to focus instead on commerce raiding, but the Dutch used the opportunity to attack the major English base at Chatham: they captured the magazines at Sheerness, broke

de Ruyter, attacked the British fleet at its anchorage at Medway on June 22-23, 1667.[90] Then the Dutch burned five British men-of-war and towed the *Royal Charles* to the Netherlands.[91] The war was a humiliating defeat for Charles II.[92]

As we have seen, there is a powerful connection between warfare and finances.[93] During the eighteenth century, all governments resorted to borrowing to fund wars.[94] This borrowing occurred due to weak national economies, which required governments to seek a funding source beyond taxation. To do otherwise would have caused great harm to the warring states. Specifically, heavy and increased taxation would have wrecked their economies. Successful nations negotiated both prudent taxation and borrowing. The Dutch mastered this new environment. The Netherlands saw its economy boom because of the mushrooming effect of industrial expansion and wartime credit.[95]

The English would learn much from Dutch success. The Dutch were:

> a nation created in the confused circumstances of revolution, a cluster of seven heterogeneous provinces separated by irregular borders from the rest of Habsburg-owned Netherlands, a mere part of a vast dynastic empire, restricted in population and territorial extent, which swiftly became a great power inside and *outside* of Europe for almost a century.[96]

The Dutch were a skilled, urban, and cosmopolitan people. They thrived on commerce and industry and were superb shipbuilders and

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the protective boom across the River Medway and burnt six deserted ships of the line before toying away Monck' flagship, the *Royal Charles*. BLACK, *supra* note 88, at 92-93. Another Dutch squadron captured Surinam on the coast of South America. *Id.* The Treaty of Breda of July 1667 confirmed English possession of New York, but the Chatham debacle left an impression of English weakness, as, in the West Indies, did French seizure of English islands in 1666. *Id.*

90. *Id.*

91. HAMILTON'S BLESSING, *supra* note 48, at 2.

92. JOHN CHILDS, WARFARE IN THE SEVENTEENTH CENTURY 163 (John Keegan ed., 2001).

93. *See generally* CASH NEXUS, *supra* note 5; *see also* THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48.

94. For an excellent overview of war and finance in the eighteenth century, *see* "Finance, Geography, and the Winning of Wars 1660-1815," in THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 73-139.

95. THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 77. And if the wars were as successful as the Dutch wars were, cheap credit was easy to come by. The nation state would become commercially stronger.

96. *Id.* at 67-68.

sailors.[97] They leapt into global trade during the 1600s.[98] Amsterdam, the growing center of international finance and "a natural corollary to the republic's function as the shipper, exchanger, and commodity dealer of Europe," financed Dutch global commerce.[99]

Money was consequently available for state loans, giving the Dutch "an inestimable advantage over its rivals; and since its credit rating was firm because it promptly repaid debts, it could borrow more cheaply than any other government—a major advantage in the seventeenth century and, indeed, at all times!"[100]

The needs of William III, the leader of the Netherlands, were obvious. He needed to protect both England and the Netherlands from France, which threatened both nations. The Dutch were forced to incur huge military costs that were straining its economy. War debts, interest payments, increased taxes, and high wages were grave concerns. The War of Spanish Succession (1702-1713) caused heavy losses of life.[101]

What was debated was how to fund this. Should a bank be authorized along the lines of Amsterdam or Hamburg? Concerns were raised about a bank with royal support. Such a bank could raise money without the intervention of Parliament, subverting the political process and leading to unwise adventures by the Crown.[102] There was also a groundswell of trade and a need for a banking house not so susceptible to the extant banks—independence was wanted. In 1694, Charles Montagu, Lord of the Treasury, Chancellor of the Exchequer, favored William Paterson's scheme for the "Bank of England." Paterson proposed

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97. *See generally* FIRST MODERN ECONOMY, *supra* note 49, for a superb economic history of the Dutch economy.

98. In the 1590s Dutch ships were sailing the Mediterranean and the Indian Ocean. They were also trading with South Africa, the Caribbean, and Equatorial West Africa. *Id.* at 396. The Dutch East India Company (trading with Batavia, the Spice Islands, and other Asian locations) was founded in 1602. *Id.* at 75.

99. THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 69.

100. For more on the Dutch financial revolution, *see id.* at 76-78.

101. THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 87.

102. *See* THE BANK OF ENGLAND, *supra* note 79, at 8. A bank under royal control was soon to be problematic. For example, when the Bank of France spun out of control in 1720, there was a collapse of national financing in France. In 1718, the Banque Général was reorganized as Banque Royale. *See* MILLIONAIRE, *supra* note 30, at 132-33. While initially Law kept 25% of the coin, gold and silver, in reserve like the Amsterdam model, the passage to government control was fatal. *Id.* The Banque Royale was unchecked in printing money and changing the terms of its banknotes. *Id.* Hamilton must have been aware of the Banque Royale disaster. His scheme harnessed private speculation and put it to public good. Further, he placed the Bank of the United States beyond the reach of popular control (government control) and used private interests to keep the government's money and credit sound.

the idea of a "Fund for Perpetual Interest" or a permanent "National Debt." This struck most businessmen as a risky, adventurous scheme.[103]

Promoters wanted a bank of issue—that is, a bank that could issue banknotes. Greater profits would ensure to the bank; it could issue banknotes. Government officials feared the loss of the state's monopoly over money if the bank could print money, hence controlling the money supply. This "peculiarity" was to be a cornerstone of the Bank.

Paterson's 1693 plan suggested that the government could raise funds not by loans, but "upon a Fund of Perpetual Interest." Paterson proposed a "Fund" of £1 million. The state would be obligated to pay investors £65,000 per year at 6% or £60,000 to public investors in the debt and 0.5% management fee per annum (£5,000) to the bankers (and their investors).[104] The institution was to be established "as a Bank to exchange such current Bills the better to give Credit thereat, and said Bills, the better to circulate."[105] Paterson set up a bank to circulate *issue*.[106] The Commons committee studying the plan favored the perpetual funds but opposed the issuing of notes without government consent.

Ultimately a second version was proposed and tacked on to a Finance Bill: £1,200,000 was to be raised, offering 8%;[107] £4,000 was to

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103. THE BANK OF ENGLAND, *supra* note 79, at 9. This offended cash and hard money types. *Id.* at 10. There is a striking similarity to resistance in the Paterson scheme and the resistance of Southern planters and small businessmen to the Bank of the United States. None of them understood the benefits of credit. All feared the transformative power of credit! In the early decades of the nineteenth century, President Madison, a Founder, planter, and founder of the Republican Party, came around to accept and embrace a number of Hamilton's economic policies. DANIEL W. HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848 83 (2007). Hamilton had presumed the national debt to be permanent, a means to enlist the support of the creditor class behind the federal government. *Id.* For Madison, the debt constituted a temporary means to financing projects for national defense and economic infrastructure. *Id.* Hamilton's program had been based on a tariff for revenue and American acquiescence in British maritime supremacy; Madison's program was based on a tariff to protect domestic manufacturing and came in the aftermath of a war demonstrating American unwillingness to submit to dictation by British commercial and naval interests. *Id.*

104. THE BANK OF ENGLAND, *supra* note 79, at 11.

105. *Id.*

106. Limited money supply was a critical bottleneck for developing European economies. Specie of gold and silver was rare. *See* THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 80. The British American colonies, unlike those of Spain, produced little gold or silver. *Id.* The British managed the rare feat growing the money supply, making those funds available to government and business without loss of credit or severe inflation. *Id.* This neat feat of course further expanded British financial power because credit was rated accordingly.

107. THE BANK OF ENGLAND, *supra* note 79, at 11.

be paid to the bank managers. Several more iterations were offered and Parliament settled upon accepting subscriptions of £1,200,000, 25% paid immediately in cash. Of the total £1,500,000, £300,000 was to be raised from annuities.[108]

The Bank of England was a quasi-government bank, operating under the control of Parliament with respect to monetary policy.[109] Formally chartered on July 27, 1694,[110] the Bank issued banknotes to the extent of deposits and had both passbooks and checks. It quickly subscribed to the war against France.[111] In its corporate capacity, it was not consulted for policy. However, Governor Sir John Houblon and Director Gilbert Heathcote had the ear of the Lords Justice.[112] The Bank of England began auspiciously—its subscription sold out; it funded a war with France; it had capable management with the trust of the Government.

Parliament blessed the Bank in the Act of 1708, extending "exclusive privilege," forbidding any banking association of more than six persons from establishing a rival bank.[113] While involved in the South

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108. *Id.* at 11-12. This scheme is quite similar to Hamilton's Bank of the United States (BUS). BUS was funded with 20% funds from the United States (in notes payable over eight years); 80% from the public. *Id.* Of that 80%, federal obligations could be used. Hamilton only required 20% in specie (cash or hard currency). *Id.* Thus, both the Bank of England and BUS were highly leveraged from the start, with most of the funds coming from government debt!

109. *Id.* At this point, Hamilton turned the bank of England model on his head. Hamilton worried that Congress would run riot without discipline or control if it had oversight of the Bank of the United States. THE BANK OF ENGLAND, *supra* note 79. Hence, the BUS was a quasi-governmental agency *controlled* by private investors to exercise the needed restraint. Under Hamilton's arrangement, the Bank of the United States would not prove susceptible to government pressure. It would act in the best interests of both the investors and the nation.

110. The Bank of England was not created with the modern central bank in mind. RICHARD ROBERTS & DAVID KYNASTON, THE BANK OF OF ENGLAND: MONEY, POWER AND AND INFLUENCE 1694-1994 (1995). Its functions as banker to the state and manager of the National Debt *and* one of the city's major commercial institutions, melded the Bank into something akin to a central bank. *Id.* at 1. The Bank's primary role was a "money-raising machine." *Id.* at 5. During the eighteenth century, government debt changed from a complicated system of non-redeemable securities replaced self-liquidating loans as the foundation for national debt. *Id.* at 9.

111. THE BANK OF ENGLAND, *supra* note 79, at 18-21.

112. *Id.* at 29.

113. *Id.* at 29. This monopoly privilege may have prevented England from rebuffing the economic challenge of the upstart United States during the nineteenth century. The United States had no such banking limitations, and as a result its banking capital came to rival Great Britain's during the early stages of America's development. *See* Christian C. Day, *Partner to Plutocrat: The Separation of Ownership from Management in Emerging*

Sea Bubble, the Bank weathered the storm. Its stock hit a nadir of £124 – well above par.[114] By 1725 the Bank safely printed notes for £20, £30, £40, £50, and £100, adding to the nation's liquidity.[115]

Throughout the eighteenth century, the Bank gradually took over the national debt. In 1714, Parliament authorized payments of interest on government securities and transfers of stock to which it had been entrusted. The Bank acquired the debt in a piecemeal fashion. The South Sea Company acquired a large block, and the East India Company acquired another. By 1762, 70% of the regular debt was transferable and interest paid by Threadneedle Street.[116]

In 1764, when its charter was about to be renewed, the total national debt stood at approximately £107 million with annual payments of £3,792,594.[117] The Bank handled over £77 million of debt, and annual payments by the Bank were £2,682,163.[118] The interest rate was a very respectable 3.48%. During the War of Austrian Succession (1739-1747), the English borrowed at 3% or 4%, which was half the rate of the Duke of Marlborough's time.[119] From 1688 until 1815, British wartime expenditure rose from £49,320,145 (1688-97) to £1,657,854,437 (1793-1815).[120] The loans totaled 33.3% of expenditure.[121] It is easy to see how, with such a low cost of funds, England grew to be a great power, outstripping its rivals France, Spain, and the Netherlands.

The Bank was critical to England's victory in the Seven Years' War. At the conclusion of the war, England's debt stood at £139 million, a (then) enormous sum. The debt had increased six-fold since 1727. The Bank aptly managed a large part of the debt in annuities.[122] The power and the influence of the Bank continued unabated. At the

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Capital Markets — 19th Century Industrial America, 58 U. MIAMI L. REV. 525 (2004) (at text & accompanying notes 46-51).

114. THE BANK OF ENGLAND, *supra* note 79, at 41-44.

115. *Id.* at 46.

116. THE BANK OF ENGLAND: A HISTORY, *supra* note 47, at 102. With debt thus assembled, the Bank issued banknotes backed by its debt portfolio. *Id.* This is called monetizing the debt. *Id.* Such an undertaking, if the bankers act prudently, liquefies the currency and promotes trade and economic growth. Hamilton would adopt such policies with his Bank of the United States. *Id.*

117. *Id.* at 102-03.

118. *Id.* at 103.

119. *Id.* at 81.

120. THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 81.

121. THE BANK OF ENGLAND: A HISTORY, *supra* note 47, at 81.

122. *Id.* at 103.

end of the American Revolution (the only war the British lost during this period), the debt stood at £250 million.[123]

Both Pitts deployed financial and commercial power to great effect.[124] William Pitt, the Great Commoner, of course, managed the Seven Years' War. William Pitt, the Younger, took the helm in April 1783.[125] After Pitt took charge, the British undertook some measures that strengthened public finance. He improved the operations of the Bank so that it was poised to support England in its life and death struggle with France.

William Pitt, the Younger, took the helm in April 1783.[126] After Pitt took charge, the British undertook a number of measures that strengthened public finance. He improved the operations of the Bank so that it could take on France, and eventually Napoleon when he came to power.[127] John Giuseppi, a chronicler of the Bank, believes that Pitt was the most astute of England's great wartime ministers. Pitt "consciously and deliberately used money as a weapon."[128] The Bank's establishment of a "Sinking Fund," which stabilized the debt and improved public credit, demonstrates Pitt's brilliance.[129] Each year £1,000,000 was pledged to reduce the debt.[130] By 1793, the debt had been reduced by £10.25 million.[131] The Fund gave the public confidence to invest even during depressions. The plan had to be abandoned,

123. *Id.* at 66. During the eighteenth century, the English were very successful in war and peace. *See generally* THREE VICTORIES AND A DEFEAT, *supra* note 54.

124. *See generally* EDWARD PEARCE, PITT THE ELDER, MAN OF WAR (2010) (discussing William Pitt's life). *See also* John Brewer, THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE 1688-1783 (1989) [hereinafter SINEWS OF POWER] (analyzing the relationship between finance and warfare in England during the eighteenth century).

125. Pitt had been Chancellor of the Exchequer at the tender age of twenty-three. THE BANK OF ENGLAND: A HISTORY, *supra* note 47, at 70.

126. Pitt had been Chancellor of the Exchequer at the tender age of 23. THE BANK OF ENGLAND, *supra* note 79, at 70.

127. Napoleon was right; the English were "a nation of shopkeepers." But the English won the Napoleonic Wars because they could finance coalitions, time and again, to field armies of allies and to build the wooden walls that protected the island nation and its overseas possessions. *See generally* SEAPOWER STATES, *supra* note 21 (discussing sea states' ability to leverage their economies).

128. THE BANK OF ENGLAND, *supra* note 79, at 70.

129. THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 84. Sinking funds are useful tools as the debtor establishes a fund that can be used to pre-pay or retire the debt. They provide additional security for the bondholders, lowering the cost of money. They signal to investors that they will be repaid, enabling the debtor to reduce its borrowing costs by retiring the debt early.

130. *Id.*

131. *Id.*

however, when war broke out in 1793. Nevertheless, the Fund had borne fruit as it raised confidence in the government and the Bank.[132]

By the late 1780s, French and British debts were about equal—£250 million.[133] However, the British interest stood at £7 million, half the French load.[134] Further, the French often borrowed at floating rates. As their financial fortunes grew more precarious, rates rose. The British, enjoying more stable revenues and much better public finance, were able to finance their warfare at much lower interest rates.[135]

In 1783 England's G.N.P. was less than one-half that of France. French G.N.P. was £160 million; England's £68 million.[136] English debt stood at £245 million in 1789.[137] In 1789, France, a much richer nation with greater resources, was bankrupt and on the cusp of revolution, in no small part due to the inability of the state to manage its finances.[138] By the time of the Napoleonic Wars, England, with a popula-

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132. Hamilton borrowed from the sinking fund concept. The very notion of the fund raises the prospect of repayment and increases the government's ability to raise credit.

133. THE BANK OF ENGLAND, *supra* note 79, at 66. English national debt stood at nearly £250 million at the signing of the Treaty of Versailles. *Id.*

134. *See* SINEWS OF POWER, *supra* note 124, at 133. The high quality of English financial administration and the *perpetual* national debt (paradoxically) permitted the Brits to borrow at much lower rates than the French, who relied on short-term obligations designed to liquidate their debt and signal creditworthiness. *Id.*

135. *See* THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 84.

136. THE PERSPECTIVE OF THE WORLD, *supra* note 30, at 80-81.

137. DAVID KYNASTON, TILL TIME'S LAST STAND: A HISTORY OF THE BANK OF ENGLAND 1694-2013 87-88 (2017).

138. In 1786 the English paid £9.5 million interest on the debt, about 4%. A FINANCIAL HISTORY OF WESTERN EUROPE, *supra* note 37, at 165. This debt was an accumulated war debt, much of it due to the war the English lost—the American Revolutionary War. In 1793, with the British fighting for their lives against France, the debt was £244.7 million with interest of £9.5 million! In 1815, at the end of the Napoleonic Wars, it stood at £834.3 million with interest of £31.4 million, a consistent 4%. *Id.* This is public finance at its finest.England's financial revolution created a great power with an "economical" government that would be largely successful in its eighteenth century war (the sole exception being the American Revolutionary War). THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 80-81. The English were able to borrow at 3% or 4% by the time of the War of Austrian Succession (1739-1747). *Id.* at 81.The United States is infinitely wealthier than England was in the eighteenth century. In comparison, the United States national debt was approximately $22 trillion in 2018. Bill Chappell, *U.S. National Debt Hits record $22 Trillion*, NPR (Feb. 13, 2019), *available at* https:/www.npr.org/2019/02/13/694199256/u-s-national-debt-hits-22-trillion-a-new-record-thats-predicted-to-fall (last visited Oct. 14, 2019). Its Gross Domestic Product stands at $20.5 trillion. *Gross Domestic Product (GDP) of the United States at current price from 1984 to 2024 (in billion U.S. dollars)*, STATISTA (last updated Sept. 27, 2019), *available at* https://www.statista.com/statistics/263591/gross-domestic-product-gdp-of-the-united-states/ (last visited Oct. 14, 2019).If the U.S. were a corporation, Wall Street would be sending out alarm bulletins. Our household wealth stands

tion of less than one half that of France, was raising more revenue than France.[139] The English were able to accomplish this astounding feat because they were about twice as wealthy per capita. Taxation in England at this time is estimated to have consumed about 20% of the G.N.P.; in France, about 10%.[140]

The Bank of England was intimately related to the rise of England's capital markets and the development of the London Stock Exchange (LSE). As each grew in power, the other grew, and so did the economic power of the state. Sir Robert Walpole[141] showed his genius by establishing a "sinking fund"[142]— treasury reserves built from revenues of certain fixed taxes that were dedicated to reducing the debt.[143] The real purpose was to convince the public the debt would be paid. And it was. The establishment of the fund caused the price of Bank annuities to rise on the market and interest rates to decline.[144]

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at $108.6 trillion, so we have capital to play with. Jason Lange, *U.S. Household Wealth Bounced Back in Early 2019: Fed*, REUTERS (June 6, 2019), *available at* https://www.reuters.com/article/us-usa-fed-wealth/u-s-household-wealth-bounced-back-in-early-2019-fed-idUSKCN1T726B (last visited Oct. 14, 2019). But the Gods of Fortune are not infinitely patient. Our current economy is gamed, and it concentrates great wealth in several key rent-seeking sectors: finance, intellectual property, real estate and licensing. This has created a great gulf between our richest one percent and the rest of the nation. Further, the rent-seeking activities have distorted the economy, resulting in much lower productivity. *See generally* THE CAPTURED ECONOMY, *supra* note 59. While we now enjoy many more technologies to leverage wealth and capture greater tax revenues, we are not managing our state fairly or prudently.

139. THE RISE AND FALL OF THE GREAT POWERS, *supra* note 48, at 80. Napoleon was unable to make radical structural changes to the French revenue system and much of the French monies were raised by confiscation. In contrast, the British relied on an efficient revenue collection and thriving capital markets to finance the navy and pay for troops and subsidies to allies.

140. THE PERSPECTIVE OF THE WORLD, *supra* note 30, at 384.

141. *See generally* EDWARD PEARCE, THE GREAT MAN: SIR ROBERT WALPOLE: SCOUNDREL, GENIUS AND BRITAIN'S FIRST PRIME MINISTER (2007). Walpole was Britain's longest serving prime minister, incredibly corrupt even by the standards of day. Yet he kept England out of major wars, governed as it rose to great commercial power, and presided over a nation that was not rife with sectarian conflict. Not too shabby for such a political scoundrel!

142. THE FINANCIAL REVOLUTION IN ENGLAND, *supra* note 51, at 85-87.

143. *See generally* SINEWS OF POWER, *supra* note 124, at 123-24. "[T]he threat of redemption gave the government leverage it needed if it were to take advantage of favourourable circumstances to lower the interest rate on its outstanding obligations." *Id.* at 124.

144. THE POWER OF THE PURSE, *supra* note 18, at 44. William Pitt, the Younger, and Hamilton applied the same method and obtained like effect! For an excellent biography of Pitt *see* WILLIAM HAGUE, WILLIAM PITT THE YOUNGER (2004). As debt becomes more secure, interest rates fall, permitting greater leveraging for national purposes and the further expansion of the private, commercial sector. Pitt's use of the sinking fund is illustrated:

The Bank of England developed a practice of buying and selling securities annuities on the LSE.[145] This kept the market high and liquid. It convinced the public that government bonds could be converted into cash, at or near face value. The ownership of bonds thus permitted the establishment of vast amounts of private credit. The Bank of England issued notes backed by the government bonds in its portfolio. Annuities supported the bank notes, and bank notes supported the annuities—monetizing the debt! Thus, it came to pass that it was neither necessary nor wise to reduce the public debt as that would have reduced the money supply.[146]

The capital markets tapped by the prudent management of the national debt paradoxically grew the economy and kept taxes lower than they otherwise might have been.[147]

> [T]he rise of public borrowing created . . . a whole range of securities in which the mercantile and financial houses could safely invest, and from which they could easily disinvest. The new partnership banks, the new insurance offices, the trading companies, the busy merchants, brokers, and jobbers of the City of London, unexpectedly found at their disposal facilities for investment far more varied and flexible than land alone . . .[148]

We have seen how the brilliant idea for the Bank of England funded British prosperity and power. The Bank of England was the prototypical central bank. Its solid and creative governance protected its investors and gave England the credit it demanded to fund its colonial expansion, protect its growing commerce, and nurse its industries. Hamilton was wise to choose it as a model.

The British were very wise to choose the Excise tax. Unlike the hideous French system, the Excise enjoyed strong political support by

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> [Pitt] now went on to propose additional taxes on spirits and hair powder to round the surplus up to £1 million, and to commence immediately an annual payment of £1 million into a Sinking Fund. Furthermore, he proposed to add to the fund the interest on the debt redeemed so that it would grow at a compound rate, and to entrench it by an Act of Parliament with independent Commissioners set up to supervise it. Parliament would only be able to go back on it by passing a new Act. The "magic" of compound interest meant that within twenty-eight years, Pitt claimed, each £1 million set aside would provide for £4 million for repayment of the debt.

Id. at 194. For more on the Sinking Fund, *see also* THE BANK OF ENGLAND, *supra* note 79, at 71-72.

145. THE POWER OF THE PURSE, *supra* note 18, at 44. The practice looks suspiciously like the Federal Reserve's Open Market Operations.

146. *Id.* at 44.

147. THE FINANCIAL REVOLUTION IN ENGLAND, *supra* note 51, at 11.

148. *Id.*

Brits wanting a strong national government—growing urban areas and commercial interests. It provided for efficient tax administration.[149] The excise tax offers stability and avoids reliance on external taxes.[150] So successful was the tax that it was the most lucrative source of revenue for Great Britain from 1713-1799 (a century of fantastic growth and global expansion).[151] When coupled with an honest revenue and efficient revenue office, capturing wealth from rising commerce and new technologies, the system would prove to be unbeatable.[152]

The excise on commerce, Parliament, the national debt, and the Bank of England made the British "square" superior to its rivals.[153] Nationalists and men of finance, like Robert Morris and Alexander Hamilton, recognized its splendid performance and would put its virtues to good use.

IV. THE HAMILTONIAN SYSTEM, ASSUMPTION OF THE DEBT, AND CREATION OF THE FIRST BANK OF THE UNITED STATES[154]

When the new Congress assembled in New York in 1789 the most pressing national problem was the nation's finances.[155] Per capita in-

149. THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 14 (1986).

150. *Id.* at 97. Both England and the United States had to create effective custom services to enforce tariff collections and stamp out smuggling that was rife.

151. *Id.* at 13.

152. The Bank of England, the revenue power of the excise tax, popular support for the government and its programs, and a strong military were responsible for the English doubling their wealth in the eighteenth century.

153. The British square also denominates a highly successful military formation that the British army used in empire building. For instance, 139 British soldiers held off 4,000 Zulus at Rorke's Drift. VICTOR DAVIS HANSON, CARNAGE AND CULTURE: LANDMARK BATTLES IN THE RISE TO WESTERN POWER 13 (2001). This battle in 1879 broke the back of Southern Africa's most feared and successful warriors and paved the way for the eventual British conquest of South Africa. Hamilton's' plan would recreate an American square that would provide the military and economic power to conquer the North American continent. When Jefferson paid down the debt and reduced the military and navy, we paid a heavy price. We eventually had to rebuild the navy and finally fight the Barbary Pirates to protect our trade. We further shot ourselves in the foot when Congress failed to re-authorize the Bank of the United States by one vote, a vote along party lines. Our political failure left the Nation strapped for cash on the eve of a war with the world's greatest power. In the present, the British square, modified by substituting the income tax for the excise taxes and tariffs, is the basis for American strength and prosperity.

154. For an overview of the development and implementation of some of Hamilton's economic policies, *see* ALEXANDER HAMILTON, *supra* note 4, at 291-303.

155. JOHN FERLING, A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN REPUBLIC 315 (2003) [hereinafter A LEAP IN THE DARK].

come fell from pre-war levels and appeared to be worse in both 1780 and 1790.[156] The nation's financial matters would have to be set right.

Public finance and the economic disorder under the Articles of Confederation necessitated the Constitutional Convention. Thus, the most important act of the first Federal Congress was its adoption of a sound scheme to solve the national credit problems and fund the government. Congress created the Treasury Department[157] and ordered the Secretary of the Treasury to develop plans to implement reforms and report on these plans in January 1790. Little did Congress know that the first Secretary of Treasury plans would be so far-reaching.[158] Most did not foresee the commercial empire that would be founded by the first Congress.

Hamilton's System was organized around five major programs. He first sought to establish a viable system of taxation to fund the government. Reliable and fair taxation was required for any nation. Hamilton concluded that there must be non-discrimination regarding creditors – that is, all creditors would have their debt securities honored at face value.[159] The federal government would assume all the state debt at par value, making investors dependent upon the federal government for payment and strengthening the union. A national or central bank was created along the lines of the Bank of England. The Bank of the United States would monetize the debt, giving rise to strong capital markets and increasing the money supply, spurring the growth of manufacturing

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156. "A comparison of estimates of per capita nonhuman wealth (that is, excluding the value of slaves) for the years 1774 and 1805 indicates drastic deterioration not only during the Revolution itself but perhaps in the 1780s as well." STUART BRUCHEY, ENTERPRISE: THE DYNAMIC ECONOMY OF A FREE PEOPLE 161 (1990) [hereinafter ENTERPRISE]. In the late eighteenth century, shipping trade served as a valuable proxy for national income. While the volume of shipping was up after the war, the population had grown substantially. In the North, per capital imports and exports declined. *Id.* at 161-62.

157. The Treasury Department was the new government's most critical and largest office. It had thirty-nine employees that contrasted with State, the senior department's five. ALEXANDER HAMILTON, *supra* note 4, at 291.

158. Checks and balances were designed to gain national consensus for government decisions. Hamilton's program would have allies in the mercantile north, but he would also need the consent of the south and agrarian interests. At this stage, Madison and others, believed they could control his genius. A LEAP IN THE DARK, *supra* note 155, at 317.

159. In reality, the final program had some important deviations from strict equality. That is, while the par value of the debt was honored, there was some variation in interest rates that resulted in a "blended" rate at a lower cost. *See id.* at 319. There is an inverse relationship between the cost of bonds and the effective interest rate; when bond prices rise (because they are perceived safer and better investments), interest rates fall. Notwithstanding these deviations, the value of the securities rose, and the cost of borrowing dropped when the program was adopted.

and commerce. Monetizing the debt would enable investors to use government bonds as collateral for new commercial purposes. Hamilton's *Report on Manufactures* was his most visionary program, and one that did not bear fruit during his lifetime. It did forecast the development of a commercial empire, funded by European capital and manned by European immigrants. Hamilton's System centralized federal power at the expense of state and rural interests. The conflicting views of post-Revolution political society resulted in the rivalry and final split with Thomas Jefferson, who had worked with Hamilton for union in the funding of the debt and its assumption.

We focus on the conundrum of the national debt. The newly formed republic had to corral the $76 million debt and render it a servant of the nation. If left unchecked and growing out of control, it threatened disunion by giving rise to sectionalism and factions. With prudent management and funding the government would use it as cement to bind the union. We then address the great state documents of Hamilton: the *Report on Credit*, concerning funding and assumption of the debt; the *Report on a National Bank*; and the *Report on Manufactures*.[160]

A. The Staggering Debt—Insoluble Problem or Wondrous Opportunity

The combined debt was massive – $76 million in principal and accrued interest.[161] At the conclusion of the War for Independence, America was a weak debtor nation. It owed $2 million to Dutch banking houses and about $5 million to the French.[162] In 1786, the total income of the central government was less than one-third of the charges owed

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160. The great state documents are readily accessible in WRITINGS, *supra* note 15, at 531, 575, 647. *The Federalist Papers* are not directly covered in this section, but are certainly important to the story. They inform Hamilton's ideas on government and its role in the economy, but they are pre-Republic political theory and provide an explication of how the Constitution is to work. Hence, they make their appearance when called upon, as in the National Bank controversy where Madison reverses his former position on implied powers and Hamilton calls him to task for it.

161. It is a somewhat fruitless exercise to translate 1790 dollars into 2018 dollars. Richard Brookheiser has gamely estimated that a 1790-dollar during normal periods was worth about $13.00 in 1999. ALEXANDER HAMILTON: AMERICAN, *supra* note 7, at *Note on Money* (unpaginated). The shortcoming of this type of estimate is that it does not capture the nature of the underlying economy or its dynamics. I choose to work with nominal dollars and contrast them with the French and English economies, especially their Gross National Products (income) and levels of taxation in order to give a picture of the nature of the problem facing the nation.

162. ENTERPRISE, *supra* note 156, at 118 (all dollars are nominal and have not been adjusted for today's value).

the national debt.[163] Under the Articles of Confederation, the situation worsened. The Confederation was burdened with huge debts because it lacked taxation powers; thus, it could neither pay nor service the debt. Debt instruments traded for a fraction of their face value in illiquid and unorganized capital markets.[164] The simple financial intermediation system was comprised of just three banks: one in Philadelphia, one in Boston, and one in New York.[165] America's money supply merely consisted of foreign coin and specie, fiat paper money from the states as well as local notes, and deposits from the three banks.[166] Speculators bought up debt from soldiers and suppliers to the army.[167] There was widespread concern that the United States would default on the debt owed to its foreign supporters and its own citizens. The Constitution created a new republic with powers sufficient to build a strong nation if they were prudently wielded.

By 1790, Washington's government faced a federal war debt owed to American citizens of approximately $40 million ($27 million in principal, and $13 million in interest arrears).[168] The total war debt, federal, state and foreign, was a staggering $76 million.[169] The federal government owed about $40 million to Americans investors;[170] it also owed $11.7 million in foreign debt.[171] The states owed $25 million in war debt.[172]

Hamilton saw the national and state debt as an opportunity—a blessing to put American finances in order and to create a commercial powerhouse.

> [The] millions of obligations, which took literally scores of different forms, traded at just fractions of their face value. Few expected payments of those decade-old obligations. So why did Hamilton argue that the national government should "service" this debt? Would it not be better simply to default on it, as so many countries had done before

163. *Id.*

164. Peter L. Rousseau & Richard Sylla, *Emerging Financial Markets and Early U.S. Growth* 5 (Vanderbilt Univ., Dept. of Econ., Working Paper No. 00-W15, 2000).

165. *Id.*

166. *Id.*

167. *See* "Speculation in the Public Debt," THE POWER OF THE PURSE, *supra* note 18, at 251-86.

168. AMERICAN PUBLIC FINANCE, 1700-1815, *supra* note 8, at 217.

169. A LEAP IN THE DARK, *supra* note 156, at 316.

170. WILLIAM G. ANDERSON, THE PRICE OF LIBERTY: THE PUBLIC DEBT OF THE AMERICAN REVOLUTION 41 (1983) [hereinafter THE PRICE OF LIBERTY].

171. *Id.* at 57.

172. *Id.* at 35.

> (and since)? The fledgling United States certainly did not appear to be a position to pay its debts. But herein lies the genius of Hamilton. Where others saw a problem, he saw an opportunity. While others viewed the national debt as a threat to republican government, Hamilton believed it was a "national blessing." In addition to aligning the interests of the wealthy with those of the government, his funding plan would increase the nation's credit overseas, making it cheaper and easier for both the government and private enterprises to obtain foreign financing. Finally, funding would create a form of liquid capital that would help the economy to allocate resources more efficiently.[173]

The 1790 GNP was about $200 million.[174] The new republic's national debt was in the $80 million range. Assuming that the United States could gain the confidence of its creditors (foreign governments and nationals) as well as domestic creditors, and successfully refund the debt at, say, 4.5% (a blended rate that takes into account that some creditors will hold out for the 6% promised on the face of their certificates),[175] interest alone would amount to $3,420,000. The Treasury's estimate of revenues needed for government operations, including interest on the debt, would be about $5 million per year. Hamilton estimated government revenues (primarily from tariffs) to be in the neighborhood of about $3.6 million. The only way the government could operate and pay its debts was to refund and increase the size of the debt until commerce revived and revenues caught up (that is, lenders would finance part of the government's expenses until revenues caught up). If the refunding was successful, that borrowing and subsequent borrowings would be at more favorable rates, lowering interest rates and freeing revenues for other important government needs. Any other scheme would destroy the nation's credit.[176]

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173. ROBERT E. WRIGHT & DAVID J. COWEN, FINANCIAL FOUNDING FATHERS: THE MEN WHO MADE AMERICA RICH 22-23 (2006) [hereinafter FINANCIAL FOUNDING FATHERS].

174. Economic historians such as Bruchey and Braudel have been able to generate pretty reliable estimates of GNP using data from earlier eras, such as shipping volume and tax receipts. The Commerce Department began to calculate GNP in 1929. Brookheiser states that the national debt in 1792 was $80 million and 40% of the gross national product. HAMILTON'S BLESSING, *supra* note 48, at 42. One site estimates the nominal GDP to have been $189 million in 1790 and $206 million in 1791. Louis Johnston & Samuel H. Williamson, *What Was the U.S. GDP Then?*, MEASURINGWORTH (2019), *available at* https://www.measuringworth.com/datasets/usgdp/result.php (last visited Nov. 15, 2019) ($200 million seems to be a reasonable estimate).

175. This anticipates the actual refunding of the debt wherein Hamilton created tranches that resulted in a blended rate of interest favorable to the United States.

176. We can contemplate a number of schemes. The United States could have repudiated the debt. It could have argued that under international law the Republic was not the successor to the Confederation; hence it was not obligated to pay the debt. (The Soviet Un-

Unlike that of the British, the United States' economy was not the world's most sophisticated. It would be a gamble to stake the future of the nation on solving the debt problem. The British national debt had grown from ¤16.7 million to ¤272 million in about a hundred years.[177] During this period of time, the English had grown wealthy and became a great power. The British had developed capital markets like the London Stock Exchange and the banks in the City. The "open market operations" of the Bank of England supported these markets.[178] In contrast, America had nascent capital markets (speculation in the national debt in cities like New York and Philadelphia) and no national banking system. The United States had only three tiny banks in New York, Boston, and Philadelphia. The banks combined capital was $3 million; these banks were incapable of providing critical financial services like clearing accounts easily and lending to governments. The American financial system was rudimentary, to say the least. While we were poised on the cusp of the Industrial Revolution, our banking system and "capital markets" were incapable of sustaining rapid industrial, technological, and commercial change.

As noted above the gulf between the sophisticated English economy and America was enormous. At first glance the United States did not seem to be a good candidate to create a strong economy founded on a sophisticated management of the national debt. It was a gamble worth taking because of the strength of Hamilton's plan, turning the debt into a perpetual fund or annuity like the British system. This would allow the Republic to grow without the threat of bankruptcy.

The next section summarizes Hamilton's important state papers on the economy and outlines his blueprint for success.

B. Hamilton's State Papers on the Economy

Hamilton's state papers created the blueprint for America's national and economic success. This subsection will outline the provisions of

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ion did not honor the obligations of Tsarist Russia to the consternation of the international financial community.) The United States could also have taken the Latin American option—restructuring and reducing both principal and interest, currency devaluation, or default.

177. In 1790 the British national debt stood [at] ¤272 million, a sum roughly as awesome in the economic universe of the late eighteenth century as the $5 trillion debt of the United States is in the late twentieth." HAMILTON'S BLESSING, *supra* note 48, at 1. Alas, our debt is now above $22 trillion with no plan to curb our appetite for "cheap" money.

178. The Bank of England kept interest rates low to support the debt, while also issuing banknotes to assure the nation adequate liquidity for commerce and growth.

the *Report on the Public Credit*, the *Report on a National Bank*, and the *Report on the Subject of Manufactures*.

1. Report on the Public Credit[179]

In the *Report on the Public Credit*, Hamilton noted the importance of honoring the debt to prospects for prosperity. Good credit was indispensable in war. For countries like the United States, with little active wealth, it was essential for building the economy. Hamilton explained that establishing credit would cause the value of government securities (bonds) to rise, lowering the cost of capital. One of the keys to establishing excellent credit was to create a "sinking fund." The government would pledge to earmark funds and redeem a certain amount of securities each year. The salutary effect of this device was to raise the nation's credit rating because of the fund's existence.[180]

Hamilton saw the wedding of moneyed interests to the national government as cementing the union. He saw the national debt as a medium of exchange and explained how monetization of the debt would increase fiat money and prosperity. He explained how land values, important to farmers and settlers, would revive if the debt were put on sound footing. Values had fallen because of a scarcity of money; the liquefied economy would rectify that.

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179. *See* WRITINGS, *supra* note 15, at 531-74. Ronald Chernow writes:

> In preparing his report, Hamilton was eclectic in his sources. He had clearly plumbed David Humes's *Political Discourses*, which admitted that public debt could vitalize business activity. Montesquieu had stressed that states should honor financial obligations, "as a breach in public faith cannot be made on a certain number of subjects without seeming to be made on all." (*footnote omitted*). Thomas Hobbes had emphasized the sacredness of contracts in transfers of securities, arguing that people entered into such transactions voluntarily and must accept all consequences—a seemingly arcane point that shortly had explosive consequences for Hamilton's career. During the Revolution, Hamilton had stuffed Malachy Postlethwayt's *Universal Dictionary of Trade and Commerce* into his satchel, and now he used it once again. Postlethwayt stressed that no country could borrow money at attractive interest rates unless creditors could freely buy and sell its bonds: "Such is the nature of public credit, that nobody would lend their money to the support of the state, under the most pressing emergencies, unless they could have the privilege of buying and selling their property in the public funds, when their occasions required.

ALEXANDER HAMILTON, *supra* note 4, at 296.

180. Here Hamilton was taking a page from Walpole and William Pitt, the Younger. Their sinking funds did exactly that for England's credit. The sinking funds lower the cost of borrowing because creditors who desire to have their loans redeemed early compete for the privilege by accepting a lower rate due to the lower risk. The cost of the borrowed funds reduces with more "buyers."

2. Report on a National Bank[181]

This report details the structure of the Bank—its prudent means that prevent domination by any group of investors and its protection of American interests by forbidding foreign control. Furthermore, Hamilton explains the functions of the Bank. Among these functions is the issue of banknotes backed by federal securities, which aid commerce and defense. Another function is the support of debt securities, which protect the nation's credit rating and the capital markets.

3. Report on the Subject of Manufactures[182]

The *Report on Manufactures* was Hamilton's answer to Jefferson's *Notes on the State of Virginia* (1785). Where Jefferson praised an agrarian nation dotted with farms and small towns, Hamilton pictured America as a bustling commercial state. Protective tariffs and subsidies would promote new industries and innovation. American capital markets would welcome European funds and provide new investments, spurring development on a continental scale.

C. Establishment of a System of Taxation to Fund the Government

Hamilton moved quickly to organize the most important department in the new government. In return for generous funds awarded to the Treasury, Congress requested Hamilton prepare a report on the country's economy and the Treasury's fiscal plans.

Hamilton worked quickly and produced a masterpiece, the *Report on the Public Credit* of January 14, 1790. The *Report on Credit* laid out the blueprint for solvency for the new nation. It cataloged sources of revenue, analyzed the state of the economy, and proposed a plan that would fund the debt and the operations of government.

Hamilton's work was assisted by the many reports his agents had filed. Thus, he had a comprehensive census of the nation's economy upon which to build the government's revenue system. He knew which ships carried which cargo and which farmlands were the most fertile.

Hamilton proposed two forms of taxes: the Excise on manufactured goods and the Impost on foreign trade. There was no federal income tax in 1790. Land taxes were burdensome and inefficient. Assessments changed rarely. Thus, increases in income and value were hard to capture with land taxes.[183]

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181. *See* WRITINGS, *supra* note 15, at 575-612.

182. *Id.* at 647-734.

183. The inability to easily capture increases in income and value is one of the reasons the British cleverly built their fiscal system upon excise and impost taxes. Economic activi-

The Excise and Impost taxes were both efficient and most effective at capturing income growth. Technological changes and increased commerce would produce new taxes as the economy grew in wealth and income. The Excise would tax luxury items like carriages (rankling Jefferson), some domestic manufactures, and spirits.[184] The Impost or tariff would fall on imported goods, and would prove to be the major source of federal revenue during peacetime during the nineteenth century. The Impost was designed to capture revenue from predominately British goods, which constituted 90% of our trade. The irony was not lost on Hamilton that the British would in effect pay for the government's operation and service its debt.

Hamilton concluded that once trade relations were normalized with Britain and treaties were made, a reliable source of funds would emerge. Trade relations with England were a bone of contention for radicals who wanted to punish the British as well as some Federalists like John Adams. Some politicians held out for using the trade weapon to force Britain to vacate the western posts. The trade weapon would prove to be a failure. The Jay Treaty, on the other hand, would normalize relations and resolve many of these issues. The failure of the trade weapon was a blessing in disguise. Imports from Great Britain were the largest source of duties; many English investors purchased American bonds. Hamilton's Impost would be the prime source of federal monies.[185] British trade was harnessed to re-finance the American Revolution! The customs office and coast guard were staffed to collect duties and squelch the smuggling industry.[186] Hamilton's Treasury also proposed a number of internal taxes on manufactured goods. The Excise, the bulwark of British revenue, was estimated to bring in $500,000 per year.[187]

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ty in commerce could be monitored within reason and the income assessed. The English were poised to capture the wealth created by the increase in trade, commerce, and manufacturing. The United States would adopt the system and benefit similarly.

184. The tax on spirits of 25% would lead to the spirited tax revolt known as The Whiskey Rebellion. The Rebellion was the most serious domestic threat to the new government and union. Washington's direction preserved the state and set standards for decency.

185. AMERICAN PUBLIC FINANCE, 1700-1815, *supra* note 8, at 232.

186. In the years leading up to the Revolution, duties were honored more in the breach than in practice. The American coastline was impossible to cordon off for collections and merchants bribed custom officials to look the other way. If the Republic was to operate in the black, the smuggling customs of Americans would have to be curtailed.

187. Hamilton "hoped to raise about $5 million for the federal government annually, with up to $3.5 million of that amount, or 70% required to pay the interest on the debt." This was about two percent of the GNP, a very low tax burden in comparison to European

Both taxes were fair and reliable. They would prove to be efficient and easy to enforce. They would accustom Americans to paying taxes regularly to support a strong central government. This would wean them away from their state governments.[188]

Hamilton's expense budget showed a deficit of about $1.5 million. This could only be met by refunding the debt, borrowing new monies, and paying a lower rate of interest. The Hamiltonian scheme resulted in all three occurring. First Congress and the Treasury focused upon the national debt, debt incurred by the Continental Congress, and under the Articles.

D. Funding of the National Debt and the Discrimination Problem[189]

There was general agreement that the federal government should be responsible for all national debt incurred in prosecuting the war. There was no serious consideration of defaulting, threatening to default, devaluing the currency, or restructuring the foreign debt. The $11.7 million owed to France, Holland, and foreign nationals would be honored at face value and at the stated interest rate.[190] When that decision was made, the value of these securities was restored as foreign governments and investors now trusted the new government's credit. The value in the securities rose in cities like New York and Philadelphia, as well as cities abroad, because there was an active market for $43 million United States debt.[191]

Speculation arose and speculators became active in both national and state debt owed to Americans. These speculators enjoyed a nasty reputation and were commonly thought of as bloodsuckers by Anti-Federalists, agrarians, rural debtors, and states' rights advocates. They did not make their reputations shine when, on rumors of federal action,

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practice. AMERICAN PUBLIC FINANCE, 1700-1815, *supra* note 8, at 232. The excise taxes were designed to raise about $500,000. However, the reality was about $350,000 in revenue with enforcement ranging from $50,000-$100,000. *Id.* at 234.

188. The states never did wither away and die on the vine as Hamilton once hoped and predicted. Indeed, states' rights issues have been rallying cries for Republicans and conservative Democrats for much of the past 100 years. Recently our major political parties have switched horses with many Democrats championing states' rights when they support sanctuary cities and financial aid to illegal aliens and Republicans holding for federal power and enforcement in immigration law!

189. For a detailed history of the funding of the debt, *see* Edwin J. Perkins, *Funding the National Debt*, AMERICAN PUBLIC FINANCE, 1700-1815, *supra* note 8, at 189-234.

190. *See* WRITINGS, *supra* note 15, at 549.

191. Wall Street, like the London Stock Exchange, was to be founded by investors trading in national debt and state. As businesses required more capital, these bonds could be used by banks and investors to fund the projects.

moneyed men from urban areas went to the back woods in search of cheap, highly discounted debt. To make matters worse, Duer, Hamilton's assistant at the Treasury, and a number of Congressmen sent their representatives to the hinterlands to buy up the discounted obligations.[192] The Georgians and North Carolinians in Congress were particularly hostile to these activities. While Hamilton was without reproach, rumors circulated about his inside profits. Anger welled up as reports filtered back to New York about the egregious behavior of the speculators. Many in Congress were willing to redeem the domestic portion of the national debt; they wanted to discriminate between the good, original holders, however, and the less worthy, subsequent holders who appeared to have been involved in speculation and were taking untoward advantage of the naïve and distressed.

The evils of speculation were exaggerated then and have been in many historical accounts of the discrimination issue.[193] The long and short of it is that the present speculation involved *speculators* and very few widows and orphans forced to sell.[194] Debt had been trading for about fifteen years so, when we take into account compounding of interest and discounting to net present value, we see that those who sold

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192. ALEXANDER HAMILTON, *supra* note 4, at 360.

193. This is probably because the press and politicians, echoing common wisdom, were so often vitriolic. However, when common sense is applied to the debt and the principles of speculation, it is apparent that Madison, Jefferson, and their supporters got it wrong.

> Most of the original holders of federal certificated who sold out to secondary investors likely did so soon after receiving them in payment for goods or services. The vast majority of the $11 million in securities issued to common soldiers when the Continental army disbanded in 1783 quickly passed into other hands. The same was true for persons who received certificates totaling about $6 million in payment for military supplies. Those citizens typically had little interest in holding financial assets, public or private, to an undetermined maturity date. They needed whatever cash could be raised immediately either to buy goods for immediate consumption, pay off private debts, or invest in more tangible assets such as land, livestock, inventories, structures, or bonded workers.

AMERICAN PUBLIC FINANCE, 1700-1815, *supra* note 8, at 226.

194. Indeed,

> [I]t seems unlikely that more than a handful of original owners were among those who missed profit opportunities by selling out to speculators in 1789 and early 1790, the assertions and lamentations of Madison and his legislative supporters notwithstanding. Speculators who profited the most did so largely at the expense of their less informed or less audacious counterparts who made different judgments about the risks and rewards associated with continued ownership of debt certificates at prevailing market prices in the period from ratification through the implementation of funding.

Id. at 225.

the debt instruments at an earlier time were in approximately the same economic situation as those who bought the discounted paper.[195]

Speculators are indeed quite useful economic creatures because they provide liquidity in markets. As bad as the discounts were during the darkest days of the war, the liquidity provided by the speculators supported the war bonds and certificates by providing a market for investors. They played a role similar to vulture capitalists in corporate bankruptcies of the present, by providing support for the bond market of the distressed company. The nation and the states would have been much worse off if the trading had been suspended to stop the speculators—then the market really would have fallen to the center of the world!

A related problem to refunding the domestic national debt at face value was that some states like Pennsylvania had for some time been buying up national debt and redeeming it. If this continued, the nation would be less reliant upon the central government to cure economic ills. Hence, it was important to nationalists like Hamilton and Morris to end state purchase programs.

Added to the mix was sectional politics. Refunding of the national debt would take federal revenues and funnel them into urban areas. Hamilton desired this dispersion because the government debt could become active capital to fund commerce and industry. This would reduce the importance of rural states and agrarian communities. To a very real extent, this division pitted the south and west against the New England and the Middle Atlantic states.

Before the First Congress was elected, Madison seemed to be the logical choice for Virginia's senate. His nationalism cost him, however, and the state electors denied him the senate seat. Madison then stood for election as a representative, and was elected.[196] He soon became the leader of the new body of representatives and a power broker for the administration to deal with.

Madison's thwarted senatorial aspirations undoubtedly caused him to mend fences. In *The Federalist Papers*, Madison argued for non-discrimination. As the leader of the Virginian delegation, he switched positions since many Virginians favored discrimination. They saw first-hand speculators in their backyards buying up the debt. Virginians also

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195. Had the United States lost the war in 1780 (as it might very well have), the widow who sold her paper to the Pennsylvanian spectator at $0.20 on the dollar, during the dark days at Valley Forge, would have had $0.20 on the dollar; the speculator, nothing for his money.

196. *See* RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 275-77 (1971).

feared the growth of commercial cities, and the loss of planter power.[197] Madison thus opposed the funding bills, in opposition to his friend and former ally, Hamilton. He was to come around in the Compromise of 1790 that would resolve several of the nation's most difficult problems.

E. The Assumption Battle and the Compromise of 1790[198]

The Compromise of 1790, which incorporated the assumption of state debt and deciding the location of the capital city, was one of the most critical decisions in the nation's history and perhaps its most important Compromise. The resolution of the debt issue and the nettlesome location of the capital strengthened the union and economy. Had these issues been resolved differently, forces of disunion might have threatened the new nation. Happily, Congress passed legislation assuming state debt at face value and approved the new locations for the capital. The capital would be in Philadelphia for ten years, followed by a permanent relocation to the banks of the Potomac that was favored by both the south and west. History has it that the Compromise resulted from a famous dinner party that brought together the protagonists, Hamilton and Madison. It is certainly a good story with a ring of truth, but we shall see Jefferson's later recollection was probably in error.

If habit is character revealed, Jefferson's recorded description of Hamilton before the famous dinner is clearly erroneous.[199] Jefferson recalled a chance meeting of Hamilton in mid-June outside the president's office. Jefferson thought Hamilton looked "somber, haggard, and dejected ... Even his dress uncouth and neglected."[200] He was not his usual dapper and self-confident self – to Jefferson, he seemed beaten. While they stood talking on the street Hamilton revealed that his assumption plan was in serious trouble.[201] James Madison was leading the south in blocking the plan because of his personal opposition to the assumption of state debts by the federal government.[202] Hamilton oozed dejection and melodrama. If his plans were defeated, he hinted he might resign.[203] Without his leadership and plan, the government would fall and the national union would collapse. Jefferson suggested that he could perhaps help by bringing together Colonel Hamilton and his good

197. Madison, along with Jefferson and Monroe, hated urban areas.

198. For an excellent history of the Compromise of 1790, *see generally* THE POWER OF THE PURSE, *supra* note 18, at 307-25.

199. *See generally* ALEXANDER HAMILTON, *supra* note 4, at 327-31.

200. *Id.* at 328.

201. *Id.*

202. *Id.*

203. *Id.*

friend, Madison.[204] The bargain was struck. Jefferson was trying to have the last laugh, re-writing history and portraying himself the hero of the piece, the Compromise of 1790.[205] This is the popular version. What follows is more likely to have happened.

Tied in with the non-discrimination issue was whether the state debt, totaling about $22 million, was to be assumed by the federal government. Hamilton's plans called for the assumption to treat all creditors with parity and make available more collateral for the bank issue currency he was planning for the nation. The assumption issue did not break down along sectional lines. Some states in the north favored it, while others opposed. The same was true for the south. The division broke along the lines of states that had repaid the debt and those that had not. Debtor states would be bailed out by a federal windfall, funded by those good states that had reduced or paid off the debt. The truth was a different matter: many of the states had reduced their debt by repayment with devalued currency or restructured obligations. Virginia fell into that camp. Virginians would also pay excise taxes on northern goods and imposts to pay the debt. They correctly foresaw a capital transfer to northern mercantile areas.

The location of the capital was also to be determined. The Southern states wanted it moved from urban New York with its influence of filthy lucre from commerce to a southern or more central location. Philadelphia was hankering for the permanent capital. Pennsylvanians also proposed locating on the Susquehanna near present-day Harrisburg, the state capital. Some wanted it at the fall of the Delaware, in Trenton, New Jersey. Southerners held out for a more southern location. Pennsylvanians and Virginians were willing to trade votes if they got what they wanted. A deal was in the air and a number of proposals were floating around at the time of the historic dinner.

The compromise would solve three issues: the discrimination issue, the assumption of state debt, and the capital location. Several Virginians whose districts bordered the Potomac switched their votes, as did some Congressmen from Pennsylvania. The Congress approved Phila-

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204. JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 49 (2000).

205. It is inconceivable that Hamilton would have appeared in public in the distraught and disheveled manner described. It is unlikely that Hamilton would have worn his heart on his sleeve and confided in Jefferson. What is more likely is that Jefferson's memory was inclined to favor himself in the later years and to portray Hamilton in an unfavorable light. Jefferson undoubtedly had something to do with the Compromise of 1790, but the Compromise was in the works for good reasons of statehood and policy. It was a good compromise that gave all parties a fair deal. It helped shape our nation as a commercial society.

delphia for the temporary capital for ten years. The permanent location was the District of Columbia, in the south. The Pennsylvanians got the opportunity to convince the government to stay in Philadelphia. The South was awarded the new capital in the wilderness near Washington's home at Mount Vernon. The union was strengthened by the Compromise as the South received its recognition as host of the new capital. Creditors interested were aligned to the federal government's fisc. Hamilton got his assumption and consolidation of the debt. Once the bills were passed, the value of the securities traded at par—evidencing confidence in the new government's fiscal plans and prospects for survival.

The dinner was probably one of many that involved thoughtful and powerful leaders such as Madison, Jefferson, and Hamilton. They would have continued to discuss the people's business in the relaxed atmosphere of their homes. The cordiality and frankness would have assisted in the passage of the Compromise, but it probably did not arise as Jefferson much later wrote.

F. Refunding the Debt[206]

The refunding of the national debt and the assumption of the state debt gave the Treasury the opportunity to streamline federal obligations, lower the interest rate, and create a perpetual fund along the lines of the English national debt.

The effective rate was approximately 4%, well below the nominal 6% rate existing at the time of the refunding.[207]

By the last decade of the eighteenth century, the U.S. government was issuing bonds with indefinite maturation dates, virtually the same as British consols, with the prospect that portions of its existing debt would remain outstanding for at least thirty years and possibly much longer. Only 2% of the principal of the outstanding bonds carrying 6% interest rate was eligible for recall and redemption in any given year, irrespective of budget surpluses. The Hamiltonian fiscal program was fully in place by 1792 and already basking in its glory, since the yields on U.S. securities had fallen to within the secretary's target of 4% by the end of Washington's first term. The gradualist approach to debt reduction had lowered the tax burden to tolerable levels, and simultaneously produced a nascent capital market at the national level.[208] A

206. For detailed information on funding the debt, *see* AMERICAN PUBLIC FINANCE, 1700-1815, *supra* note 8, at 199-234.

207. *Id.* at 232.

208. *Id.* at 231-32.

modest tax burden freed up domestic capital that could be employed to expand the American economy and commerce.

The refunding was an immediate success and investors, mostly foreign, extended the United States new funds to pay the debt's interest and principal. So successful was the refunding that by 1792 the United States had credit equal to that of any European nation. Hamilton 6s were trading considerably above par—meaning that the effective interest rate for national debt securities was below its nominal value. The securities were deemed so safe that there was a premium for them.[209] This, of course, made borrowing by the government cheaper. The Hamilton program was working.

G. Establishing the Bank of the United States[210]

The revenue acts established reliable income for the new government. Refunding and assumption aided the union and lowered the cost of borrowing. The next step in the Hamiltonian System was the national bank.

The Bank Bill in Congress was much less controversial than the assumption and non-discrimination issues had been. The act sailed through without strong opposition being mounted. However, Jefferson, Madison, Monroe, and Edmund Randolph, the Attorney General, all opposed it as an unconstitutional intrusion upon states' rights and an unjustified exercise of federal power. Hamilton and Madison worked together in preparing Jefferson's opposition at the cabinet. Washington's preference was to defer to his cabinet officers in matters in their bailiwick.

Because of Jefferson's opposition, Washington asked Hamilton, Jefferson, and Randolph to prepare opinions on the constitutionality of the bank. Madison reversed his "implied powers" position he expounded in *The Federalist Papers*[211] and helped Jefferson prepare his brief. Jefferson argued for the strict construction of states' rights as there was no explicit banking power in the constitution. Randolph's argument echoed Jefferson's and called for strict construction as corporations and

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209. The safety premium, because the securities were so well regarded, caused the 6s to trade at about 4.5%. This market perception of safety reduced the borrowing costs of the new nation as it refinanced its public debt. Jefferson, while no friend of Hamilton or the bank, sold his 2200 shares of bank stock holdings in 1802. Baring Brothers, a leading English merchant bank, sold Jefferson's shares for 45% over par. Jefferson earned a profit of $670,000! *Id.* at 238.

210. For detailed information on the First Bank of the United States, *see id.* at 235-65.

211. *See*, for example, THE FEDERALIST NO. 44 (James Madison), wherein Madison discusses implied powers bottomed on the "necessary and proper" clause.

businesses were being chartered and supervised by the states. Neither Jefferson nor Randolph wanted extensive federal economic powers challenging the states.

Hamilton wrote a *tour de force* articulating the now-accepted "implied powers" argument that carried the day in *McCulloch v. Maryland*.[212] In *tour de force*, Hamilton asserted that the right to create and charter a bank could be found. The constitution had implied powers permitting the federal government to undertake necessary and proper steps to discharge its duties. The bank facilitated the many federal economic powers, such as minting currency, collecting taxes, and funding the army and navy. A federally chartered bank could be seen as a helpful handmaiden in all of these operations. For instance, the bank could lend money to the government during the slack periods between the spring and fall custom collections. It could write checks to pay for soldiers in the west if a Native American nation threatened settlers. The bank could store federal treasure collected from taxes, and earn interest for the government for funds on deposit.

Hamilton's arguments persuaded Washington, who still had doubts, but made the decision by giving preference to the cabinet officer making the proposal in a close case. Hamilton's arguments borrowed liberally from Madison in *The Federalist Papers*. John Marshall discovered the private state documents when he was preparing his biography of George Washington. Later Daniel Webster made the argument in favor of the Second National Bank before the Supreme Court. Chief Justice Marshall, ever the nationalist, used Hamilton's arguments almost verbatim in sustaining the bank and establishing expansive implied federal powers in *McCulloch v. Maryland*.[213]

The Bank of the United States was a quasi-public institution with a capitalized value of $10 million in subscription.[214] The government was permitted to own 20% of the bank.

The fractional public ownership was motivated in part by the desire to maintain some degree of continuity with the colonial heritage of legislative loan offices. During the half-century preceding independence, those publicly-owned financial instruments managed by public employees produced steady profits that alleviated the burden on taxpayers. Many political leaders wanted to preserve a measure of that tradi-

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212. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

213. *Id.*

214. The Bank was capitalized at $10 million with 25,000 shares having a par value of $400. H.W. BRANDS, THE MONEY MEN: CAPITALISM, DEMOCRACY AND THE HUNDRED YEARS' WAR OVER THE AMERICAN DOLLAR 52 (2006).

tion of public involvement in the financial sector. Thus, in an attempt to forestall criticism that the proposed national bank would cater strictly to the "selfish" interests of wealthy urban investors, as opposed to the welfare of ordinary citizens, Hamilton recommended a mixed enterprise—government ownership of 20% of the shares with 80% going into private hands.[215]

The government paid its subscription by borrowing funds and giving the bank notes, payable in full over eight years.[216] Private investors paid in the balance.[217] Government debt could be used to buy stock, so long as the private investors put up 20% in specie. Thus, about 16% of the Bank's assets were gold and silver, and the balance was government debt that was treated as if it were specie.[218] On July 4, 1791, the Bank sold out its subscription immediately, establishing it as the largest financial institution in the Western Hemisphere.

Hamilton's bank had extensive powers. It could buy and sell government securities, supporting the bond market like the Bank of England or the Modern Fed. It could lend to the government, other banks, and businesses. It was a federal depository and payor (earning fees).[219] It issued banknotes, backed by its reserve of specie and government bonds. The monetizing of the debt created fiat money that circulated and stimulated commerce. The Bank was wildly successful, earning its primarily British investors very nice profits. Nice profits were also earned by the government. The Bank accommodated President Jefferson and financed the Louisiana Purchase from Napoleon. It also bailed out Jefferson's parsimonious neglect of the navy by funding its revival when American trade was threatened at sea.

The Bank had an interesting public/private mix. Private investors controlled the Bank, shielding it from popular influence in the Congress. While foreign investment was huge, foreign investors had no control over the resources. They were content to profit from the splendid dividends and capital appreciation. The Bank represents another instance where the United States was funded by foreign capital to its ad-

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215. AMERICAN PUBLIC FINANCE, 1700-1815, *supra* note 8, at 236-37.

216. Id. at 237.

217. Private investors purchased three-fifths of the Bank's stock with government securities! ENTERPRISE, *supra* note 156, at 170. Financial genius was at work here as the refunded debt lowered the cost of credit and financed the national bank that supported the rejuvenated credit of the new republic.

218. Because the Bank was so sound and the government debt perceived to be a very safe investment as it traded above its issue price, it had the value of gold and silver, but not the weight.

219. AMERICAN PUBLIC FINANCE, 1700-1815, *supra* note 8, at 236.

vantage. For a fixed return in the manner of the dividend, we received use of English funds. (We were also repaying the debt by taxing their imports and shipping!) Hamilton and sophisticated merchants understood this; in its flights of xenophobic fancy, the public often did not.

In conclusion, the Bank's greatest contribution was in monetizing the debt—instantly creating substantial capital in a capital-poor land. Its prudent policies protected investors and regulated the economy by its clearinghouse policies with state banks, its security market operations with the federal debt, and its branching operations in many locations.

The Bank created capital pools and boosted the development of Wall Street. It spurred investment and boosted the economy. Eventually Jefferson and his great Treasury Secretary, Albert Gallatin, came around and saw the Bank's importance. It aided the government in re-establishing a navy and army that Jefferson had thoughtlessly allowed to wither. It funded the great Louisiana Purchase. In 1811 its re-chartering was defeated in the Senate. The anti-Bank forces captured half the votes, and Vice President Clinton voted against re-chartering.[220] The Bank's affairs were wrapped up and substantial profits returned to all investors, including federal government. On the eve of the War of 1812, the Bank refunded precious specie to its English investors. With the Bank out of operation, the currency in circulation shrank dramatically. With no Bank, the government was unable to fund its defense after Congress ill-advisedly voted to take on the greatest power in the world. National fortunes were saved by the resourceful and courageous banking of Philadelphian Stephen Girard, whose financial and banking skills, contacts, and private fortune funded the United States.

After the war, the chastised United States chartered the Second Bank of the United States. The Second Bank was to prove to be a great success. It was also hated by President Jackson who, like Jefferson, had a profound ignorance of banking and finance. What with the Banking War in Jackson's presidency and the end of the national bank,[221] the United States ended its experiment with central banks until 1913, when Congress enacted the Federal Reserve Act, creating the Federal Reserve System.

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220. HAMILTON'S BLESSING, *supra* note 48, at 47.

221. Jackson, as a Westerner, opposed the Bank because its regulatory functions (clearing, approving state banks for deposit and receipt of funds) angered state banks. By the Age of Jackson, the Bank was an accepted institution and vital to the economy of the Middle Atlantic States. No one questioned its constitutionality. It died for political purposes. SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 437-40 (1965).

V. CONCLUSION

Hamilton's System put the United States on sound credit almost overnight. It established a principle of non-discrimination among investors and protected foreign investors (who then invested in the secure United States markets). His refunding of the debt established these securities as a medium that could be used as "active" capital, driving commerce and industry. His Bank of the United States funded government operations, performed prudently, issued banknotes monetizing the debt, and liquefied America's cash-poor economy. The Bank's operations supported the government debt and helped to found Wall Street. The hand of his active, virile government may be seen in important government programs of the last two centuries. Without Hamilton's leadership and his program, it is hard to conceive of our commercial empire.

While Jefferson was initially opposed to Hamilton's plan, by 1816 he had become a convert with respect to the value of the protective tariff. He supported the Tariff Act of 1816. The large footprint of Hamilton is seen in Henry Clay's American System and the development of Wall Street in the nineteenth century. Hamilton's influence continues to this day when the government employs the Fed and acts as an entrepreneur in the economy—such as with NASA and the Eisenhower National Defense Interstate Highway System.

Hamilton's inquisitive mind, his administrative skills, his grasp of finance, and his shrewd borrowing from the Brits and the Dutch established strong financial institutions and sound public finance and policies; this laid the groundwork for America to become a great power.

THE DEATH OF CUSTOM: WINNERS AND LOSERS IN THE LEGAL TRANSFORMATION OF PERI-URBAN LAND IN NIGER

Thomas A. Kelley*

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I. INTRODUCTION

The population of Niamey, the capital city of the West African Republic of Niger, is exploding.[1] Since urban residents need houses, large tracts of peri-urban[2] land around the city are being transformed from fields to suburbs.[3] This land transformation is being accompanied by a

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1. Hamadou Issaka, *La Promotion Immoblière Informelle a Niamey: L'Irregularite Comme Reponse a la Crise du Logement*, URBANITES (Nov. 8, 2013), *available at* http://www.revue-urbanites.fr/la-promotion-immobiliere-informelle-a-niamey-lirregularite-comme-reponse-a-la-crise-du-logement/ (last visited Sept. 27, 2019) (arguing Niamey has undergone vertiginous growth); *see The World Factbook (Niger) (People and Society)*, CIA, *available at* https://www.cia.gov/the-world-factbook/countries/niger/ (last visited Sept. 27, 2019) [hereinafter *Factbook: People and Society*] (estimating Niger's rate of urbanization as 4.27% for 2015-2020, ranking 11th for highest urbanization rate in the world).

2. There is no universally accepted definition of the term "peri-urban." Beacon Mbiba & Marie Huchzeremey, *Contentious Development: Peri-Urban Studies in Sub-Saharan Africa*, PROGRESS IN DEV. STUD. 113, 114 (2002). However, it generally refers to land around the periphery of urban areas that includes elements of both rural and urban use and where farmland is being converted to suburbs. *See* Achamyeleh Gashu Adam, *Land Tenure in the Changing Peri-Urban Areas of Ethiopia: The Case of Bahir Dar City*, INT'L J. URB. & REG'L RES. 1970, 1970-71 (2014) (arguing peri-urban lands are places just outside municipal boundaries where urban and rural coexist and where farmland is being converted to suburban house plots); Janine Ubink, *Traditional Authority Revisited: Popular Perceptions of Chiefs and Chieftaincy in Peri-Urban Ghana*, J. LEGAL PLURALISM & UNOFFICIAL L. 123, 129 (2007) (defining peri-urban as "approximating a continuum from rural to urban"); *see also* IGNASIO MALIZANI JIMU, EVERYDAY PRACTICES AND RELATIONS IN PERI-URBAN BLANTYRE, MALAWI 69 (2012) (arguing peri-urban land is usually characterized by "the encroachment of the expanding urban area onto the surrounding rural land . . . affecting the livelihood of small farmers" and where land goes from rural to urban and from customary to statutory tenure).

3. *See infra* Part IV.D.

legal transformation from customary to formal state law.[4] As is true of most legal transformations, this one is producing winners and losers.[5] The winners are those with access to financial, political, and social capital who use their superior strength to take advantage of the new rules.[6] The losers are the peasant farmers and their families who are uprooted from their traditions and their main sources of livelihood.[7]

Under customary law in rural Niger, land is inextricably interwoven with history, identity, and religion.[8] One's access to land depends on membership and good standing in a family, a lineage group, and a village.[9] At the same time, land helps define those institutions.[10] Villagers explain themselves, their family histories, and the linkages between families by recounting stories of ancestors who founded their villages, usually by clearing the land for agricultural use.[11] All males who descend from the original, land-clearing ancestors can claim membership in the lineage and thus present-day access to land.[12]

Rural land in Niger is also intertwined with spiritual beliefs. Land helps bind together the temporal and spiritual worlds.[13] Villages are surrounded by all manner of spirits including the black spirits (*gangi bi*) who controlled the land before humans arrived, and the spirits of ancestors who made pacts with the *gangi bi* that permitted them to inhabit

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4. *See* JIMU, *supra* note 2, at 69.

5. *See infra* notes 276-78 and accompanying text (arguing elites in developing countries always benefit from changes in the law).

6. *See infra* Part V.A.

7. *See infra* Part V.B.

8. *See* Thomas Kelley, *Squeezing Parakeets into Pigeon Holes: The Effects of Globalization and State Legal Reform in Niger on Indigenous Zarma Law*, 34 N.Y.U. J. INT'L L. & POL. 635, 680-91 (2002) [hereinafter *Squeezing Parakeets*] (arguing land in Nigerien villages is closely connected to spiritual beliefs, history, and community identity); *see also* PARKER SHIPTON, MORTGAGING THE ANCESTORS: IDEOLOGIES OF ATTACHMENT IN AFRICA 117 (2009) (arguing land is tightly tied up with social position and also with "the most intimate, emotionally charged dimensions of personhood and pride.").

9. Thomas Kelley, *Unintended Consequences of Legal Westernization in Niger: Harming Contemporary Slaves by Reconceptualizing Property*, 56 AM. J. COMP. L. 999, 1006-07 (2008) [hereinafter *Unintended Consequences*]; Parker Shipton & Mitzi Goheen, *Understanding African Land-Holding: Power, Wealth, and Meaning*, 62 AFR. J. INT'L AFR. INST. 307, 307 (1992) (arguing land in Africa helps "define personal and social identities"); *see* SHIPTON, *supra* note 8, at 110 (arguing that, in East Africa, people belong to their land).

10. *See Squeezing Parakeets*, *supra* note 8, at 663 (describing a Nigerien village that traces its history to a group of brothers who dug a well and cleared the bush around it).

11. *Id.*

12. *Unintended Consequences*, *supra* note 9, at 1006-08.

13. *See id.* at 1007 (arguing Nigerien traditional leaders ensure land is used in ways approved by the spirits).

and exploit the land.[14] Those spirits intervene in the daily lives of rural people, sometimes helping them, sometimes harming them.[15]

Rural Nigerien people who lose their land as a result of urbanization lose their connections to these powerful practical and symbolic touchstones that bring order and meaning to their lives, but that is not all they lose. Because most rural Nigeriens rely on subsistence farming, many will also lose their livelihoods.[16] In Niger, there is no equivalent of Detroit or Pittsburg where displaced agricultural workers can find wage labor,[17] so many will simply starve.[18]

This paper explores Niger's peri-urban transition in land use and law. Part II provides background on Niger with an emphasis on the demographics that explain why the country is facing a potentially cataclysmic if slow-moving land crisis. Part III will indulge in a step often skipped by legal scholars and development practitioners: it will explore in some detail the customary law that governs land use in rural areas. Without understanding customary law, one cannot understand the enormity of the loss that will result when fields become suburbs. Part IV will shift the lens to the city and describe the legal and political context that has permitted Niamey's explosive and largely unregulated growth. It notes that when formal state law and customary law bump into one another in peri-urban areas, formal law almost always prevails: the land is irrevocably transformed from a key element of a social, historical, and spiritual complex, into a commodity. Part V describes in detail who wins and who loses as a result of the transformation. The paper concludes that the wealthy and well-connected win, while peasant farmers lose. They lose their livelihoods and, just as important, the cus-

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14. *See infra* note 71 and accompanying text.

15. *Squeezing Parakeets*, *supra* note 8, at 647-48; *Unintended Consequences*, *supra* note 9, at 107.

16. *Factbook: People and Society*, *supra* note 1; *see* U.N. Exec. Bd. of the U.N. Dev. Programme, the U.N. Population Fund and the U.N. Off. for Project Servs., *Country Programme Document for Niger (2019-2021)*, ¶ 14, U.N. Doc. DP/FPA/CPRD/NER/9 (Nov. 21, 2018) (arguing that a large part of the Nigerien population is dependent on subsistence farming).

17. *See* Interview with Hamdallaye Canton Chief, Hamdallaye, Republic of Niger (May 1, 2018) [hereinafter Interview with Hamdallaye Canton Chief] (arguing "[i]f peasant farmers sell their land, what will they do? It's not as if there are factories in the city where they can go find jobs"); *see also* SHIPTON, *supra* note 8, at 33 (arguing that in the U.S. urban employment cushioned the blow from rural land dispossession but that in Africa no such safety net exists).

18. *See infra* Part V.B.2.a (describing the livelihood effects of rural Nigeriens losing access to agricultural land).

tomary law that has sustained their communities through centuries of adversity.

A. About Niger

Niger is among the poorest, least developed countries in the world.[19] One reason is its paucity of natural resources.[20] It is landlocked and two-thirds of its surface is located in the parched Sahara Desert,[21] a zone unsuitable for agricultural production.[22] The southern third of the country, where most of the population lives,[23] is only marginally more fecund.[24] The soils there tend to be sandy and of poor quality,[25] water-

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19. *Human Development Reports: Human Development Data (1990-2017)*, U.N. DEV. PROGRAMME, *available at* http://hdr.undp.org/en/data (last visited Sept. 27, 2019) (ranking Niger as the poorest country in the world out of all 189 countries listed); *The World Factbook (Niger) (Geography)*, CIA, *available at* https://www.cia.gov/the-world-factbook/countries/niger/ (last visited Sept. 27, 2019) [hereinafter *Factbook: Geography*] ("Niger is one of the poorest countries in the world with minimal government services and insufficient funds to develop its resource base, and is ranked last in the world on the United Nations Development Programme's Human Development Index.").

20. Although Niger's land is unproductive, it is not completely bereft of natural resources. *Factbook: Geography*, *supra* note 19 (listing Niger's natural resources as uranium, coal, iron ore, tin, phosphates, gold, molybdenum, gypsum, salt, and petroleum). It has significant uranium deposits in its northern mountains, the proceeds of which led to a minor economic boom in the 1970s. *See also* Ursula Meyer, Négocier l'accès, la propriété et l'autorité publique en marge de la ville : enjeux fonciers à Niamey et production d'Etat au Niger 108 (2016) (doctoral thesis presented to the Faculty of Geosciences and the Environment, University of Lausanne) (on file with author). But uranium prices dropped in the 1980s as nuclear power fell out of favor in the developed world, and the mines have done little to lift Niger out of poverty. *See also* Gabriella Körling, In Search of the State, An Ethnography of Public Service Provision in Urban Niger 58 (2011) (doctoral dissertation in Cultural Anthropology, Uppsala University in Sweden) (arguing uranium prices fell in the late 1970s). More recently, petroleum deposits have been identified in northeastern Niger. *Factbook: Geography*, *supra* note 19; Meyer, *supra* note 20, at 120 (referring to a recent increase in mining and oil extraction).

21. U.N. Int'l Human Rights Instruments, *Common Core Document Forming Part of the Reports of States Parties: the Niger*, ¶ 1, U.N. Doc. HRI/CORE/NER/2018 (Mar. 22, 2018) ("Located in the eastern part of western Africa, the Niger is a landlocked country with a surface area of 1,267,000 km^2. Two-thirds of the national territory is in the Saharan zone."); *Factbook: Geography*, *supra* note 19 ("[L]andlocked; one of the hottest countries in the world; northern four-fifths is desert, southern one-fifth is savanna, suitable for livestock and limited agriculture[.]"); Meyer, *supra* note 20, at 91.

22. *Common Core*, *supra* note 21, ¶ 1.

23. *Factbook: Geography*, *supra* note 19 ("[M]ajority of the populace is located in the southernmost extreme of the country along the border with Nigeria and Benin[.]"); Meyer, *supra* note 20, at 91 (arguing that 80% of Niger's population lives in the southern third of the country).

24. *Factbook: Geography*, *supra* note 19 (reporting that only 12.3% of Niger's land is "arable").

courses are rare, and rainfall, upon which most farmers depend,[26] is sparse and variable.[27] These challenging geographic and climatic realities are troubling in a country where most peoples' livelihood depends on agriculture.[28]

Approximately 85% of Niger's population engages in agricultural work and most people depend, at least in part, on subsistence farming for their food.[29] Irrigation is rare, so rainfed agriculture is vital to peoples' survival; however, climate change is resulting in a shrinking of Niger's rainy season, cutting further into agricultural productivity.[30] Due to decreasing yields, most households supplement their livelihood by engaging in animal husbandry,[31] wage labor, and informal small business activity.[32]

Niger's deteriorating agricultural conditions are particularly alarming when one considers how many mouths there are to feed. The country's population growth rate is the highest in the world at 3.9%.[33] In the

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25. Ibrahim Yahaya Ibrahim, *Niger in the face of the Sahelo-Saharan Islamic Insurgency: Precarious Stability in a Troubled Neighborhood* 5 (Sahel Research Group, Working Paper No. 004, 2014).

26. *Factbook: Geography*, *supra* note 19 (reporting that Niger has only 300 kilometers of waterways, ranking ninety-third out of the 107 countries listed); Florence Bron-Saidatou, *La Gouvernance Fonciere au Niger: Malgre des Acquis, de Nombreuses Difficultes* 6 (2015) (working paper produced by a coalition of French Development Agencies).

27. Bron-Saidatou, *supra* note 26, at 6; *see* Ambe J. Njoh, *The role and goals of the state in urban development in Niger*, 30 HABITAT INT'L 540, 545 (2006) (referring to Niger's "low rainfall").

28. *The World Factbook (Niger) (Economy)*, CIA, *available at* https://www.cia.gov/the-world-factbook/countries/niger/ (last visited Sept. 27, 2019) [hereinafter *Factbook: Economy*] (arguing that agriculture provides a livelihood for more than 80% of Niger's population).

29. *Factbook: People and Society*, *supra* note 1; *see Country Programme*, *supra* note 16 (arguing that a large part of the Nigerien population is dependent on subsistence farming).

30. *Factbook: People and Society*, *supra* note 1 (arguing that rainfall in Niger is declining); Bron-Saidatou, *supra* note 26, at 8.

31. Bron-Saidatou, *supra* note 26, at 6 (arguing that 43.2% of Niger's population engages in animal husbandry).

32. *See* THE WORLD BANK, REPUBLIC OF NIGER: PRIORITIES FOR ENDING POVERTY AND BOOSTING SHARED PROSPERITY: SYSTEMATIC COUNTRY DIAGNOSTIC, ¶ 12, Report No. 115661-NE (Nov. 28, 2017) [hereinafter WORLD BANK COUNTRY DIAGNOSTIC].

33. *Factbook: People and Society*, *supra* note 1 ("Niger has the highest total fertility rate (TFR) of any country in the world, averaging close to 7 children per woman in 2016."); *Country Programme Document for Niger*, *supra* note 16, ¶ 1 ("Niger's annual demographic growth rate is the highest in the world, at 3.9 per cent; its population, currently 17,138,707, will double every 18 years."); WORLD BANK COUNTRY DIAGNOSTIC, *supra* note 32, ¶ 52 (arguing at present, an average Nigerien woman experiences 7.3 live births during her lifetime).

early 1960s, around the time of Niger's independence from France, Niger had approximately 4.3 million inhabitants.[34] By 2012, the population had expanded to 17 million.[35] Estimates put the current population at over 20 million[36] and, if the growth trends continue, 33 million by 2030.[37]

The converging trends of land degradation and population growth means that many more people, almost all of whom need arable land to feed themselves, must crowd onto ever-smaller fields upon which less and less rain is falling.[38] The overcrowding, in turn, exacerbates problems with soil fertility. As the expanding population seeks to feed itself by planting ever-more staple crops, the amount of fallow land decreases, further diminishing the fields' productive capacity.[39] The end result is that contemporary Niger experiences periodic acute food crises and 16.7% of children under the age of five are chronically malnourished.[40]

Rapid, poorly planned and poorly regulated urbanization is exacerbating the crisis in rural land and livelihoods.[41] Although Niger is still a predominantly rural society, its rate of urbanization is among the highest in the world.[42] The challenging demographic and climatic conditions

34. Bron-Saidatou, *supra* note 26, at 4.

35. *Id.*

36. *Niger*, WORLD BANK, *available at* https://data.worldbank.org/country/niger?view=chart (last visited Sept. 27, 2019) [hereinafter World Bank Profile] (reporting Niger's population as 21,602,472 in 2017); *Country Programme*, *supra* note 16, ¶ 1 (estimating Niger's population at 21,466,862 as of 2017).

37. *See* World Bank Profile, *supra* note 36.

38. *Factbook: People and Society*, *supra* note 1; *see also* Interview with Former Resident of Goudel, Republic of Niger (Apr. 30, 2018) [hereinafter Interview with Former Resident of Goudel] (arguing the shrinking rainy season will no longer support the best strains of millet, Niger's staple crop).

39. *Country Programme*, *supra* note 16, ¶ 5 ("Niger's challenges also result from population pressure, the adverse effects of climate change, inadequate agricultural practices and resulting land degradation."); Bron-Saidatou, *supra* note 26, at 8 (arguing population pressure is leading to shorter fallow periods and the overall degradation of soils); Interview with Judge, Niamey, Republic of Niger (May 9, 2018) [hereinafter Interview with Judge in Niamey] (arguing that due to population pressure it is no longer possible to let land lie fallow so that it is overcultivated); *see generally* Interview with Hamdallaye Canton Chief, *supra* note 17 (arguing there is "enormous pressure on land" in Niger).

40. WORLD BANK COUNTRY DIAGNOSTIC, *supra* note 32, ¶ 152 ("[B]eing malnourished is almost normal (44 percent of children [are] stunted)[.]"); *see* Ibrahim, *supra* note 25, at 5 (arguing acute malnutrition touches 16.7% of Inger's children under age five).

41. Meyer, *supra* note 20, at 90 (arguing rural land loss is causing Nigeriens to seek refuge in cities); *see infra* notes 259-60 and accompanying text (arguing urban expansion in Niger is guided by private interests and poorly regulated).

42. *See Factbook: People and Society*, *supra* note 1 (estimating Niger's rate of urbanization as 4.27% for 2015-2020, which ranks 11th for highest urbanization rate in the world).

described in preceding paragraphs are driving the rural population, particularly young men,[43] towards the city.[44] Further, the lure of the city has been enhanced by the rise of economic liberalization and structural adjustment policies, which have compelled the Nigerien state to withdraw much of its healthcare, education, and infrastructure investment from rural areas.[45] Combined, these factors have led to sizzling growth in Niamey's population.[46] Specifically, in 1977, the capital counted 243,000 residents; by 2000, the number was 650,000; today, estimates run as high as 1.5 million.[47] Because all of these new arrivals need shelter, and because most residential construction in Niger is in the form of one-story,[48] metal-roofed, mud and cement houses surrounded by small walled compounds,[49] the city is gobbling up large swaths of agricultural land each year and irreversibly converting it into suburban house plots.[50]

In sum, Niger is in the midst of a vicious cycle. Due largely to demographic and climatic pressures on agricultural land, ever more people are seeking sustenance in the city. As the city grows, it devours the agricultural land that is the main source of food – even if an increasingly feeble one – for Nigeriens who remain in rural communities. As the following sections will demonstrate, when real estate developers and investors convert fields to suburbs, rural people lose not only their source of food but their way of life: a social and spiritual identity that is rooted in, and to large extent defined by, land.

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43. *See* WORLD BANK COUNTRY DIAGNOSTIC, *supra* note 32, ¶ 40.

44. Issaka, *supra* note 1 (arguing thousands of rural citizens seek a better life in Niamey every year and most have no qualifications); Meyer, *supra* note 20, at 103, 105 (arguing Niger sees spikes in urban population growth at times of famine).

45. Meyer, *supra* note 20, at 110; *see* Körling, *supra* note 20, at 21 (arguing Niamey is privileged over rural areas in both health and education).

46. Issaka, *supra* note 1.

47. Körling, *supra* note 20, at 77; *Common Core*, *supra* note 21, Table 1 (reporting Niamey's population as 397,437 in 1988, 725,030 in 2001, and 1,011,277 in 2012); *see Factbook: People and Society*, *supra* note 1 (estimating Niamey's population to be 1.214 million in 2018).

48. *See* Henri Kokou Motcho, *Urbanisation et Rôle de la Chefferie Traditionnelle dans la Communauté Urbaine de Niamey*, 229 LES CAHIERS D'OUTRE-MER, REVUE DE GEOGRAPHIE DE BORDEAUX 73, 74 (2005) (arguing that Niamey's expansion has included few multi-story buildings).

49. *See id.* at 2 (arguing housing density is low in Niamey because most structures are single-story).

50. *See infra* notes 271-72 and accompanying text.

1. Existing Customary Land Law in Rural Niger[51]

Customary land law has been remarkably resilient in Niger.[52] In spite of numerous attempts by Niger's government during the twentieth and twenty-first centuries to weaken or eliminate it,[53] most of Niger's rural land is still governed by it.[54] From the perspective of a western-trained lawyer it can be diffuse and confusing,[55] but it must be grappled with if one is to understand the profound legal, social, and spiritual transformation the country is undergoing as urban areas encroach on farmland. The following discussion will introduce a somewhat idealized, archetypal version of customary land law before showing how it has been affected by colonialism, the rise of orthodox Islam, and the pervading influence of globalization and economic liberalism.

II. THE CUSTOMARY LAW ARCHETYPE

Descriptions of customary land law in Niger tend toward static, archetypal accounts[56] when in fact it is dynamic, variable, and often messy.[57] Still, the archetype is one that rural Nigeriens recount, some-

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51. Custom in Africa is a contested and controversial construct. Scholars generally reject the idea that custom was a static, self-contained body of pristine norms that existed in pre-colonial times. Sara Berry, *Privatization and the Politics of Belonging in West Africa*, in LAND AND THE POLITICS OF BELONGING IN WEST AFRICA 241, 245 (Richard Kuba & Carola Lentz eds., 2013). Instead, they view custom as endlessly dynamic and in recent centuries developed "through interactions between colonial officials and their subjects, each drawing selectively on historical precedents to influence one another and make the best of changing circumstances." *Id.* Colonial governments made attempts to define, and at times manipulate, custom in ways that supported the state's authority. *Squeezing Parakeets*, *supra* note 8, at 652-55. But colonial and post-colonial states rarely succeeded in inventing custom from whole cloth and "have often exercised little real control of it." Shipton & Goheen, *supra* note 9, at 308.

52. *See Squeezing Parakeets*, *supra* note 8, at 656-57; Thomas Kelley, *Apples to Oranges: Epistemological Dissonance in the Human Rights Case Hadijatou Mani v. Niger*, 32 QUINNIPIAC U. L. REV. 311, 336-37 (2014).

53. *See* Bron-Saidatou, *supra* note 26, at 11-12 (arguing the Nigerien state passed several laws intended to limit traditional leaders' authority over land); *Squeezing Parakeets*, *supra* note 8, at 658, n. 105-06 (arguing Niger's post-independence government passed laws aimed and curbing chiefs' authority over land, all to little effect).

54. *Squeezing Parakeets*, *supra* note 8, at 659-60 (arguing most rural people in Niger base land claims on custom and often have no knowledge and no desire to know what formal state law would say about the matter).

55. *Unintended Consequences*, *supra* note 9, at 1008.

56. *See Squeezing Parakeets*, *supra* note 8, at 653 (arguing the French colonialists in Niger attempted to explain customary law in terms of fixed rules).

57. *See* Janine M. Ubink, *Tenure Security: Wishful Policy Thinking or Reality? A Case from Peri-Urban Ghana*, 51 J. AFR. L. 215, 231 (2007) [hereinafter *Tenure Security*] (arguing customary law in Ghana is "fluid, relational and negotiable" and "constantly recreated

times wistfully, when discussing their communities' historic relationship to land.[58] Thus, even if it does not provide a perfectly accurate history of customary land law, it reveals much about rural peoples' collective memory and values concerning land.[59]

In rural Nigerien villages, the most enduring and powerful land rights are those of first-comers.[60] Every village has a founding story, often involving brothers or male cousins who left their natal village in search of adventure or due to a rift within their lineage.[61] In some accounts, the men began by capturing slaves and forcing them to dig a well.[62] The well became the symbolic and practical center of the new village.[63] Starting from the circumference of the well, the founders traced pie-shaped lots of land that stretched indefinitely into the surrounding bush.[64] Nobody paid close attention to the claims' outer

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and disputed"); SHIPTON, *supra* note 8, at 230 (arguing Kenyan customary land law is endlessly dynamic); *Unintended Consequences*, *supra* note 9, at 1006 (referring to Niger's land use customs as "evolving, fluid, and negotiable").

58. Interview with Village Chief in Gassangourni, Republic of Niger (May 18, 2000); Interview with Yaye Issa and Issafou Lali (May 22, 1996); Interview with Group of Villagers (1996); Interview with Group of Villagers in Fandou-Berri, Republic of Niger (May 17, 2000 (morning)).

59. *See generally* SHIPTON, *supra* note 8.

60. Richard Kuba, *Spiritual Hierarchies and Unholy Alliances: Competing Earth Priests in a Context of Migration in Southwestern Burkina Faso*, *in* LAND AND THE POLITICS OF BELONGING IN WEST AFRICA 57, 60 (Richard Kuba & Carola Lentz eds., 2006) (arguing in a West African context that land rights arise from first-comers who made pacts with local deities); Sten Hagberg, *Money, Ritual and the Politics of Belonging in Land Transactions in Western Burkina Faso*, *in* LAND AND THE POLITICS OF BELONGING IN WEST AFRICA 99, 103 (Richard Kuba & Carola Lentz eds., 2006) (referring to the oldest male descendant establishing land rights by forming an original pact with the spirits); Meyer, *supra* note 20, at 125 (arguing Niger's land law is based largely on "rights of the first to clear").

61. *See Squeezing Parakeets*, *supra* note 8, at 663 (describing the village of Fandou Berri's founding by a famous warrior and his brothers who captured slaves and compelled them to dig a well to sustain the village); *see also* Boureima Amadou, *Aire protégée et construction de territoire en patrimoine: l'exemple de l'île de Karey Kopto (Niger)*, LES CAHIERS D'OUTRE-MER 226-27 (2004).

62. *Squeezing Parakeets*, *supra* note 8, at 663 (describing the village of Fandou Berri's founding by a warrior and his brothers who captured slaves and compelled them to dig a well to sustain the village); *Unintended Consequences*, *supra* note 9, at 1027 (describing a similar story regarding the village of Saabu Dey).

63. JEAN-PIERRE OLIVIER DE SARDAN, LES SOCIETES SONGHAY-ZARMA (NIGER-MALI) 663 (1984) (describing the symbolic importance of well digging in Nigerien culture).

64. Interview with Saabu Dey Village Chief and Group of Elders, Saabu Dey, Republic of Niger (Dec. 5, 2003). A somewhat different version of founders' land rights, one I have heard only once, involves founders galloping on horseback, throwing spears into the earth, and vying to knock one another off if there was a disagreement about boundaries. *See*

boundaries because land was an inexhaustible resource.[65] Over time, men would solidify their claims to land by clearing the bush and tilling the soil.[66] Although there seem not to have been hard and fast rules on the matter, leaving the land untouched for too long could weaken a claim of access.[67]

A father could generally expect that the land he controlled would pass to his sons since inheritance passed through the male line.[68] The family land would never be formally divided, but each son would be apportioned a parcel that he would control until he divided it among his own sons.[69] The lineage head, the village chief, the land chief (*laabu-koy*), and the heads of families within the lineage would decide how the parcels of land would be divided among young men.[70]

The first-comers formed alliances with the original black spirits (*gangi bi*) who inhabited the bush, and those alliances had to be nurtured and respected by subsequent generations.[71] Because the spirit world, like the temporal world, was dynamic and ever changing,[72] other actors also came to inhabit the spiritual realm, including the spirits of villagers' ancestors.[73] If the spirits were pleased, villagers in the temporal world would prosper in their daily lives.[74] The rains would fall gently and persistently, while locusts and other pestilence would stay away. If the spirits were displeased, villagers would suffer crop failure, sickness, and death.[75]

Interview with Former Resident of Goudel, *supra* note 38; *see also* Interview with Judge in Niamey, *supra* note 39.

65. *See* Meyer, *supra* note 20, at 125 (arguing agricultural land in Niger was historically abundant and "if a man had reason he could simply clear land and benefit from its fruits.").

66. *Id.*

67. *Unintended Consequences*, *supra* note 9, at 1007; *Squeezing Parakeets*, *supra* note 8, at 682, n. 176.

68. *Squeezing Parakeets*, *supra* note 8, at 683.

69. *Id.* at 681, n. 175. Typically, young males would work in their father's fields, and would not be assigned a separate plot until they married.

70. *Unintended Consequences*, *supra* note 9, at 1007.

71. *See Squeezing Parakeets*, *supra* note 8, at 646.

72. *See id.*

73. *See id.* at 646-47.

74. *See id.*; *see also* Amadou, *supra* note 61, ¶ 56 (arguing villagers in a Nigerien river village, Karey Kopto, appeal to the spirits to ensure good fishing, good harvests, and to avoid sickness).

75. *Unintended Consequences*, *supra* note 9, at 1007; *see* Hagberg, *supra* note 60, at 99 (arguing earth priests and elders regard the earth "as a divinity and fear that the violation of rituals may endanger not merely the individual's well-being but community life in general.").

Some members of the community were particularly skillful at understanding and addressing the spirits' demands.[76] The land chief, often the same person as the village chief, would ensure that villagers' use of land would not cause offense.[77] In instances where the spirits had been offended, the community could organize a spirit possession ceremony to communicate directly between the realms.[78] During these ceremonies, spirits would inhabit the bodies of certain villagers and speak directly to the gathered throng.[79] Other villagers, referred to as *zimas*, were skilled at summoning the spirits to the temporal world to visit punishments and rewards upon living people or, conversely, to protect threatened humans from harm.[80]

Chiefs in Niger historically played – and still play – important roles in determining access to land.[81] Typically, only direct descendants of a village's founders could vie for the position of village chief.[82] Once selected, he had little prescriptive power and instead acted as first among equals, convening village leaders and lineage heads to form consensus.[83] Niger's history is replete with efforts by the state – at first the colonial regime, later post-independence governments – to manipulate, coopt, or diminish the chiefs and their authority.[84] The position of village chief, has, however, endured and today is an intriguing amalgam.

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76. *See* Amadou, *supra* note 61, ¶ 13 (describing a village chief in southern Niger who descended directly from village founders and who therefore had the ability to "remain in permanent contact with the invisible world," appease the spirits and protect the village).

77. *Unintended Consequences*, *supra* note 9, at 1007.

78. *Squeezing Parakeets*, *supra* note 8, at 647.

79. I witnessed a spirit possession ceremony in a rural Zarma village in 1987. A powerful storm had blown through the village destroying crops and several grass huts in which villagers lived. An interlocutor explained that participants wanted to know why the damage had been unleashed. When I asked whom they were communicating with, they answered "irikoy," which translates to "our keeper." It is the term that most Zarma people use when they referring to God in the Islamic tradition.

80. *See* Amadou, *supra* note 61, ¶ 19 (describing a *zima* as a priest healer and an ally of the spirits).

81. *See Unintended Consequences*, *supra* note 9, at 1019; *see also* Meyer, *supra* note 20; *see also infra* notes 171-72 and accompanying text (arguing rural people in Niger still prefer to deal with chiefs on matters involving land).

82. *See Squeezing Parakeets*, *supra* note 8, at 653; Amadou, *supra* note 61, ¶ 12 (arguing the chief of a village in southern Niger represents legitimate authority, that he presides over political and land-related decisions, and that the position of chief is elected from among descendants of the family of the first occupants).

83. *See Squeezing Parakeets*, *supra* note 8, at 653.

84. *See* Bron-Saidatou, *supra* note 26, at 11 (arguing the colonial and post-independence governments passed various laws intended to diminish chiefs' authority); *see also Squeezing Parakeets*, *supra* note 8, at 658, n. 106.

Chiefs are rooted in tradition and considered, at least in many communities, legitimate sources of authority.[85] At the same time, they act as low-level administrators for the state.[86] They collect taxes, conciliate local disputes, and, crucially, endorse land transactions.[87]

Higher-level regional chiefs, generally referred to as canton chiefs (chefs de canton),[88] also exercised influence over land, but they enjoyed less historical legitimacy.[89] Cantons were geographic regional divisions imported to Niger by the French colonizers.[90] To aid their administration of the vast territory (one they had little interest in except its value in blocking Great Britain's colonial expansion),[91] the French invented chieftaincies to rule over the cantons they had just created.[92] In some instances, the canton boundaries were in approximate accord with the domains of pre-colonial regional chiefs, and the new chefs de canton retained at least some legitimacy in the eyes of rural people.[93] But the French filled many of the chef de canton positions with their own toadies, including some who were said to come from Niger's slave class and therefore lacked legitimate claim to positions of customary leadership.[94]

Rural Nigeriens strongly prefer to resolve their disputes at the family or lineage levels.[95] To involve a chief in a dispute or, worse yet a state institution, is to admit that family patriarchs have failed in their duties.[96] However, where disputes cannot be resolved by lineage heads,

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85. *See Squeezing Parakeets*, *supra* note 8, at 655 (arguing the position of village chief predated the arrival of the French and so its legitimacy survived colonialists' machinations); Abdourahaman Chaibou, *Les Judge, Le Cadis, le Chef et les Autres*, REVUE JURIDIQUE DE SAMAN 5 (1998) (arguing chiefs in Niger act as both legitimate traditional leaders and as low-level agents of the modern state).

86. *See Squeezing Parakeets*, *supra* note 8, at 655 (arguing the position of village chief predated the arrival of the French and so its legitimacy survived colonialists' machinations); Chaibou, *supra* note 85, at 5.

87. *See infra* notes 297-301 and accompanying text.

88. *Squeezing Parakeets*, *supra* note 8, at 654.

89. *Id.*

90. *Id.*

91. *See* Meyer, *supra* note 20, at 97 (arguing the French occupied Niger to prevent the British from expanding northward from Sokoto (in present-day Nigeria) and to facilitate France's plans to sweep across the continent from Dakar to Djibouti); Körling, *supra* note 20, at 43 (arguing the French's interest in Niger was political and strategic, not economic); *Squeezing Parakeets*, *supra* note 8, at 651-52.

92. *Squeezing Parakeets*, *supra* note 8, at 654.

93. *Id.* at 655.

94. *See* Meyer, *supra* note 20, at 103 (arguing the first Canton Chief in Niamey was viewed as a French collaborator).

95. *Squeezing Parakeets*, *supra* note 8, at 668.

96. *Id.*

villagers call upon chiefs to conciliate.[97] In deciding among competing access claims, chiefs apply no fixed rules and followed no established procedures.[98] Instead, they gather historical evidence from villagers with the longest memories.[99] Whose ancestor cleared the parcel of land at issue? Did the ancestor give the parcel to another individual, or was it only a loan? Who planted the fruit trees on edge of the parcel or dug the well, since both these actions are strong evidence of access rights?[100] Having brought that history to light, the chief would steer the disputants toward a resolution.[101] Crucially, the resolution often would take account of the interests of the disputing parties, but also of their ancestors (who now live in the spirit realm), the black spirits, and the unborn members of the community.[102]

Chiefs also protected the prerogatives of secondary rights holders in rural land. Although men inherited access to agricultural land, their rights were not the equivalent of ownership.[103] Other members of the community might have durable, enforceable rights to other uses of the same land.[104] For example, women, who are not necessarily from the

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97. Based on many of performing ethnographic research in rural parts of Niger, I can report generally that land disputes arise for various reasons. Villagers might disagree over which founder laid claim to a particular tract of land, or indeed, whether a particular ancestor was or was not among the village founders. They might disagree about boundaries between fields, which typically were (and are) marked by narrow uncultivated strips of land and immovable objects such as trees. Often, especially in more recent times, village disputes involve disagreement over whether founder's lineage gave a field to a late-comer and his descendants (in some instances slaves), or merely loaned it.

98. *Squeezing Parakeets*, *supra* note 8, at 670-71.

99. *See, e.g.*, *id.* at 685-86.

100. Interview with Canton Chief of Koure, Niamey, Republic of Niger (May 3, 2018) [hereinafter Interview with Canton Chief of Koure].

101. I participated in such a dispute resolution gathering in 1986 in the Nigerien village of Fandou Berri. At the time, I was a Peace Corps volunteer living in the village, and to demonstrate my *bona fides*, I cultivated my own half-hectare of millet, the staple crop. Not long before the harvest, a herder's son fell asleep (at least that was his story) and his flock wandered into my field and ate much of my crop. In a country where most people's livelihoods are based on subsistence agriculture, this was a gravely serious matter. The village chief and a respected marabout brought the shepherd's father and uncles to my hut and, after much discussion, agreed that the family would apologize and, after the harvest, give me a quantity of their grain. I agreed that the resolution as fair, but declined to accept the grain on grounds I was collecting a stipend from Peace Corps and could afford to feed myself. In the end, everyone was delighted: harmony was preserved.

102. *Squeezing Parakeets*, *supra* note 8, at 672.

103. *Id.* at 682 (arguing agricultural land in Niger is subject to "overlapping use claims").

104. *See* SHIPTON, *supra* note 8, at 309 (arguing secondary rights holders in Kenya might claim access to thatched grass, fuelwood, wild foods, or sources of water and miner-

man's family unit, might have the right to gather straw to weave into mats as a source of pocket money.[105] They might also have the right to pick sauce ingredients or plant a small garden.[106] Traditional healers might have the right to harvest medicinal herbs.[107] Anyone in the community might have the right to collect fodder after the harvest to feed farm animals.[108] Younger men and slaves associated with the village might also have secondary, contingent rights in the land at issue. These rights are not necessarily secure use rights that would permit them to exclude others, but are culturally enforceable rights to plant and harvest crops to serve their specific needs.[109]

From the existence of these durable, enforceable secondary rights under customary law, it follows that the holders of primary rights – older male farmers – do not have the right to alienate their land.[110] Indeed, how could an elder male presume the right to sell land to an outsider when rights in the land also extend to secondary rights holders, spirits from the past, and the yet- unborn?

If customary law, which includes land law, functioned properly, the village would enjoy *barka*, a term and a concept that does not translate easily into English but includes a spiritual element which connotes general wellbeing and good luck.[111] *Barka* arises when members of the village are living in harmony and the various actors in the spirit realm

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als); *see also* Lawrence C. Becker, *Land Sales and the Transformation of Social Relations and Landscape in Peri-Urban Mali*, 46 GEOFORUM 113, 122 (2013) (arguing secondary rights holders in Mali might have access to pasture, wood collection, and other economic activities); *see also* Admos Chimhowu & Phil Woodhouse, *Customary vs Private Property Rights? Dynamics and Trajectories of Vernacular Land Markets in Sub-Saharan Africa*, 6 J. AGRARIAN CHANGE 346, 347-48 (2006) (arguing secondary rights in land act as "'safety-net' rights" for the community's poor); *see also* CHRISTIAN LUND, LOCAL POLITICS AND THE DYNAMICS OF PROPERTY IN AFRICA 16 (2008) (referring to the same types of rights in land as "nested hierarchies of estates"); Aparna Polavarapu, *Reconciling Indigenous and Women's Rights to Land in Sub- Saharan Africa*, GA. J. INT'L & COMP. L. 93, 114 (2013-2014) (referring to women's secondary rights in land as "nested" rights).

105. I base this statement on my own observation of women in the Nigerien village of Fandou Berri; *see also* Polavarapu, *supra* note 104, at 111 (describing women's secondary land rights under customary law in Botswana).

106. *Squeezing Parakeets*, *supra* note 8, at 682.

107. *Id.*

108. *Id.*

109. *Unintended Consequences*, *supra* note 9, at 1007, 1015.

110. *Squeezing Parakeets*, *supra* note 8, at 683; *see* Hagberg, *supra* note 60, at 104 (arguing those who attempt to sell lineage lands in rural Burkina Faso risk sanction from the spirit world).

111. *Squeezing Parakeets*, *supra* note 8, at 647.

are appeased.[112] So long as *barka* is maintained, the rains will fall regularly, crops will produce generously, and all will be well among the living.[113]

To summarize this archetypal description of customary land law, access rights were based primarily on proving descent from village founders. All male descendants expected ongoing, predictable access to agricultural land. Decisions about which land an individual could cultivate were made by elder males. These elder males included heads of family, lineage heads, and chiefs. Their decisions about access are influenced by the needs of the spirits and of secondary rights holders including women, later born men, and slaves. The man who farmed the plot of land could not be said to own it, because he did not have the right to exclude all others from it. Nor did he have the right to sell it. He could, however, count on primary access to that land during his lifetime, and could presume that his sons would inherit undivided shares of the same land. Village leaders who allowed this system of interlocking, overlapping, nested rights to deteriorate, risked the wrath of the spirits and the loss of *barka*.

A. Complicating the Picture of Customary Law

If the customary Nigerien land law described in the previous section is an ideal, the contemporary reality can be far more complicated, partly because outside influences have altered rural life and land. Although many rural Nigerien communities still rely on lineage heads and traditional chiefs to determine land rights, the second half of the twentieth century ushered in a profusion of new actors and institutions eager for a role in establishing the rules of the game and determining winners and losers.

B. The Influence of Colonialism

From the European colonial perspective, Niger was a mostly barren hinterland, so the French did not arrive on the scene until the dawn of the twentieth century.[114] France's approach to colonialism, some-

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112. *Id.*

113. To some skeptics, the notion of *barka* may sound suspiciously close to "harmony." Some commentators have critiqued the "harmony" thesis of African village dispute resolution as unrealistic, even naïve. *See infra* note 345. However, based on my own fieldwork in rural Nigerien villages, I am confident that harmony and good relations between and among families is what they say they are trying to accomplish. *Squeezing Parakeets*, *supra* note 8, at 694.

114. *Squeezing Parakeets*, *supra* note 8, at 651 (arguing France occupied Niger late in the colonial period, mainly to prevent Great Britain's colonial expansion in West Africa).

times referred to as "direct rule,"[115] assumed that their colonial subjects were uncivilized but that they could aspire – with sufficient tutelage – to evolve into civilized Frenchmen.[116] One aspect of civilized life was private ownership and titling of land, which the French set about establishing in Niger.[117] By the close of the colonial period in 1960, however, they had made little progress.[118]

The fact was that although France claimed to practice direct rule, Niger was mostly an afterthought and so they limited their investment by settling for what the eminent anthropologist, Sara Berry, has drolly referred to as "hegemony on the cheap."[119] When it came to land, that meant introducing the Code Napoléon, including individual ownership and registration of land, but doing little to enforce it beyond Niamey.[120] It also involved declaring that all "unoccupied" land, which the French meant all land not subject to individual ownership, belonged to the state.[121] Once again, however, the vast majority of the population simply ignored that rule and went on with their lives as before.[122]

By the time of Niger's independence in 1960, the land-related aspects of France's civilizing mission had affected rural people in three limited respects. First, it had introduced the concept, if not the reality, of individual ownership and titling of land.[123] Rural people became vaguely aware that individual ownership of land was a possibility,[124] even they viewed that possibility with disinterest or revulsion.[125] Second, the French, who felt the need to provide housing for colonial offi-

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115. *Squeezing Parakeets*, *supra* note 8, at 652.

116. *Id.*; *see* Paul D. Ocheje, *"In the Public Interest": Forced Evictions, Land Rights and Human Development in Africa*, 51 J. AFR. L. 173, 185 (2007) (referring to France's "civilizing mission" when it came to urban planning).

117. *See* Ambe J. Njoh, *Urban Planning as a Tool of Power and Social Control in Colonial Africa*, 24 PLAN. PERSP. 301, 306 (2009) (arguing it was French colonial practice to decree that the Civil Code would apply in land matters and that their motivation was to "legitimize their land entitlements" and commodify land).

118. Njoh, *supra* note 117, at 309; Hagberg, *supra* note 60, at 101.

119. SARA BERRY, NO CONDITION IS PERMANENT: THE SOCIAL DYNAMICS OF AGRARIAN CHANGE IN SUB-SAHARAN AFRICA 23-24 (1993); *Squeezing Parakeets*, *supra* note 8, at 651.

120. Njoh, *supra* note 117, at 306.

121. *Id.*

122. *Id.*

123. Meyer, *supra* note 20, at 100.

124. *See Squeezing Parakeets*, *supra* note 8, at 682-83, n. 177 (recounting a village elder's recollection that views about ownership of land began to evolve starting in 1960s).

125. *See id.* at 681-82 (quoting a rural farmer saying, "nobles do not divide their lands.").

cials as well as Nigerien functionaries that worked for the government, had begun seizing peri-urban farmland and subdividing it into house plots.[126] At the time, that activity affected relatively few rural Nigeriens, but it set the stage for the rampant rural land loss which is happening today.[127] Third, they created the quasi-traditional position of canton chief, which added powerful new actors to the governance of rural land.[128] Otherwise, the French impact on land law and land use was minimal.[129]

C. The Influence of Islam

The rise of Islam in Niger, particularly the recent surge of fundamentalist Islamic practice, has had more impact on customary land law than the French ever achieved. Trans- Saharan traders introduced Islam to West Africa in the eighth century.[130] In the mid-fourteenth century, Mansa Mousa, the ruler of the West African Mali Empire, made the Islamic pilgrimage toMecca and wowed the world with his vast wealth.[131] But Islam spread slowly through West Africa, mainly along trade routes.[132] Niger – a territory always off the beaten track – was late to adopt the religion in its more orthodox forms.[133]

Well into the twentieth century, most rural Nigeriens professed Islam and adhered strictly to its Five Pillars[134] but blended Islam with pre-Islamic spirit beliefs. Throughout my many visits to rural Niger over the past thirty years, pious Islamic friends have adjured me not to whistle, never to say nice things about a baby's appearance, never to enter the

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126. *See infra* notes 208, 210 and accompanying text.

127. *See infra* text accompanying notes 261-68.

128. *See supra* text accompanying notes 92-94.

129. Njoh, *supra* note 117, at 306.

130. *See Squeezing Parakeets*, supra note 8, at 648.

131. Al-Umari, *Chapter Ten: The Kingdom of Mali and What Appertains to It*, *in* CORPUS OF EARLY AFRICAN SOURCES FOR WEST AFRICAN HISTORY 252, 269-72 (N. Levtzion & J.F.P. Hopkins eds., 2011).

132. *Squeezing Parakeets*, *supra* note 8, at 648.

133. *See id.*

134. Thomas Kelley, *Exporting Western Law to the Developing World*, 39 GEO. WASH. INT'L L. REV. 321, 339 (2007) [hereinafter *Exporting Western Law*] (arguing most Nigeriens practice the Five Pillars of Islam, which are: 1) the declaration of faith that there is only one God (Allah) and that Muhammad is God's messenger; 2) the performance of five daily prayers; 3) the giving of alms to the poor and needy; 4) fasting during the month of Ramadan; 5) making the pilgrimage to Mecca, if one is able).

bush before sunrise, and not to build a hut on the foundation of recently deceased ancestor's home, all to avoid agitating the spirit realm.[135]

Although it is true that until recently Islam has been a "stain not always deep"[136] in Niger, that situation is changing. In recent decades, Niger's supple blend of Islam and spirit worship has come under pressure from conservative Islamic influences emanating from the Arabian Peninsula.[137] Young men in particular are increasingly attracted to what Nigeriens refer to as "reformist" Islam, partly because it is presented by its promoters as a truer, purer, unsullied version of their religion and, at least according to some commentators, because it condemns Nigerien customs surrounding bride price payments, which place insuperable financial burdens on young men and sometimes prevent them from marrying.[138]

This gradual but persistent rise of orthodox Islamic beliefs in Niger has led to three relatively recent changes in customary land law. First, and most simply, it has introduced Islamic religious leaders as an additional cadre of non-state actors willing to help settle land disputes.[139] By the 1980s, village patriarchs' and village chiefs' efforts to mediate land questions in rural communities routinely involved local Islamic marabouts as part of the process.[140] In some intractable land disputes, it

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135. *See Squeezing Parakeets*, *supra* note 8, at 650, n. 70. In an interesting sign of Niger's syncretic religious practices, when villagers feel the need to protect themselves from vengeful spirits, or to provoke the spirits into harming their rivals, they consult an Islamic *marabous* for charms and incantations rather than visiting a *zima*, who was the traditional interlocutor to that realm. Amadou, *supra* note 61, ¶ 19; *see supra* note 80 and accompanying text (explaining the powers of *zimas*).

136. JEAN ROUCH, LA RELIGION ET LA MAGIE DES SONGHAY 59 (1954) ("[e]n fait, l'Islam n'est q'une teinture plus ou moins profounde.").

137. *See* Hagberg, *supra* note 60, at 115 (arguing orthodox Islam disapproves of land priests, particularly any ritual addressed to land spirits). Ibrahim, *supra* note 25, at 9 (arguing Niger is undergoing an "emerging Islamic revival" that includes the growth of Islamic ascetic practices in daily life"). I have witnessed significant changes in Islamic practice during my thirty years of visiting rural Nigerien villages. To take only a few examples, village Islamic leaders no longer permit post-harvest tom-tom dances or traditional games of chance. Village women cover their heads or wear veils much more frequently than in the 1980s and 90s. Finally, villagers feel constrained when mentioning or invoking the spirits, though they still come into conversation regularly.

138. *See* Interview with Young Man Working in Auto Parts Store, Niamey, Republic of Niger (Mar. 4, 2009) (arguing "Izala" Muslims are popular among young men in Niamey because they condemn bride wealth payment).

139. *See Squeezing Parakeets*, *supra* note 8, at 668 (describing a land-related dispute in a rural village where the local *marabout* helped mediate).

140. *Id.*

is now common for one or both parties to seek a ruling by a regionally prominent Islamic sheik[141] or to a national Islamic association.[142]

Second, land-related nostrums in the Koran have led rural residents to a gradual acknowledgement, if not yet acceptance, of individual ownership and inheritance of land.[143] The Koran calls for male descendants to share equally in land and female descendants to receive half- shares.[144] Thus far, no one I have encountered in rural Niger has suggested abandoning the customary law that permits only men to inherit land; however, Islamic law, perhaps in combination with the French colonial legacy, has nudged rural people closer to the view that land is something to be owned and inherited individually without the mediating influence of traditional leaders.[145]

Finally, the spirits, including the original *gangi bi* land spirits and the spirits of ancestors, today play a diminishing role in determining land use and outcomes. It is not that rural people believe there are no spirits; rather they believe that Islam is ascendant and that the spirits therefore have less power than they once did.[146]

D. The Influence of Economic Liberalization

Notions about individual ownership of land, registration of land rights, and the possibility of land sales, were pushed upon rural Nigeriens with much more force starting the late 1980s and 1990s with the rise of global liberalization.[147]

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141. *See Exporting Western Law*, *supra* note 134, at 324-27 (describing an incident where disputing parties brought the matter to a prominent Islamic figure).

142. *See generally* Meyer, *supra* note 20, at 48 (arguing various Islamic actors, including the Islamic Association of Niger, sometimes "act in place of the state" in resolving land disputes). *See* Interview with Village Chief and Group of Elders, Saabu Dey, Republic of Niger (Dec. 18, 2003) (recounting an instance where parties to a land dispute swore oaths before officials of the Association Islamique du Niger); Interview with President of the Islamic Association, Cadis, and Chef de Canton's Secretary, Say, Republic of Niger (Feb. 25, 2004) (describing the procedure when disputants swear before the religious leaders from the Association Islamique du Niger).

143. *See* Ali Abd Al-Kader, *Land Property and Land Tenure in Islam*, 5 ISLAMIC Q. 4, 5 (1959) (noting that both the Koran and the actions of the early Muslim state show "an express emphasis and encouragement of land ownership.").

144. *See Mirath*, ENCYCLOPEDIA OF ISLAM (P. Bearman et al. eds., 2d ed. 2005).

145. *See Squeezing Parakeets*, *supra* note 8, at 683 (arguing rural farmers' understanding of the land the cultivate is "unsettled" and combines communal tenure with French and Islamic notions of ownership and inheritance).

146. *See id.* at 649 (arguing rural Nigerien people feel free to blend Islam with spirit worship so long as the Muslim God is supreme); *see also* Interview with Former Resident of Goudel, *supra* note 38 (arguing the spirits do not like modernity and are losing power).

147. *Unintended Consequences*, *supra* note 9, at 1019-20.

In Niger's case, the liberal agenda included, among other features, the passage of a comprehensive land reform law known as the Rural Code and overall government decentralization, both of which have affected land rights and laid the groundwork for the transformation of peri-urban land from communal custom to individual ownership.[148]

The story of liberalization in Africa is long, complicated, and in some respects tragic,[149] but a summary version must suffice here. When the Berlin Wall fell in 1989 and the Soviet Union collapsed, the United States became, at least temporarily, the world's only superpower.[150] If poor countries in the Global South wanted help paying their bills, they could no longer count on playing the U.S. and the Soviet Union off of one another.[151] They would have to agree to economic and political reforms dictated by the U.S., its allies, and the international financial institutions they controlled.[152] Those policies collectively became known as the Washington Consensus.[153]

The Consensus was geared toward shrinking and democratizing the state and allowing the free hand of the market to work its magic.[154] Governments across Africa, if they wished to benefit from the Global North's economic largess, were compelled to slash civil service rolls, eliminate regulations, privatize state-owned industries, roll back subsidies, and commit to free and fair elections and democratic governance.[155] Another key tenet of the Washington Consensus was the need to privatize, title and register land.[156] Based on the writings of the Peruvian economist Hernando de Soto, the assumption was that poor countries such as Niger remain poor because its citizens lack secure

148. *Id.* at 1019-20.

149. *Id.* at 1021 and n. 131; *infra* notes 164-73 and accompanying text; *Unintended Consequences*, *supra* note 9, at 1029.

150. *See generally Unintended Consequences*, *supra* note 9, at 1029 (arguing the introduction of Western land laws and anti-slavery laws to Niger was causing Niger's customary slaves to lost access to agricultural land).

151. *See* Thomas Kelley, *Beyond the Washington Consensus and New Institutionalism: What is the Future of Law and Development?*, N.C. J. INT'L L. & COM. REG. 539, 542 (arguing after the fall of the Berlin Wall Western nations interpreted their Cold War victory as proof of the value of unregulated free markets).

152. *See Unintended Consequences*, *supra* note 9, at 1001 (arguing after the fall of the Berlin Wall, African countries could no longer play "the Western and Eastern blocs off of one another.").

153. *Beyond the Washington Consensus*, *supra* note 151, at 542; *Exporting Western Law*, *supra* note 134, at 328.

154. *Beyond the Washington Consensus*, *supra* note 151, at 542.

155. *See Exporting Western Law*, *supra* note 134, at 327-28.

156. *Unintended Consequences*, *supra* note 9, at 1002.

rights in their own land.[157] The Nigerien farmer with no formal deed to the land he tills cannot pledge it as collateral to buy fertilizer or a tractor and thereby intensify his investment.[158] As a result, he sits on an under-exploited pile of "dead capital" and remains mired in poverty.[159] The key to unlocking prosperity in poor countries, therefore, was the reform and formalization of land rights,[160] which would allow property owners to "revive their 'dead' capital and generate surplus value from their assets."[161]

To summarize in one sentence the results of the Consensus economic policies – including land titling – they inflicted significant pain and suffering on poor people in the Global South while producing few of the advertised economic benefits.[162] Nevertheless, Niger was an early and enthusiastic adopter Consensus policies, including land titling.[163]

In 1993, in keeping with the Consensus and just as the country was embarking on its first experiment with democratically elected government, it adopted a comprehensive new set of land laws, referred to as the Rural Code,[164] aimed at bringing order and consistency to what aid experts and central government officials viewed as the country's confusing jumble of land customs and practices.[165] It was an enormously ambitious scheme that can only be summarized here. It envisaged the creation of a series of land commissions at various levels of government and procedures by which those who control land could obtain and register individual title to it.[166] In theory, the Rural Code and its administrative processes took a culturally sensitive approach to land reform in that

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157. *Id.*; *see* Tor A. Benjaminsen et al., *Formalization of Land Rights: Some Empirical Evidence from Mali, Niger and South Africa*, 26 LAND USE POL'Y 28, 29 (2008) (arguing De Soto's book THE MYSTERY OF CAPITAL gave direction to an entire new movement in law and development); *see generally* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL, WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

158. *Unintended Consequences*, *supra* note 9, at 1002.

159. DE SOTO, *supra* note 157, at 163.

160. *See generally* Benjaminsen et al., *supra* note 157, at 29.

161. *Unintended Consequences*, *supra* note 9, at 1002.

162. *See Exporting Western Law*, *supra* note 134, at 328-29 (arguing the track record of Washington consensus reforms "has been poor"); *see also Unintended Consequences*, *supra* note 9, at 1002-03 (arguing studies of privatization find that "few of the predicted economic benefits actually materialized.").

163. *See Unintended Consequences*, *supra* note 9, at 1021 (arguing Niger launched a "full scale land reform effort" that aimed to "convert Niger from customary land tenure to a Western system of freehold ownership and titling.").

164. CODE RURAL [C. RURAL.] [RURAL CODE] art. 93-115 (Fr.).

165. *Unintended Consequences*, *supra* note 9, at 1022.

166. *See* Meyer, *supra* note 20, at 249-50.

it claimed that communal rights and secondary rights – the sort of customary land rights described in Part III.A., above – were eligible for registration and protection.[167] However, as the Rural Code began to roll out, it became abundantly clear that government agents were intent on registering land in the names of individuals, not groups, as part of an overall effort to comply with Consensus dictates and "modernize" Niger's land laws.[168]

Several excellent articles and books have been written about Niger's attempts at land law reform.[169] The short version is that in more than two decades, the reforms have had limited effect.[170] Peasant farmers find the process of land registration cumbersome and expensive, and they still generally prefer to deal directly with traditional chiefs.[171] The chiefs, who receive prestige and money by recognizing land claims and conciliating land disputes, encourage the view that nothing has changed, that other local political actors such as mayors and councilors are impotent, and that the Rural Code's land commissions are a waste of time.[172] Even where farmers are motivated to formally register their lands – and some are, particularly where there are disputes over access or the threat of state expropriation – the government often lacks resources and personnel to maintain the necessary registers.[173]

The Influence of Government Decentralization emerged as Niger's government began implementing the Rural Code the early 1990s. It

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167. *See Unintended Consequences*, *supra* note 9, at 1021.

168. *Id.*; Chimhowu & Woodhouse, *supra* note 104, at 347 (arguing land registration schemes in Africa claim to register group rights but usually aim for individualized ownership "formalized in a written title to physically-demarcated land"); *see also* Lorenzo Cotula et al., *Land Tenure and Administration in Africa: Lessons of Experience and Emerging Issues*, IIED 13 (2004) (arguing Niger's Rural Code purports to respect customary rights but places the new land system firmly under the control of non-customary actors); *see also Tenure Security*, *supra* note 57, at 222 (arguing titling schemes in the African context often ignore secondary rights holders).

169. *See* CHRISTIAN LUND, LAW, POWER, AND POLITICS IN NIGER: LAND STRUGGLES AND THE RURAL CODE IN NIGER (1998).

170. Bron-Saidatou, *supra* note 26, at 25 (arguing less than 3% of parcels of eligible land have been registered in Niger).

171. Cotula et al., *supra* note 168, at 12; Andrew R. Falk, *Ahead of the Curve: Promoting Land Tenure Security in Sub-Saharan Africa To Protect the Environment*, SEATTLE J. SOC. JUST. 1, 35 (2016) (arguing titling schemes in sub-Saharan Africa are often "arduous and expensive"); *see* Meyer, *supra* note 20, at 251.

172. Meyer, *supra* note 20, at 252 (arguing canton chiefs use their customary authority to block or authorize land transactions even though they have not formal authority under the Rural Code).

173. *See* Cotula et al., *supra* note 168, at 5 (arguing implementation of Niger's Rural Code has been slow due to lack of resources).

simultaneously dove into government decentralization, which is another aspect of the standard consensus liberalization package.[174] Lawmakers hoped these two reforms would mesh seamlessly and that the new procedures for registering rural land would be carried out by grassroots officials, including locally elected councilors and mayors whose positions were created by the new decentralization legislation.[175] That was not how things turned out.[176]

The theory behind decentralization was that if responsibility for revenue collection and service delivery were pushed down from the central government to locally elected officials, there would be greater accountability and efficiency.[177] Decisions on whether to invest in road maintenance or the construction of markets would be made at the local level and local people would hold their officials – local councilors and mayors whose offices had been created by the decentralization legislation – accountable for results.[178] If local leaders spent public money unwisely or irresponsibly, or more to the point, if tax revenues disappeared as a result of corruption, local voters would know it and would elect new local representatives.[179] Likewise, decisions about land ownership and registration, whether in rural or urban areas, would be most accurately and efficiently carried out by local governments and local officials.[180] After all, they would be closest to the facts on the ground and they would be accountable to local land users.[181]

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174. Meyer, *supra* note 20, at 110 (describing decentralization as one of the "watchwords" of democratization in Niger).

175. *See* Cotula et al., *supra* note 168, at 12 (arguing countries in sub-Saharan Africa attempted to decentralize control over land within the broader context of political decentralization).

176. *See infra* notes 183-86 and accompanying text; Njoh, *supra* note 27, at 549 (arguing that decentralization in Niger never really materialized).

177. *See* Körling, *supra* note 20, at 105 (arguing that aid agencies promoted decentralization as bringing governmental administration closer to the people and increased accountability, transparency, and efficiency, but that it just made local level governance more complex).

178. *Id.* at 113 (a goal of decentralization was that citizens would see where their money was going, thereby legitimizing taxation).

179. *See id.* at 106 (arguing decentralization in Niger was supposed to create accountability, transparency, and efficiency). Interview with Former Mayor of Niamey Commune 5, Niamey, Republic of Niger (May 2, 2018) [hereinafter Interview with Former Mayor of Niamey] (arguing "it's harder to see corruption when it's farther away").

180. *See* Interview with Former Mayor of Niamey Commune 5, *supra* note 179 (arguing land conversions were better managed by local commune governments, as opposed to the CUN government, because they were more accountable to local residents).

181. *Id.*

More than twenty years in, most observers judge decentralization to be a failure both in rural areas and in Niamey.[182] One problem was that, the scheme gave local governments major responsibility for service delivery – including responsibility for implementing the Rural Code's new land registration procedures – but virtually no resources with which to achieve those tasks.[183] Also, central government actors who had long enjoyed unquestioned authority were reluctant to surrender their prerogatives, including the rent seeking opportunities that go along with controlling finances, so they simply delayed and obfuscated when it came to devolving power to lower levels of government.[184]

In the end, all that decentralization accomplished was to add a low-level, comparatively powerless set of government actors to an already crowded and chaotic institutional matrix.[185] Before decentralization, a jumble of customary chiefs, Islamic religious leaders, and representatives of the central government vied with one another for legitimacy and power in both rural and urban areas.[186] Decentralization laws added local councilors and mayors to the mix, a group that brought no historical legitimacy and no additional resources with which to entice adherents.[187] They ended up being easily out-competed by central government authorities, who never removed their fingers from the purse strings, and by traditional chiefs, who either isolated them by convincing rural people to ignore them, or coopted them by having their own relatives run for local office.[188]

The failure of decentralization has contributed to an atmosphere of "general dysfunction"[189] when it comes to land registration in rural areas.[190] Because there are no resources to create and maintain cadastral

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182. Körling, *supra* note 20, at 106-07 (arguing that in many areas decentralization simply made things more complicated by adding to the already confused jumble of political actors involved in land and the delivery of government services).

183. *Id.* at 107-08; Cotula et al., *supra* note 168, at 5. Njoh, *supra* note 27, at 540.

184. Körling, *supra* note 20, at 110 (arguing the subdivision of land was a "valuable resource" and "source of illicit enrichment" for governmental actors, and that the central government officials won the struggle against local governments).

185. *Id.* at 106; *see* Meyer, *supra* note 20, at 24-27, 30-34 (arguing numerous Nigerien institutions vie with one another for authority over land transactions).

186. *See* Meyer, *supra* note 20, at 24-27, 30-34.

187. *Id.* at 224, 251 (arguing the institutions of the state lack legitimacy in land matters, that people still turn to chiefs instead of local officials); Bron-Saidatou, *supra* note 26, at 20 (arguing commune level governments in peri-urban areas lack the power the money to control land matters).

188. Körling, *supra* note 20, at 106, 119-20.

189. Bron-Saidatou, *supra* note 26, at 21.

190. *Id.* at 24.

systems at the lower levels of government, and because there is constant competition from other actors, precious few parcels of rural land are actually being registered in rural areas.[191]

In spite of these institutional failures, the Rural Code (including its plans for titling and registration of land) and government decentralization have in combination affected land and land use in peri-urban areas in two respects. First, they have helped spread the word about the concept of individual ownership and registration of land. Although land ownership is not an entirely new concept, having been introduced to rural communities by the French and by the rise of "reformist" Islam, until recently it has been more of a rumor than a reality.[192]

E. The Death of Customary Law in Peri-Urban Niamey

Peri-urban development around African cities tends to follow major paved roads that lead to the countryside, and eventually link to other major cities and towns.[193] Since 1986, for more than thirty years, I have regularly traveled on Niamey's Filingue Road, which heads east-northeast out of the capital toward the town of Filingue.[194] Therefore, I have had a consistent reference point by which to track Niamey's growth. As late as the mid-2000s, the Filingue Road had one gas station across from the Wadata Market, in what was the edge of the city. Drivers, including me, often filled up there before leaving town and venturing into the bush. There was sporadic development along the road beyond the gas station, but few permanent structures. As one exited the city, the landscape quickly turned to millet fields and tree nurseries. The first village, Saga Gourou, approximately ten kilometers from the Wadata gas station, looked and felt as if it belonged to a different world, a rural world.

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191. *Id.* at 24 (estimating that 3% of rural land in Niger has been registered under the Rural Code).

192. *See Unintended Consequences*, *supra* note 9.

193. *See* Janine M Ubink, *Courts and Peri-Urban Practice – Customary Land Law in Ghana*, U. GHANA L.J. 25 (2002-2004) (arguing development of peri-urban areas in Ghana follows main roads because that is where electricity is most commonly available).

194. I base my description of the Filingue Road, officially named RN 25, on decades of observation. I served as a Peace Corps volunteer in Niger from 1986 to 1988 and was posted in a village approximately fifty kilometers east-northeast of Niamey in the general direction of the town of Filingue. I regularly rode a motorcycle to and from Niamey along that route. In late 1990s, when I began performing ethnographic legal research in the same zone, I regularly traveled the Filingue Road in public transportation. Still later, when I had a Fulbright Scholarship in Niger from 2003-2004, I drove a private vehicle out the Filingue Road several times each week to perform fieldwork. I have continued to visit that zone regularly, most recently in May of 2018.

When I drove out of Niamey along the Filingue Road in 2018, I counted eleven gas stations beyond my old fill-up spot.[195] The road was lined with commercial buildings, compounds, and, behind that commercial strip, residential neighborhoods as far as the eye could see. The rampant development has engulfed the village of Saga Gourou. Clearly, something dramatic is happening to land around Niamey.[196]

III. HISTORY OF LAND IN NIAMEY AND ENVIRONS

The city of Niamey was, to a large extent, a colonial creation.[197] Before the French arrived at the turn of the twentieth century, there were several villages along the banks of the Niger River, in the area of present-day Niamey, but no significant cities or towns.[198] During the early years of their colonial project in Niger, the French vacillated between Zinder and Niamey as their center of activity.[199] But Niamey had attractive views of the Niger River and an airy plateau where the colonial overlords could build their offices and residences. In 1926, the French established a permanent capital there.[200]

The airy plateau favored by the French was located between two villages that became important actors in the story of Niamey's peri-urban land transformation. To the west, and somewhat upriver, was the village of Goudel.[201] To the east, and somewhat downriver, was the village of Gamkallay.[202] Historically, their fields were divided by a watercourse and gully that now bisects Niamey.[203] Today, both former villages are considered neighborhoods of the capital city.[204]

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195. *See* Interview with Hamdallaye Canton Chief, *supra* note 17 (describing development along the Filingue Road between Niamey and Hamdallaye).

196. Much of this description, including the presence of the eleven gas stations beyond Wadata, can be verified on Google Maps. The first village, Saga Gorou, is not identified by name but you can see the settlement on the satellite version.

197. Meyer, *supra* note 20, at 93.

198. *See id.* (arguing in pre-colonial days, present-day Niamey was away from major trade routes and a "zone of refuge" for diverse peoples).

199. Njoh, *supra* note 27, at 546. Meyer, *supra* note 20, at 99 (arguing the city of Zinder, located in eastern Niger, was a city of longstanding political and economic importance).

200. Meyer, *supra* note 20, at 99.

201. *Id.* at 94.

202. *Id.*

203. *See id.* at 96 (arguing Gamkalle and Goudel originally controlled the land that later became Niamey and that the dividing line between them was the ravine of Gunti Yena, a stream that enters the Niger River).

204. Based on personal knowledge, Gamkalle and Goudel are not the only villages incorporated into Niamey over the decades. For example, Gaway, a pre-colonial fishing

The French set about transforming land law in their new colony, but as discussed in Part III, they made little progress in rural areas.[205] The vast majority of Niger's people simply ignored the putative changes in land law and went on with their lives as before.[206]

But this was less the case in and around Niamey. By the 1950s, the colonial regime was beginning to carve up rural land on the city's outskirts – largely in what had been the agricultural fields of Goudel and Gamkale – to produce subdivided residential parcels, mostly for civil servants and veterans who had regular salaries.[207] Because the French did not recognize customary claims, they simply requisitioned what they considered empty land and dedicated it to their preferred uses.[208]

The colonists' subdivision of land around Niamey for residential purposes was slow and steady until the late 1950s,[209] when it began to accelerate as a result of economic growth, high birth rates, and two great droughts in 1972-73 and 1983-84.[210] Rural people were being pushed by crisis but also pulled by opportunity as pre- and post-Independence governments focused their limited resources on developing schools, health care facilities, and other infrastructure in cities.[211] The rapid growth in urban population outstripped the government's ability to convert land from farms to house plots,[212] and the result was the appearance of informal, mostly unplanned neighborhoods around Niamey's periphery.[213]

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settlement on the banks of the Niger River, was displaced during the 1970s to make room for the present-day Hotel Gawaye. The government moved Gaway's residents across the Niger River to a newly settled area called Haro Banda and compensated them by granting them multiple subdivided house plots. Another village, Saga, had much of its territory expropriated by Niger's government to build Diori Hamani Airport on what was then the outskirts of the capital. Today, Niamey has grown around and beyond the airport and Saga is considered a suburban neighborhood.

205. *See supra* notes 120-22 and accompanying text.

206. *Id.*

207. Meyer, *supra* note 20, at 105; *see* Körling, *supra* note 20, at 73 (arguing that since the colonial period urban planning in Niamey has focused on subdivision of land, but that the planning has always fallen behind actual expansion).

208. Meyer, *supra* note 20, at 3; *see* Interview with Former Gamkalle Resident and His Friend (May 5, 2018) [hereinafter Interview with Former Gamkalle Resident and His Friend].

209. Motcho, *supra* note 48, at 2 (describing Niamey's rapid population growth during the late colonial and early independence periods and rising demand for parcels of land).

210. Meyer, *supra* note 20, at 109.

211. Ocheje, *supra* note 116, at 187.

212. Körling, *supra* note 20, at 73.

213. Meyer, *supra* note 20, at 107 (arguing some of the informal neighborhoods were later formalized while others were not).

When the French colonialists departed in 1960 and the post-independence government took control, little changed, at least in the realm of law.[214] The newly independent country declared that the French Civil Code would continue to be the law of the land,[215] and the vast majority of Niger's citizens continued to ignore that formal law, just as they had under the French.[216] In Niamey, however, the post-independence government held more sway than in rural areas and was able, at least to a certain extent, to continue the colonial land practices and policies.[217] Particularly during the reign of Sayni Kountche, a military dictator who ruled from 1974-1987, the Nigerien state carried on with expropriating significant tracts of land on the periphery of the city, all by military decree, and dedicating it to providing housing for the city's growing population.[218] As was true during colonialism, much of the land was taken from farmers from the villages of Gamkale and Goudel.

A. Decentralization Struggles Lead to Chaos in Urban and Peri-Urban Land Management

Fundamental changes in land law, changes that have profoundly affected the lives and livelihoods of people living in peri-urban zones, did not accelerate until the 1990s, the era of economic liberalization, democratization, and government decentralization described in Part III, above. Niger, whether by choice or compulsion, fully implemented Washington Consensus reforms including land law reform and government decentralization. While those policies had comparatively little impact in isolated rural areas,[219] they began to alter peoples' lives in peri-urban zones around the capital.

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214. Njoh, *supra* note 27, at 547, 549; Meyer, *supra* note 20, at 107.

215. Njoh, *supra* note 27, at 550.

216. Njoh, *supra* note 27 (Niger's post-independence governments periodically issued decrees and passed laws attempting to reform land practice. For example, in the 1970s, the military regime of President Sayni Kountche decreed a new policy of *mise en valeur*: the notion that henceforth all rural land would "belong" to those who were farming it). *Squeezing Parakeets*, *supra* note 8, at 685. Many said that in fact this policy was Kountche's attempt to remove or at least weaken chiefs' power of land tenure matters. *Id.* In the end, it really did not matter, since resilient rural Nigeriens largely ignored that policy too.

217. Meyer, *supra* note 20, at 107.

218. Meyer, *supra* note 20, at 3 (arguing Niger's post-independence governments seized his family's lands without compensation and dedicated them to Niamey's Green Belt); *Squeezing Parakeets*, *supra* note 8, at 138 (arguing the Kountche regime also continued the expansion of the colonialist's Green Belt).

219. *See supra* note 216.

The land transformation in and around Niamey began in earnest as an indirect result of government decentralization. In 2002, Niamey's central government, the Urban Community of Niamey ("CUN") was divided into five separate local governments, known as communes, each with significant responsibility for providing municipal services.[220] Importantly, each of the urban communes had the authority to subdivide and sell land on its periphery.[221] The communes quickly realized that the central government was going to do little to help pay for governmental services,[222] and that converting peri-urban land from farms to house plots was a source of desperately needed revenue.[223]

The communes quickly realized that the central government was going to do little to help pay for governmental services,[224] and that converting peri-urban land from farms to house plots was a source of desperately-needed revenue.[225] Not incidentally, subdividing and selling land also created rent-seeking opportunities for commune officials, of which they took full advantage.[226] With these dynamics at play, the ur-

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220. Meyer, *supra* note 20, at 227.

221. Meyer, *supra* note 20, at 111.

222. *Squeezing Parakeets*, *supra* note 8, at 682; Cotula et al., *supra* note 168 (arguing Niger's Rural Code purports to respect customary rights but places the new land system firmly under the control of non-customary actors); *Tenure Security*, *supra* note 57, at 222 (arguing titling schemes in the African context often ignore secondary rights holders); Chimhowu & Woodhouse, *supra* note 104, at 347 (arguing land registration schemes in Africa claim to register group rights but usually aim for individualized ownership "formalized in a written title to physically-demarcated land"); Njoh, *supra* note 27, at 540 (arguing the decentralization that was supposed to accompany the Rural Code "never really materialized"); Meyer, *supra* note 20, at 224, 251 (arguing the institutions of the state lack legitimacy in land matters, that people still turn to chiefs instead of local officials); Bron-Saidatou, *supra* note 26, at 20 (arguing commune-level governments in peri-urban areas lack the power the money to control land matters).

223. *See* Interview with Former Mayor of Niamey Commune 5, *supra* note 179 (arguing the communes produced revenues from developing peri-urban land and spent it on service provision); Meyer, *supra* note 20, at 227; Körling, *supra* note 20, at 109 (arguing zoning power appeared to the commune governments as a "golden opportunity" to produce revenue).

224. *See* Körling, *supra* note 20, at 108 (arguing commune governments were given much responsibility for service delivery but few means to raise funds).

225. Meyer, *supra* note 20, at 227 (arguing that subdividing land provided revenues to commune-level governments).

226. *See* Körling, *supra* note 20, at 81 (arguing that the process of subdividing land is complicated and corrupt); Issaka, *supra* note 1 (arguing that in the 1990s the communes were practically the only ones subdividing land around Niamey and that corruption had been at the heart of the system).

ban communes enthusiastically dove into the business of converting farmland around the city into subdivided house plots.[227]

During this period, however, there was growing tension between Niamey's newly empowered commune governments and the CUN. From the CUN's perspective, the communes squabbled with one another, refused to collaborate, and prevented the CUN from playing its rightful role as coordinator.[228] From the communes' perspective, the CUN simply did not want to relinquish its centralized power.[229] By 2011 the struggle between Niamey's communes and the CUN was over and, for political reasons beyond the scope of this article,[230] the CUN had reasserted control of city government, including the development of peri-urban land.[231] The CUN's inability to handle the volume of land transactions and the entry of private developers to the market conjunctively catalyzed chaos in peri-urban land development.[232]

B. Enter the Private Developers

Before the CUN mayor's office could bring order to peri-urban land development, it was overtaken by the arrival of private land developers in the market.[233] Legal changes in the late 1990s authorized private development,[234] but its influence was not felt until the mid-2000s when a governmental decree definitively removed the state's monopoly and made it possible for anyone possessing peri-urban land to subdivide and sell it.[235] The idea was to unburden the government from constantly having to search for resources to carry out necessary improvements for the process of converting agricultural land to house plots: the provision of roads, public buildings, water, electricity, and other infrastructure.[236] The effect, however, was to permit private actors, particularly those

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227. Meyer, *supra* note 20, at 233.

228. *Id.* at 227.

229. Interview with Former Mayor of Niamey Commune 5, *supra* note 179.

230. In brief, Niger experienced a coup d'état in 2010 and the military government preferred to govern the city by naming its own top officials. *See* Meyer *supra* note 20, at 228.

231. *Id.* at 113.

232. *Id.* at 228 (arguing the CUN mayor's office attempted to centralize all land-related record-keeping, resulting in boxes of disorganized records piled high in the corridors, complete lack of file verification, and some parcels being sold multiple times).

233. *Id.* at 229.

234. Issaka, *supra* note 1 (arguing many private developers entered the Niamey land market after legal reforms in 1997); Meyer, *supra* note 20, at 118.

235. Meyer, *supra* note 20, at 227, 229 (arguing private developers were not fully able to participate in development of peri-urban land until a government decree in 2000).

236. *Id.* at 229.

with working capital, to suddenly and entirely take over land development on the edge of the city.[237] There has been a boom in the development of peri-urban land since 2010,[238] and every new subdivision around Niamey has been undertaken by private developers.[239]

Most of the leading private actors have been individuals who, through personal contacts and prior experience, know how to navigate the tortuous bureaucratic process involved in converting farmland into suburbs.[240] Some acquired their knowledge by working on the inside of the state bureaucracy and their core expertise is keeping up on the constant modifications to the arcane procedural requirements.[241] Others have become powerful private actors because of family ties to chiefs in the peri-urban zones.[242] They use their connections to identify potential sellers of land and to negotiate with lineage heads.[243] The former group of intermediaries are familiar with the corridors of power and the constant flux in the rules, while the latter keep tabs on who owns which lands and who might be convinced to sell.[244] The most effective of the middlemen combine both competencies.[245] They propose their service directly to customary owners, offering the enticing possibility of selling their land without having to engage directly with the distasteful, even dreaded, government bureaucracy; and often offering better terms than those offered by commune-level mayors' offices (before municipal government was re- centralized) or the CUN (before it was squeezed out of the game).[246]

The entrance of private developers into peri-urban land markets have led to the emergence of symbiotic, mafia-like networks between the private actors and government officials.[247] The developers, many of whom have grown vastly wealthy, grease the necessary palms in the state bureaucracy to ensure their development plans are approved,[248]

237. *Id.* at 235, 238.

238. *Id.* at 242.

239. Issaka, *supra* note 1 (arguing private developers have become more powerful actors than government); Meyer, *supra* note 20, at 229.

240. *See* Meyer, *supra* note 20, at 236.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *See* Meyer, *supra* note 20, at 239.

246. *Id.* at 237.

247. *See id.* at 241.

248. *See* Körling, *supra* note 20, at 80, 91 (arguing the sale of peri-urban house plots is the source of corrupt practices, that Niamey city hall is a "locus of negotiations and ac-

whether or not those plans comply with state requirements, or the best practices for infrastructure, public space, and the like.[249] In recent years, the developers' corrupt influence is rumored to go even deeper and higher.[250] Some have become so wealthy that they are able to pour vast amounts of money into electoral campaigns to ensure the election of officials who are sympathetic to their projects.[251] Once this is accomplished and their friends are in office, the tortuous governmental regulatory and permitting processes become crystal clear and streamlined for the politicians' patron but remains tortuous and opaque for the patron's competitors.[252] It is common knowledge in Niamey that these relationships reach the highest levels of government, which means no bureaucrat, at any level of the state apparatus, can safely impede the private developers' plans – whether for corrupt or legitimate public safety reasons.[253]

As in rural areas,[254] in peri-urban zones there is an ongoing struggle over who has formal authority to authorize the transition from farmland to suburban house plots.[255] Chiefs in peri-urban zones vie with formal CUN officials, who in turn vie with various central government ministers and their underlings whose portfolios touch on land development.[256] But since the entrance of wealthy, politically connected private developers onto the scene, the contest for formal authority matters

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cess," and that government officials are typically bribed by offering them plots in the subdivisions they authorize); *see also* Interview with Former Mayor of Niamey Commune 5, *supra* note 179 (arguing "[t]he only way to move a [housing] project forward is to engage in corruption" by paying ministry officials).

249. *See* Körling, *supra* note 20, at 90; *see also* Interview with Former Mayor of Niamey Commune 5, *supra* note 179.

250. *See* Interview with Former Mayor of Niamey Commune 5, *supra* note 179 (arguing the land system around Niamey is "full of corruption," that faulty development plans are routinely approved by corrupt CUN officials, and that the office of Niger's president overrules decisions by lower-level government offices that might block development plans).

251. Meyer, *supra* note 20, at 241.

252. *Id.*

253. *See id.* at 244-45, 259; *see generally* Interview with Former Mayor of Niamey Commune 5, *supra* note 179 (arguing his private business was suffering because those in political power were steering business away from him).

254. Meyer, *supra* note 20, at 225.

255. *Id.*

256. *Id.* at 211, 225, 256 (arguing the Ministries of Environment, Urbanism, Cadaster, and Education all have claims to authorize peri-urban land transactions, but that Urbanism is the most powerful so private developer with clout skip the other ministries and go straight to Urbanism).

less[257] because the private actors simply push aside the competing organs of the state and carry out their development plans in whatever way will maximize their profits.[258] The state has become one actor among many, and in most instances it not the most powerful one.[259] The result, discussed in more detail in Part V., below, is that it has become "impossible to manage the peri-urban land for the good of all, especially for the lowest level of society."[260]

IV. THE CURRENT SITUATION

Today, land in the vicinity of Niamey is coveted and the market is frenzied.[261] Although the large private developers described above are dominant players and reap the greatest rewards, it seems that everyone with capital to invest is jostling to get into the game.[262] Business people who have no background in land development and whose main activities focus on general commerce or transportation, are buying up empty lots in the fast-spreading peri-urban neighborhoods with an eye toward flipping them or developing them.[263] Those with sufficient means purchase the lots in large quantities,[264] often in cahoots with government

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257. *See* Issaka, *supra* note 1 (arguing the developers and their highly placed patrons in central government succeeded in pushing the lower-level commune governments out of the way even though they were supposed to have authority over subdividing land); *see also* Meyer, *supra* note 20, at 225.

258. Meyer, *supra* note 20, at 224; Interview with A Highly Placed Official in Niger's Ministry of Environment and of Durable Development, Niamey, Republic of Niger (May 11, 2018) [hereinafter Interview with Official] (arguing the rise of private developers means no one is taking account of the public interest and it is now all about generating profit).

259. Meyer, *supra* note 20, at 225.

260. *Id.*

261. *See* Issaka, *supra* note 1 (employing the French term "*combat foncier*," meaning "land combat," to describe the real estate market in peri-urban areas around Niamey).

262. *See* Interview with Retired Office Worker, Niamey, Republic of Niger (Apr. 28, 2018) [hereinafter Interview with Retired Office Worker] (describing his purchases of various empty house lots in towns near Niamey); *see also* Interview with Two Real Estate Developers, Niamey, Republic of Niger [hereinafter Interview with Two Real Estate Developers] (Apr. 30, 2018) (discussing where one developer was a former lawyer and the other was until recently a "documentary filmmaker" and still had that profession on his business card).

263. *See* Interview with El Hadji Merchant, Niamey, Republic of Niger (May 4, 2018) [hereinafter Interview with El Hadji Merchant] (describing a merchant with no development experience revealing his plans for developing recently purchased peri-urban land); Interview with a Businessman, Niamey, Republic of Niger (May 4, 2018) (describing an uneducated businessman with no prior experience in land development revealing his participation in a large peri-urban social housing development); Interview with Two Real Estate Developers, *supra* note 262 (describing two principals of a social housing project, one a former lawyer, the other a documentary film maker).

264. *See, e.g.*, Interview with El Hadji Merchant, *supra* note 263.

officials with whom they split the profits when prices rise.[265] While others purchase large tracts of agricultural land located far from the city;[266] and some plan to subdivide the land quickly and sell to smaller-scale speculators.[267] Others intend to sit on the distant land until the fast-expanding city approaches their holdings and pushes the value upward.[268]

Poor urban Nigeriens are nowhere to be seen in this scramble for peri-urban land. The government, with the support and advice of aid agencies, has begun in recent years entering into public-private partnerships to establish new *logement social* ("social" or "affordable" housing) in peri-urban zones.[269] However, in spite of the "social" moniker,

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265. Meyer, *supra* note 20, at 225.

266. *See* Interview with Two Real Estate Developers, *supra* note 262 (describing a housing development located approximately thirty kilometers from Niamey); Interview with El Hadji Merchant, *supra* note 263 (describing his purchase and conversion of land approximately twenty kilometers outside of Niamey).

267. *See* Issaka, *supra* note 1 (arguing many speculators have entered Niamey's land markets); Cotula et al., *supra* note 168, at 27 (arguing many urban elites are speculating in peri-urban land markets).

268. *See* Interview with El Hadji Merchant, *supra* note 263 (arguing he will leave much of his recent peri-urban land purchase "in reserve" to allow prices to rise). Major business actors are not the only ones fueling the red-hot peri-urban land markets. Peri-urban land is one of Niger's few investment opportunities, so many salaried employees (primarily civil servants) are purchasing multiple undeveloped plots in recently subdivided neighborhoods outside of town, often while living in small, rented lodgings in the city. Meyer, *supra* note 20, at 233. In fact, it is rare that the first purchaser of a newly subdivided plot actually constructs a house and moves in. *Id.* Most initial buyers are investors and often it is the second or third purchaser who constructs a residence. *Id.* at 234 ((offering an example of one house plot in a peri-urban neighborhood that originally was purchased for 60,000 CFA (approximately $110 at current exchange rates), that changed hands twice, and eventually sold for 2 million CFA to the person who constructed a house)).

269. *See* Alexandra Biehler, Armelle Choplin, & Marie Morelle, *Le Logement Sociale en Afriquie: Un Modele a (Re)inventer?* 1, 1 (May 18, 2015), *available at* https://www.metropolitiques.eu/Le-logement-social-en-Afrique-un.html (last visited Sept. 23, 2019) (arguing NGOs and international agencies have supported social housing); *see also* Meyer, *supra* note 20, at 240 (mentioning social housing in Niger and arguing it does not benefit the poor). Based on personal observation, these social housing neighborhoods are popping up like mushrooms in rural areas around Niamey. Because they are being developed well outside the boundaries of the city, they can be a startling, incongruous sight as one drives through the bush. The completed neighborhood can include hundreds of residential units, typically a mix of one-, two-, and three-bedroom cement, metal-roofed houses, each with a small, walled concession surrounding it, all packed closely together. *See* Interview with Two Real Estate Developers, *supra* note 262 (describing a social housing site under construction approximately thirty kilometers from Niamey). They often are completely surrounded by agricultural fields where farmers go about their traditional routines of planting and cultivating subsistence crops and husbanding their animals. *See id.* (describing a new social housing site next to what appeared to be a millet field).

little, if any, of the resulting housing is within the means of poor people.[270]

From the perspective of an academic studying land in Niger, this is a fascinating transitional moment in which the rules governing peri-urban land and land use are changing rapidly. But from the perspective of farmers living in peri-urban zones this transition signals and end to a way of life. Whether their land is purchased by a developer, or condemned by the state, once official title has been printed and properly registered, the purchaser's rights are secure and the rural people, along with their rural beliefs, rural ways of life, and rural livelihoods, are out of the game. The transition to suburbs is irreversible[271] and the land becomes a commodity like oranges on special in Niamey's Petit Marche.[272]

V. SUMMARY

Niamey was created during the colonial era on land expropriated from the nearby villages of Gamkale and Goudel. As the city's population steadily grew, the colonial government expropriated and subdivided land on its periphery–land that the French considered vacant–to provide residences for its functionaries. Once the land was subdivided, it was subject to the Code Napoléon. However, the scale of this conversion was modest; most rural people were unaffected, and their lives continued as before.

Niger's post-colonial governments carried on in a manner similar to the French. As Niamey's population growth accelerated, the state expropriated and converted larger swaths of surrounding land, primarily still from the domains of Goudel and Gamkale. At times, population

270. Interview with Two Real Estate Developers, *supra* note 262 (in a typical social housing project, the government and private financial institutions combine forces to make mortgages available to prospective purchasers. The banks agree to loan money at comparatively moderate rates of interest and the government agrees to deduct the monthly payments directly from the borrowers' paychecks. This means, of course, that only Nigeriens with regular paychecks, or who live overseas – together a wafer-thin slice of Niger's population – can take advantage of the programs); *see* Körling, *supra* note 20, at 79 (arguing Niger claims that provision of housing for the poor is a key to poverty reduction but in fact has provided exceedingly little that is accessible to the poor).

271. *See* Interview with Two Real Estate Developers, *supra* note 262 (arguing that once they have formal title in hand, they have no fear that farmers will be able to challenge their ownership of land).

272. Meyer, *supra* note 20, at 235; *see* Interview with Former Gamkalle Resident and His Friend, *supra* note 208 (arguing that "land has become money"); Interview with Insurance Executive, Niamey, Republic of Niger (May 5, 2018) (arguing "land was religious; now it is money.").

growth outstripped the government's ability to subdivide land, and so informal settlements began to appear on what had been agricultural land.

Starting in the 1990s, democratization, economic liberalization, and decentralization, combined with accelerating population growth in Niamey, led to a dramatic increase in the city's expansion and an accompanying flood of land conversions from fields to suburbs. Various sources of authority–the CUN, central government ministries, local government officials, and chiefs–vied with one another for authority over peri-urban land transactions and attendant spoils. However, beginning in 2010, most of the governmental actors were shoved to the side by the entrance of private land developers, who formed mafia-like networks in cahoots with high government officials. Suddenly, all limits to peri-urban land development vanished and a scramble for profits ensued. Developers and speculators began purchasing, subdividing, titling and registering formerly agricultural lands at a blistering pace, sometimes scores of kilometers outside the city. The private developers had no reason to care about poor people which included the peasant farmers selling their ancestral lands. The government of Niger claims they provide "social housing" to meet the needs of the poor, but in fact only comparatively well-off Nigeriens are eligible to participate.

The next section explores who wins and who loses as a result of Niger's peri-urban transformation.

VI. WINNERS AND LOSERS WHEN PERI-URBAN LAND IS TRANSFORMED FROM CUSTOMARY TO FORMAL

The physical and legal transformation of peri-urban land around Niamey produces winners and losers.[273] In general, the winners are those with power and wealth who take advantage of the transition to increase their bounty.[274] The losers are peasant farmers whose livelihoods

273. *See* Hagberg, *supra* note 60, at 102 (arguing peri-urban land sales always produce winners and losers and that rural people are usually the losers); *see* SHIPTON, *supra* note 8, at 144 (arguing early practitioners of land privatization and titling in Kenya, which was a precursor to such efforts across sub-Saharan Africa, assumed "energetic or rich Africans will be able to acquire more land and bad or poor farmers less, creating a landed and landless class" and that "[t]his is a normal step in the evolution of a country.").

274. *See* Mbiba, *supra* note 2 (arguing local elites including officials, politicians and traditional authorities often control land entitlements); Falk, *supra* note 171, at 1 (arguing land tenure reform always ends up redistributing land from the poor to the rich); *see also* Polavarapu, *supra* note 104, at 98 (arguing that in Botswana land tenure security is enjoyed only by the "rich and legally adroit"); Cotula et al., *supra* note 168, at 3 (arguing "elites claim land that isn't theirs when they know registration is coming.").

disappear and who forfeit the historical and spiritual foundations that until now have provided order and meaning to their lives.[275]

A. Winners

Among scholars, it is a generally accepted nostrum that legal transformations in poor countries benefit elites.[276] The reason is obvious: elites are better positioned to shape the details of the new legal rules to serve their own interests.[277] Once the new rules are in place, they have the necessary knowledge, capital, and connections to consolidate their advantages before less informed societal actors become aware of the shift.[278] The transformation of land law in peri- urban Niger is a case in point.[279]

1. Private Real Estate Developers and Investors and the Government Officials with Whom They Collaborate

Private developers have emerged as the biggest winners in the conversion of peri-urban land. At the top of the developer pyramid are the leaders of the mafia-like networks that have infiltrated and dominated all levels of the state apparatus, and who have amassed fortunes by converting large swaths of agricultural land into house plots.[280] But those land kingpins are not the only private real estate actors who have thrived as a result of the transition.

Lower tiers of private developers have gotten into the game. Companies are forming in Niamey to build the social housing developments around the city's periphery.[281] Some complain that their profit

275. *See* Interview with Hamdallaye Canton Chief, *supra* note 17 and accompanying text; *see also* Cotula et al., *supra* note 168 and accompanying text; *see also* Falk, *supra* note 171 and accompanying text.

276. *See* Körling, *supra* note 20, at 78 (arguing in Niger urban policy and investment always serves elites); SHIPTON, *supra* note 8 (arguing when land is converted from customary control to freehold title, "the best-informed and best-connected people" benefit); *Tenure Security*, *supra* note 57, at 222.

277. *See* Njoh, *supra* note 27, at 542 (arguing changes in zoning laws usually protect the rights and privileges of the wealthy).

278. *See* JIMU, *supra* note 2, at 7 (arguing that in African contexts urban actors seeking land can take advantage of the poverty and ignorance of rural sellers).

279. *See* Njoh, *supra* note 27, at 542; *see supra* Part V.B.

280. *See* Issaka, *supra* note 1 (arguing certain private developers of peri-urban land have become more powerful than governmental actors).

281. *Id.*

margins are thin. However, the recent profusion of these project indicate that they are generating profits.[282]

A third tier of wealthy elites benefit from the conversion of peri-urban land. These are the wealthy El Hadji merchants from the city who until now have had few options for diversifying their investments within Niger.[283] They are moving into land speculation, buying large tracts of undeveloped agricultural property, sometimes twenty or more kilometers from the city.[284] Different merchants employ different strategies. Once they have established titled ownership of the land, many subdivide it into plots even if they intend to sit on it until Niamey grows closer and the value of the plots increases.[285] Some intend to sell the plots piecemeal to other smaller investors, or even to potential residents.[286] Still others have grander plans to move into the business of real estate development by constructing the social housing projects described above.[287] Whatever the details of their development strategies, wealthy businessmen based in the capital are mobilizing to take advantage of the shift to private ownership of land.

These private developers become so successful partly by collaborating with government officials who can claim formal authority over land transactions. There is still lively competition among the governmental actors to determine whose authority will prevail, but as the competition plays out it is clear that many are prospering. They formed corrupt symbiotic relationships that strengthened their claims to authority over government institutions and, simultaneously, produced significant private wealth.[288]

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282. *See* Issaka, *supra* note 1 (arguing corporations have entered the land development market and have made substantial profits).

283. *Id.*; Interview with El Hadji Merchant, *supra* note 263.

284. *See* Interview with El Hadji Merchant, *supra* note 263 (describing his speculative investment in peri-urban land outside Niamey).

285. *Id.*

286. *Id.*

287. *Id.*

288. It should be noted that there is another class of people, who will be mentioned only in this note, that both win and lose as a result of the symbiotic relationship between major real estate developers and corrupt governmental officials. They are civil servants of moderate means who are searching for housing in the vicinity of Niamey. They are winners because the entry of private developers on the peri-urban scene has increased the number of houses and house plots available for purchase. *See* Meyer, *supra* note 20 (arguing Niger's efforts to create housing and financing for civil servants has worked). They are losers because the resulting neighborhoods and houses are often poorly planned and constructed; *see also* Issaka, *supra* note 1. Because the developers are in cahoots with the government officials, they can maximize profits by making roads too narrow for fire trucks, eschewing

Amidst this struggle for legitimacy and advantage among multifarious organs of the state apparatus, traditional chiefs – historically a resilient and adaptable group[289]— have found opportunities to enhance their power and wealth.[290] With peri-urban land in high demand and ambiguity concerning which state actors have the power to convert land from farms to suburbs, rural Nigeriens have turned to chiefs, who retain much of their customary authority over land in spite of the state's efforts to weaken it.[291]

Traditional chiefs' approaches to peri-urban land transactions are as variable as those of the state. Some village and canton chiefs expand their pocketbooks and their power by taking an active role in facilitating the transfer of agricultural land to urban investors or developers.[292] In a typical transaction, a developer from the city will approach a traditional chief whose rural domain is twenty or more kilometers from the edge of Niamey's existing suburbs.[293] The chief will act as a broker, identifying a family patriarch willing to sell a large tract of family land; sometimes with, sometimes without the extended family's informed consent.[294] The chief may take a finder's fee that includes cash or a percentage of the house lots to be developed.[295] In other instances, chiefs simply sell

drainage infrastructure, and failing to reserve space for public utilities. *Id.* With regulators looking the other way, they also save money and increase profits by constructing homes using substandard materials. *Id.*

289. *See Squeezing Parakeets*, *supra* note 8; *see also Unintended Consequences*, *supra* note 9.

290. *See Courts and Peri-Urban Practice*, *supra* note 193, at 28 (arguing in villages chiefs are major actors in converting peri-urban land from agricultural to residential and that they often are the prime beneficiaries); Benjaminsen et al., *supra* note 157, at 31 (arguing land shortages combined with increasing desire to formalize land rights has provided a financial boon to traditional chiefs).

291. *See* Cotula et al., *supra* note 168, at 12 (arguing land titling schemes in Africa did not work well, which led to increases in chiefs' power over land).

292. *See* Interview with Retired Office Worker, *supra* note 262 (recounting his purchase of plots of land that were endorsed by canton chiefs).

293. Interview with Two Real Estate Developers, *supra* note 262 (arguing their social housing project, located approximately thirty kilometers outside Niamey, began with a purchase of land from farmers); Interview with Former Mayor of Niamey Commune 5, *supra* note 180 (arguing most peri-urban land sales begin when a buyer approaches the head of a family).

294. *See Courts and Peri-Urban Practice*, *supra* note 193, at 37 (arguing chiefs in Ghana sometimes connive with family elders to sell land out from under the control of extended families).

295. Interview with Retired Office Worker, *supra* note 262 (arguing that when land is subdivided, the chiefs always get their cut and providing the example of Niamey's Haro Banda neighborhood, where 20% of all the newly created plots were divided among chiefs and government officials); *see also* Motcho, *supra* note 48, at 7 (arguing chiefs have be-

large tracts of undeveloped "chief's lands" to investors even though customarily they are guardians of that land and not owners.[296]

Even chiefs who do not take an active role in selling or developing peri-urban land benefit from the transactions, at least in the short term. When investors or developers arrive in the village and come to agreement with a family patriarch, the chief, for a fee, will create a written document referred to as a *detention coutumiere* (customary holding).[297] That document represents the developer's or investor's first step in the long and tortuous process (one that is simpler for the land development kingpins with political connections)[298] of obtaining full, individual ownership and registered title over the land.[299] In theory, the chief investigates the transaction before granting the *detention coutumiere*, ensuring that the seller has a legitimate claim over the land and that the seller's family, many of whom may claim primary or secondary rights in land,

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come central actors in suburbanization and that they profit by, among other things, receiving compensation in the form of parcels).

296. *See* Bron-Saidatou, *supra* note 26, at 10, 27 (arguing under customary law chiefs are guardians of undeveloped land, not owners); *see also* Interview with Canton Chief of Koure, *supra* note 100 (claiming – incorrectly – that in pre-colonial Niger all land "belonged" to canton chiefs and that in recent time some village chiefs have claimed ownership of land, obtained title, and sold it to developers); *see also* Interview with Official, *supra* note 258; *see also Courts and Peri-Urban Practice*, *supra* note 194, at 30 (arguing chiefs in Ghana wrongly claim they have the right to displace individual users of land and either sell it or lease it to strangers); *see* Joseph Blocher, *Building on Custom: Land Tenure Policy and Economic Development in Ghana*, YALE HUM. RTS. & DEV. L.J. 166, 168-69 (2006) (note) (arguing chiefs sometimes sell land "out from under" users); *see* Cotula et al., *supra* note 168, at 27 (arguing chiefs sell land they do not own).

It should be noted that at least some chiefs take a hard line against the sale of peri-urban land to outsiders.

For example, the *chef de canton* of Hamdallaye, a town a half-hour drive out of the Fillingue Road from Niamey, claims he has steadfastly refused to authorize sales of customary agricultural land to investors or developers. *See* Interview with Hamdallaye Canton Chief, *supra* note 17. He also uses his traditional authority and prestige to prevent his subjects from circumventing his authority and seeking authorization from the local mayor's office. *Id.* However, this reluctance to permit land conversion appears not to be well grounded in formal law and is the exception rather than the rule. *See* Interview with Canton Chief of Koure, *supra* note 100 (arguing that he lacks authority to prevent land sales); *see* Interview with Former Mayor of Niamey Commune 5, *supra* note 179 (arguing canton chiefs lack authority to block land sales, even in rural areas).

297. *See* Körling, *supra* note 1 (mentioning detention coutumere, and arguing chiefs often charge 5000 FCFA to issue certificates of sale for village land).

298. *See generally* Meyer, *supra* note 20; *see also* Körling, *supra* note 20; *see also* Interview with Former Mayor of Niamey Commune 5, *supra* note 179.

299. *See* Bron-Saidatou, *supra* note 26, at 24 (describing the process of formalizing land).

approve of the sale.[300] However, as described in Part V.B.1. below, the sales often proceed without the extended family's knowledge or acquiescence.

Whether or not the chief thoroughly vets the land sale, he receives his fee and thus becomes a short-term winner in the conversion of land from fields to suburbs.[301]

C. Losers

1. Immediate Losers: Secondary Rights Holders

When a land developer or speculator purchases a plot of agricultural land located in a peri-urban area – usually from a family patriarch or chief[302] – the complicated customary law bundle of nested, contingent, secondary rights that heretofore determined access to that land[303] instantaneously vanishes.[304] Rural people who depend on secondary rights in land find themselves with nothing.

Women in rural communities are a prime example.[305] Among rural Nigeriens, women do not customarily have the right to inherit or control agricultural land, however, this does not mean that they entirely lack

300. Meyer, *supra* note 20, at 190; *see generally Squeezing Parakeets*, *supra* note 8; Interview with Canton Chief of Koure, *supra* note 100 (arguing chiefs preside over historical examinations to determine who has rights to agricultural lands).

301. *See* Meyer, *supra* note 20, at 190, 252 (arguing chiefs extract fees for approving land sales); Körling, *supra* note 20, at 125. Although the chiefs are "short-term" winners, one can speculate that their authority, which is practically and spiritually rooted in the community's lands, will wither as the chiefs convert the community land to individually owned parcels. *See generally Squeezing Parakeets*, *supra* note 8; Becker, *supra* note 104; SHIPTON, *supra* note 8; *Unintended Consequences*, *supra* note 15.

302. *See Courts and Peri-Urban Practice*, *supra* note 194, at 37 (arguing chiefs in Ghana sometimes connive with family elders to sell land out from under the control of extended families); *see also* Interview with Former Mayor of Niamey Commune 5, *supra* note 179; *see also* Körling, *supra* note 20, at 106 (arguing land sales on the edge of the city usually start when a buyer approaches the head of a family).

303. *See Squeezing Parakeets*, *supra* note 102, at 682; SHIPTON, *supra* note 8, at 309; Becker, *supra* note 104; Chimhowu & Woodhouse, *supra* note 104; Polavarapu, *supra* note 104; *Unintended Consequences*, *supra* note 9, at 1007, 1015.

304. *See* Chimhowu & Woodhouse, *supra* note 104, at 347-48 (arguing land titling often extinguishes secondary "safety-net" rights such as wood gathering); *see also Tenure Security*, *supra* note 57, at 222 (arguing titling schemes often ignore secondary rights holders); Cotula et al., *supra* note 168, at 18 (arguing land titling often leads to loss of secondary rights by women and pastoralists); Polavarapu, *supra* note 104, at 114 (arguing that "nested rights" disappear when land is turned into a commodity).

305. Polavarapu, *supra* note 104, at 99-100.

rights in the lands controlled by their fathers, husbands, or brothers.[306] As described above, women normally enjoy the right to enter land to harvest medicinal herbs, collect straw, or plant a small garden.[307] These rights in land are not merely at the sufferance of their husbands and male relatives; they are part of a finely-honed, well understood cultural and spiritual complex.[308] If a male to denies or violate a woman's customary rights, he will bring shame on himself and his family, and the spirits tied to the land may sanction him.[309]

Later-born men can be frozen out when their older brothers or uncles sell the family lands.[310] As described in Part III. A., the family patriarch typically acts in the role of caretaker or trustee for the extended family's lands.[311] This means that a later-born man must seek the patriarch's approval before clearing or cultivating a new plot, but it does not mean that the patriarch in any sense owns the family lands.[312] However, if the patriarch sells the land to an outsider, the land becomes governed by state law, not customary law. Thus, the later-born man's access rights suddenly disappear,[313] whether or not the patriarch decides to share the financial proceeds from the sale.[314]

Customary slaves, a group most Nigeriens prefer not to discuss,[315] also lose their culturally enforceable secondary rights in land when it is sold to developers or investors. It is beyond the scope of this article to discuss the complicated bundle of Nigerien social categories inexactly

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306. *See* Polavarapu, *supra* note 104, at 111 (describing women's secondary land rights under pre-colonial customary law in Botswana); *see Squeezing Parakeets*, supra note 8, at 682.

307. *Squeezing Parakeets*, supra note 8, at 682.

308. *See Squeezing Parakeets*, *supra* note 8, at 683; *see also* Hagberg, *supra* note 60, at 104 (arguing those who attempt to sell lineage lands in rural Burkina Faso risk sanction from the spirit world).

309. *See* Hagberg, *supra* note 60, at 10 (arguing earth priests and elders regard the earth "as a divinity and fear that the violation of rituals may endanger not merely the individual's well-being but community life in general.").

310. *See Unintended Consequences*, *supra* note 9, at 1007 (arguing younger men in Nigerien villages have limited rights to land access and are subject to the demands of the greater group and village Elders).

311. *See id.*

312. *See id.*

313. *See* Chimhowu & Woodhouse, *supra* note 104, at 347-48; *see also Tenure Security*, *supra* note 57, at 222; Cotula et al., *supra* note 168, at 18; Polavarapu, *supra* note 104, at 114.

314. JIMU, *supra* note 2, at 363 (arguing some sellers of customary land spend the proceeds on frivolity).

315. *See Unintended Consequences*, *supra* note 9, at 1012 (arguing Nigerien government officials deny that slavery exists in Niger).

lumped together under the English word "slave" or the French word *esclave*.[316] It must suffice to say that under Nigerien customary law, slaves have a culturally enforceable right to demand of village founders the use of sufficient agricultural lands to feed themselves and their families.[317] In some villages, slave lineages have been cultivating tracts of land for generations, land they do not control, but to which they have culturally enforceable access rights.[318] Under custom, a patriarch that unceremoniously ejected a slave from agricultural lands would bring shame on his lineage.[319] If, on the other hand, the patriarch sells the family land cultivated by the slave, the culturally defined and enforceable rights described above simply vanish.[320] Once the transaction is complete, the legal context instantaneously morphs: customary law holds its relevance and "ownership" instantaneously vests in the individual who holds the piece of paper reflecting title.

2. Long Term Losers

i. Those Who Depend on Customary Land for Livelihoods

For secondary rights holders, the loss resulting from the legal conversion of land from custom to formal state law are sudden and dramatic. For primary rights holders, the losses become apparent over time.

Imagine, for example, a village patriarch in a peri-urban zone sells all or much of his family's ancestral lands to a developer or speculator. Assume he obtained some form of permission from the sale from all or most of the heads of household in his lineage, though that is not always the case.[321]

Assume also that he receives a large amount of money in exchange for the land. I have heard of one such transaction for which the pur-

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316. *See id.* at 1013-16.

317. *See id.* at 1017, 1022 (arguing Nigerian custom requires nobles to make agricultural land available to slave, but in adopting western notions of land law, they can abandon this.)

318. *See id.* at 1034.

319. *Id.* at 1032.

320. *Unintended Consequences*, *supra* note 9, at 1032.

321. *See* Blocher, *supra* note 296, at 168-69 (arguing chiefs in Ghana sometimes sell land out from under its rightful users); *see also Tenure Security*, *supra* note 57, at 216 (arguing similarly to Blocher); Bron-Saidatou, *supra* note 26, at 127 (arguing chiefs in Niger do not own communal land but sometimes sell it without consultation).

chaser paid the equivalent of $20,000,[322] a substantial fortune in a country where most people live off of less than two dollars per day.[323]

The money rarely lasts. In African locales, where peri-urban ancestral land is being sold to developers, stories abound of patriarchs who spend the proceeds on la belle vie: drink, women, and flashy possessions.[324] In Niger, a country where most rural people profess and practice Islam and live sober, acetic lives,[325] the money may not go to alcohol and high living but instead to satisfy the lineage's pent-up demand for life's necessities.[326] Young men who have delayed marriage because they lack money for a bride price payment require financial backing from the patriarch.[327] Family members living in grass huts require the construction of more expensive banco houses with metal roofs.[328] Linage members who have been making due with donkey carts feel the urgent need for motorcycles.[329] And, of course, the sale of agricultural land means that the lineage's ability to grow its own staple crops diminishes or disappears, so they must purchase their grain at the

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322. Interview with Canton Chief of Koure, *supra* note 100 (arguing purchases of rural land in Koure, near Niamey, sometimes amount to $10,000 or $20,000, a huge amount in Niger).

323. *See Niger: Country Profile*, WORLD HEALTH ORG., *available at* https://www.who.int/hac/crises/ner/background/profile/en (last visited Sept. 27, 2019) (reporting that over 60% of Niger's population lives on less than $1 a day); *see also Country Reports on Human Rights Practices for 2015: Niger*, U.S. DEP'T OF STATE (Jan. 20, 2015), *available at* https://2009-2017.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252713 (last visited Sept. 27, 2019) (reporting that in 2011, 48.2% of Niger's population lived under the poverty income level of $1.70 a day).

324. *See* JIMU, *supra* note 2, at 38 (arguing most proceeds from land sales in Malawi are spent on "beer, prostitutes, and pot," and on general "conspicuous consumption.").

325. *Exporting Western Law*, *supra* note 134. My characterization of Nigeriens leading sober and ascetic lives is based on my years of experience and observation in rural communities there.

326. Interview with Canton Chief of Koure, *supra* note 100; *see* Becker, *supra* note 104, at 120 (arguing some sellers of ancestral land in Mali, a predominantly Muslim country, spend lavishly by giving gifts and offering their friends rides in their new cars); *see also* JIMU, *supra* note 2, at 312-13 (arguing in Malawi land sales are often motivated by practical financial concerns such as the payment of school fees, medical bills, bride-wealth payments, or tombstones for dead relatives, though some of these justifications are "after-the-fact rationalizations.").

327. Interview with Canton Chief of Koure, *supra* note 100.

328. I base this statement on personal knowledge of Nigerien friends who live in the U.S. and who send home remittances so their relatives can switch from grass to banco.

329. Interview with Canton Chief of Koure, *supra* note 100.

market if they are to avoid starvation.[330] The small fortune disappears quickly.[331]

When the money is gone, rural Nigeriens have no place else to turn. Niger has no equivalent of mid-twentieth century Detroit or Chicago where former agricultural workers can migrate to seek factory jobs.[332] Even if such jobs existed, the former subsistence farmers would have no relevant skills to offer, since the vast majority are illiterate.[333] In short, when the proceeds from the sale of ancestral lands run out, rural people will suffer.[334]

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330. *See* JIMU, *supra* note 2, at 71 (arguing that in Malawi the conversion of peri-urban land led to declines in food production and increased poverty and insecurity for rural people).

331. Interview with Official, *supra* note 258 (arguing peasant farmers are "selling their patrimony" and that in many cases the money they receive only lasts for months or years). It should be noted that counterexamples exist. There are instances where those who sell their ancestral land invest wisely or start small businesses and prosper. JIMU, *supra* note 2, at 7 (arguing some sellers of ancestral lands in Malawi use the proceeds to start a small business or obtain a commercial driving license and prosper, though most spend the money quickly). Of the many Nigeriens I have interviewed over the years, I have met one who prospered as a result of land sales. He was from the village of Goudel. Niger's government expropriated much of his family's agricultural land over the decades. After the start of democratization in the early 1990s, the government tried to compensate him and similarly situated Goudel farmers by granting them a share of the undeveloped suburban house plots that had been carved out of their old fields. This man sold many of those house plots and used the cash to buy a bar in Niamey. Over the following decades, the bar grew into a small empire of bars, nightclubs, hotels, tourist businesses, transport, and real estate holdings. However, as the text indicates, such economic success stories are the exception, not the rule.

332. *See* SHIPTON, *supra,* note 8, at 144 (arguing Kenya lacked the industry to create jobs for people made landless by land titling; *see also* JIMU, *supra* note 2, at 7 (arguing wage jobs were not available for Malawi citizens rendered landless).

333. *Factbook: People and Society*, *supra* note 1 (reporting 19.1% of Nigeriens over the age of fifteen are literate).

334. Interview with Canton Chief of Koure, *supra* note 100 (arguing Nigerien farmers who well their land "end up poor"); Interview with Former Mayor of Niamey's Central Government, Niamey, Niger (May 11, 2018) [hereinafter Interview with Former Mayor of Niamey's Central Government] (arguing proceeds of rural land sale go for weddings, trips, and motorcycles, and "then they're left with nothing—they become beggars and thieves"); Interview with Judge in Niamey, *supra* note 39 (arguing after rural land sales in Niger, "pretty soon the money is gone and they [the farmers] starve"); *see also* JIMU, *supra* note 2, at 338 (arguing land sellers in Malawi who cannot find wage labor end up destitute); Falk, *supra* note 171, at 1 (arguing that in African contexts landlessness is synonymous with poverty).

ii. Those Who Define Themselves, Their Communities, Their History, and Their Religion with Reference to Ancestral Land

For rural people in peri-urban Niger, hunger is not the only consequence of land sales because land represents more than just a means of food production.[335] The legal transformation of ancestral land into a salable commodity, effectively converting land into money,[336] effaces the historical, cultural, and spiritual legacy that until now had given shape and strength to rural Nigerien communities.[337]

Rural Nigeriens may be desperately poor by international standards,[338] but overall, they lead lives of honor and purpose.[339] They take pride in offering food and shelter to travelers.[340] If a stranger wants to extend their stay in the village, the village chief or other lineage heads will accord him access to enough land to feed himself and his family.[341] Villagers look after one another, periodically gathering together to cultivate and harvest the fields of sick or recently deceased members of the community or to build huts for newlywed couples.[342] Respect for age is common.[343] Theft is rare.[344] Rural Nigeriens generally live in peace, mediating their differences in ways that Americans should emulate: they gather in public, talk things through, and endeavor to find compromise, a *modus vivendi* that permits them to navigate the difficult business of living together amidst some of the harshest geographic and climatic conditions on earth.[345]

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335. *See supra* Part III.A.

336. Interview with Former Gamkalle Resident and His Friend, *supra* note 208; Interview with Former Mayor of Niamey's Central Government, *supra* note 334.

337. *See Squeezing Parakeets*, *supra* note 8, at 667, 710, n. 135; *see also* SHIPTON, *supra* note 8, at 14.

338. *See Human Development Reports*, *supra* note 19; *Factbook: Geography*, *supra* note 19.

339. *Squeezing Parakeets*, *supra* note 8, at 667.

340. *See id.* (arguing visitors to Nigerien villages "are plied with food and gifts.").

341. *See id.* at 666 (describing a family making agricultural land available to an outsider who wished to settle in the village).

342. *See id.* (arguing in the Zarma language of Niger, the word *bogu* describes communal labor, often undertaken on behalf of a villager in need and is the rough equivalent of "barn raising" in English).

343. *Id.* at 667; *see also* SHIPTON, *supra* note 8, at 14 (arguing respect for age is common among the Luo people of Kenya).

344. *Squeezing Parakeets*, *supra* note 8, at 673.

345. *See id.* at 710. I am fully aware that depicting rural life in Niger in this way risks sparking the ire of scholars who condemn as simplistic the colonial and post-colonial thesis that rural Africans live in harmony with themselves and nature. *See generally* Mark Davidheiser, *Harmony, Peacemaking, and Power: Controlling Processes and African Media-*

These positive attributes of Nigerien rural society arise out of an undivided complex of spiritual, historical, and cultural beliefs in which land, including individuals' rights in and obligations toward land, is a central tenet.[346] Land gives shape to rural peoples' identities and sense of self.[347] Even considering the recent increase of Islamic influence, most rural Nigeriens believe their ancestors made pacts with the spirits who control the land and that those spirits, along with the spirits of their ancestors continue to watch over the decisions and actions villagers take.[348] A young man in the village avoids unruly behavior because he has been raised that way, but also because he does not want to be the one to spark the spirits' wrath and thereby diminishes the village's *barka*.[349] He accepts his father's or uncle's decisions about which plot of land to cultivate, and about when he can begin cultivating for his own rather than the extended family's account, because to object, to rebel, would injure not only his family but would insult the original land spirits and the spirits of his ancestors.[350] That same young man, once his elders have accorded him a portion of the family land for cultivation, will avoid waste and certainly avoid sale, because he understands that interest in the land is shared not only by his living relations, but by those who lived before and those members of the family and community yet unborn.[351]

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tion, 23 CONFLICT RESOL. Q. 281, 282-86 (2006) (summarizing various critiques of the "harmony thesis"). But ire be damned. Yes, rural Nigeriens sometimes vie with one another over resources. Yes, intractable conflicts sometimes arise within and among villages that can only be resolved with outside intervention. Yet, the cooperative practices described above, and the overall peaceful, positive nature of Nigerien villages, is both an ideal toward which Nigeriens strive and an empirical fact.

346. *See Squeezing Parakeets*, *supra* note 8, at 704 (arguing land is a key element in maintaining village harmony); *see also* Becker, *supra* note 104, at 115 (arguing customary land helps "define cultural identity through social relations.").

347. SHIPTON, *supra* note 8, at 110-11, 117 (arguing that the Luo people of Kenya view themselves as belonging to the land and, through the medium of the land, belonging to other people and that land is "tied up with some of the most intimate, emotionally charged dimensions of personhood and pride.").

348. *See Squeezing Parakeets*, *supra* note 8, at 647-48.

349. *Squeezing Parakeets*, *supra* note 8, at 704; *see also* Hagberg, *supra* note 60, at 99 (arguing village leaders in Burkina Faso consider the land "as a divinity and fear that the violation of rituals may endanger not merely the individual's well-being but community life in general.").

350. *Squeezing Parakeets*, *supra* note 8, at 704; JIMU, *supra* note 2, at 8 (arguing land is a symbolic medium through which living people connect with their ancestors and their traditions); Blocher, *supra* note 296, at 174 (arguing trust and honor can play a vital role in consistent land practices leading to stability and efficiency).

351. *See Squeezing Parakeets*, *supra* note 8; *see also* Njoh, *supra* note 27, at 555 (arguing land sales are unthinkable in Nigerien customary law because those who control land

When land is titled and sold out of the community, those beliefs that tie together history, spirituality and law disappear.[352] If the spirits and their influence are displaced by a legal title – a piece of paper filed in a distant town saying an outsider now owns the property – that young man can take his proceeds, (assuming he is not struck by lightning or otherwise quickly felled by illness or other misfortune)[353] and ignore concerns about the ancestors' wrath.[354] He can disregard the wishes of his father, his lineage head, and his village chief, because they no longer have influence over his and his children's future access to land.[355] That issue will be decided not by village elders, but by who can decode the foreign, formal legal process, obtain the necessary piece of paper and properly register it in the distant cadaster.

In sum, land is an essential aspect of the social, spiritual, historical and legal complex that provides structure and meaning to rural Nigerien communities. Removing land from this complex will profoundly disrupt a system that has permitted Nigeriens to persevere for many generations amidst extraordinarily difficult conditions.[356]

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hold it act as custodians for future generations); *see also* Blocher, *supra* note 296, at 174 (arguing chiefs in Ghana hold land in trust for the living, the dead, and the not yet born).

352. *Squeezing Parakeets*, *supra* note 8, at 704-07; *see* Körling, *supra* note 20, at 133-34 (arguing authority in Nigerien rural communities is tied to land and those who alienate land lose their authority); Becker, *supra* note 104, at 115 (arguing "Where land is not a commodity, its non-market values define cultural identity through social relations. When and where land sales occur marks a fundamental agrarian change that breaks cultural ties to the land...").

353. *See* SHIPTON, *supra* note 8, at 159 (arguing that in Kenya those who title an alienate family land "expose themselves to the wrath of the spirits.").

354. Becker, *supra* note 104, at 121 (arguing in Mali, land sales are leading to a decline in cooperative spirit of the ethnic group's values). *See also Tenure Security*, *supra* note 57, at 223 (arguing studies of peri-urban land sales show abundant evidence of high social cost, especially for the poor).

355. *Squeezing Parakeets*, *supra* note 8, at 70; *see also* Becker, *supra* note 104, at 121 (arguing land sales in peri-urban Mali contribute to "a decline in the cooperative spirit of the ethnic group's values" that will "radically change the village in the next generation.").

356. *See* Becker, *supra* note 104, at 115 (arguing land conversion creates "new territories with new boundaries, new rules and new authorities claiming new legitimacy to control access" leading to "a profound transformation of society"); SHIPTON, *supra* note 8, at 128-29 (arguing land titling in Kenya threatens to upset the deeply rooted land-related traditions and may lead to social disruption).

IS "MY NUMBER" REALLY MY NUMBER?: NATIONAL IDENTIFICATION NUMBERS AND THE RIGHT TO PRIVACY IN JAPAN

Shigenori Matsui*

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ABSTRACT

In 2013, Japan decided to introduce the national identification number ("my number") to be allocated to all registered residents in Japan, primarily in order to secure fair taxation and fair provision of social security benefits. The system started in 2016. All residents are mandated to use "my number" before the administrative agencies with respect to application for registration and identification, payment of tax, and application for social security benefits. Moreover, private companies are mandated to collect and use "my number" of employees, customers, or clients in order to issue necessary documents to be submitted to administrative agencies for tax and social security. Further, in 2015 the government decided to mandate banks to use "my number" to manage saving accounts from 2018, expanding the use of national identification number in the private sectors. Moreover, it plans to allow the card showing "my number" (my number cards) to be used for much broader purposes. Does the "my number" system infringe upon the constitutional right to privacy? This article traces the history of the previous failed attempts to introduce a national identification number system in Japan, outlines the current "my number" system, and examines whether the "my number" system infringes on the constitutional right to privacy and whether it will likely succeed.

I. INTRODUCTION

In 2013, the Diet, the national legislature in Japan, passed the *My Number Act*, creating and authorizing the use of national identification numbers or "individual numbers," generally called "my number."[1] The government started distributing this random twelve-digit number allocated to each individual resident in October 2015 and started its use in January 2016. Initially, the purpose of "my number" was claimed as primarily to secure fair taxation and fair provision of social security benefits, but in reality, it was designed to promote efficiency in managing personal information by the government. Residents are mandated to use this "my number" before administrative agencies with respect to applications for registration and identification, payment of tax, and applications for social security benefits. Moreover, private companies were mandated to collect and use the "my number" of employees, customers, or clients in order to issue necessary documents to be submitted to the administrative agencies for tax and social security. This is the first time that private companies are mandated to collect and use the national identification number of individuals. In 2015, the statute was amended to mandate banks to use "my number" to manage saving accounts, thus clearly broadening the purpose of the use of "my number." Although the customers are not required to submit "my number" for pre-existing saving accounts, eventually, the government mandated every resident to use this number every time the resident receives any service from a bank. Moreover, the government issued the card indicating a person's "my number" ("my number" card) to verify the identity of the card holder and this card can be used as a public identification card. It may be used in the future as a driver's license or an identification card for private companies, or may even be used as a debit card or credit card.

Introduction of the national identification number system has been a long-held dream of the Japanese government, but all previous attempts failed in the past. It is worth considering how the "my number" system differs from previous attempts. Additionally, its introduction was a highly controversial one. Many people were opposed to it and claimed that the system infringes on the right to privacy protected by the Constitution. There is also a serious question of whether this new system will prove to be effective since all previous attempts failed to achieve their

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1. *See* Gyousei tetsuduki niokeru tokutei no kojin wo shikibetsu surutameno bangō no riyoutō nikansuru hōritsu [Act on the Use of Number to Identify the Particular Individual for the Purpose of Administrative Procedure], Law No. 27 of 2013 (Japan) [hereinafter My Number Act].

goal of serving as a national identification number system. Furthermore, it is a fair question whether it is worth the tremendous amount of spending necessary for the system's introduction. This article attempts to critically examine the introduction of the national identification number, i.e., "my number" in Japan.

In the United States, there is no official national identification number, but the social security number has functioned as a de facto national identification number. With the development of information technology and the increasing necessity to manage personal information of individual residents, many countries around the world have already introduced the national identification number system or are thinking about introducing one. Japan's experience with the "my number" system will provide valuable lessons for these countries.

II. BACKGROUND TO THE INTRODUCTION OF THE "MY NUMBER" SYSTEM

A. Personal Identification System in Japan

1. Registration Systems

Japan has two very elaborate registration systems: the family registry system and the local resident registration system.

The "family registry" (*koseki*) system created by the *Family Registry Act*[2] is designed to keep personal records on all Japanese citizens, including details of births, marriages, divorces, parentage, deaths, and family relations and to serve as a national identification system.[3]

On the other hand, the "local resident registration" (*juminhyo*) system created by the *Local Resident Registration Act*[4] is designed to keep basic records on all local residents regardless of nationality. Municipal governments are mandated to keep the listed personal information in the local resident registry[5] based on the family unit.[6] The basic personal in-

2. *See generally* Kosekihō [Family Registry Act], Law No. 224 of 1947 (Japan).

3. *See id.* art. 13; *Koseki [Family Registry]*, MINISTRY OF JUST., *available at* http://www.moj.go.jp/MINJI/koseki.html (last visited Sept. 20, 2019). A similar system existed for non-citizens in the past: the foreigner registration system. This system was replaced in 2009 by a "foreigner stay card" system. Shutsunyukoku kanri oyobi nanmin ninteihō [Immigration Control and Acceptance of Refugee Act], Cabinet Order No. 319 of 1951, art. 19-3 (Japan).

4. *See* Jumin kihondaichohō [Local Resident Registration Act], Law No. 81 of 1967 (Japan).

5. *Id.* art. 5.

6. *Id.* art. 6, ¶ 1.

formation to be recorded includes a person's name, birthdate, sex, name of the head of the family and relationship with that person, location of the family registry, date the person became a resident, address, date the current address was entered, and previous address.[7] But it also includes other information regarding voting eligibility and services that the resident is receiving such as national health insurance, disability care insurance, national pension, child benefits, and other information specified by government order.[8] Every time a person changes address, the individual is mandated to submit a moving-out form to the municipal government responsible for the area the individual is leaving[9] and submit a moving-in form to the municipal government responsible for the area the individual is moving to.[10] From this, the municipal government is mandated to create a new registration for the new resident and inform the first municipal government of these changes.[11]

2. Identification of Person

Both registration systems perform an identification function, but the family registry performs a much more official identification function for a citizen. Therefore, in order to obtain a passport, a citizen needs to submit a copy of the citizen's family registry.[12] On the other hand, the local resident registration performs a more everyday identification function for local residents. A resident can apply for a copy of the resident's own or the resident's family's local resident registration where the resident is recorded after indicating the purpose for which the copy will be used.[13] Usually, the copy will certify the person's name, birthdate, sex, address, date the resident moved in, and previous address.[14] Residents in Japan need to bring an official copy of their local resident registration

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7. *Id.* art. 7, ¶ 1(1)-(8). After the local resident registration code was introduced, the code was added as information to be recorded. Local Resident Registration Act, *supra* note 4, art. 7, ¶ 1(13). After the "my number" system took effect, "my number" was also added. *Id.* art. 7, ¶ 1(8)(2).

8. *See* Local Resident Registration Act, *supra* note 4, art. 7, ¶ 1(9)-(12), (14); *see also* Juumin kihon daichohō sekourei [Local Resident Registration Act Enforcement Order], Cabinet Order No. 292 of 1978, art. 6-2 (Japan).

9. Local Resident Registration Act, *supra* note 4, art. 24.

10. *Id.* art. 22, ¶ 1.

11. *Id.* art. 9, ¶ 1.

12. Ryokenhō [Passport Act], Law No. 267 of 1951, art. 3, ¶ 1 (Japan).

13. Local Resident Registration Act, *supra* note 4, art. 12, ¶ 1. If the purpose of the application is obviously inappropriate, the municipal government head can refuse to provide a copy. *Id.* art. 12, ¶ 6. Anyone other than family members can apply for a copy of certain identification information upon showing a legitimate purpose. *Id.* art. 12, ¶ 3.

14. *Id.* art. 12, ¶ 5.

or other government-issued document, for instance, to open a bank account[15] or to enter a contract with a mobile phone company.[16] Other government-issued documents include a passport,[17] driver's license,[18] and national health insurance certificate.[19]

Very few Japanese citizens are unregistered in a family registry. Once a child is born, parents are mandated to file a childbirth notification with the municipal office.[20] When parents fail to perform this obligation, the municipal government can create a record ex officio.[21] It is highly uncommon for a Japanese citizen not to have a family registry. But there are certainly some cases, for example, where a run-away mother refuses to file the childbirth registration notification out of fear that her abusive ex-husband might discover her whereabouts and the municipal government does not find out about the childbirth, then the child would remain unregistered.[22]

Similarly, most residents have a local resident registration but some, for instance, women who are hiding from an abusive ex-partner, may be unwilling to file a move-in form and may not have an updated local resident registration. If a child does not have a family registry, then the child likely does not have a local resident registration. But it is quite difficult to live a normal life without a local resident registration

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15. *See* Hanzai niyoru shueki no itenboushi nikansuru hōritsu [Act on Prevention of Transfer of Benefit Raised by the Criminal Conducts], Law No. 22 of 1977, art. 4, ¶ 1 (Japan).

16. *See* Keitai onsei tsushin jigyousha niyoru keiyakushatō no hon-nin kakunin oyobi keitai onsei tsushin ekimu no huseina riyou no boushi nikansuru hōritsu [Act on Customer Identification by the Mobile Phone Companies and on Prevention of Improper Use of Mobile Phone Service], Law No. 31 of 2005, art. 3, ¶ 1 (Japan).

17. Passports are issued by the Foreign Affairs Minister through prefectural governors. Passport Act, *supra* note 12, art. 5, ¶ 1.

18. Driver licenses are issued by prefectural public safety commissions, which supervise the prefectural police. *See* Douro Kotsuhō [Road Traffic Act], Law No. 105 of 1960, art. 84, ¶ 1, 92 (Japan).

19. Japan has a mandatory national health insurance system and everyone is obliged to have national health insurance. The national health insurance certificate is issued by the municipal head to the family head and the insurance holder needs to show this certificate at hospitals or clinics to receive care under the public health insurance system. *See* Kokumin kenko hokenhō [National Health Insurance Act], Law No. 192 of 1958, art. 9, ¶ 2, art. 36, ¶ 3. However, the national health insurance certificate is often used for identification purposes as well.

20. Family Registry Act, *supra* note 2, art. 49.

21. *Id.* art. 44, ¶ 3.

22. The Ministry of Justice revealed that as of November 10, 2017, there are 719 persons without family registry. *See Siryo 5* [App. 5], CABINET GENDER EQUALITY BUREAU OFF., MINISTRY OF JUST. (2017), *available at* http://www.gender.go.jp/kaigi/senmon/boryoku/siryo/pdf/bo90-5.pdf (last visited Sept. 20, 2019).

because residents have extreme difficulty in receiving government services including welfare, health care, medical treatment, and educational services without local resident registration.

B. Past Government Attempts to Introduce a National Identification Number

1. Service Numbers

The public receives various kinds of services from the government. Most of these services are provided by local governments, usually municipal governments. Some services are provided by the central government through local governments. In the past, each of these services necessitated different service recipient lists, which were not interconnected. With the development of information technology, each of these services came to carry a different service number. Thus, passports, driver's licenses, national health care, welfare payments, unemployment benefits, pensions, and others came to carry different service numbers.

However, there was no national identification number that could connect the recipients of all these services. As a result, each individual needed to use a different service numbers to receive government services and the government agencies were unable to know what other kinds of services the particular individual was receiving from the other government agencies. The Japanese government had a long-held dream of creating a national identification number to connect all recipients of these services.

2. National Taxpayer Number System

The first such attempt was to create a "national taxpayer number" system. The system was designed to allocate a different taxpayer number to each taxpayer and mandate the use of this number for tax purposes. In addition, financial institutions were required to use this number, so the tax agency could easily find out the banking and financial information of any given taxpayer.[23] The government had been discussing the possibility of introducing national taxpayer number since 1979.

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23. *See* Zeimuseido chousakai [Advisory Board on Tax System] & Nouzeisha bangou seido [National Taxpayer Number System], WEB ARCHIVING PROJECT (Dec. 1, 2010), *available at* http://warp.da.ndl.go.jp/info:ndljp/pid/1238758/www.cao.go.jp/zeicho/tosin/zeichof/z028.html (last visited Sept. 15, 2019); Iwata Yoko, *Nouzeisha bangou seido no donyu to kin-yu shotoku kazei* [*Introduction of the National Taxpayer Number System and Tax on Financial Gains*], 475 RIPPO TO CHOUSA 1 (2005), *available at* https://www.ndl.go.jp/jp/diet/publication/issue/0475.pdf (last visited Sept. 15, 2019).

As for salaried workers employed by private companies, the employer company deducts taxes and pay that tax to the tax agency when paying employer salaries. Therefore, their income is significantly controlled by the tax agency. Some other types of income are harder to detect. Capital gain needs to be declared in the tax return, but it was subject to a flat tax. So, the tax agency needed to detect all the capital gain income of a particular taxpayer. And since interest payments paid by banks and dividends earned were taxed separately and subject to a flat tax, the taxpayer did not have to declare interest or dividend income in their tax return. Therefore, the tax agency had extreme difficulty in finding out how much additional income the taxpayer received. The tax agency was naturally frustrated by this loophole. Thus, the tax agency wanted to keep track of income sources other than salaries by introducing the national taxpayer number system.[24]

However, very strong opposition erupted against the introduction of a national taxpayer number, in fear that it might lead to the creation of a national identification number system which would allow the government to keep an eye on all individuals' personal information. As a result, the attempt failed.

3. Basic Pension Number System

The second attempt was the introduction of the "basic pension number" in 1997. In 1997, Japan again attempted to create a national identification number system by introducing the "basic pension number." The government disseminated the "basic pension number" to all pension subscribers and pension recipients,[25] which, practically-speaking, allocated a national identification number to all individuals paying pension premiums and/or receiving a pension. Since all Japanese people over the age of twenty living in Japan are mandated to become subscribers to the pension system,[26] this system, in practice, forced every Japanese citizen living in Japan to have a basic pension number. The basic pension number was a ten-digit number allocated to each individual subscriber. Here, the government's primary purpose

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24. Iwata, *supra* note 23.

25. Kisonenkinbangou no kisochisiki [Basic Facts on Basic Pension Identification Number], MINISTRY OF HEALTH, WELFARE & LAB., *available at* https://www.mhlw.go.jp/www1/topics/kiso/ (last visited Sept. 21, 2019).

26. *See* Kokumin nenkin-ho [National Pension Act], Law No. 141 of 1959, art. 7-8 (Japan).

was to connect the previous three separate pension systems and achieve efficiency.[27]

Again, many criticized the basic pension number system for being merely an attempt to create a national identification number system. In the end, the basic pension number system was introduced, but its use was strictly limited to the national pension administration. As a result of this limited use, the system failed to function as a national identification number.

4. Local Resident Registration Code System

The third attempt was the introduction of a "local resident registration code" under the *Local Resident Registration Act*.[28] Introduced in 1999 and put into operation in 2002, this code is an eleven-digit number randomly allocated to all local residents registered in the local resident registry.[29] Initially, a "designated organization" randomly chose the specific number pertaining to each resident. Now, the Japan Agency for Local Authority Information System (J-LIS), which was established by a separate statute,[30] assigns the number to residents, and municipal governments are in charge of notifying each resident.[31] This code enables the local government to share certain information of local residents (i.e., name, birthdate, sex, address, local resident registration code and other designated information) with the central government and other local governments. They can now accomplish this using an independent computer network (not the Internet) designed to fulfill designated ad-

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27. *See id.* art. 14. Previously, there were three separate pension systems: the national pension system, the welfare pension system, and the mutual help system. Basically, all Japanese citizens are mandated to subscribe to the national pension system. Those who worked for private companies also subscribed to additional welfare pension systems and public employees subscribed to the mutual help pension system. Each system employed separate and independent identification numbers and there was nothing to connect all these numbers. As a result, there was confusion when someone changed jobs. The basic pension number system was introduced primarily to connect these different systems. Basic Facts on Basic Pension Identification Number, *supra* note 25. Mutual help pension system has now been integrated into welfare pension system. Therefore, now only the national pension system and the welfare pension system remain

28. *See* Local Resident Registration Act, *supra* note 4.

29. *See id.* art. 30(3); *see also* Jumin kihondaichohō sekou kisoku [Local Resident Registration Act Enforcement Regulation] Law No. 10 of 1999, art. 1 (Japan) (promulgated by the Ministry of Local Government Regulation, which is now Ministry of Internal Affairs and Communications).

30. *See* Local Resident Registration Act, *supra* note 4, art. 30(2), ¶ 1 (revised), art. 30(3), ¶ 2.

31. *Id.* art. 30(3), ¶ 4.

ministrative duties, such as managing the personal information of local residents.[32]

Moreover, residents were allowed to apply for a local resident registration card.[33] There were two options: residents could choose a card with only a photo or a card also with the IC chip. The card with a photo bears an identification photo and can be used as identification for opening a bank account, applying for a credit card, or purchasing a mobile phone. The cards with an IC chip can be used to file a tax return online or to apply for a copy of the person's local residence registration. It was anticipated that this card could be used more broadly in everyday life, for example, as a library card or as a point card for private businesses.

The local resident registration code system, however, failed to achieve its broader goal. Because of strong opposition to it, the government could not allow for the wider use of the local resident registration code. The scope of available information through the network is strictly limited to a resident's name, birthdate, sex, address, and local resident registration code.[34] Its use is limited to the central government and local government. The purpose of its use is also limited to share identity information among government departments. And the local resident registration card, which could be used by local residents as proof of their identity for the government and private organizations, was not widely used. Such a small fraction of the public actually applied for the card[35] since it is almost useless to have one.

The government then came up with a proposal to use a national identification number system for broader tax and social security purposes. This proposal eventually led to the introduction of the "my number" system.

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32. *Id.* art. 30(6)-(7). The municipal government transmits this identification information to the prefectural government using the independent computer network and the prefectural government then sends it to J-LIS. The other local governments and the central government agencies can ask J-LIS to provide the identification information of residents in order to perform the listed duties. *Id.* art. 30(9)–30(12), apps. 1-4.

33. *Id.* art. 30-44, ¶ 1 (repealed). Once the "my number" system took effect, the local resident registration card was replaced by the "my number" card.

34. Local Resident Registration Act, *supra* note 4, art. 30-36. After the "my number" system took effect, "my number" was added to shared identification information. *Id.* art. 7, no. 8(2).

35. Four years after it was first implemented, only 1.4 million cards were issued by 2007. Jumin kihondaichō card nitsuite [On Local Residence Registration Card], MINISTRY OF INTERNAL AFF. & COMM., *available at* http://www.soumu.go.jp/main_sosiki/jichi_gyousei/c-gyousei/daityo/old/pdf/070718_1_s11.pdf (last visited Sept. 21, 2019). That is slightly over 1% of the entire population of Japan.

III. THE "MY NUMBER" SYSTEM

A. *"My Number"*

1. *Allocation of "My Number"*

"My number," officially an "individual number," is a twelve-digit number[36] created based on the local resident registration code provided by the municipal head to identify a resident and allocated to each resident by the J-LIS.[37] All transmissions between the municipal heads and the J-LIS need to use an independent and separate "Information Providing Network System,"[38] in other words an independent computer network, not the internet. The municipal head is mandated to notify this number to each resident by a "notification card," listing the resident's name, address, birthdate, sex, individual number, and other information.[39] The government started the distribution of "my number" in October 2015. It was decided to be used from January 1, 2016.

The purpose of allocating this "my number" to all residents is claimed as primarily to secure fair taxation and fair provision of social security benefits.[40] Therefore, it was anticipated from the beginning that "my number" would be used to ensure residents pay income tax according to their actual income and to prevent residents from concealing their income to fraudulently claim government benefits such as welfare benefits. However, apparently promotion of effective and efficient information management in the government is also a primary goal and

36. The twelve-digit number consists of an original eleven-digit identification number plus one check digit. My Number Act, *supra* note 1, art. 8, ¶ 2; Gyousei tetsuduki niokeru tokutei no kojin wo shikibetsu surutameno bangō no riyoutō nikansuru hōritsu sekourei [Cabinet Order to Enforce the Act on the Use of Number to Identify the Particular Individual for the Purpose of Administrative Procedure], Cabinet Order No. 155 of 2014, art. 8 (Japan).

37. My Number Act, *supra* note 1, art. 2 ¶ 5, & art. 7. The "individual number" will be provided by J-LIS, when the municipal head sent the local resident registration code of resident. *Id.* art. 8, ¶ 1. It needs to be created by converting the local resident registration code, needs to be unique to a particular resident, and needs to have a non-regularity to prevent reconversion back into local resident registration code. *Id.* art. 8, ¶ 2. Since the local resident registration code is only allocated to registered residents of Japan, regardless of nationality, Japanese citizens living abroad without a local resident registration are not granted a local resident registration code or "my number" as well. On the other hand, so long as foreigners are living in Japan and are registered on the local resident registration, they are also assigned their "my numbers."

38. *Id.* art. 2, ¶ 14.

39. *Id.* art. 7, ¶ 1.

40. My Number Act, *supra* note 1, art. 1.

therefore it was anticipated that "my number" would be used in much broader contexts inside the government.[41]

"My number," once assigned, cannot be altered and every resident is supposed to use the same "my number" for life. A resident's "my number" can only be changed upon application or ex officio when it is leaked or stolen and could be abused.[42] Once a resident receives the notification card, the resident needs to present that notification card if the resident moves to another municipality and submits a move-in form to that municipal government.[43] The individual must present the notification card when there is any change to the information recorded[44] and notify the heads of the municipality if it is lost.[45] Furthermore, residents should use "my number" every time its use is authorized by the statute for performing government jobs.

2. "My Number" Card

Residents can apply for the "my number" card,[46] officially an individual number card, and can use this card instead of the notification card to move-in.[47] Thereafter, the resident needs to submit the card for revision within 14 days every time there is a change in the information recorded in the "my number" card.[48]

The "my number" card displays the resident's name, address, birthdate, sex, and photo, as well as the assigned number on the back.[49] The card also contains an IC chip, which includes the same information as electronic data and functions as an electronic identity verification certificate.[50] The card is free. The "my number" card can be used as verification when the card is presented to a government agency, local gov-

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41. As a result, the compilation of disaster victims in time of disaster was also allowed to use "my number." *Id.* app. 1, no. 36-2. The Japanese government came to argue that the disaster response is one of the primary purposes of the use of "my number," although the statute only mentions to the purpose of fair taxation and fair provision of social security benefits. My Number Seido [My Number System], MINISTRY OF INTERNAL AFF. & COMM., *available at* http://www.soumu.go.jp/kojinbango_card/01.html (last visited Sept. 21, 2019).

42. My Number Act, *supra* note 1, art. 7, ¶ 2.

43. *Id.* art. 7, ¶ 4.

44. *Id.* art 7, ¶ 5.

45. *Id.* art. 7, ¶ 6.

46. *Id.* art. 17, ¶ 1. When the resident receives the "my number" card, the resident must return the notification card.

47. My Number Act, *supra* note 1, art. 17, ¶ 2.

48. *Id.* art. 17, ¶ 4.

49. *Id.* art. 2, ¶ 7.

50. *Id.* The card must have security necessary measures to prevent unauthorized access and revision.

ernment, independent administrative organization, and others who need to verify the identity of the person.[51]

When you present the "my number" card for tax and social security benefit, it will verify your "my number" and also verify your identity. As will be explained below, the government intends to allow more extended use of this "my number" card in the future. It could be integrated into a driver's license. It could be used at home to log into the "my number portal" using special card-readers and the electronic verification information included in the IC-chip could function as an electronic verification system.[52] Then, the resident will be able to apply for various government services online. It could be used as an identification card for the government[53] and for private corporations and could be integrated into bank debit card or credit card as well.[54]

3. Use of "My Number"

According to article 9, paragraph 1, of the *My Number Act*, government agencies, local governments, and independent administrative organizations listed in the appendix 1 can use "my number" of residents in relation to administration of their duties as listed in the same appendix to the extent necessary in order efficiently to search and manage personal information contained in the "designated personal information files," which contains "my number."[55] For example, the head of the National Tax Agency is authorized to use "my number" in order to decide the amount of tax to be paid, the deduction and other tax matters under the national tax legislations.[56]

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51. *Id.* art. 18.

52. "My number portal" (often abbreviated as "myna portal") started its full operation in November 13, 2017. *See* Myna portal, *available at* https://myna.go.jp/SCK0101_01_001/SCK0101_01_001_InitDiscsys.form.

53. The government started integration of identification card for its public workers with their "my number" cards. Kantei Kokkakoumuin, *IC card no kojinbango card eno ittaika nitsuite*, Integration of IC Identification Card for Public Employees and My Number Card (Sept. 4, 2015), *available at* https://www.kantei.go.jp/jp/singi/it2/cio/dai63/siryou4.pdf. Some local government came to allow my number cards as a membership cards for their public libraries. *See* Jichitai point navi, *available at* https://www.point-navi.soumu.go.jp/pointnavi/summary/point.

54. *Id.* The government came to allow local government to convert the credit card point or air miles of airliners to municipal points to be used for paying the public fees, receiving shopping certificates, or buying the local souvenirs.

55. My Number Act, *supra* note 1, art. 9, ¶ 1, app. 1. "Designated personal information" is personal information, which contains individual number and "designated personal information file" is a personal information file, which contains individual number. *Id.* art. 2, nos. 8-9.

56. *Id.* app. 1, no. 38.

According to article 9, paragraph 2, heads of the local governments can also use "my number" if authorized by local bylaws for the purpose of the administration of their duties for distributing welfare benefits, social security benefits such as health care, medical treatment, and others, and for local taxation to the extent necessary in order efficiently to search and manage personal information contained in the designated personal information files, which contain individual number.[57]

These jobs performed in accordance to article 9, paragraph 1 and paragraph 2 are defined as "jobs using individual number" and the agency or person who is performing these jobs is defined as "an executor of the job using individual number."[58] In addition, according to article 9, paragraph 3, persons who are mandated or authorized to submit documents using "my number" of residents to an administrative agency, local government, or independent administrative organization or to their heads of the local government listed in the appendix 1 for the purpose of national health insurance, inheritance tax, welfare pension insurance, income tax, unemployment insurance, and others can also use "my number" to the extent necessary to perform their jobs.[59]

These jobs performed in accordance with this provision are defined as "jobs that are related to individual number" and the organization or individual who is performing this job is defined as an "executor of the job that is related to individual number."[60] This provision mostly mandates private individuals and corporations to collect and use "my number" in the documents to be submitted to administrative agencies.

Those authorized to use "my number" can ask individuals whom "my number" belongs to, or others who are authorized to use "my number", to provide "my number."[61] No one is allowed to ask for the provisions of "my number" other than those who are authorized to receive "my number" information in accordance with the provisions outlined in the Act.[62] Those who are authorized to receive "my number" need to adopt necessary measures to verify the "my number" card or notification card and the identity of the person who submitted these cards.[63]

57. *Id.* art. 9, ¶ 2.

58. *Id.* art. 2, ¶¶ 10, 12.

59. My Number Act, *supra* note 1, art. 9, ¶ 3.

60. *Id.* art. 2, ¶ ¶ 11, 13.

61. *Id.* art. 14, ¶ 1.

62. *Id.* art. 15.

63. *Id.* art. 16. When the person providing "my number" brought notification card for identity verification, it is necessary to check the other proof of identity such as driver's license but when a person providing "my number" brought "my number" card, the card will function as the identity verification.

They also have an obligation to adopt sufficient security measures.[64] They can delegate the whole or part of those jobs to others and those who are authorized can also use "my number."[65] However, they need to enforce necessary and appropriate supervision over those who are delegated these jobs.[66]

Thus, residents are asked to produce "my number" to government agents or their local government in order to change their name, address, to file a tax return or apply for child benefits, entrance of children into kindergarten, medical booklets for pregnant mother, disability care, disability benefits, welfare, joining the national health insurance system, and receiving health benefits or special senior health benefits, all with respect to registration and identification, tax and social security benefits.[67] Additionally, the *My Number Act* mandated residents to provide "my number" to private corporations. For example, private companies paying salaries to their employees need to deduct income tax and social security premiums from the payroll, pay the deducted tax and deducted social security premiums to relevant agencies,[68] and then issue the necessary documents which requires that they know the "my number" of each employee. They will also need to collect the "my number" of the spouse of the employee as well.[69] They will ask each employee to noti-

64. My Number Act, *supra* note 1, art. 12.

65. *Id.* art. 9, ¶¶ 1-3. Those who received delegation can re-delegate those jobs to others only when they are authorized by delegating agency. *Id.* art. 10, ¶ 1.

66. *Id.* art. 11.

67. May number no teikyou wo motomerareru omona case [When the Residents Are Asked to Produce "My Number"], MINISTRY OF INTERNAL AFF. & COMM., *available at* https://www.cao.go.jp/bangouseido/pdf/qa_case.pdf.

68. Shotokuzeihō [Income Tax Act], Law No. 33 of 1965, art. 183, ¶ 1; National Pension Act, *supra* note 26, art. 95; Kenko hokenhō [Health Insurance Act], Law No. 70 of 1922, art. 155, ¶ 1 & art. 167.

69. For the employer to deduct tax, they need to calculate the tax break for the spouse along with the submission of spousal declaration with the "my number" of dependent spouse from the employees. *See* Income Tax Act, *supra* note 69, art. 185, ¶ 1. The employee needs to provide the "my number" of the employee's spouse to the employer as "executor of job that is related to individual number." The employer is not mandated to verify the identity of the spouse in this case. On the other hand, the dependent spouse can claim special treatment as a spouse for the National Pension system. The employer is then mandated to submit the document verifying the dependent status of the spouse to the National Pension agency. National Pension Act, *supra* note 26, art. 94-96. In order to submit this document, the employer needs to collect the "my number" of the spouse of the employee and in this case the employee will act as a representative for his or her spouse and submit the document to employer (he or she needs to be appointed as a representative. The employer then needs to verify the identity of the spouse. The duty of the employer is to check "my number" and the identity of the "my number" holder which could be different depending upon on how the employer collects "my number." My number Q&A, CABINET SECRETARIAT (内閣官房 -

fy their "my number" as well as the employee's spouse's "my number" and then verify the number and identity of the person who submitted the number. Security companies, insurance companies and others also need to use "my number" to issue payment record to be submitted to the tax agency.[70] As a result, a huge number of private corporations have now come to use "my number" of their employees, customers, and others and the residents are asked to produce "my number" to these private corporations.

B. The 2015 Amendment and the Future Plan

1. 2015 Amendment

In 2015, just prior to the start of using "my number," the *My Number Act* was amended and the scope of use of "my number" was expanded.[71] Most importantly, the amendment mandates banks to manage savings accounts using "my number" from January 1, 2018.[72] As a re-

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NAIKAKU KANBŌ, *available at* https://www.cao.go.jp/bangouseido/faq/faq4.html#q4-3-9. (last visited Sept. 15, 2019).

70. *See* Income Tax Act, *supra* note 68, art. 224 (dividend), art. 223 (payment for the sale of stocks), art. 225, ¶ 1 no. 4 (life insurance payment), art. 225, ¶ 1, no. 5 (property damage insurance payment); *see also* MINISTRY OF INTERNAL AFF. & COMM., *supra* note 67. It became mandatory to provide my number to security companies to open an account from January 1, 2016. The security companies are mandated to collect my number from their customers by the end of 2018. *Japan securities industry supports SDGs!*, JAPAN SEC. DEALERS ASS'N, *available at* http://www.jsda.or.jp/sonaeru/oshirase/kojinbangou.html. (last visited Sept. 16, 2019). Since 2019, the security companies might be prevented from paying dividend or sale of securities without submission of my numbers. Eventually, however, the government decided to postpone the deadline of submission of "my number" for another three years. *See Outline of Tax System Reform*, MINISTRY OF FIN. (Dec. 21, 2018), *available at* https://www.mof.go.jp/tax_policy/tax_reform/outline/fy2019/20181221taikou.pdf. (last visited Sept. 16, 2019). For information pertaining to banks, *see infra* note 72.

71. Kojin jouhō no hogo nikansuru hōritsu oyobi gyousei tetsuduki niokeru tokutei no kojin wo shikibetsusuru tame no bango no riyoutō nikansuru hōritsu no ichibu wo kaiseisuru hōritsu [Act to Amend the Administrative Personal Information Act and My Number Act], Law No. 65 of 2015 (Japan).

72. *Id.* (adding app. 1, no. 55-2). The 2015 amendment allowed the Deposit Insurance Corporation of Japan, agency handling pay-off system of banks, a system to guarantee savings in the savings account up to the certain limits in case banks lost money and could not pay back all the saved money, to use "my number," thus forcing banks to collect "my number" in order for the savings to be covered by the pay-off system. It thus allowed the use of "my number" beyond the purpose of securing fair taxation and fair provision of social security benefit. But at the same time, the 2015 amendment also revised the National Tax General Principle Act and mandated banks to manage their account using "my number" of customers, thus making it easier to execute tax investigation. *See* Kokuzei tsusokuhō [National Tax General Principle Act], Law No. 66 of 1962, art. 74-13-2. It also revised the National Pension Act to allow Health, Welfare and Labor Minister to ask banks on the financial situation of the insured by using "my number." National Pension Act, *supra* note 26, art. 108. To

sult, in order to open a new saving account at a bank, the customer is asked to notify the bank of his or her "my number."

Previously, it was mandatory to notify "my number" to banks in order to invest, to use special tax-free saving account for disabled person or to transfer money internationally,[73] but there was no need to notify it to banks in order to open or use savings accounts. Interest is taxable but since it was taxed separately by a flat rate and is paid by paying banks, there was no need to issue a payment slip and there was thus no need to assign a particular number to a bank savings account. Now, however, the banks are mandated to use "my number" to manage saving account, indicating much broader use of "my number" in private corporations.

The 2015 amendment does not mandate banks to collect "my number" for all pre-existing bank accounts right away. It is estimated that there are more than one billion bank accounts in Japan, including those with Japan Post Corporation, for a total population of just 120 million.[74] It was too difficult to immediately mandate to collect "my number" for all pre-existing accounts. However, banks are required to use my number by the end of 2018. Although there is still nothing to compel the customers to submit their "my numbers" for saving accounts, eventually the government might compel them to submit their "my numbers".

The national pension administration is allowed to use "my number" for managing pension.[75] However, after all the scandals involving administration of the national pension system discussed below,[76] the government decided to postpone the application of "my number" to the national pension administration.[77] It became possible for the Japan Pen-

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that extent, this amendment allowed tax agency and social security agency to get access to bank record using "my number" to check the financial situation of the resident. But still there is nothing to compel the customers to submit their "my numbers" to banks.

73. Income Tax Act, *supra* note 68, art. 224 (dividend payment slip); Shotokuzeihō sekourei [Cabinet Order to Enforce the Income Tax Act], Cabinet Order No. 96 of 1965, art. 34 (tax-free account declaration document); Naikokuzei no tekisei na kazei no kakuho wo hakarutame no kokugai soukintō ni kakawaru chōsho no teishutsutō nikansuru hōritsu [Act concerning the Submission of Document on International Money Transfer in order to Secure the Proper Taxation of Domestic Tax], Law No. 110 of 1997, art. 3 (international money transfer document) (Japan).

74. *Yokin kouza nimo my number: Ginko gyoukai akumu sairaika [My Number Will be Applied to Bank Accounts: Nightmare Again for Banking Industry?*, J-CAST NEWS (Apr. 21, 2014), *available at* https://www.j-cast.com/.

75. My Number Act, *supra* note 1, app. 1, no. 31.

76. *Infra* notes 101-03.

77. My Number Act, *supra* note 1, addendum art. 3-2 (revised by the 2015 amendment).

sion Service to use "my number" from January 1, 2017, and as of March 5, 2018, customers can use "my numbers" to file various applications and change registration instead of the basic national pension number.[78] Still, national pension number has not been replaced by "my number."

When the Japan Pension Service started to use "my number," the initial goal was to secure fair taxation and fair provision of social security benefits. The government further anticipates a much broader use of "my number" in the future.[79] When "my number" becomes broadly used by government agencies, we can anticipate that private organizations will be authorized to use "my number" for documents to be submitted to these government agencies and that the public will be more frequently forced to provide "my number" to these private organizations as well.[80]

Moreover, the government plans to allow the use of the "my number" card far more broadly in daily life. For instance, the roadmap prepared by the government plans to use the "my number" card as an identification card for public employees.[81] It will also allow private companies to accept "my number" cards as identification cards, as a way to verify the identity of the buyer of an event ticket, for a mobile phone contract, or to challenge entrance examinations for colleges.[82] Further, it plans to allow the integration of the "my number" card with other government-issued cards, such as driver's licenses, national health insurance certificates, and professional licenses such as medical licenses and teachers' licenses. It will also extend to be included with other pri-

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78. Gyosei tetsuduki niokeru tokuteino kojin wo shikibetsu surutameno bango no riyotō nikansuru hōritsu husoku dai3jou no 2 no seireide sadameru hi wo sadameru seirei [Cabinet Order to Provide for the Date Anticipated by Addendum 3-2 of the My Number Act], Cabinet Order No. 347 of 2016 (Japan); Japan Pension Service, Nihon nenkin kikō niokeru my number eno taioou [Response to the Introduction of My Number of the Japan Pension Service] (Japan), *available at* https://www.nenkin.go.jp/mynumber/kikoumy number/1224.html (last visited Sept. 12, 2019).

79. The original Act also intended for "my number" to be used during the times of disaster. My Number System, *supra* note 41. The 2015 amendment also allowed "my numbers" to be used to provide advice for medical check-ups and to share immunization records among local governments. My Number Act, *supra* note 1, revising app. 1, no. 2 & no. 10.

80. The national health insurance is also added as a job to use "my number." My Number Act, *supra* note 1, app. 1, no. 30. Thus, the use of "my number" is mandated for the purpose of national health insurance administration, such as enrollment on the national health insurance system, from January 2016.

81. *My number seido rikatsuyou suishin roadmap* [*Roadmap to Facilitate Wider Use of My Number System*], *available at* https://www.kantei.go.jp/jp/singi/it2/senmon_ bunka/number/dai9/siryou6.pdf.

82. *Id.*

vately issued cards, such as retail point cards or medical clinic cards, and even as debit cards or credit cards.[83]

The "my number" card can be used to log into the "my number portal" online using a special card reader to ascertain the procedures taken by using "my number" and to check the information sent from the government, to function as a one-stop site to take all the procedures when the user asks for help from local government for raising a child, or even to file a tax return.[84] The government also plans to work with mobile phone companies and app developers to develop special "my number" apps that can be used on smartphones.[85] "My number" and "my number card" could be used as a key to access all sorts of government and private services in the future

IV. NATIONAL IDENTIFICATION NUMBER SYSTEM AND THE RIGHT TO PRIVACY

A. Right to Privacy

1. The Right to Be Let Alone

The Constitution of Japan, enacted in 1946, has a bill of rights, but there is no provision that specifically protects the right to privacy. The right to privacy was first proposed in the United States as a tort right to be protected from the publication of private information by mass media as a "right to be let alone".[86] Thereafter, the right to privacy came to be accepted in many states by court holdings or by statutes.[87] Nevertheless, the right to privacy used to be viewed as a tort right.

83. *Id.*

84. *My Number, Myna portal towa* [*What is Myna Portal?*] CABINET SECRETARIAT, *available at* https://www.cao.go.jp/bangouseido/myna/index.html (last visited Sept. 12, 2019).

85. Roadmap, *supra* note 81, at 19. An application for "my number" can be now filed through my smartphone. *See Individual Number* Card, JAPAN AGENCY FOR LOC. AUTH. INFO. SYS., *available at* https://www.kojinbango-card.go.jp/kofushinse-smartphone/ (last visited Sep 16, 2019). Experimentation of identification using "my number" through a smartphone has been conducted and it looks like it should be ready in time for the Tokyo Olympics in 2020. *See You can enter your phone number on your iPhone to confirm your identity with a smartphone such as the Tokyo Olympics*, SANKEIBIZ, *available at* https://www.sankeibiz.jp/macro/news/170329/mca1703290500003-n1.htm (last visited Sept. 13, 2019).

86. Samuel Warren & Louis Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

87. JOHN T. SOMA, STEPHEN D. RYNERSON & ERICA KITAEV, PRIVACY LAW IN A NUTSHELL 31-32 (2nd ed. West 2010); *see also* Harry Kalven, Jr., *The Right of Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEM. PROBS. 326 (1966).

However, the right to privacy came to embrace not only a right to be protected from publication of private information, but also from intrusion or collection of private information.[88] With the invention of computer technology and with the increased possibility of collecting, using, and disclosing a huge amount of personal information about individuals using the computer technology, a gradually increasing number of commentators came to perceive the right to privacy as a right to control one's own personal information.[89] It is a right to control the collection or gathering of personal information, use and storage or management of personal information, and disclosure or publication of personal information.[90]

In Japan, the courts have accepted the right to privacy, to be protected from publication of private information, as a tort.[91] The Supreme Court of Japan also made this right enforceable against the government for its reckless disclosure of private information.[92] Moreover, it held that the provision of personal information to third parties, even to the police, without consent could also be illegal as a tort.[93]

2. Constitutional Right to Information Privacy

With the increased use of computers by the government, an increasing number of commentators came to accept the right to privacy, not just as a tort right, but also as a constitutional right to be protected against government infringement. The United States Supreme Court intimated that it would acknowledge the right to privacy as a constitutional right, but so far, the privacy seems limited to an autonomous right to decide one's personal affairs.[94] Although the United States Supreme

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88. William L. Prosser, *Privacy,* 48 CAL. L. REV. 383 (1960); *see also* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,* 39 N.Y.U. L. REV. 962 (1964).

89. *See* ALAN WESTIN, PRIVACY AND FREEDOM 7 (1967); *see also* Charles Fried, *Privacy,* 77 YALE L. J. 475, 482 (1968).

90. *See* DANIEL J. SOLOVE, UNDERSTANDING PRIVACY (2008); *see also* William J. Fenrich, *Common Law Protection of Individuals' Rights in Personal Information,* 65 FORDHAM L. REV. 951, 955 (1996).

91. Saikō Saibansho [Sup. Ct.], Feb. 8, 1994, 1989 (O) 1649, 48 Saikō Saibansho Hanreishu Minju [Minshū] 149 (Japan); Saikō Saibansho [Sup. Ct.], June 28, 2001, 1999 (Ju) 922, 55 Saikō Saibansho Hanreishu Minju [Minshū] 837 (Japan).

92. Saikō Saibansho [Sup. Ct.] Jan. 31, 2017, 2016 (Kyo) 45, 71 Saikō Saibansho Hanreishu Minju [Minshū] 149 (Japan).

93. Saikō Saibansho [Sup. Ct.] Sept. 12, 2003, 2002 (Ju) 1656, 57:8 Saikō Saibansho Hanreishu Minju [Minshū] 973 (Japan).

94. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); *see also* SOMA ET AL, *supra* note 87, at 21; *see also* Louis Henkin, *Privacy and Autonomy,* 74 COLUM. L. REV. 1410 (1974).

Court has suggested that it might be willing to grant constitutional protection towards the "right to information privacy",[95] it is still unclear whether one has a constitutional right to control and protect personal information against the government.[96]

Most commentators in Japan, however, have come to interpret the "right to life, liberty and pursuit of happiness," guaranteed in Article 13 of the *Constitution of Japan,* to include some sorts of unenumerated freedom as a constitutional right.[97] They would grant constitutional protection to freedom, which is essential for the development of personal integrity, in contrast to other non-essential freedoms. Article 13 thus functions just like the Ninth Amendment or like the Due Process Clause of the Fourteenth Amendment in the United States. Moreover, most commentators agree that the right to informational privacy should be included in the right to life, liberty and pursuit of happiness.[98]

These commentators define the right to information privacy as a right to control one's own personal information.[99] Accordingly, any government use of personal information, beyond the purpose of collection or gathering authorized by a statute, without justification could also be challenged as an invasion of the constitutional right to privacy. Any disclosure or publication of personal information without justification could similarly be an invasion of the constitutional right to privacy. What is important is that individuals can claim constitutional infringement of the right to privacy and challenge the constitutionality of the authorizing statute.

Moreover, the right to privacy mandates that the government must secure the personal information collected or gathered. If a government

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95. *See* Whalen v. Roe, 429 U.S. 589 (1977) (suggesting that the constitutionally protected "zone of privacy" extends to the "individual interest in avoiding disclosure of personal matters").

96. NASA v. Nelson, 562 U.S. 134 (2011) (even assuming that the U.S. Constitution does in fact guarantee a right to information privacy, the federal law requiring background checks of private contract employees does not violate that privacy right). Fred H. Cate & Robert Litan, *Constitutional Issues in Informational Privacy,* 9 MICH. TELECOMM. & TECH. L. REV. 35 (2002); Russell T. Gorkin, *The Constitutional Right to Informational Privacy: NASA v. Nelson,* 6 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1 (2010). Many argue for the acceptance of the constitutional right to information privacy. Michael J.O'Donnell, *Reading for Terrorism: Section 215 of the USA Patriot Act and the Constitutional Right to Informational Privacy,* 31 J. OF LEGIS. 45, 48 (2005).

97. NOBUYOSHI ASHIBE (SUPPLANTED BY KAZUYUKI TAKAHASHI), KENPŌ [CONSTITUTIONAL LAW] 119 (6th ed. Iwanami Shoten 2015); KOJI SATO, NIHONKOKU KENPŌRON [JAPANESE CONSTITUTION] 176 (Seibundo 2011).

98. ASHIBE, *supra* note 97, at 123; SATO, *supra* note 97, at 181.

99. ASHIBE, *supra* note 97, at 123; SATO, *supra* note 97, at 182.

employee recklessly leaks personal information, then that leak is a tort, and the victim can recover damages from the government. When a statute authorizing collection, gathering, or use of personal information lacks sufficient security measures, then the authorizing statute itself could be challenged as unconstitutional.

The Supreme Court of Japan has not accepted all of these arguments yet. The Supreme Court of Japan acknowledged that the collection and gathering of individuals' personal information without justification is an infringement of the right to private life protected by article 13 of the Constitution.[100] It has not squarely held, however, that the unreasonable use of personal information beyond the purpose of collection or unreasonable disclosure or publication is an unconstitutional infringement of the right to privacy. It has also not squarely held that the collection and use of personal information without sufficient security measures is a constitutional violation. In light of the understanding of the right to privacy in tort law, however, there is a good chance that the Supreme Court of Japan is willing to accept all of these as infringements of the constitutional right to privacy.

B. National Identification Number System and the Challenge to the Right to Privacy

1. Problems Raised by the National Identification Number System

The use of the national identification number system raises a very significant challenge to the constitutional right to privacy. The risk will surely be far greater if the government establishes a comprehensive database containing personal information about all residents and uses national identification numbers to retrieve all personal information from that central database. However, even if the government decides to use the national identification number system without establishing a national database, the use of the national identification number system raises very serious questions because, by using national identification numbers, it becomes easy to collect all sorts of personal information about a particular individual. There is a real risk that the government could abuse its power and use the personal information collected for other purposes or for data matching. There is also a serious risk that, if abused or leaked, the national identification numbers will allow hackers to access and steal all sorts of personal information from the government.

100. Saikō Saibansho [Sup. Ct.] Dec. 15, 1995, 1990 (A) 848, 49 SAIKŌ SAIBANSHO KEIJI HANREISHŪ 82 (Japan).

Moreover, allowing or mandating the use of national identification number by private organizations or private persons will allow a huge number of persons to get access to that number of the other person and allow them to fraudulently use it. In short, there is a realistic risk of identity theft. Moreover, if leaked, there is a risk that "my number" can be used by database companies to secretly construct the private data banks of residents, making it possible to retrieve all private personal information using "my number".

This risk is not merely fictional: by now the public knows about the improper information management inside the national pension administration. In 2005, Social Security Agency employees, who are not directly in charge of dealing with pension information, obtained access to the pension information of other residents in violation of the Agency's policy and more than 3,000 employees were disciplined.[101] In 2007, with the introduction of the basic pension identification number system, the Agency disclosed that there are more than 50 million pension records that cannot be connected with a basic pension identification number and that it lost at least fifty-five pension records.[102] Moreover, after the Agency was transformed into a new administrative agency, the Pension Administration was hacked and more than 1.25 million pension records were leaked in 2015.[103] The public evidently has a legitimate concern about the security of personal information when that information can be traced using the national identification numbers.

The Public Workers Act mandated that government workers keep government secrets confidential.[104] *The Act on Protection of Personal Information Held by Administrative Organs*[105] restricts the collection, use, and management of personal information inside administrative agencies. Basically, government agencies are allowed to hold the per-

101. *Naiki ihan no zusan kanri: 55 manken password setteisezu [Sloppy Information Management in Violation of Internal Policy: More Than 55,000 Records Left Unprotected by Password]*, SANKEI NEWS (June 1, 2015) *available at* http://www.sankei.com/affairs/news/150601/afr1506010046-n1.html (last visited Sept. 13, 2019).

102. Higuchi Osamu, *Nenkin kiroku mondai no kei to kadai [History of the Pension Records Issue and the Future Agenda]*, 654 CHOSA TO JOUHOU 1 (2009). There were also 6,900 improperly deleted records.

103. Kensho hokokusho [Review Report], MINISTRY OF HEALTH, WELFARE & LAB. (Aug. 21, 2015), *available at* http://www.mhlw.go.jp/kinkyu/dl/houdouhappyou_150821-02.pdf (last visited Sept. 14, 2019).

104. Kokka koumuinhō [National Public Workers Act], Law No. 120 of 1947, art. 100 (1). There is a similar restriction for local government workers as well. *See* Chihō koumuinhō [Local Government Workers Act], Law no. 261 of 1950, art. 34 (1).

105. Gyouseikikan no hoyu suru kojin jouhou no hogo ni kansuru hōritsu [Act on Protection of Personal Information Held by Administrative Organs], Law No. 58 of 2003.

sonal information of individuals only to the extent necessary to perform its job and needs to specify the purpose of the use and is prohibited from holding personal information beyond the necessary limit specified.[106] In order to collect personal information, it needs to disclose the purpose of the use.[107] The government agency is prohibited from using it or providing it for purposes other than specified and disclosed.[108] Of course, it is mandated to adopt appropriate measures to secure personal information from leaks or destruction.[109] All government workers who currently handle or used to handle personal information are also specifically prohibited from revealing to others personal information which he or she came to know, and from using it for other improper purposes.[110]

To enforce these restrictions, government workers who leak government secrets learned through their work face criminal liability.[111] The *Administrative Personal Information Protection Act* imposes criminal punishment on national government workers who provide personal information files containing individual secrets without justification,[112] or who abuse their powers and collect documents, pictures, or electronic records containing individual secrets for unauthorized use.[113]

It even imposed criminal punishment on those individuals who received disclosure of personal information by falsification or other im-

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106. *Id.* art. 3.

107. *Id.* art. 4.

108. *Id.* art. 8.

109. *Id.* art. 6.

110. Act on Protection of Personal Information Held by Administrative Organs, *supra* note 105, art. 7. There are similar restrictions for local government per its by-laws. There are also such restrictions on independent administrative organizations and their workers. Dokuritsu gyousei houjintō no hoyusuru kojin jouhou no hogo nikansuru hōritsu [Act on the Protection of Personal Information Held by Independent Administrative Organizations], Law No. 59 of 2003. The collection, use, and provision of personal information by private companies is regulated by the Kojin jouhou no hogo nikansuru hōritsu [Personal Information Protection Act], Law No. 57 of 2003.

111. *See* National Public Service Act, *supra* note 104, art. 109, no. 12 (imprisonment for not more than one year or fine for not more than one-half million JPY); *see also* Local Government Workers Act, *supra* note 104, art. 60, no. 2.

112. Act on the Protection of Personal Information Held by Administrative Organs, *supra* note 105, art. 53-54 (imprisonment for not more than two years or fine for not more than one million JPY). If the worker provided or stole personal information he or she came to know during his or her duty for the purpose of gaining improper advantage for oneself or others, the punishment is also imposed (imprisonment for not more than one year or fine for not more than one-half million JPY).

113. *Id.* art. 55 (imprisonment for not more than one year or fine for not more than one-half million JPY).

proper methods.[114] However, there is a serious concern regarding whether the restriction is sufficient enough. The sloppy record management practice and accessing of other people's pension records from inside the Social Security Agency was not prevented by the *Administrative Personal Information Protection Act.* Indeed, as will be discussed, there is no criminal punishment on government workers for unintentional leaks, failure to adopt sufficient security measures, losing or destroying personal information, or even peeping into personal information of others outside of their jobs.

2. Local Resident Registration Code System

Accordingly, the local resident registration code system had to introduce additional safeguards and limit the scope of use and shared identification information and local resident registration code. First, information needs to be transmitted by an independent computer network and not by the Internet.[115] Second, local residents are free to change their local residence registration code.[116] Third, the identification information shared is limited to a resident's name, birthdate, sex, address, local resident registration code and others[117] so that if leaked or revealed, it will not lead to a serious breach of privacy.

J-LIS is allowed to provide identification information other than the local resident code provided from a prefecture when it is requested from listed government administrative agencies with respect to listed administrative jobs.[118] There is also a similar restriction on the provision of identification information to other municipalities inside the same prefecture[119] as well as to other prefectures or municipalities in other prefectures.[120] Moreover, in order to secure private information, agencies that receive identification information through the network are banned from using or providing that information for other purposes.[121] Agencies are also mandated to adopt appropriate security measures for the received identification information.[122]

Government workers, local public workers, or J-LIS workers who handle shared identification information using computers are specifical-

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114. *Id.* art. 57 (monetary penalty for not more than 100,000 JPY).
115. Local Resident Registration Act, *supra* note 4, art. 30-6.
116. *See id.* art. 30-4, at ¶ 1.
117. *Id.* art. 7, ¶ i-xiv.
118. *Id.* art. 30-10.
119. *Id.* art. 30-10.
120. Local Resident Registration Act, *supra* note 4, art. 30-11.
121. *Id.* art. 30-29.
122. *Id.* art. 30-28.

ly prohibited from leaking confidential identification information they came to know during their works.[123] There is also a specific ban on local public officials who are handling or used to handle received shared identification information using computers from leaking any confidential identification information.[124]

The government officials cannot ask for local resident registration code unless specifically authorized.[125] No one outside of the government is also allowed to ask for local resident registration code.[126] Apparently, the use of local resident registration code is restricted to government officials.

The *Local Resident Registration Act* imposed additional criminal penalty against violation of these confidentiality obligations of public workers.[127] Anyone who requested the disclosure of identification information from the prefecture or from J-LIS using falsification or improper method will be also punished.[128]

Additionally, J-LIS is subject to all sorts of safeguards against improper use or leaks. Ultimately, the Internal Affairs and Communication Minister (Minister) had also supervisory power over the organization.[129] The prefecture governors are mandated to adopt appropriate measures to secure the operation.[130] Each prefecture is also mandated to establish a personal information protection council to supervise the handling of identification information within the prefecture.[131] Therefore, the government claimed that there are sufficient security measures adopted to protect the privacy of residents.

3. Local Resident Registration Network and the Supreme Court of Japan

Nevertheless, many still opposed the network. Some municipal governments were reluctant to connect their servers to the central server

123. *Id.* art. 30-26.

124. Jumin kihondaichohō [Local Resident Registration Act], Law No. 81 of 1967, art. 30-31.

125. *Id.* art. 30-37.

126. *Id.* art. 30-38.

127. *Id.* art. 42 (imprisonment for not more than two years or fine for not more than 1 million JPY).

128. *Id.* art. 52 (stating monetary penalty for not more than 100,000 JPY).

129. Jumin kihondaichohō [Local Resident Registration Act], art. 30-19.

130. *Id.* art. 30-22; *id.* art. 30-23. Moreover, J-LIS is tightly regulated by the statute. *Id.* art. 30-24, ¶ 2 (stating necessity of securing information); *id.* art. 30-25, ¶ 2 (stating ban on use for other purposes); *id.* art. 30-31, ¶ 3 (stating confidentiality obligation of workers).

131. *Id.* at 30-15.

using the local resident registration network.[132] Many citizens also filed suits challenging the constitutionality of the use of the local resident registration code.

Eventually, the Supreme Court of Japan rejected the constitutional challenge.[133] In this particular case, local residents sought an injunction asking the defendant, municipal governments, to delete their local resident registration codes, alleging that the introduction of the local resident code network was an unconstitutional infringement of the personality right, including the right to privacy protected by Article 13 of the Constitution.[134] Although the High Court accepted the plaintiffs' argument and granted the injunction, the Supreme Court disagreed.

The Supreme Court admitted that Article 13 of the Constitution protects one's private life, including the right to be protected from unreasonable disclosure or publication of private personal information to third parties.[135] However, the identification information consists only of the person's name, birthdate, sex, and address, plus his or her local residence registration code, and others. The Supreme Court believed that these pieces of information are usually used for identification purposes. Such information can be also used by government agencies for identification purposes as long as it is permitted by statute. The information is not thus sensitive.[136] The local resident registration code is also a random number and does not change this basic characteristic of the other identification information.[137]

The Supreme Court found that the management and use of identification information by the local resident registration network serves a legitimate government purpose of improving local services and administrative efficiency.[138] Moreover, it found that there is no concrete risk that the identification information would be disclosed or published without a statutory ground or legitimate administrative purpose. There

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132. Juuki net no katsuyo joukyo to juuki net husetsuzokudantai nitaisuru zesei no youkyu nitsuite [On the Current Use of Local Resident Registration Network and Request against Local Government to Comply with the Network] (Oct. 15, 2009), *available at* http://www.soumu.go.jp/main_content/000042074.pdf (last visited Sept. 16, 2019) (stating Yamatsuri Town and Kunitachi City were refusing to connect). All municipalities ended up using the local residence code network.

133. Saikō Saibansho [Sup Ct], Mar. 6, 2008, 62 no. 3 SAIKŌ SAIBANSHO HANREISHU MINJI [MINSHU] 665 (Japan).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Saikō Saibansho [Sup. Ct.] Mar. 06, 2008, 2007 (O) 403, Saikō Saibansho Minji Harnreishū [Minshū] (Japan).

is also no concrete risk of hacking and improper access from outside; any improper use or leak of identification information by the recipient is subject to disciplinary action as well as punishment; and an identification information protection council needs to be established in all prefectures and the similar measures needed to be adopted in designated organization (later J-LIS) once established to deal with local resident registration and identification information.[139] As a result, the Supreme Court concluded that the management and use of identification information by the local resident registration network does not infringe upon the plaintiffs' right to privacy.[140] It was a unanimous judgment of the First Petty Bench.

Nevertheless, all the reluctance and objections to the local resident registration code and the local resident registration network manifestly showed the difficulty of introducing a national identification number system and the unwillingness or reluctance of the public to accept such a system.

V. "MY NUMBER" SYSTEM AND THE RIGHT TO PRIVACY

A. The Security Measures Adopted in the My Number Act

The *My Number Act* carries security measures similar to those introduced for the local resident registration code. The same kinds of restriction are applicable to administrative agencies in the central government, which handle "my number," under the *National Public Workers Act* and *Administrative Personal Information Protection Act.*[141] Moreover, the *My Number Act* basically stipulated that these agencies could use "my number" only when it is necessary to search for personal information in their personal information files to the extent necessary and use it only with respect to specifically listed duties.[142]

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139. *Id.*

140. *Id.*

141. *See* Kokka koumuinhō [National Public Workers Act], Law No. 120 of 1947, art. 100, ¶ 1 (Japan); Gyouseikikan no hoyu suru kojin jouhou no hogo ni kansuru hōritsu [Act on Protection of Personal Information Held by Administrative Agency], Law No. 58 of 2003, art. 3-7 (Japan); Dokuritsu gyousei houjintō no hoyusuru kojin jouhou no hogo nikansuru hōritsu [Act on Protection of Personal Information Held by Independent Administrative Organizations], Law No. 59 of 2003.

142. *See* Gyousei tetsuduki niokeru tokutei no kojin wo shikibetsu surutameno bangō no riyoutō nikansuru hōritsu [Act on the Use of Number to Identify the Particular Individual for the Purpose of Administrative Procedure], Law No. 27 of 2013, art. 9, ¶ ¶ 1-2, app. 1, no. 8-9, 38 (Japan).

The *My Number Act* also mandates private individuals and corporations use "my number" of residents for documents to be submitted to administrative agencies and local governments. However, the persons in charge who use "my number" are authorized to use them only to the extent necessary to perform their duties.[143] They are mandated to adopt necessary measures to prevent leaks, loss, or destruction of "my number.[144] They can delegate these tasks to third parties, but they have an obligation to supervise the delegate third party to secure the safety and security of personal information that contains "my number." [145] They can ask "my number" from individuals only if it is necessary to perform their duties.[146] Other persons are prohibited from asking for the provision of "my number" from other persons.[147]

Moreover, there is a restriction on the provision of designated personal information, which contains "my number." Basically, no one is allowed to provide designated personal information, which contains "my number," except in the circumstances listed in the *My Number Act*.[148] One of the circumstances when the provision of designated personal information, which contains "my number," is allowed is when the executor of the job using "my number" is providing designated personal information, which contains "my number," to the person whom that personal information belongs to, his or her representatives or to the executor of the job relevant to "my number" to the extent necessary to execute the job using "my number."[149] Moreover, no one else is allowed to collect or store designated personal information that contains "my number."[150]

Also, the provision of personal information containing "my number" between the government agencies, local government and independent administrative organizations is accomplished by using specific "information provision network system" managed by the Minister.[151] It needs to use the telecommunication method, which would prevent the reconstruction of the content of information transmitted, such as encryption.[152] This network will allow the persons listed in the statute who

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143. *Id.* art. 2, ¶ 11, 13, app. 1.
144. *See* "My Number Act" *supra* note 1, art. 12.
145. *See id.* art. 11.
146. *See id.* art. 14, ¶1.
147. *See id.*
148. *See id.* art. 19.
149. "My Number Act" *supra* note 1, art. 19, no. 1.
150. *Id.* art. 20.
151. *Id.* art. 2, ¶ 14.
152. *Id.*

asked for designated personal information listed with respect to specific jobs listed from the persons listed to receive that designated personal information.[153] Specifically, when the person authorized to ask for designated personal information according to this provision, the Minister will notify the request to the person who holds that information using this information provision network system.[154]

Once the person receives the request from the Minister of Internal Affairs and Communications, then the person must provide the specific personal information to the individual who requested it.[155] If there is a request for specific personal information, the individual who requested it and the individual providing the information must record the request and any information provided in the computer's Information Providing Network System and save the record for the designated Cabinet Order.[156] The Minister, the person who requests the personal information, and the person who provides the information need to adopt security measures to data breaches,[157] and the people providing or requesting information for the Information Providing Network System must not leak or steal the confidential information they acquired during the information request period.[158]

Furthermore, the Specific Personal Information Protection Commission (SPIPC), established by the Act for the Establishment of the Cabinet Office, will publish the results of the assessment and seek public feedback prior to holding the designated personal information files,[159] regularly inspect the practices of government agencies and independent administrative organizations that hold designated personal information files.[160] SPIPC may provide the individuals and entities handling the personal information with any guidance necessary to ensure that they handle the information appropriately.[161]

If the SPIPC finds that an individual or entity violated a statute or regulation related to the proper way to handle Specific Personal Information, it may issue a recommendation to suspend the violating conduct and to take other measures to become compliant with the proper Specif-

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153. *Id.* art. 19, no. 7.
154. My Number Act, *supra* note 1, art. 21, ¶ 2.
155. *Id.* art. 22, ¶ 1.
156. *Id.* art. 23.
157. *Id.* art. 24.
158. *Id.* art. 25.
159. My Number Act, *supra* note 1, art. 27, ¶ 1.
160. *Id.* art. 31.
161. *Id.* art. 50.

ic Personal Information handling procedures.[162] If the person who is receiving the recommendation fails to accept it without legitimate reason, the PIPC could order the individual to take the recommended action within the specified period.[163]

The "my number" card can be used for identification by a private organization, however, private organizations are not allowed to collect "my number" displayed on the back side of the card or use it unless specifically authorized to.[164] They are thus precluded from making a photocopy or keeping a copy of the backside of the card. The "my number" card has an IC chip, but it does not by itself include any sensitive personal information. In order to use this card as an electronic verification certificate, one needs to insert the card into a special card reader and type in a password so that the reader can contact the main server and verify the identity of the cardholder. If it is stolen, there is certainly a possibility that it could be misused, but there will be room for criminal punishment for improper gathering of someone else's "my number."[165]

As a result, there is fairly good protection for personal information and "my number[s]." However, is the protection sufficient to meet the constitutional requirement?

B. Social Security Number and the Right to Privacy in the United States

In order to answer this question, it is helpful to see how other countries that have already introduced similar national identification number systems protect the national identification number. In comparison to Japan's "my number," the restrictions on the use of social security numbers in the United States are extremely limited.

Although the social security number was originally designed for use with social security programs, it has become a de facto national identification number in the United States.[166] The 1974 *Privacy Act*[167] restricts the government's use of private information, but it has too many loopholes and is poorly enforced.[168] There is no other federal

162. *Id.* art. 51, ¶ 1.

163. *Id.* art. 51, ¶ 2.

164. My Number Act, *supra* note 1, art. 6.

165. *See id.* art. 51, ¶¶ 1, 3; *see also infra* note 181.

166. Kathleen S. Swendiman & Emily M. Lanza, *The Social Security Number: Legal Developments Affecting Its Collection, Disclosure, and Confidentiality, Congressional Research Service*, CONG. RES. SERV. 1 (Feb. 4, 2014), *available at* https://www.hsdl.org/?view&did=750387 (last visited Sept. 18, 2019).

167. *See e.g.*, 5 U.S.C. § 552(a) (2019).

168. *See* Swendiman & Lanz, *supra* note 167, at 8.

statute effectively limiting the collection and use of social security numbers by administrative agencies.[169] There is also no restriction on the use of social security numbers by private organizations.[170] Congress has attempted to place limits on the private use of social security numbers, but so far its attempts have been unsuccessful. However, some states have enacted social security number privacy protection laws in the absence of federal laws aimed to protect the dispersion of social security numbers.[171] Yet, these state statutes are hardly sufficient to restrict wide use of social security numbers by private organizations. Although the social security number card is not equipped with an IC chip, it nevertheless displays the social security number, which could allow unauthorized persons to steal or misuse another individual's social security number. There is thus a legitimate concern with regard to the possibility of identity theft.

Since the right to information privacy in the United States is not clearly articulated, attempts to prevent the collection or use of social security numbers through the courts seem to have been unsuccessful so far.[172] Although there is a call for more effective restraints on the collection and use of social security numbers,[173] the constitutional arguments against them seem to have only limited persuasiveness.

C. Are the Security Measures for "My Number" Sufficient?

Surely, therefore, there is stronger protection to national identification numbers in Japan. Despite all the security measures for the "my number" system in Japan, however, the question of whether they are sufficient to protect the right to privacy can still be raised.

First, it needs to be emphasized that "my number" creates privacy. Although it is merely a random 12-digit number, no one can figure out from the number itself whose number it is, as each is uniquely assigned to a particular individual. Each number is attached to sensitive information of a particular individual, culminating with the identification of

169. *Id.* at 11.

170. *Id.* at 16.

171. For example, Michigan's state legislature enacted the Social Security Number Privacy Act in 2004.

172. Swendiman & Lanza, *supra* note 167, at 12.

173. Flavio L. Komuves, *We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. MARSHALL J. COMPUTER & INFO. L. 529, 544 (1998).

the particular individual. It should be thus viewed as private, or at least it should be granted the same protection as privacy.[174]

Second, in light of the seriousness of the breach of privacy, the government needs to adopt sufficient security measures. Mere statutory restrictions and bans would not be sufficient to prevent the violations. In order to secure the ban, the *My Number Act* imposes additional criminal penalties against government workers who are engaged or used to be engaged in a job using "my number," or those who are or used to be involved in a job of creating, assigning, or notifying "my number" or handling identification information for unlawful provision of designated personal information files, which contain "my number," they came to know during their jobs, without legitimate reason.[175] If the workers provided or stole the "my number" information for the purpose of accomplishing the improper benefit for oneself or for others, then criminal punishment will be imposed even if it is not a file that was provided or stolen.[176] If the government workers engaged in the job of providing or requesting designated personal information, leaked or stole confidential information, then they will be similarly punished. [177] If the government workers, local public workers, independent administrative organization workers or workers of the J-LIS abused their power and collected documents, pictures or electronic data which contains "my number," that belongs to confidential information of a person for purposes other than the purpose they are authorized to use, they would be criminally punished.[178]

But there is still no applicable criminal ban. For instance, on negligent leaks or disclosure, destruction or loss of personal information, or peeping into personal information of residents outside of his or her official job. Therefore, there could be a legitimate question whether these criminal bans are sufficiently broad enough. Moreover, the Japanese

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174. The Administrative Personal Information Protection Act was amended to make clear that the definition of "personal information" includes "information, which contains personal identification number[s]," including "my number," and thus this type of information is protected by this Act. *See* Act Concerning the Adjustment to the Relevant Acts in order to Contribute to the Creation of New Industry and Realization of Energetic Economic Society and Rich National Life by the Adequate and Effective Use of Personal Information Held by Administrative Agency, Law No. 51 (2016).

175. My Number Act, *supra* note 1, art. 48 (noting that a punishment could include imprisonment up to four years, a fine up to 2 million JPY, or both).

176. *Id.* art. 49 (nothing that a punishment could include imprisonment up to three years, a fine up to 1.5 million JPY, or both).

177. *Id.* art. 50.

178. *Id.* art. 52 (stating that punishments for this could include either imprisonment up to two years or a fine up to million JPY).

government tends to believe that if the misuse is banned with criminal punishment, then the security measures are sufficient enough. However, it is questionable whether the mere ban and possibility of criminal punishment is sufficient to deter the misuse.[179]

Furthermore, regarding private corporations, anyone who used fraud, infliction of assault, or intimidation against a person, stealing property, trespassing, illegal access to protected computer, or other kind of conducts which prevent the management of the person who hold "my number" to obtain "my number" is also punished.[180] Also, anyone who received a notification card or "my number" card using falsification or another improper method is criminally liable.[181]

However, there is no criminal punishment, for instance, if the company or its employee did not adopt sufficient security measures and "my number" is leaked or misused. Moreover, there is no criminal punishment when store clerks make a copy of "my number" when they received "my number" cards. Further, there is nothing to prevent a store clerk from taking a look at the backside of the "my number" card and memorizing the "my number" written there. Finally, there is also a question whether the use of "my number" by private persons or corporations already collected could lead to criminal punishment.

When the private corporation refuses to obey the order of the PIPC to stop the violation of the *My Number Act*, criminal punishment with imprisonment up to three years or a fine up to 500,000 JPY could be imposed.[182] But there is a question whether criminal punishment is sufficient as a deterrent. There is no provision that allows for civil enforcement or a civil damage suit from the persons impacted.

Indeed, there is a huge number of private companies affected, and many have expressed concerns that they are not ready to handle "my

179. *The Same My Number Was Issued to the Different Men; In Kagawa and in Nagano*, MAINICHI SHIMBUN (Feb. 23, 2016), *available at* http://mainichi.jp/articles/20160223/k00/00e/040/214000c. (last visited Sept. 18, 2019). There are several cases where the same number was issued to two different residents. *Response to Wrong Delivery of My Number Notification Cards*, SOUMU (Nov. 2, 2015), *available at* http://www.soumu.go.jp/menu_news/s-news/01ryutsu14_02000052.html (last visited Sept. 16, 2019). There are already some signs showing the mismanagement of the "my number" system. For instance, there are some cases where the notification cards were delivered to wrong residents, and the Minister of Internal Affairs and Communications warned the president of the Japan Postal Office for its slippery delivery.

180. My Number Act, *supra* note 1, art. 51 (stating that a punishment could include imprisonment up to three years or a fine up to 1.5 million JPY).

181. *Id* art. 75 (stating that there could be imprisonment up to six months or a fine up to 0.5 million JPY).

182. *Id.* art. 68.

number" from its effective start date of January 1, 2016.[183] It is doubtful whether they are ready now.[184] There could be sloppy management, possible leaks, and misuse of "my number" information. Even today, despite the obligation to keep personal information confidential, there are many instances of leaks and misuse. There is no guarantee that similar leaks and misuse will not happen with respect to "my number" information.[185] There are legitimate concerns that the whole system is not designed to sufficiently secure "my number" information.

Especially when "my number" card is stolen. If a "my number" is stolen, then a fake "my number" card could be created and could be used to identify "my number" and identify the "my number" holder. Such use would allow a criminal to file false change of address, a false marriage application or death application at the local government office.[186] In light of the expanded purpose of collecting and using "my

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183. *My Number Taiou Kanryo No kigyo: Wazuka 6.4%, [Only 6.4% of Companies Finished Preparation for Introduction of My Number]*, SANKEI NEWS (Nov. 17, 2015), *available at* http://www.sankei.com/politics/news/151117/plt1511170024-n1.html (last visited Sept. 18, 2019).

184. As of February 2016, 49% of the companies responded to a survey that they have finished preparation. *My Number Seido Eno Taiou: Jittai Chosa, [Response to the My Number System: Survey]*, EN JAPAN (Apr. 22, 2016), *available at* http://corp.en-japan.com/newsrelease/2016/3240.html (last visited Sept. 18, 2019). This means that roughly half of the companies were not ready for introduction.

185. The National Personal Information Commission, which is tasked with correction of any mistreatment of personal information, including "my number," reported in November 2017 that during the first half of 2017, there were 273 cases of improper handling of "my number", including the wrong delivery of tax notification, the loss of personal information by programming error, and the loss of documents by fire. *Heisei29nendo Kamihanki Niokeru Kojinjouhou Hogoiinkai Nokatsudou Jisseki Nituite* [Activities of the National Personal Information Commission During the First Half of 2017], NAT'L. PERS. INFO. COMM'N., (Nov. 1, 2017), *available* at https://www.ppc.go.jp/files/pdf/h29kamihanki.pdf. (last visited Sept. 18, 2019). Moreover, the Commission issued 173 recommendations. *Id.*; *see also Jutaku Gyoumu Niokeru Keiyaku Oyobi Hourei Ihan No Gohoukoku To Owabi* [Report on the Contract and Law Violation Concerning the Delegated Jobs and Our Apology] SYS. DESIGN CORP. (Dec. 14, 2018), *available at* https://ssl4.eir-parts.net/doc/3766/tdnet/1656293/00.pdf (last visited Sept. 18, 2019) (revealing that some 700,000 records, including "my number", delegated from the tax agency were improperly re-delegated to an outside third-party, and also later revealing an additional 1.7 million records were similarly redelegated to outside third-party).

186. One man was already convicted for trespass and for a My Number Act violation when he entered into a female colleague's house to a take picture of her notification card. *See Doryo Joseitakuni Shin-nyusi My Number Tsuchi Card Satsuei [My Number Notification Card Shot into a Colleague's Woman's House and A Hidden Camera Installed. Prison to A 57-year-old Man June 2 Years]*, SANKEI WEST (June 21, 2016), *available at* http://www.sankei.com/west/news/160621/wst1606210051-n1.html (last visited Sept. 18, 2019).

number" and insufficient safeguards and risk of leaks and misuses, it can be surely argued that the "my number" system is an unconstitutional infringement of the right to privacy protected by Article 13 of the Constitution of Japan.[187]

VI. COULD THE "MY NUMBER" SYSTEM BE EFFECTIVE AND WORTHWHILE?

In addition to all the risks, it should also be questioned whether the newly introduced "my number" system can effectively achieve its goal. This question is justified since all previous attempts have failed to achieve broader goals. Moreover, even if it can achieve its purpose, it is a fair question whether it is a worthwhile attempt.

Whether the "my number" system can effectively function as a national identification number system depends on to what extent it could be accepted among the public as necessary and useful, and to what extent then can it accomplish its goal of securing fair taxation and fair provision of social security benefits. For the purpose of securing the fair and efficient administration of taxation and social security benefits, the "my number" system could surely work to some extent. It would become difficult to hide bank accounts and interest payments, dividend payments, or capital gains for tax purposes. It would also become difficult to claim welfare benefits, for instance, by concealing undeclared income.

But it is still unclear to what extent the "my number" system can actually contribute to the fair taxation and fair provision of social security benefits. For instance, with respect to most salaried workers, their salaries are paid by their employers, who are mandated to deduct taxes and adjust any discrepancies at the end of each year, and it is fairly difficult to evade taxation. For these salaried workers, the use of the "my number" system will make it even more difficult to evade taxation, but they are already controlled to a large extent by the tax agency. With respect to most farmers or small retail-store owners, however, it is hard to detect all of their income. Introduction of the "my number" system

187. At present, more than 100 residents have joined the lawsuit against the government seeking damages alleging the unconstitutionality of the "my number" system. *My Number Was Iken: Zenkokude Issei Teiso, Kunini Kanshisareteiru to Kanjiru* [*My Number is Unconstitutional: Suits Were Filed All Over Japan, Alleging that the Government is Looking Over Us*], HUFFINGTON POST (Dec. 1, 2015), *available at* https://www.huffingtonpost.jp/2015/11/30/my-number_n_8685408.html (last visited Sept. 18, 2019); *My Number Lawsuit*, MINISTRY OF JUST., *available at* http://www.moj.go.jp/shoumu/shoumukouhou/shoumu01_00059.html (last visited Sept. 18, 2019) (noting that suits are pending in eight different courts).

would probably not eradicate this difference in detecting the income between different professions. As long as this discrepancy remains, some citizens can complain about the unfairness of tax collection.[188]

Furthermore, currently tax on interest payments or capital gains obtained as a result of investment is separately calculated and it is a flat 20 percent tax, while income tax is a progressive tax, mandating higher income taxpayers to pay a higher tax rate.[189] With the introduction of the "my number" system, it will become difficult to hide interest payments or capital gains however, those who make money through interest payments or capital gains still do not have to share a higher tax responsibility.

Moreover, although the "my number" system will force everyone to declare income such as interest payments, dividend payments, and capital gains, the current tax system heavily relies upon income tax. As a result, regardless of one's assets, they will not have to pay higher income tax so long as their income is limited. Therefore, there would still be unfairness resulting from the difference between those who have huge asset holdings and those who do not, even after the introduction of the "my number" system.[190]

Therefore, it could be questioned whether the "my number" system could significantly contribute to fair taxation, or whether the introduction of the "my number" system is just an early step towards overall tax reform. In the future, the government might introduce a tax system that includes a much more comprehensive asset tax.[191] In that case, the government would need to have a system to verify not only the income, but also the assets of all taxpayers. On the other hand, in order to accurately collect income tax and asset tax, the government would need to know the details of every business transaction, and the details of amount of assets taxpayers have. This could be quite intrusive and could strip away the privacy of many lawful taxpayers.

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188. *Zeino Hukousei, My Number Demo Shotokuhaaku Ni Nukeana* [*Unfairness in Taxation: Still Loopholes Left After the Introduction of My Number*], NIKKEI (July 6, 2013), *available at* https://www.nikkei.com/article/DGXZZO56955690U3A700C1000000/ (last visited Sept. 18, 2019).

189. Those with income greater than 40 million JPY are subject to a 45% income tax rate. *See* Income Tax Act, *supra* note 68, art. 89.

190. *See* Nikkei, *supra* note 189.

191. *See Wagakuni Zeisei No Genjo to Kadai: Wagakuni Zeisei No Arikata* [*Current Status and Agenda of Japan's Taxation System: Future of Taxation System in Japan*], TAX COMMISSION (July 14, 2000), *available at* http://warp.da.ndl.go.jp/info:ndljp/pid/11152999/www.cao.go.jp/zeicho/tosin/zeichof/z008.html (last visited Sept. 18, 2019).

Furthermore, the acceptance of "my number" as a national identification number in the society depends on how far "my number" would come to be used by the government for much broader purposes. It also depends on to what extent the public will come to view "my number" as a national identification number. Broader use of a "my number" card might facilitate such understanding, but it is still unclear to what extent "my number" card will be actually used. Since any use of "my number" for purposes other than statutorily authorized is prohibited, there is a doubt whether the wide use of "my number" card could lead to acceptance of "my number" as a national identification number.

Finally, it was estimated that more than 270 billion JPY would be needed to start the "my number" system and an additional budget will be required each year to maintain the system.[192] It is a fair question whether all the investment in the "my number" system is worthwhile, especially if the use of "my number" is limited to taxation and social security benefits and the "my number" card is not actually used widely.[193]

VII. CONCLUSION

The "my number" system introduced by the Japanese government is a bold attempt to allocate a national identification number to all registered residents in Japan in order to secure fair taxation and social security benefits. As a result, government agencies, local government and independent administrative organizations are authorized to use "my number" to manage and search personal information in personal information files they use, and the residents are mandated to produce "my number" for filing tax return or applying for social security benefits. It also mandated private corporations to collect and use "my number" of employees, customers or clients in order to submit necessary documents on tax and social security to issue necessary documents. In order to improve the convenience of the residents, the government issued "my number" cards and allowed the residents to receive and present those

192. *Shasetsu: My Number* [*Careful Operation to Prevent Misuse of My Number*], KYOTO SHIMBUM (May 26, 2013), *available at* http://www.kyoto-np.co.jp/info/syasetsu/20130526_3.html (last visited Sept. 18, 2019). The government has not revealed how much it actually costs to start and maintain the system.

193. The local resident registration network is managed by the Ministry of Internal Affairs and Communications, while the "my number" system is managed by the Cabinet Secretariat. Management of the local resident registration network is the local government's responsibility, while management of the "my number" system is the central government's responsibility, delegated to the local government. Certainly, the purpose is different and the scope of use is different. Nevertheless, it is a fair question whether there is a need for two different national identification numbers.

cards for verification of identity, but the government anticipates that they could use "my number" in much broader contexts. Moreover, in order to promote the use of "my number" cards, the Japanese government plans to use "my number" cards to allow private companies to use them as identity cards, debit cards, credit cards, and others, but it raises a serious question of whether the system can be justified in light of the right to privacy protected by the Constitution of Japan.

The use of the national identification number is an alluring idea to promote administrative efficiency and to control the residents and citizens. It is indeed quite illuminating that the Japanese government came to call this national identification number "my number" instead of calling it "individual number," as is provided in the statute. Every resident now has his or her "my number." However, in light of the serious consequences that could result if that national identification number is misused or leaked, there should be a sober reflection on whether it is sufficiently secured, and whether it is a worthwhile attempt.

Only the future can tell whether the system will be widely accepted and whether the security of the system is sufficient.[194] Since many other countries have already introduced a national identification number system or are now considering its introduction, Japan's experience would provide valuable lessons.

194. The poll conducted by the Cabinet Office in November 2018, revealed that 34.9% of the residents have no opportunity to use "my number." Moreover, it is only 27.2% of the residents that have obtained the "my number" card or have applied for it, and, while 16.8% of them plan to apply for it, 53% of them have no intention of applying for it. *My number seido nikansuru yoronchousa no gaiyou [Summary of the Result of the Poll on the Use of My Number]* MAINAN (Nov. 2018), *available at* https://survey.gov-online.go.jp/tokubetu/h30/h30-mainan.pdf (last visited Sept. 16, 2019). Indeed, according to another report, the number of "my number" cards actually issued as of December 1, 2018, was 15,642,405 representing only 12.2% of the total population. *My number card no shikuchouson betsu hakkou maisuto nitsuite [Number of My Number Cards Issued Depending Upon the Municipalities]*, MINISTRY OF INTERNAL AFF. & COMM. (Dec. 1, 2018), *available at* http://www.soumu.go.jp/kojinbango_card/#kouhu (last visited Sept. 16, 2019). This is clear evidence of the difficulty of implementing the national identification number system.

POWERS USED FOR EVIL: UNITED STATES DEFENSE CONTRACTORS' AIDING AND ABETTING OF SAUDI ARABIAN WAR CRIMES IN THE YEMENI CIVIL WAR

Nicholas W. Carter*

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ABSTRACT

Yemen has long been one of the poorest countries in the Middle East and an afterthought in the geopolitical community. However, two Middle Eastern powers have long maintained interest in the small state: Saudi Arabia and Iran. The Kingdom of Saudi Arabia brought relative stability to Yemen through its long-standing influence over the Yemeni government, but the Arab Spring of 2011 introduced uncertainty. The departing Saleh regime gave way to the incoming Hadi leadership, but President Hadi was quickly and consistently challenged by an insurgent group who had long sought relevance in Yemen: the Houthi movement. The Houthis have historically been an unsophisticated group of rebels but began showing signs of real power during its conquest of Yemen, and in 2014, it gained its desired relevance, when it seized control of the Yemeni government and chased President Hadi out of the country. Saudi Arabia chalked the Houthis' sudden logistical and technological surge up to the help of Iran and inserted itself into the Yemen conflict in 2015.

It has been almost four years since Saudi Arabia and its coalition inserted itself into the Yemen conflict and the situation in the country is now desperate. Civilians are dying at alarming rates, in large part at the hands of the Saudi military forces – specifically through Saudi airstrikes. These attacks, which have come by the thousands, are occasionally considered war crimes by the international community due to the tremendous toll they take on civilian lives. Dozens of these strikes have been carried out with weapons made in the United States, supplied by defense contractors such as Lockheed Martin and Raytheon. The executives of these corporations could, and should, be held criminally responsible under international criminal law for aiding and abetting Saudi Arabian war crimes in Yemen. This note will explore the background of the Yemeni Civil War, how Saudi Arabia became involved, U.S. corporations' assistance to Saudi Arabia, and the legal path that could be taken to prosecute executives for these corporations.

I. U.S. DEFENSE CONTRACTORS: HEROES OR VILLAINS?

"With great power comes great responsibility" are some of the most recognizable words to ever come from a comic book, and although they were uttered in the context of Spider-Man's fictional world, they have real world application as well. Characters who are graced with superpowers rarely choose to use their powers for good without a struggle, as they are often times given the chance to use their powers for personal gain, which would ultimately make them a villain. Real-world

entities that hold the real-world equivalent of superpowers are often faced with similar choices – use resources, funds, and skills to improve the world, or allow such assets to go to waste by not ensuring their proper use.

The closest thing to a "superhuman" that the modern geopolitical sphere has ever seen is the United States of America ("U.S.") and its many assets. Not since the great Roman Empire has there been such a dominant force capable of doing such good, but at the same time, equipped with the powers to do tremendous evil. Whether a hero uses his powers for good or evil is usually a matter of opinion, just like whether the U.S. uses its powers for good or evil is typically dependent upon who you ask. Some believe the U.S. is a hero in the international community, fighting crime and enforcing the proper status quo whenever it is needed. Others see the U.S. as a villain, imposing its will on weaker and poorer countries in order to continue dominating the world. The U.S.'s assistance to Saudi Arabia in its intervention in Yemen, specifically its continued weapons sales to Saudi Arabia, is one of such instances. Some believe the U.S. is doing good by helping Saudi Arabia in its proxy-crusade against the enemy Iran, while others see the U.S. assistance to Saudi Arabia for what it is: aiding and abetting of war crimes.

Saudi Arabia has violated international law through its actions in Yemen, and the U.S. government has used its power to aid and abet it on several occasions.[1] U.S. defense contractors, like the country they reside in, possess great powers well, and, like a superhuman using his power for personal gain, have failed to fulfill the great responsibility bestowed upon them. U.S. defense contractors have manufactured and sold weapons to Saudi Arabia that have been used to commit war crimes on multiple occasions (and continue to do so today). This has resulted in these corporations violating international law by aiding and abetting Saudi Arabian war crimes in Yemen. I argue that the executives of these U.S. defense contractors should be held liable for aiding and abetting these Saudi Arabian war crimes.

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1. *See* U.N. Human Rights Council, Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014, U.N. DOC. A/HRC/39/43 (Aug. 17, 2018); *see also Yemen Conflict: UN experts detail possible war crimes by all parties*, BBC NEWS (Aug. 28, 2018), *available at* https://www.bbc.com/news/world-middle-east-45329220 (last visited Feb. 2, 2019) (stating that the international law community has condemned Saudi Arabia's involvement in the Yemeni Civil War as internationally criminal due to its continued violation of customary principles of international law and Common Article 3 of the Geneva Conventions).

II. THE STORY: THE YEMENI CIVIL WAR

When the Kingdom of Saudi Arabia ("KSA") originally began its intervention in Yemen it predicted that its forces' presence in the country would be short-lived.[2] KSA originally had two objectives in Yemen: eliminate the threat of the Iranian-backed Shia insurgency group known as the Houthi movement and get out.[3] This would give the recently removed Sunni leadership a chance to regain power, allowing KSA to maintain its influence over Yemen.[4] KSA believed this could be accomplished in a matter of weeks, but weeks turned into months, and now months have turned into five brutal years.[5] The Yemen conflict is dragging on with no real end in sight and conditions across the country are becoming increasingly desperate.[6] International humanitarian bodies have referred to it as the worst man-made humanitarian crisis in the world currently and the world's largest humanitarian disaster in the last fifty years.[7] Official death tolls are seemingly unreliable – the United Nations ("U.N.") last estimated that the Yemen conflict had produced a total of 10,000 casualties, but that figure has not been updated for over two years.[8] Other independent investigative entities estimate the actual figure to currently be around 60,000 total casualties, with at least 6500 of those being civilian deaths.[9]

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2. Thalia Rahme, *Yemen crisis: Why is there a war?*, BBC NEWS (Dec. 18, 2018), *available at* https://www.bbc.com/news/world-middle-east-29319423 (last visited Feb. 2, 2019).

3. *Debunking Media Myths About the Houthis in War-Torn Yemen*, GLOBAL VOICES (Apr. 1, 2015), *available at* https://globalvoices.org/2015/04/01/debunking-media-myths-about-the-houthis-in-war-torn-yemen/ (last visited Mar. 8, 2019) (stating that the Houthi movement is a Shia Muslim group of the Zaidi sect. The Houthi movement's formal name is "Ansar Allah," which translates to "Supporters of God.").

4. *See* Rahme, *supra* note 2.

5. *See* Robert F. Worth, *How the War in Yemen Became a Bloody Stalemate – and the Worst Humanitarian Crisis in the World*, N.Y. TIMES (Oct. 31, 2018), *available at* https://www.nytimes.com/interactive/2018/10/31/magazine/yemen-war-saudi-arabia.html (last visited Mar. 8, 2019).

6. *See id.*

7. *Yemen could be 'worst' humanitarian crisis in 50 years*, AL JAZEERA NEWS (Jan. 5, 2018), *available at* https://www.aljazeera.com/news/2018/01/yemen-worst-humanitarian-crisis-50-years-180105190332474.html (last visited Feb. 2, 2019).

8. *Id.*

9. *Yemen War Death Toll Exceeds 60,000 According to Latest ACLED Data*, ACLED DATA (Dec. 11, 2018), *available at* https://www.acleddata.com/2018/12/11/press-release-yemen-war-death-toll-now-exceeds-60000-according-to-latest-acled-data/ (last visited Feb. 2, 2019) (stating that the death toll in the Yemeni Civil War is much higher than the U.N. report on the conflict, which has not been updated since 2017. ACLED's data only takes death by violence into account, so the total number of civilian casualties is in reality much higher due to preventable causes such as disease and malnutrition).

The state of the country deteriorates more and more each day: it is under a food emergency that is speeding towards famine, with two-thirds of its people not knowing where their next meal is going to come from.[10] Preventable disease is everywhere and unemployment rates continue to climb.[11] The situation in Yemen has been described as apocalyptic, which feels like an understatement considering the totality of the circumstances.[12] When all factors are considered together it is safe to assume that the war's high casualty mark will only continue to rise. There is no one side to blame for the crisis in Yemen – every party involved has contributed to the chaos.[13] With that being said, KSA's fingerprints are all over the Yemeni people's current plight.[14]

KSA entered the Yemen conflict in 2015 but the ongoing violence in the country can be traced back to the Arab Spring of 2011, when President Ali Abdullah Saleh was forced out of office and replaced with Abdrabbuh Mansur Hadi.[15] Hadi, a Sunni Muslim, was generally perceived as weak, and the Houthi Movement sought to take advantage immediately.[16] This aggression resulted in the Houthi insurgency gaining tremendous ground from 2012-2014, seizing parts of the region sporadically.[17] The Houthis were bolstered by supporters of the Saleh regime and also received covert assistance from Iran in its effort to take

10. *See 85,000 children 'dead from malnutrition'*, BBC NEWS (Nov. 21, 2018), *available at* https://www.bbc.com/news/world-middle-east-46261983 (last visited Feb. 2, 2019) (stating that Yemen is on the brink of famine due to the current war); *see also Fighting Famine in Yemen*, WORLD FOOD PROGRAM, USA (June 2019), *available at* https://www.wfpusa.org/countries/yemen/ (last visited July 20, 2019) (stating that a child in Yemen dies every ten minutes from preventable causes, and that 3.2 million women and children in Yemen currently suffer from acute malnutrition).

11. *See Yemen: Health*, UNICEF (2018), *available at* https://www.unicef.org/yemen/activities_11434.html (last visited Mar. 8, 2019) (stating that 14.1 million Yemeni people are in need of healthcare and that around 10,000 Yemeni children died of preventable diseases in 2017); *see also Knoema – Unemployment Rate*, KNOEMA (2019), *available at* https://knoema.com/atlas/Yemen/Unemployment-rate (last visited Mar. 8, 2019) (showing that Yemen's unemployment rate is over 14%).

12. *See* Al Jazeera, *supra* note 7.

13. *See* Rahme, *supra* note 2.

14. *See* Glen Carey & Sarah Algethami, *How Saudis, Allies Made Yemen a Humanitarian Crisis*, BLOOMBERG (Oct. 19, 2018), *available at* https://www.bloomberg.com/news/articles/2018-10-19/how-saudis-turned-yemen-war-into-humanitarian-crisis-quicktake (last visited July 20, 2019).

15. *See* Emma Graham-Harrison, *Beyond Syria: the Arab Spring's aftermath*, THE GUARDIAN (Dec. 30, 2018), *available at* https://www.theguardian.com/world/2018/dec/30/arab-spring-aftermath-syria-tunisia-egypt-yemen-libya (last visited July 27, 2019).

16. *See* Rahme, *supra* note 2.

17. *See id.*

control of large portions of Yemen.[18] This outside assistance eventually allowed the Houthis to drive President Hadi out of the country.[19] The Houthis subsequently took control of the government after seizing the capital of Sana'a in late 2014, and KSA's coalition began their intervention shortly after.[20]

Although the fighting in Yemen has largely been between the KSA-led coalition and Houthi insurgents, nearly everyone in the international community agrees that the conflict is really a proxy war between KSA and Iran.[21] The U.N. Security Council has stated that it believes Iran may be violating its arms embargo by shipping weapons to the Houthis in Yemen – a theory supported by the fact that the Houthi movement was a grassroots effort for years and largely unfamiliar with military technology until it began using sophisticated weapons at the outset of its conquest of Yemen.[22] Iran employed a go-to diplomatic strategy by denying any involvement in the conflict when it first began, but has remained quiet on the subject since then.[23]

Many western nations rely heavily on their business relationships with KSA and are terminally at odds with Iran, so it is in their best

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18. *Id.*

19. *Id.*

20. *See id.*; *see also* Jon Gambrell, *Associated Press: Here are the members of the Saudi-led coalition in Yemen and what they're contributing*, BUS. INSIDER (Mar. 30, 2015), *available at* https://www.businessinsider.com/members-of-saudi-led-coalition-in-yemen-their-contributions-2015-3 (last visited Feb. 2, 2019) (listing the members of the Saudi Arabian-led coalition in its intervention in the Yemen conflict, which includes the United Arab Emirates (UAE), Kuwait, Bahrain, Qatar, Sudan, and Egypt. All countries in the coalition contribute to the Saudi Arabian efforts in Yemen to an extent, but Saudi Arabia and UAE are the main antagonists of the coalition).

21. *See* Rahme, *supra* note 2.

22. *See* U.S. Dep't of State, Iran Action Group, Outlaw Regime: A Chronicle of Iran's Destructive Activities (2018) (summarizing Iran's general attitude towards the West and its allies, including its ongoing proxies with Saudi Arabia. The report discusses Iranian influence in the Yemen conflict and its support for the Houthi movement in Yemen); *see also* Fatima Abo Alasrar, *Denying Iran's role in Yemen muddles peace process*, ARAB NEWS (Oct. 9, 2018), *available at* http://www.arabnews.com/node/1385156 (last visited Feb. 3, 2019) (stating that the Houthi movement has historically been a rebel group without access to sophisticated technology until recently, and that Iranian weapons were found in the aftermath of fighting in which the Houthis were involved).

23. *See* Simon Tisdall, *Iran-Saudi proxy war in Yemen explodes into region-wide crisis*, THE GUARDIAN (Mar. 26, 2015), *available at* https://www.theguardian.com/world/2015/mar/26/iran-saudi-proxy-war-yemen-crisis (last visited Feb. 2, 2019) (noting that Iran has not given many indications of its involvement in Yemen, but that it has actively criticized Saudi Arabia's role in the conflict).

interest for KSA to maintain its influence over Yemen.[24] As a result, KSA has received American support for much of the war, but the full extent of U.S. involvement is unclear.[25] The U.S. has acknowledged its participation in the conflict by confirming that it shares intelligence with KSA, and has also given logistical support to KSA's military via training and mid-air refueling of KSA military aircraft.[26] The U.S.'s major contribution to the fighting, however, has come through its billion dollar arms deals with KSA.[27]

III. THE KINGDOM OF SAUDI ARABIA: THE DECIDED VILLAIN

There are ten different countries and several non-state actors allegedly involved in the Yemeni Civil War, but the conflict is considered non-international in character by international law standards since the two main belligerents consist of the Yemeni government and an opposition group *within* Yemen.[28] Non-international armed conflicts like the Yemeni Civil War are bound by Common Article 3 of the Geneva Conventions,[29] which asserts that "violence to life and person, in particular murder of all kinds" shall "remain prohibited at any time and in any place whatsoever" when applied to "[p]ersons taking no active part in the hostilities."[30] Common Article 3 of the Geneva Conventions is regarded as the minimum standard for non-international conflict, and any violation is considered a grave breach of the Geneva Conventions.[31]

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24. *See* Matt Schiavenza, *Why the U.S. is Stuck with Saudi Arabia*, THE ATLANTIC (Jan. 24, 2015), *available at* https://www.theatlantic.com/international/archive/2015/01/why-the-us-is-stuck-with-saudi-arabia/384805/ (last visited Mar. 8, 2019).

25. *See* Marlo Safi, *Understanding U.S. Involvement in Yemen's 'Forgotten War'*, NAT'L REV. (Nov. 30, 2018), *available at* https://www.nationalreview.com/2018/11/yemen-civil-war-american-involvement-under-increasing-scrutiny/ (last visited Feb. 2, 2019) (giving an overview of U.S. involvement in the Yemen War, but also highlighting that the depth of American assistance to Saudi Arabia is not entirely clear at this point).

26. *See id.*

27. Irina Ivanova, *Saudi Arabia is America's No. 1 weapons customer*, CBS NEWS (Oct. 12, 2018), *available at* https://www.cbsnews.com/news/saudi-arabia-is-the-top-buyer-of-u-s-weapons/ (last visited Feb. 2, 2019).

28. *See Key Facts About the War in Yemen*, AL JAZEERA (Mar. 25, 2018), *available at* https://www.aljazeera.com/news/2016/06/key-facts-war-yemen-160607112342462.html (last visited Mar. 8, 2019); *see also* Rahme, *supra* note 2.

29. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Common Article 3 of the Geneva Conventions].

30. Common Article 3 of the Geneva Conventions.

31. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

The customary international law principles of civil immunity, distinction, and proportionality apply to non-international conflicts as well, but they are not codified anywhere in treaty law.[32] Civil immunity and distinction lay the foundation for the protection of civilians in customary international law. These principles make clear that civilians can never be the direct targets of military attacks, and that parties to a conflict must distinguish between civilians and combatants at all times.[33] Customary international law accepts the fact that some civilian casualties are inevitable, but requires combatants to take all feasible precautions to minimize harm to civilians as well as civilian objects, meaning all attacks must be limited to military objectives.[34] When civilian casualties are seemingly inevitable the principle of proportionality says that aggressors cannot carry out attacks which will cause disproportionate civilian casualties.[35] Attacks that violate these principles are typically condemned as war crimes by the international community.

It seems as if KSA has violated both Common Article 3 of the Geneva Convention as well as the customary principles of international law on numerous occasions during its intervention in Yemen.[36] The KSA military has carried out approximately 16,000 air strikes in Yemen since 2015.[37] Roughly one third of those have hit non-military targets, resulting in over 4300 civilian casualties.[38] Nonetheless, KSA has not changed its "unceasing" air campaign even after its impact on the civilian population became apparent.[39] International law imposes an

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32. *See Customary IHL Database: Rule 1. The Principle of Distinction between Civilians and Combatants*, ICRC, *available at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 (last visited Feb. 2, 2019) [hereinafter ICRC].

33. *See id.*

34. *See id.*

35. *See id.*

36. *See* Declan Walsh, *The Tragedy of Saudi Arabia's War*, N.Y. TIMES (Oct. 28, 2018), *available at* https://www.nytimes.com/interactive/2018/10/26/world/middleeast/saudi-arabia-war-yemen.html (last visited Feb. 2, 2019).

37. Sudarnsan Raghavan, *Saudi Arabia's Role in Yemen War Comes Under Renewed Scrutiny After Khashoggi Killing*, THE WASH. POST (Oct. 31, 2018), *available at* https://www.washingtonpost.com/world/saudi-role-in-devastating-yemen-war-comes-under-new-scrutiny-after-khashoggi-murder/2018/10/29/ (last visited Mar. 8, 2019).

38. Lee Keath, *Civilian death toll in Yemen mounting despite US assurances*, AP NEWS (Nov. 10, 2018), *available at* https://www.apnews.com/24ee4b33373a41d389e2599c5aa7bbfa (last visited Feb. 2, 2019).

39. *See Saudi air strikes on Yemen intensify, residents in capital stay indoors*, REUTERS (Dec. 6, 2017), *available at* https://www.reuters.com/article/us-yemen-security/saudi-air-strikes-on-yemen-intensify-residents-in-capital-stay-indoors-idUSKBN1E00JZ (last visited Feb. 2, 2019).

affirmative duty on state actors whose military attacks result in disproportionate civilian casualties to investigate such attacks, but KSA has rarely done so effectively, which is a demonstration of its passive attitude towards the atrocities.[40]

There has been shockingly little Western media coverage of KSA's slaughter of Yemeni civilians, but a few attacks have garnered more attention than the rest.[41] The first occurred in Mastaba in March 2016, when a KSA-fired missile hit a busy market, resulting in 106 civilian deaths.[42] When asked for answers, KSA stated that the market constituted a military objective because it was a well-known Houthi gathering spot.[43] An independent investigation of the attack lead by Human Rights Watch ("HRW") found that there were in fact Houthi troops in the area, but the number of enemy combatants in the vicinity of the market paled in comparison to the civilians in the market.[44]

The second attack that gained significant Western attention occurred in October 2016, when KSA forces launched an air raid on a funeral in Sana'a.[45] In this case, there were 140 civilian casualties and approximately 600 people wounded, with seemingly no combatants killed or hurt.[46] KSA initially denied its involvement in the attack, but subsequently claimed responsibility, to an extent.[47] Its acceptance of blame was not exactly contrite, as it placed most of its culpability on the fact that the coalition forces were given bad intelligence, which lead it to believe that the funeral was actually a gathering of enemy military personnel.[48]

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40. *See Yemen War: Saudi Coalition War Crimes Investigation 'Not Credible'*, BBC NEWS (Aug. 24, 2018), *available at* https://www.bbc.com/news/world-middle-east-45295678 (last visited Mar. 8, 2019).

41. *See* Rahme, *supra* note 2 (the Yemeni Civil War is often referred to as the "forgotten war" because Western media has not covered the war extensively).

42. *Yemen: US Bombs Used in Deadliest Market Strike*, HUM. RTS. WATCH (Apr. 7, 2016), *available at* https://www.hrw.org/news/2016/04/07/yemen-us-bombs-used-deadliest-market-strike (last visited Feb. 2, 2019).

43. *See id.*

44. *Id.* (stating that there were about ten Houthi fighters killed in the attack, and that there were two or three more Houthi fighters in the vicinity, roughly 250 meters away from the site of the attack).

45. *Saudi-led coalition admits to bombing Yemen funeral*, THE GUARDIAN (Oct. 15, 2016), *available at* https://www.theguardian.com/world/2016/oct/15/saudi-led-coalition-admits-to-bombing-yemen-funeral (last visited Feb. 2, 2019) [hereinafter *Yemen funeral*].

46. *Id.*

47. *See id.*

48. *See id.*

The KSA attack that has earned the most Western attention up to this point was the coalition's August 2018 strike on a school bus travelling through Saada that killed fifty-four civilians, including forty children.[49] KSA has struggled to muster up an excuse for the incident; it has referred to the attack as "unjustified," but also stated that it *believed* there to be a Houthi target in the area, while ultimately accepting responsibility for being wrong about that belief.[50]

These are just three examples of dozens of alleged violations of international law committed by KSA throughout the Yemeni Civil War. The U.N. and Human Rights Watch have conducted independent investigations of all three attacks, and each was condemned as an apparent war crime.[51] The twist on these attacks, as well as at least twenty-one others, is that the remnants of U.S.-made weapons were found at the site of each.[52]

IV. THE U.S. ARMS TRADE: ABUSING POWER FOR PROFITS

There is little dispute among legal scholars that the U.S. government could eventually be in hot water for its role in the Yemeni Civil War as a result of its active assistance to the KSA coalition in its efforts.[53] Attorneys for the Obama administration were weary of potential blowback for assisting KSA in Yemen, but the Trump administration has said little about potential human rights violations perpetrated by KSA and how it might affect U.S. officials in the future.[54]

Former U.S. Secretary of Defense General James Mattis was quoted as saying that assisting KSA in its defense endeavors was not a "blank check," and that KSA would need to clean up its act if it wanted

49. Salma Abdelaziz, Alla Eshchenko, & Joe Sterling, *Saudi-led coalition admits 'mistake' made in deadly bus attack in Yemen*, CNN (Sept. 2, 2018), *available at* https://www.cnn.com/2018/09/01/middleeast/saudi-coalition-yemen-attack/index.html (last visited Feb. 2, 2019).

50. *Id.*

51. Rahme, *supra* note 2.

52. *See* Nima Elbagir, Salma Abdelaziz, & Laura Smith-Spark, *Made in America*, CNN (Sept. 2018), *available at* https://www.cnn.com/interactive/2018/09/world/yemen-airstrikes-intl/ (last visited Feb. 2, 2019).

53. *See* Warren Strobel & Jonathan Landay, *As Saudis bombed Yemen, U.S. worried about legal blowback*, REUTERS (Oct. 10, 2016), *available at* https://www.reuters.com/article/us-usa-saudi-yemen/exclusive-as-saudis-bombed-yemen-u-s-worried-about-legal-blowback-idUSKCN12A0BQ (last visited Feb. 2, 2019).

54. *Id.*

to continue receiving military support from the U.S.[55] The Pentagon has chimed in when the remnants of U.S. weapons have been found at the scene of apparent KSA war crimes, but has blamed the attacks on KSA military personnel not knowing how to aim their weapons properly – something that the U.S. does not see as its problem.[56] This attitude is irresponsible and startling. Such a response is analogous to a shooting range employee giving a child who has no experience with guns a rifle and saying, "I just give the kids the guns – teaching them how to aim them is not really what I do," after the child ends up shooting someone. The instructor allowing the child to continue shooting the gun even though he knew that the child did not know how to aim it properly is no different from the U.S.'s current attitude towards the KSA intervention in Yemen.

Many legal scholars look to the U.S.'s practical assistance to KSA, i.e. its sharing of intelligence and mid-air refueling of KSA aircrafts, as its main cause for concern.[57] This type of support obviously raises serious legal and moral questions, but U.S. arms sales to KSA could ultimately be what bring the U.S. under the lens of international criminal law.

KSA has long been the U.S.'s number one client when it comes to arms sales and that does not look as if it is going to change anytime soon.[58] President Trump's first trip abroad as leader of the free world included a visit to Riyadh, Saudi Arabia, where he inked a Jared Kushner-facilitated deal that will send roughly $110 billion in U.S. weapons to KSA over the span of ten years.[59] A yearly average of $11 billion in sales seems like a lot, but that number appears as if it's closer to the floor than the ceiling for U.S. arms sales to KSA: 2017 sales

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55. Patrick Wintour, *US says support for Saudi Arabia not a 'blank cheque' after Yemen air raid*, THE GUARDIAN (Oct. 9, 2016), *available at* https://www.theguardian.com/world/2016/oct/09/saudi-arabia-investigate-air-raid-on-funeral-in-yemen (last visited Feb. 2, 2019).

56. *See* Nima Elbagir, Salma Abdelaziz, Ryan Browne, Barbara Arvanitidis, & Laura Smith-Spark, *Bomb that killed 40 children in Yemen was supplied by the US*, CNN (Aug. 17, 2018), *available at* https://www.cnn.com/2018/08/17/middleeast/us-saudi-yemen-bus-strike-intl/index.html (last visited Feb. 3, 2019) (quoting former US Secretary of Defense James Mattis as saying that the Pentagon does not help the Saudi Arabian military with exact targeting of airstrikes).

57. Melissa Dalton & Hijab Shah, *U.S. Support for Saudi Military Operations in Yemen*, CSIS (Mar. 23, 2018), *available at* https://www.csis.org/analysis/us-support-saudi-military-operations-yemen (last visited Feb. 3, 2019).

58. Ivanova, *supra* note 27.

59. *Id.*

alone amounted to $18 billion.[60] Defense industry giants Lockheed Martin ("Lockheed") and Raytheon look poised to continue to rake in the lion's share of U.S.-KSA defense contract dollars through the duration of the new deal between the two countries, as Lockheed alone estimates that it will sell around $29 billion in weapons to KSA through the deal, while Raytheon expects to bring in a comparatively measly $6 billion in sales.[61] These projections are business as usual for both companies, as they have consistently been among the top sellers of U.S.-made weapons over the last twenty years.[62]

If the money that American defense contractors see from arms deals between the U.S. and KSA is a high point for the corporations, seeing their weapons turn up at sites of apparent war crimes has to be the low point. Unfortunately, this is a reality that U.S. defense contractors have faced on several occasions since KSA became involved in Yemen. As stated earlier, remnants of U.S. weapons have been found at ground zero of twenty-four separate KSA attacks that resulted in disproportionate civilian casualties and were deemed to be apparent war crimes.[63]

In an independent investigation conducted two weeks after the March 2016 attack on the civilian market in Mastaba, Human Rights Watch uncovered shrapnel from a 2000 pound MK-84 bomb equipped with a Paveway laser guidance kit, which are typically produced by Raytheon.[64] The Sana'a funeral bombing that killed 140 civilians took place several months later, and the U.N. subsequently conducted an independent investigation which uncovered what was left of a 500 pound U.S.-made Paveway missile.[65] Pieces of U.S.- made weaponry were also found at the site of the August 2018 fieldtrip attack that resulted in the death of forty children, as investigative journalist outlet *Bellingcat* found leftovers of a Lockheed-produced 500 pound Paveway

60. *Id.*

61. *Id.*

62. *See id.*

63. *Yemen: Coalition Bus Bombing Apparent War Crime*, HUM. RTS. WATCH (Sept. 2, 2018), *available at* https://www.hrw.org/news/2018/09/02/yemen-coalition-bus-bombing-apparent-war-crime (last visited Feb. 3, 2019).

64. HUM. RTS. WATCH, *supra* note 42; *Raytheon's Paveway™ Precision Guided Bomb Kit Wins U.S. Air Force Contract Competition*, RAYTHEON (Nov. 30, 2006), *available at* http://investor.raytheon.com/phoenix.zhtml?c=84193&p=irol-newsArticle&ID=937371 (last visited Feb. 3, 2019).

65. *See Yemen funeral*, *supra* note 45.

laser-guided missile during its examination of the scene of the attack.[66] Proof of the use of U.S. weapons has been found at the sites of attacks on hospitals, schools, and hotels as well.[67]

Executives from Lockheed Martin and Raytheon have both tried to downplay their involvement in the chain of events leading up to the attacks by treating the attacks as business transactions with negative consequences when pressed about their weapons being used to carry out attacks on civilian targets in Yemen.[68] For instance, Lockheed Martin CEO Marillyn Hewson has clung strongly to the government's policy towards KSA and its involvement in Yemen by saying that her company will continue to follow the government's agenda.[69] Ms. Hewson's stance makes sense to an extent, on paper at least – defense contractors can sell products to countries on their own through direct commercial sales ("DCS"), but contractor to country sales are tightly regulated and scrutinized heavily by the U.S. government. Contractors are usually not able to sell any products which the government identifies as carrying technological or security concerns.[70] Rather, these weapons typically must be sold through the U.S. government and are identified as foreign military sales only items ("FMS").[71] However, the government maintains discretion over the items that may be sold using particular channels, and often times reputable contractors who sell to the U.S. government as well as foreign countries will be granted permission to sell FMS weapons to foreign governments.[72] Both Lockheed and Raytheon sell FMS through the government and make DCS directly to KSA, and both companies are well aware of who will probably end up

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66. Julian Borger, *U.S. supplied bomb that killed 40 children on Yemen school bus*, THE GUARDIAN (Aug. 19, 2018), *available at* https://www.theguardian.com/world/2018/aug/19/us-supplied-bomb-that-killed-40-children-school-bus-yemen (last visited Mar. 8, 2019).

67. *See* Rasha Mohamed, *It's time for the U.S. to stop supplying weapons to the Saudi-led coalition in Yemen*, WASH. POST (Aug. 31, 2018), *available at* https://www.washingtonpost.com/news/democracy-post/wp/2018/08/31/its-time-for-the-u-s-to-stop-supplying-weapons-to-the-saudi-led-coalition-in-yemen/?utm_term=.febc224dae6f (last visited Feb. 3, 2019).

68. *See* Aaron Gregg & Christian Davenport, *Defense contractors stand with White House on Saudi arms sales*, WASH. POST (Oct. 25, 2018), *available at* https://www.washingtonpost.com/business/2018/10/25/defense-contractors-stand-with-white-house-saudi-arms-sales/?utm_term=.a9e39381e4ef (last visited Feb. 3, 2019).

69. *Id.*

70. *Foreign Military Sales vs Direct Commercial Sales*, NDIA (2017), *available at* http://www.ndia.org/policy/international/fms-vs-dcs (last visited Feb. 3, 2019).

71. *Id.*

72. *See id.*

with their weapons when they sell them through the government.[73] Thus, the U.S. arms industry is conscious that its weapons are being received by a regime that is not always using them for defensive or peace-keeping purposes.

Unfortunately, placing arms in the hands of warring countries is the standard for U.S. arms sales and not the exception. The U.S. sold over $67 billion in arms to developing countries from 1985 to 1995, including over half the arms that entered the Middle East during that time.[74] The Middle East's military expenditures to gross national product ratio for that decade was 7.9%, the highest in the world during that time.[75] This was probably due to the fact that there were eleven globally recognized conflicts in the region over the course of that decade, most of which involved U.S. weapons.[76] However, U.S. arms sales were not limited to the Middle East during that decade. In fact, 90% of the fifty significant ethnic and territorial conflicts that occurred in the early 1990s involved at least one party that received U.S. weapons or military technology.[77] In 1993 alone the U.S. sold 90% of its arms to developing countries with poor human rights records.[78] These statistics are a troubling demonstration that the U.S. is no stranger to selling its arms into unstable situations.

The continuous attacks on civilian targets carried out by KSA over the course of the last several years, paired with the mysterious disappearance of KSA dissident journalist Jamal Khashoggi, has put the countries that make up the international arms dealing community at odds with the idea of continuing to sell weapons to KSA.[79] News

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73. *See generally* Celia Pena-Gomez, *Lockheed Martin defense contract with Saudi Arabia has been increased*, ADHRB (July 30, 2018), *available at* https://www.adhrb.org/2018/07/lockheed-martin-defense-contract-with-saudi-arabia-has-been-increased/ (last visited Mar. 8, 2019).

74. *See* Lucien J. Dhooge, *We Arm the World: The Implications of American Participation in the Global Armaments Trade*, 16 ARIZ. J. INT'L & COMP. L. 577, 588 (1999).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *See* Andreas Rinke, Andrea Shalal, & Maria Sheahan, *Merkel: No German arms exports to Saudi until killing cleared up*, REUTERS (Oct. 22, 2018), *available at* https://www.reuters.com/article/us-saudi-khashoggi-germany-merkel/merkel-no-german-arms-exports-to-saudi-until-killing-cleared-up-idUSKCN1MW2LT (last visited Feb. 3, 2019); *see also* Christal Hayes, *Finland, Denmark and Germany stop arm sales to Saudi Arabia after Khashoggi's death*, USA TODAY (Nov. 24, 2018), *available at* https://www.usatoday.com/story/news/world/2018/11/24/jamal-khashoggi-finland-denmark-germany-arms-sales/2101874002/ (last visited Feb. 3, 2019).

outlets began compiling lists of countries and manufacturers who are still choosing to sell weapons to KSA just after Khashoggi's disappearance in the Fall of 2018, but that has not kept the U.S. from going about business as usual with KSA.[80] The international law community leaves questionable arms sales practices largely unchecked, so the U.S. will be able to continue these dealings for as long as it wants. The only time international law truly forbids arms sales to/from a specific country is when a formal embargo is declared, in which case arms sales to that country are technically prohibited.[81] However, embargoes are rare and ineffective due to the lack of international uniformity in the implementation of arms trade regulation.

The international law community attempted to address the issue of selling arms to human rights violators in 2014 with the Arms Trade Treaty (ATT), but it has been almost entirely moot since its passage.[82] The ATT's stated mechanism is to obligate member states to monitor arms exports and ensure that weapons do not cross existing arms embargoes or end up being used for human rights abuses, including terrorism. Member states, with the assistance of the U.N., will put into place enforceable, standardized arms import and export regulations (much like those that already exist in the U.S.), and will be expected to track the destination of exports to ensure they do not end up in the wrong hands. Ideally, that means limiting the inflow of deadly weapons into places like Syria.[83]

The ATT's mission sounds like an effective way for the international community to limit weapons exports to states who use arms to violate international law in theory. However, the treaty has been totally ineffective in practice, largely because the U.S. has signed it, but not ratified it, while Russia and China have avoided it altogether.[84] Those three nations constitute three of the world's top five

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80. *See* Angela Dewan, *These are the countries still selling arms to Saudi Arabia*, CNN (Nov. 23, 2018), *available at* https://www.cnn.com/2018/11/22/middleeast/arms-exports-saudi-arabia-intl/index.html (last visited Feb. 3, 2019).

81. For a general overview of arms embargoes and their aims, *see* DAMIEN FRUCHART ET AL., UNITED NATIONS ARMS EMBARGOES: THEIR IMPACT ON ARMS FLOWS AND TARGET BEHAVIOUR (Stockholm Int'l Peace Res. Inst. & Uppsala Univ. 2007), *available at* https://www.sipri.org/sites/default/files/SIPRI07UNAE.pdf (last visited Feb. 3, 2019).

82. *See* Kirk Jackson, *The Arms Trade Treaty: A historic and momentous failure*, CEASEFIRE (Apr. 29, 2013), *available at* https://ceasefiremagazine.co.uk/failure-arms-trade-treaty/ (last visited Feb. 3, 2019) (discussing why the newly adopted ATT would not be effective).

83. *See id.*

84. *See There's a treaty for that: A UN treaty to regulate the global arms trade has little impact*, THE ECONOMIST (Aug. 18, 2018), *available at* https://www.economist.com/

weapons exporters, so the impact of the ATT would be furthered exponentially if even one of them agreed to sign on.[85] However, there is strong doubt that Congress will ratify the ATT, and the idea of Russia or China participating in such an agreement is almost laughable.[86]

The requirements of arms dealers under U.S. domestic law are not exactly lax, but U.S. defense contractors consistently manage to skirt existing regulations. FMS sales are reviewed by Congress before being approved, and DCS sales are closely scrutinized by the government before defense contractors are allowed to even begin negotiating weapons deals with foreign countries.[87] These deals are usually approved, but the legality of these sales still comes under U.S. federal jurisdiction, with the applicable law being Section 2301 of the Foreign Assistance Act of 1961.[88] According to this law, arms transfers from the U.S. to foreign governments should be for the purpose of improving the climate of political independence and individual liberty in recipient countries.[89] Section 2304(a)(2) goes on to prohibit military assistance to any country which engages in "a consistent pattern of gross violations of internationally recognized human rights."[90] On top of this, any arms sales to countries with poor human rights records are supposed to be vetted by the Executive before such deals are finalized.[91] Again, such rules and regulations are nice in theory, but have been ineffective when it comes to arms sales to KSA.

V. HOLDING THE VILLAINS ACCOUNTABLE: INTERNATIONAL ACCOMPLICE LIABILITY

It has already been established that international law recognizes criminal responsibility for violations of human rights as far as direct

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international/2018/08/18/a-un-treaty-to-regulate-the-global-arms-trade-has-little-impact (last visited Feb. 3, 2019).

85. Daniel Brown, *Weapons sales are on the rise – here are the top 10 countries exporting arms around the world*, BUS. INSIDER (Mar. 16, 2018), *available at* https://www.businessinsider.com/top-countries-exporting-weapons-arms-sales-2018-3 (last visited Mar. 8, 2019).

86. THE ECONOMIST, *supra* note 84.

87. NDIA, *supra* note 70.

88. Dhooge, *supra* note 74, at 631.

89. *Id.* at 631-32.

90. *Id.* (stating that the Foreign Assistance Act, as written, is supposed to apply to foreign assistance of countries with poor human rights records as applied to their own citizens, but it only makes sense for the law to apply to assistance of countries with poor human rights records abroad as well. Saudi Arabia has both, so it should apply to weapons sales to it regardless).

91. *Id.*

perpetrators are concerned.[92] However, international criminal law also recognizes accomplice liability in such circumstances under international laws and principles of criminal aiding and abetting.[93] This section will explore the development of accomplice liability in international criminal law as it applies to both individuals and corporations.

Accomplice liability exists in international criminal law in order to hold those actors besides material perpetrators of crimes accountable for their actions when there are parties other than the material criminals who render the commission of such crimes possible.[94] Among these actors are individuals occupying important positions in corporations, who, in the course of their ordinary work, make the commission of such crimes possible.[95]

Accomplice liability was first recognized in international criminal law at Nuremberg, when the International Military Court sought to prosecute those who had a direct *impact* on the facilitation of the Holocaust through their actions without *actively* participating in the principle crimes, along with those individuals *acting* directly in the atrocity.[96] The Nuremberg Trials established the idea of accomplice liability in international criminal law, but the international community has struggled to clearly define aiding and abetting ever since.

In 1996 the International Law Commission ("ILC") of the U.N. said that "complicity in the commission . . . of a war crime . . . is a crime under international law."[97] This is the groundwork which the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") operated

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92. *See generally* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

93. *See* Rome Statute of the International Criminal Court art. 25(3), July 17, 1998, 2187 U.N.T.S. 90, rev. 2010. For a general overview and history of the development of accomplice liability in international criminal law, *see* William A. Schabas, *Enforcing international humanitarian law: Catching the accomplices*, 83 INT'L REV. RED CROSS 439 (2001).

94. Andrea Reggio, *Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading with the Enemy" of Mankind*, 5 INT'L CRIM. L. REV. at 623, 626 (2005).

95. *Id.* at 627.

96. *Id.* at 630 (emphasis added).

97. Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUM. RTS. 304, 307 (2008) (quoting *Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal*, (1950) 2 Y.B. Int'l L. Comm'n, 377, UN Doc. A/CN. 4/SER.A/1950/Add. 1).

under when prosecuting those who helped facilitate war crimes in both cases.[98] Both tribunals imposed individual criminal responsibility on any "person" who "aided and abetted in the planning, preparation, or execution" of war crimes.[99] The ILC further clarified these standards in the 1996 Draft Code of Crimes Against the Peace and Security of Mankind.[100] Finally, aiding and abetting was addressed in the Rome Statute of the International Criminal Court when it was drafted in 1998.[101]

International criminal law's recognition of accomplice liability is virtually unquestioned at this point, but a full and proper definition for aiding and abetting in international criminal law is still debated, even after its development through case law and codification.

Just like almost every crime in almost every jurisdiction around the world, aiding and abetting in the international criminal sense requires some sort of an actus reus and a mens rea. And, as almost always, the actus reus is more easily defined than the mens rea. The actus reus of aiding and abetting in international law was discussed by the court in *Furundzija*, a case from the ICTY:

> [T]he relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal . . . the position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime . . . in sum, the Trial Chamber holds that the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support, which has a substantial effect on the perpetration of the crime.[102]

Article 25(3) of the ICC contains similar language for its interpretation of the actus reus element of aiding and abetting. It reads:

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98. *See* Reggio, *supra* note 94.

99. *Id.*

100. *See Draft Code of Crimes against the Peace and Security of Mankind*, (1996) 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN. 4/SER.A/1996/Add. 1 (Part 2).

101. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, *adopted* July 17, 1998, *entered into force*, July 1, 2002, U.N. Doc. A/CONF.183/9, 21, art. 25.3(c), 37 I.L.M. 999 (1998) [hereinafter ICC Statute].

102. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 232-235 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998), *quoted in* Reggio, *supra* note 94, at 638.

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime jurisdiction of the Court if that person: [. . .] For the purposes of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission.[103]

There are small differences in the wording of the ICC statute and the decisions of the *ad hoc* courts, but the spirit is consistent among the definitions. The distinction between the two standards is that Article 25 of the ICC uses "for the purposes of," while the *ad hoc* courts do not allude to purpose at all in describing the actus reus.[104] The word "purpose" fits best when addressing the mens rea of the crime as opposed to the actus reus, so the ICC's use of it will be discussed as part of the mens rea requirement.

Taken together, legal scholar Ryan Goodman defines the actus reus of aiding and abetting a war crime in international criminal law as an act in which "there is a principal person or entity that commits a war crime (main perpetrator), and another actor who committed an act that had a substantial effect upon the commission of the underlying offense."[105]

Legal scholars have long had a difficult time figuring out the exact mens rea standard of aiding and abetting under international law because of the split between international criminal tribunals, also known as "customary law," and the codification found in the ICC. The court in *Furundzija* applied a knowledge test when determining the mens rea for aiding and abetting war crimes, stating "to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with the *knowledge* that the torture is taking place."[106] In a subsequent decision by the ICTY, the court also said that "in addition to knowledge that his acts assist in the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his

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103. ICC Statute, art. 25.3

104. *See* Reggio, *supra* note 94, at 637-44.

105. Ryan Goodman, *The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support for Saudi Strikes in Yemen*, JUST SECURITY (Sept. 1, 2016), *available at* https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen/ (last visited Feb. 3, 2019).

106. *See* Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 257.

conduct."[107] The depth of the accomplice's knowledge does not have to be extensive, as he does not need to know the *precise* crime that will be committed, but rather that a crime will *probably* be committed.[108]

This has been the view of the international law community since these decisions were handed down, but the customary definition of the aiding and abetting mens rea became murky at the drafting of the Rome Statute in 1998 when the drafters seemingly included two mens rea standards.[109]

The mens rea portion of Article 25(3) of the Rome Statute states that the contribution made in the act of aiding and abetting "shall be *intentional* and shall either: be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court;" or "[b]e made in the *knowledge* of the intention of the group to commit the crime."[110] This provision has confused legal scholars, but according to Maria Kelt and Herman Von Hebel, the dual mens rea provision was included in the Rome Statute so that future courts would have discretion over which mens rea to would apply to someone charged with aiding and abetting.[111] Generally speaking, Article 25(3) is considered to require purpose for aiders and abettors, but since nearly all international criminal law jurisprudence up to (and after) the drafting of the Rome Statute has applied a knowledge test to aiders and abettors, leading scholars believe a minimum requirement of knowledge will continue to be applied.[112]

In sum, an aider/abettor of a war crime must commit an act that has a substantial effect upon the commission of the underlying offense (the war crime), and the aider/abettor must know that the offense would occur, or that there was a substantial likelihood that their act would assist in the commission of the crime.[113]

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107. Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 286 (Int'l Crim. Trib. for the Former Yugoslavia, Mar. 3, 2000), *available at* https://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf (last visited Feb. 3, 2019).

108. Reggio, *supra* note 94, at 637-44.

109. Maria Kelt & Herman Von Hebel, *General Principles of Criminal Law and the Elements of Crimes*, *quoted in* ROY S.K. LEE & HAKAN FRIMAN, THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 19, 37 (2001).

110. ICC Statute, art. 25.3.

111. Kelt & Von Hebel, *supra* note 109.

112. Goodman, *supra* note 105.

113. *Id.*

VI. VILLAINS UNCHECKED: CORPORATE CRIMINALITY IN INTERNATIONAL LAW

It is first important to note that legal entities, such as corporations, cannot currently be held criminally responsible for violating international law.[114] The drafters of the Rome Statute believed that respecting national sovereignty was important, and since not every country who is a party to the Rome Statute allows for the criminal prosecution of legal entities, the ICC thought it better to not allow criminal responsibility to be imposed upon legal entities.[115] With that being said, the ICC and other international criminal tribunals have had no issue prosecuting leading figures of legal entities and groups in the past. However, this does not mean that just anyone within a corporation can be punished for the decisions made by executives; culpability is usually limited to those people high enough in the chain of command to make decisions which lead to the facilitation of war crimes.[116]

The court in *U.S. v. Krupp*, a case against the head of a large German engineering firm that produced various instruments used in WWII for the Nazis, stated, "[a]s already said, we hold that guilt must be personal. The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient."[117] The judge presiding over the U.S. Military Tribunal in which the case was being heard went on to elaborate as he quoted principles of American law:

> Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company's business may be held criminally liable individually therefor. So, although they are ordinarily not criminally liable for corporate acts performed by other officers or agents, and at least where the crime charged involves guilty knowledge or criminal intent, it is essential to criminal liability on his part that they actually and personally do the acts which constitute the offence or that they be done by his direction or permission. He is liable where his scienter or authority is established or where he is the actual present and efficient actor. When the corporation itself is

114. Reggio, *supra* note 94, at 650-51.

115. *See* Doug Cassel, *supra* note 97, at 304, 316; *see also* ICC Statute (showing that the U.S. is not a party to the Rome Statute and does not come within the ICC's jurisdiction, so ICC principles do not apply to the U.S.).

116. *See* Reggio, *supra* note 94, at 120-21.

117. *U.S. v. Krupp*, 9 L.R.T.W.C. 1, 151, 9 T.W.C. 1448 (1948), *quoted in* Schabas, *supra* note 93, at 446 [hereinafter *The Krupp Case*].

forbidden to do an act, the prohibition extends to the board of directors and to each director separately and individually.[118]

Another example of the prosecution of corporate executives for aiding and abetting war crimes can be seen in Nuremberg's *Zyklon B* case. There, the court found Bruno Tesch, the owner of the company that produced the gas used in Nazi concentration camp gas chambers (Zyklon B) guilty of criminal aiding and abetting of war crimes.[119] The court found that because Tesch *knew* what his insecticide would be used for, or that he knew with *substantial certainty* how the product would be used, he was responsible for aiding and abetting the Nazis in their efforts.[120] Bruno Tesch's procurist, Karl Weinbacher, was convicted as an accomplice as well, as he was found to have had enough knowledge of the workings of the Tesch firm to be considered an aider and abettor.[121]

If a corporation itself is going to be held criminally responsible for aiding and abetting a crime, it would need to be in a domestic court within the jurisdiction of a country whose law allows legal entities to be considered criminals, such as a U.S. federal court.[122] However, customary international law has established in the cases above, as well as in other decisions heard in international court, that executives of corporations and companies who aid and abet in war crimes may very well be held liable for their actions.

VII. BEHIND THE CORPORATE MASKS: LIABILITY OF EXECUTIVES IN INTERNATIONAL LAW

Prosecuting corporate executives for accomplice liability on the international stage is tricky in its own right. Legal scholar Andrea Reggio accurately points out the fact that, in most cases, executives of companies who aid and abet war crimes are not doing so for the purpose of facilitating criminal activity.[123] These people are almost always economic actors who have business interests at stake, and as they are individuals in executive positions, their decisions have an effect on their

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118. *Id.*

119. *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, 1 Law Reports of Trials of War Criminals 93 (1947) (Brit. Mil. Ct., Hamburg, Mar. 1-8, 1946) [hereinafter *The Zyklon B Case*].

120. *The Zyklon B Case.*

121. *Id.*

122. *See* CHARLES DOYLE, CONG. RES. SERV., R43293, CORPORATE CRIMINAL LIABILITY: AN OVERVIEW OF FEDERAL LAW (2013) for an overview of corporate criminal responsibility under U.S. federal law.

123. *See* Reggio, *supra* note 94, at 651-53.

entire companies – from the shareholders to the assembly lines. In Reggio's opinion, corporate executives are usually not pursued under accomplice liability theories simply because it creates a slippery slope;[124] if executives can be held criminally responsible, can those who build the products be held responsible as well? What about those who had the idea for the product itself? Reggio's slippery slope argument is compelling when speculating on why corporate executives have not been prosecuted for accomplice liability often in the past. However, it seems clear from a logical standpoint that the only people within a company who should be held criminally responsible for accomplice liability are those making the decisions that lead directly to the facilitation of the crime.

The application of international legal standards for accomplice liability to U.S. defense contractor executives' business activity with KSA creates a textbook example case of international criminal aiding and abetting. The executives of these corporations should be held responsible for facilitating war crimes when U.S. weapons are used by KSA to do so. This section will apply the laws and standards discussed above to the situation in Yemen to show this.

A. Principal Crime

It is indisputable that KSA has violated international law during its intervention in Yemen via indiscriminate and disproportional airstrikes resulting in mass civilian casualties. KSA has shown no regard for civilian life on hundreds of occasions by launching airstrikes that cause tremendous civilian casualties. Anytime these airstrikes are aimed at civilian targets or cause disproportionate civilian casualties when they are aimed at military targets there are grounds for the international community to condemn such attacks as apparent war crimes.[125] These acts may fall under Common Article 3 of the Geneva Conventions or under the customary principles of international law.[126] The March 2016 attack on the civilian market in Mastaba is particularly illustrative of the applicable legal standards and relevant for purposes of this argument, as

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124. *See* Reggio, *supra* note 94, at 651-72.

125. *See* Patrick Wintour, *All sides in Yemen may be responsible for war crimes, say UN experts*, THE GUARDIAN (Aug. 28, 2018), *available at* https://www.theguardian.com/world/2018/aug/28/all-sides-in-yemen-may-be-responsible-for-war-crimes-say-un-experts (last visited Feb. 3, 2019).

126. *See* Common Article 3 of the Geneva Conventions; *see* ICRC, *supra* note 32.

KSA used a U.S.-made weapon in the attack and subsequently denied culpability for the civilian casualties that resulted.[127]

The Mastaba market attack appears to have been a deliberate strike on a civilian target in violation of Common Article 3, and as such, should be treated as a war crime. The attack was carried out on a known civilian area and resulted in mass civilian casualties. However, the attack should still be treated as a war crime even if the international legal community ultimately fails to recognize the market as a civilian target and treats the strike as a military operation. In such a case the act would be seen as an indiscriminate attack on a military objective that resulted in a disproportionate number of civilian casualties in violation of the principle of proportionality.[128] Thus, KSA's strike on the Mastaba market constitutes a war crime in this case regardless of which international legal standard applies, and the underlying principal offense of a war crime is present.[129]

B. Facilitation – Actus Reus

Once the underlying principal offense is proven, a showing of the alleged aider's/abettor's action which helped facilitate the underlying crime is the first step in analyzing whether accomplice liability exists.[130] In order for the act of accomplice liability to be established, it must be shown that the individual committed an act which had a *substantial effect* on the commission of the underlying offense.[131] KSA's attack on the Mastaba market in 2016 was carried out with a weapon that is typically manufactured and sold by Raytheon, which makes the sale of the weapon to KSA a textbook example of an act which had a substantial effect on the commission of a war crime.[132] The attack may not have happened but for Raytheon's sale of the weapon to KSA, so the actus reus element of aiding and abetting is met as a result.

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127. *See* HUM. RTS. WATCH, *supra* note 42 (citing the Saudi Arabian response to the Mastaba market bombing, as KSA claimed it believed there was a legitimate military target in the form of a militia gathering at the market. HRW found there were few, if any, Houthi fighters in or around the market at the time of the attack, and that Saudi Arabia knew the market was a popular civilian area).

128. *See id.*

129. *See id.* (the Mastaba bombing has already been condemned as an apparent war crime by Human Rights Watch).

130. *See* Reggio, *supra* note 94.

131. *See id.*

132. *See* HUM. RTS. WATCH, *supra* note 42.

C. Facilitation – Mens Rea

The international legal community has established that proving mens rea of accomplice liability in international criminal law is complicated. In the hypothetical case of U.S. defense contractor Raytheon aiding and abetting KSA war crimes in Yemen through its sale of weapons to KSA, international criminal prosecution would need to show that, at the very least, executives for Raytheon *knew*, or believed with substantial certainty, that KSA would commit a war crime while using its weapons. It might be difficult to prove that Raytheon executives *knew* that KSA would commit a war crime by attacking the market in Mastaba, but the mens rea definition of aiding and abetting does not require the accomplice to know the exact crime that will be committed – the accomplice must only know that his actions would substantially contribute to the commission of a war crime at some point. Raytheon executives probably did not know that the sale of its weapons would result in this exact attack. However, it is undeniable, based on KSA's extensive record of human rights violations in Yemen and consistent abuse of its access to advanced weapons systems, that Raytheon executives knew or believed with substantial certainty that the sale of its weapons would result in the commission of a war crime at some point.

Evidence of the use of U.S.-made weapons in a KSA-perpetrated war crime was first discovered after an attack in 2016, so U.S. defense contractors have known for at least two years now that their weapons are being used in apparent war crimes.[133] However, as U.S. defense contractors continue to sell weapons to KSA in billion-dollar quantities, it is becoming more and more clear that the executives of these corporations know what their weapons will be used for. The problem is that they are not doing anything to stop it.

Raytheon executives have gone on record multiple times to clarify their attitude towards KSA's troublesome and illegal behavior, which does not appear to be an issue worth discussing extensively in their eyes. Shortly after the disappearance of Jamal Khashoggi, Raytheon's CFO Anthony O'Brien said "[w]e continue to be aligned with the administration's policies, and we intend to honor our commitments," while CEO of Raytheon International stated in February 2019 that "[w]e are an element of U.S. policy – our role is not to make policy, our role is

133. *See id.* (identifying the bomb used in the Mastaba attack as "U.S. made," meaning U.S. defense contractors have known for at least that long that their weapons are being used to perpetrate apparent war crimes in Yemen).

to comply with it."[134] O'Brien and Harris stuck with apparent company policy when making these comments, as the corporation's CEO Thomas Kennedy has handled the Saudi Arabian controversies in a similar manner, saying that because Raytheon is a "global company providing technology and security solutions for over 80 countries" he feels confident that Raytheon will be able to "weather" these complexities.[135] Referring to KSA's misuse of U.S. made weapons and other violations of international law as complexities is astoundingly insensitive, and shows either a lack of understanding of the situation at hand, or a complete and knowing disregard of the seriousness of his company's decision to continue selling weapons to KSA. Even if it is to be believed that the executives of a global corporation such as Raytheon are totally ignorant of the situation in Yemen, such ignorance would be a classic case of willful ignorance, which scholar Andrea Reggio compares to a mens rea of knowledge.[136]

Lockheed Martin CEO Marillyn Hewson also seems to be clinging to the government's lead on U.S.-KSA relations, as she defers to the administration just as the Raytheon executives do. When speaking about Lockheed Martin's continued weapons sales to KSA, Ms. Hewson said that "[m]ost of these agreements that we have are government-to-government purchases, so anything that we do has to follow strictly the regulations of the U.S. government . . . beyond that, we'll just work with the U.S. government as they're continuing their relationship with Saudi."[137] All of what Ms. Hewson said is true – but the fact of the matter is that she knows where the weapons are going, and she knows what they are being used for. Ms. Hewson is simply weighing her bottom line heavier than the legality of her company's weapons sales to KSA.

U.S. defense contractor executives are not oblivious to what KSA is using their companies' products for, but they are not selling weapons to KSA for the purpose of assisting in the commission of war crimes. Rather, they are selling the weapons for economic gain, with the knowledge that their weapons will be used to carry out war crimes. This distinction is irrelevant, however, for purposes of deciding whether

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134. Natasha Turak, *Raytheon International CEO on weapons sales to Saudi Arabia: 'We don't make policy'*, CNBC (Feb. 16, 2019), *available at* https://www.cnbc.com/2019/02/16/raytheon-exec-on-sales-to-saudi-arabia-we-dont-make-policy.html (last visited July 26, 2019).

135. *See* Ivanova, *supra* note 27 (referring to O'Brien's support for the Trump administration's decision to continue to associate with Saudi Arabia).

136. *See* Reggio, *supra* note 94, at 686-87.

137. *See* Ivanova, *supra* note 27.

or not defense corporation executives could still be held criminally liable for aiding and abetting war crimes, as even indirect support of war crimes due to economic interest has been found to rise to a mens rea of purpose in past ad hoc international tribunals.[138] The U.S. defense contractor executives' desire to maintain healthy economic relationships with KSA is illustrated through their continued efforts to win large military contracts with KSA, as well as their attendance at a major business summit hosted in Riyadh.[139] U.S. defense executives have also shown their support of KSA military operations through their express support for President Trump's $110 billion arms deal with KSA from 2017.

Collectively, these factors show that the executives of U.S. defense contractors know, and have known, that their weapons are being used to commit war crimes in Yemen. Not only do they know what their weapons are being used for, but it is now apparent that they are, at best, indifferent towards how their weapons are being used. This establishes a mens rea of knowledge through either direct knowledge or willful ignorance. It could also be argued that if U.S. defense contractor executives have knowledge of their actions, then they also have purpose, through purposefully continuing to sell weapons to KSA for economic gain with the knowledge of how the weapons are being used. Even so, since the mens rea requirement established by principles of international law seems to only be knowledge, U.S. defense contractor executives clearly meet the required standard and should be held criminally liable as accomplices to war crimes.

VIII. JUSTICE FOR THE VICTIMS BY PROSECUTING THE VILLAINS

Now that it has been established that executives of U.S. defense contractors that continue to sell weapons to KSA should be considered accomplices of KSA war crimes in Yemen, a solution must be

138. *See* Reggio, *supra* note 94.

139. *See* Joan Vennochi, *Khashoggi and Raytheon profit ahead of principle?*, BOS. GLOBE (Oct. 22, 2018), *available at* https://www.bostonglobe.com/opinion/2018/10/22/khashoggi-and-raytheon-profit-ahead-principle/PlRRCrOwPiaOipPaOpPd1N/story.html (last visited Mar. 8, 2019) (reporting that Raytheon CEO Thomas Kennedy would remain a speaker at the Saudi-hosted business conference aka "Davos in the desert" even after controversies involving KSA); *see also* David Alexander, *Lockheed awarded $1.48 billion Saudi missile defense contract: Pentagon*, REUTERS (July 19, 2019), *available at* https://www.reuters.com/article/us-lockheed-martin-defense-saudi/lockheed-awarded-1-48-billion-saudi-missile-defense-contract-pentagon-idUSKCN1UE2JQ (last visited July 27, 2019) (reporting that a July 2019 modification to a weapons sales contract between Lockheed Martin and KSA made the total value of the contract over $5 billion).

addressed. Any sort of legal action against these corporations or their executives taken in U.S. federal court would need to be approved by the Department of Justice, which is unlikely to occur under the Trump administration.[140] Lockheed CEO Marillyn Hewson and President Trump seem to have a friendly relationship (even though Trump referred to her as "Marillyn Lockheed" at one point), and he may not allow the Justice Department to pursue her prosecution.[141] Further, President Trump has orchestrated the most recent government-to-government military tech sales between the U.S. and KSA, so pursuing legal action against defense corporations would ultimately reflect poorly on him, making the likelihood of such a pursuit even slimmer.

Since the possibility of prosecution under U.S. federal law looks rather bleak, the only realistic route to bringing U.S. defense contractor executives to justice is the international course. There are two feasible paths to prosecuting U.S. defense contractor executives under international law: prosecution under the ICC or prosecution under an *ad hoc* court. Neither seems likely in the near future, but there are arguments to be made that either one is possible.

A. ICC Prosecution

The Rome Statute states that the ICC is somewhat of a last resort; the ICC only exercises jurisdiction over an international crime if the home country of the perpetrator is either unable or unwilling to prosecute the alleged criminal itself.[142] The only way an individual can come under the jurisdiction of the ICC is if the home country of the individual is a party to the ICC or if the crime in question occurred within the boundaries of a state that is bound by the ICC.[143] The U.S. is

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140. The only way that corporate executives could be held criminally liable under U.S. federal law is under the War Crimes Act of 1996. *See* War Crimes Act, 18 U.S.C. § 2441(c) (1996). Although the actions of the executives of U.S. defense contractors are not war crimes themselves, the War Crimes Act allows for aiding and abetting to be counted as a war crime as well. However, the Department of Justice would be the entity bringing suit against the executives, and the importance of companies like Lockheed Martin and Raytheon to the government, especially the Executive branch, makes any suit implausible.

141. Ben Brimelow, *Trump flubbed the name of Lockheed Martin CEO, calling her 'Marillyn Lockheed'*, BUS. INSIDER (Mar. 22, 2018), *available at* https://www.businessinsider.com/trump-marillyn-lockheed-martin-ceo-hewson-2018-3 (last visited Feb. 3, 2019).

142. *See* ICC Statute, art. 17 (the International Criminal Court was established under the Rome Statute).

143. *See* David Davenport, *Will The International Criminal Court Prosecute Americans Over Afghanistan?*, FORBES (Mar. 26, 2018), *available at* https://www.forbes.com/sites/daviddavenport/2018/03/26/will-the-international-criminal-court-prosecute-americans-over-afghanistan/#3c9befc110a5 (last visited Feb. 3, 2019) for an example of a

a signatory to the Rome Statute, but did not ratify it, and informed the ICC that it does not intend to do so.[144] This means that no one under U.S. jurisdiction can be brought under the arm of the ICC unless the U.S. consents to it (compulsory jurisdiction), or if the U.S.-based actor committed a crime in a territory that is bound by the ICC.

U.S. officials have been critical of the ICC in the past, referring to it as "freewheeling" in the sense that it lacks due process.[145] The U.S.'s disdain for the ICC has recently become more apparent, as the ICC has been attempting to investigate apparent war crimes committed by the U.S. in Afghanistan.[146] Afghanistan is a party to the Rome Statute, and since the ICC can exercise jurisdiction over a nation that violates international law within a country that is a party to the Rome Statute, the ICC technically has jurisdiction over the U.S. in that case. However, the Trump administration has made it clear that it does not intend to cooperate with the ICC's investigation, even if it technically has jurisdiction over the U.S. The Trump administration's National Security Advisor John Bolton has gone so far as to say that the administration would "fight back" against the ICC and impose sanctions on it by seeking to prosecute ICC officials if the ICC continued to investigate U.S. officials for war crimes in Afghanistan.[147]

Yemen, like the U.S., is only a signatory to the Rome Statute, but it seems as if Yemen could ratify it once the government is stable.[148] Ryan Goodman believes, however, that the ICC will still be able to exercise jurisdiction over war crimes committed in Yemen even if Yemen does not eventually ratify the Rome Statute, since Yemen can

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situation in which the ICC has said it would attempt to exercise jurisdiction over the United States.

144. *See* Steven Groves & Brett Schaefer, *U.S. Refusal to Ratify Rome Statute Vindicated by ICC Afghanistan Report*, THE HERITAGE FOUND. (Dec. 11, 2014), *available at* https://www.heritage.org/report/us-refusal-ratify-rome-statute-vindicated-icc-afghanistan-report (last visited Feb. 3, 2019).

145. *See Bolton's Remarks on the International Criminal Court*, JUST SECURITY (Sept. 10, 2018), *available at* https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/ (last visited Feb. 3, 2019); *see also* Owen Bowcott, Oliver Holmes, & Erin Durkin, *John Bolton threatens war crimes court with sanctions in virulent attack*, THE GUARDIAN (Sept. 10, 2018), *available at* https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech (last visited Feb. 3, 2019).

146. *See* JUST SECURITY, *supra* note 145.

147. *See id.*

148. *See* Ryan Goodman, *Does the Int'l Criminal Court Have Jurisdiction over Alleged War Crimes by Saudi-Led Coalition in Yemen?*, JUST SECURITY (Sept. 14, 2016), *available at* https://www.justsecurity.org/32910/intl-criminal-court-jurisdiction-war-crimes-allegedly-committed-saudi-led-coalition-yemen/ (last visited Feb. 3, 2019).

consent to ICC jurisdiction regardless of whether it is a party to the Rome Statute or not.[149] If Yemen chooses to allow the ICC to exercise jurisdiction over it, the U.S. (and U.S.-based defense corporations) will, theoretically, be subject to the ICC's jurisdiction as well, since the U.S. and U.S.-based defense contractors have assisted in the commission of war crimes in Yemen. The U.S. government would not allow such jurisdiction to be exercised without a fight, since doing so would force the government itself to admit some fault in aiding and abetting KSA in their war crimes in Yemen. Thus, even though it is unlikely, there is a route for defense contractor executives to be prosecuted under the ICC.

B. U.N. Security Council Resolution

The other way executives of U.S. defense contractors could face international justice for aiding and abetting KSA war crimes in Yemen is through a U.N. Security Council resolution. Such action would create an investigation into the Yemeni Civil War, which would eventually lead to a special court for Yemen, created for the purpose of prosecuting war criminals from the Yemeni Civil War. Resolutions are binding on the parties which they are meant to address, so any U.N. country brought into a resolution is bound by decisions pursuant to the resolution under Chapter VII of the U.N. Charter.[150] This means that any individuals subpoenaed by an *ad hoc* court for Yemen, including U.S. defense contractor executives, would be required to participate in the proceedings.[151] It is important to note that the five permanent members of the U.N. are able to veto any resolution if they so choose, and as a permanent member, the U.S. would have the power to do just that.[152] However, there would be no guarantee that the U.S. would be implicated in a Security Council investigation, and even if it was, it would be an incredibly damning implication for the U.S. to veto a resolution that would create an investigation or *ad hoc* court for the

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149. *Id.*

150. *Are UN resolutions binding?*, DAG HAMMARSKJÖLD LIBR. (Apr. 26, 2018), *available at* http://ask.un.org/faq/15010 (last visited Feb. 3, 2019) (stating that U.N. Security Council Resolutions are usually binding when issued under Chapter VII of the U.N. Charter, which deals with maintaining peace and security of the United Nations. A resolution created for the purposes of investigating war crimes committed in Yemen would likely fall under Chapter VII).

151. The U.S. is a member of the U.N., so if any U.S. citizens are called on to participate in action pursuant to a U.N. Security Council resolution then they would be required to cooperate, barring a U.S. veto of the resolution.

152. *See United Nations Security Council Fast Facts*, CNN (Mar. 28, 2018), *available at* https://www.cnn.com/2013/09/03/world/united-nations-security-council-fast-facts/index .html (last visited Feb. 3, 2019).

purposes of holding violators of human rights in Yemen accountable for their actions. However, it would not be shocking if the U.S. did just that.

IX. DEFENDING THE VILLAINS: ARGUMENTS SUPPORTING U.S. DEFENSE CONTRACTORS

There are strong arguments to be made against prosecuting executives of U.S. defense contractors who aid KSA in its internationally illegal efforts, but none are strong enough to overcome the reasons to pursue such prosecution. The first argument against prosecuting executives of U.S. defense contractors is the fact that, while these corporations have a responsibility to not facilitate war crimes, they also have a responsibility and obligation to their shareholders to do what they can to continue to make them money. They also have a responsibility to the government to continue to provide them with weapons that they can sell to KSA. Finally, there is the argument that if U.S. defense contractors did not sell weapons to KSA then someone else would. All three of these arguments are convincing and logical on the face, but none hold enough water to stop from pursuing legal action against U.S. defense contractor executives.

Lockheed Martin's anticipated sales to KSA for 2019 are around $500 million, with 2020 projected sales to KSA close to $900 million.[153] These sound like huge figures on their own, but considering that the defense tech giant pulled in a total of about $50 billion in 2017, those amounts are very expendable.[154] As a matter of fact, Lockheed Martin has said itself that it does not have a "huge dependency on KSA sales."[155] Raytheon is in a similar situation, as only about 5% of its total annual sales come from KSA.[156] On the other hand, both countries sell a tremendous amount of weapons to the U.S. government itself, which accounted for 90% of Lockheed's net revenue in 2016.[157] This goes to

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153. Aaron Gregg & Christian Davenport, *Defense contractors stand with White House on Saudi arms sales*, WASH. POST (Oct. 25, 2018), *available at* https://www.washingtonpost.com/business/2018/10/25/defense-contractors-stand-with-white-house-saudi-arms-sales/?utm_term=.01c2f53558f1 (last visited Feb. 3, 2019).

154. *See* Mike Stone, *Lockheed Martin profit beats, downplays Saudi exposure*, REUTERS (Oct. 23, 2018), *available at* https://www.reuters.com/article/us-lockheed-results/lockheed-martin-profit-beats-downplays-saudi-exposure-idUSKCN1MX1ML (last visited Feb. 3, 2019).

155. *Id.*

156. Gregg & Davenport, *supra* note 68.

157. Rich Duprey, *6 companies that are the most reliant on government contracts*, USA TODAY (Nov. 10, 2017), *available at* https://www.usatoday.com/story/money/

show that, although KSA is an important foreign client for U.S. defense contractors, they really do not need these sales to sustain extreme success, meaning Lockheed and Raytheon shareholders could remain happy even without sales to KSA. On top of this, shareholders of these corporations should expect ethical business practices from the corporations and the executives themselves. Selling products to a country that uses the products to violate international law does not seem as if it fits the mold of ethical business practices, and publicized unethical business practices can result in stock plummets, doing damage to shareholders' pockets.[158] Thus, although it may seem as if it is in the shareholders' best interest for these corporations to continue selling weapons to KSA, the reality of the situation is that it is in fact *not* in the best interest of the shareholders if these corporations continue to sell to KSA.

The second argument against the prosecution of defense contractor executives is that the government depends on them to produce weapons for KSA, and the U.S. relies heavily on its good relationship with KSA. However, this lends more support to the U.S. government's policy of selling weapons to KSA than it does to the defense contractors selling them to the U.S. The government's weapons sales to KSA accounted for about one-fifth of its total sales to foreign countries from 2012-2017.[159] However, the U.S. government is making itself potentially vulnerable to future legal action because of its sales to KSA, among other risks, so it is ultimately in the government's best interest to halt sales to KSA, at least for the time being.

Last, but not least, is the ever-popular theory that if U.S. defense contractors do not sell weapons to KSA, someone else will. This argument is not persuasive because U.S. defense contractors are almost irreplaceable in this case, but even if they were easily replaceable, U.S. allies and rivals alike would be unlikely to do so.

This is true for a few reasons. First, the capabilities of U.S.-based defense contractors far surpass defense contractors based in other countries (shown by sales), so it is unrealistic to think that foreign

business/2017/11/10/6-companies-that-are-the-most-reliant-on-government-contracts/107395784/ (last visited Feb. 3, 2019).

158. *See* Spuma M. Rao & J. Brooke Hamilton, III, *The Effect of Published Reports of Unethical Conduct on Stock Prices*, 15 J. BUS. ETHICS 1321 (1996) (stating that stock in corporations that have unethical business practices published tends to go down, decreasing the value of a shareholder's stock in the company for an appreciable period of time).

159. Ivanova, *supra* note 27.

defense contractors will take the U.S.'s spot.[160] Second, even if foreign defense contractors were poised to replace corporations like Raytheon and Lockheed, it is unlikely that any U.S. ally, such as the United Kingdom or France, would allow their corporations to split from U.S. foreign policy, in order to appease and align with the U.S. Finally, it is unrealistic that a U.S. *rival* would sell weapons to KSA, since KSA is arguably the U.S.'s most powerful friend in the Middle East. Russian relations with KSA have improved over the last few years, but Russia's allegiance remains with Iran, and as such, Russia would not do anything to support KSA in its proxy war against Iran, especially since Russia has already been involved in the Yemen conflict itself.[161] Beyond this, Russia does not house defense contractors capable of meeting KSA's demands, making the sale of weapons to KSA even more unlikely.[162] China has also seen its relationship with KSA blossom in recent years, but, like Russia, it has a stronger and more valuable relationship with Iran.[163] Beyond this, China has not expressed support for KSA and its coalition in the Yemen conflict and seems as if it would prefer peace in the Middle East, so it is difficult to see it doing anything to fuel the war.[164]

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160. *See* Amanda Macias, *American firms rule the $398 billion global arms industry: Here's a roundup of the world's top 10 defense contractors, by sales*, CNBC (Jan. 10, 2019), *available at* https://www.cnbc.com/2019/01/10/top-10-defense-contractors-in-the-world.html (last visited July 27, 2019) (reporting that U.S. defense contractors Lockheed Martin, Boeing, and Raytheon make up about $96 billion in global arms sales, while the United Kingdom's arms sales are around a third of that total and France's major weapons manufacturer grosses about $9 billion annually).

161. *See* Anna Borshchevskaya, *Will Russian-Saudi Relations Continue to Improve?*, FOREIGN AFF. (Oct. 10, 2017), *available at* https://www.foreignaffairs.com/articles/saudi-arabia/2017-10-10/will-russian-saudi-relations-continue-improve (last visited July 27, 2019) (stating that Russian-Saudi relations have been cordial recently); *see also* Jonathan Fenton-Harvey, *Russia's deadly game in Yemen*, THE NEW ARAB (Mar. 6, 2018), *available at* https://www.alaraby.co.uk/english/indepth/2018/3/6/Russias-deadly-game-in-Yemen (last visited July 27, 2019) (stating that Russia has supported Iran in the Yemeni Civil War).

162. *See* Macias, *supra* note 160 (stating that Russia's top defense firm, Almaz-Antey, grosses around $9 billion a year).

163. *See* Ben Blanchard, *China's Xi speaks to Saudi king among Iran tensions*, REUTERS (May 8, 2019), *available at* https://www.reuters.com/article/us-usa-iran-china-saudi/chinas-xi-speaks-to-saudi-king-amid-iran-tensions-idUSKCN1SE1S3 (last visited July 27, 2019) (illustrating the strategic relationship between China and KSA).

164. *See* Ben Blanchard, *China's Xi urges Yemen resolution in call with Saudi king*, REUTERS (Apr. 18, 2015), *available at* https://www.reuters.com/article/us-yemen-security-china-saudi/chinas-xi-urges-yemen-resolution-in-call-with-saudi-king-idUSKBN0N909420150418 (last visited July 27, 2019) (stating that Chinese President Xi Jinping urged a political solution to the crisis in Yemen).

Thus, though it is clear that there are logical arguments to be made against prosecuting U.S. defense contractor executives, none of these arguments have strength to defeat the argument in favor of prosecuting these individuals. The international community should recognize the fact that these arguments do not hold enough water to ignore the actions of U.S. defense contractor executives and instead should pursue prosecution of these individuals.

X. U.S. DEFENSE CONTRACTORS: POWERS USED FOR EVIL

With great power comes great responsibility. U.S. defense contractors have been given a great power – they are undoubtedly powered by some of the brightest STEM and business minds in the world, yet as the top producers of the world's weapons they are also capable of creating technology that can tear populations of people apart and cause immense destruction. When selling weapons to KSA, U.S. defense contractors are not fulfilling the responsibility that comes with their power. Executives of U.S. defense contractors have aided and abetted war crimes committed by KSA in Yemen through the sale of weapons which they know are ultimately being used to kill innocent people.

Although the path to prosecuting defense contractor executives under international law would not be easy or straight-forward, it must be explored. Prosecution of these executives may be possible under the ICC or through a U.N. Security Council resolution investigation and creation of an *ad hoc* court. If the international community is serious about holding war criminals accountable for their actions, then it should be serious about holding their aiders and abettors accountable for their actions as well. U.S. defense contractors have great power – they should not be permitted to abandon the responsibility that comes with it.

THE BATTLE OF THE BRONZE: INTERNATIONAL LAW AND THE RESTITUTION OF CULTURAL PROPERTY

Jeanine M. Cryan*

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ABSTRACT

Since the promulgation of the 1970 United Nations Education, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention") and the 1995 International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects ("1995 UNIDROIT Convention"), the subject of art repatriation has continued to garner increasing international attention and cooperation among foreign nations. The shift in public attitude and decrease in litigation of issues of cultural patrimony are reflective of increased collaboration among countries of origin and museums resulting in deals that consider ethical and moral concerns and marketability issues as well as a collective desire to combat looting and illegal trafficking. Nonetheless, conflicts over particular artifacts have generated extensive legal disputes and questions regarding the applicable governing law, the artifact's discovery and provenance, and due diligence by museums before acquisition. For over three decades, Italy and the J. Paul Getty Museum have engaged in an extensive legal battle encompassing these issues over the "Statue of a Victorious Youth."

I. INTRODUCTION

Notoriously difficult to define, art encompasses a seemingly infinite number of innovations of human creativity, both past and present. Art is typically thought of as a work in a tangible, physical form using traditional media to sculpt, paint, photograph, and so forth. However, art encompasses both visual and performing arts. Multidisciplinary study and the body of art law have evolved to address

the complex legal issues involving the visual arts.[1] Art law protects, facilitates, and regulates the use, sale, and marketing of art.[2]

Cultural heritage law has developed in order to preserve and protect cultural property. The term "cultural property" was first used in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("Hague Convention").[3] Under the Hague Convention, cultural property was defined to include "movable or immovable property of great importance to the cultural heritage of every people," such as objects religious or secular, that are of historic, artistic, or archaeological interest.[4]

In the years since the Hague Convention, cultural property has evolved under the broader concept of cultural heritage, focusing not only on the protection of the cultural objects themselves, but also on their value as significant to the culture and identity of a community.[5] Peacetime international law grew to protect cultural property from illicit trafficking, notably under the 1970 UNESCO Convention and 1995 UNIDROIT Convention.[6] Additionally, many countries have enacted export and import restrictions, not to cut off transfers of art, but in order to improve regulation of art across borders and discourage illicit black-market trading.[7]

Public opinion regarding the repatriation of art and antiquities has been especially influential as the publicity of repatriation claims has drawn attention to the conflicting public policies faced by host countries, countries of origin, and private institutions.[8] Many museums have changed their stance on repatriation of illicitly looted objects in their collections for both moral and economic reasons. Not only is it the

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1. *Art Law Research Guide*, GEO. L. LIBR., *available at* http://guides.ll.georgetown.edu/artlaw (last visited Feb. 17, 2019).

2. *Id.*

3. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (1954) [hereinafter Hague Convention].

4. *Id.* art. 1.

5. Francesco Francioni, *Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law, in* ENFORCING INTERNATIONAL HERITAGE LAW 9, 12-13 (Francesco Francioni & James Gordley eds., 2013).

6. *Id.* at 13-14.

7. LEONDARD D. DUBOFF, SHERRI BURR, & MICHAEL D. MURRAY, ART LAW CASES AND MATERIALS 592 (2010).

8. Abby Seiff, *How countries are successfully using the law to get looted cultural treasures back*, ABA (July 1, 2014), *available at* http://www.abajournal.com/magazine/article/how_countries_are_successfully_using_the_law_to_get_looted_cultural_treasur (last visited Feb. 17, 2019).

right thing to do, but failure to do so once the claim has been publicized is simply bad for business.[9] Institutions such as the Metropolitan Museum of Art in New York have received an overwhelmingly positive response to decisions in favor of repatriation, whereas institutions such as the British Museum in London have received harsh criticism for decisions to deny the return of cultural objects.[10] The most infamous collection of looted antiquities, known as the Eglin Marbles, was removed from the Acropolis in Athens, Greece, in the early 1800's by British nobleman Thomas Bruce, the Earl of Elgin.[11] The eponymous marbles have garnered decades of press attention as a result of the British Museum's staunch refusal to return the antiquities to Greece.[12]

However, there is a general misconception that all cultures whose property is in private institutions and public museums around the world want the objects returned to their country of origin.[13] Rather, in some circumstances, looted objects should not be sent back because of insecure conditions or communities' attitudes towards the particular object.[14]

The diverse perspectives on repatriation have contributed to competing public policies regarding the return of cultural objects. Beside moral or ethical obligations, there are a number of compelling arguments that either support or caution against the growing trend of repatriation. The rising view of art as a symbol of cultural identity, heritage and pride for the country of origin, best understood and appreciated in its original cultural and historical context opposes the contrasting view that art is part of a shared heritage and transcends cultural boundaries. Further, there are legitimate concerns that ease of repatriation would reduce the marketability of foreign art and that weak

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9. *Id.*

10. *Id.*

11. The Elgin Marbles are also known as the "Parthenon Sculptures." For more information about the Parthenon Sculptures, *see* Juan Pablo Sanchez, *How the Parthenon Lost Its Marbles*, NAT'L GEOGRAPHIC (Mar. 28, 2017), *available at* https://www.nationalgeographic.com/history/history-magazine/article/parthenon-sculptures-british-museum-controversy (last visited Feb. 17, 2019). For the British Museum's statement on the Parthenon Sculptures, *see Parthenon Sculptures*, THE BRITISH MUSEUM, *available at* https://www.britishmuseum.org/about-us/british-museum-story/objects-news/parthenon-sculptures (last visited Feb. 17, 2019).

12. Seiff, *supra* note 8.

13. Nicholas Thomas, *Should Colonial Art be Returned Home?*, FIN. TIMES (Dec. 6, 2018), *available at* https://www.ft.com/content/6c61c6e6-f7ed-11e8-af46-2022a0b02a6c (last visited Feb. 17, 2019).

14. *Id.*

claims by modern nations that have a tenuous title and connection to the object may result in unjust return of objects. The public's view of museums as repositories for stolen art competes with the notion that museums present an opportunity to broaden cultural understanding and increase exposure to a variety of cultural objects. These competing policies lead to important questions regarding the role of museums, the availability of appropriate channels to navigate repatriation issues, and the impact of repatriation claims on the global art market.

Rather than engaging in extensive, costly litigation, museums are more frequently using a collaborative model to establish arrangements with willing countries of origin.[15] These deals harmonize the institution's needs with the home country's desire to repatriate the property through cross-cultural cooperation, loans and special exhibits.[16] Nevertheless, not all interactions between the alleged home country and current host country are quite so amicable. The extensive legal battle between Italy and the J. Paul Getty Museum over the Statue of a Victorious Youth highlights the many flaws of the international legal framework, competing public policies and greater questions resulting from the growing trend toward repatriation.

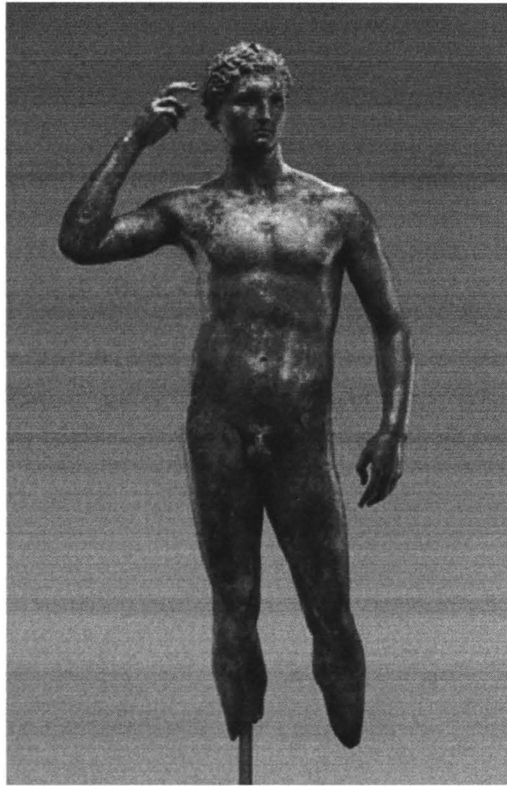
The Statue of a Victorious Youth is a bronze, nude athlete standing approximately five feet tall, resting his weight on his right leg, and raising his right arm as if he is admiring his olive wreath crown, or crowning himself with it.[17]

15. *Id.*

16. *Id.*

17. *Statue of a Victorious Youth*, J. PAUL GETTY MUSEUM, *available at* http://www.getty.edu/art/collection/objects/7792/unknown-maker-statue-of-a-victorious-youth-greek-300-100-bc/?dz=#0e7116b1eef4fd3a30227068c44986a494b1b49f (last visited Feb. 17, 2019) [hereinafter Getty Bronze Description].

Figure 1: The bronze Statue of a Victorious Youth.[18]



The so-called "Getty Bronze" was allegedly discovered in 1964 by Italian fishermen in international waters off the Adriatic Coast.[19] After its discovery, the statue changed hands numerous times, finally coming to rest in Los Angeles, California, after purchase by the Getty Museum in 1977.[20] Italy's legal claim over the statue arises from a 1939 Italian law that declares that the Italian State owns any and all cultural property discovered on its territory, and that any artifact exported from Italy requires an export license.[21] The Getty argues that because the statue was found in international waters, Italy does not have a claim to the statue, and the Italian courts have flip-flopped on whether they agree.[22]

18. *Id.*

19. Sopan Deb, *Italian Court Says the Getty's Prized Ancient Bronze Should Be Seized*, N.Y. TIMES (June 13, 2018), *available at* https://www.nytimes.com/2018/06/13/arts/getty-bronze-victorious-youth-italy-court.html (last visited Feb. 17, 2019).

20. *Id.*

21. *Id.*

22. *Id.*

Parts II and III of this note introduce the story of the Statue of a Victorious Youth, beginning with its discovery and subsequent purchase by the Getty Museum. Part IV details the legal history between Italy and the Getty Museum. Part V explains relevant international law as well as applicable law of Italy and the United States (U.S.). Though Italian criminal law and procedure are significant to the Italian courts' decisions, the focus of this note is on the justification for the application of Italian law, and Italy's claim for the forfeiture or voluntary return of the statue. In Part VI, this note considers how the judgments of the Italian courts might be enforced in the U.S. and whether the U.S. is under any international law or treaty obligation to return the Bronze. Additionally, in Part VII, the pertinent public policy arguments around cultural property will be analyzed. In sum, this note is a critique of the international framework for the repatriation of cultural property. This flawed system and conflict of applicable governing law have enabled a legal battle between Italy and the Getty to carry on for far too long. This note concludes that Italy's legal claim for the Statue of a Victorious Youth is tenuous at best, and that under the current international legal framework, the U.S. is not obligated to return the statue.

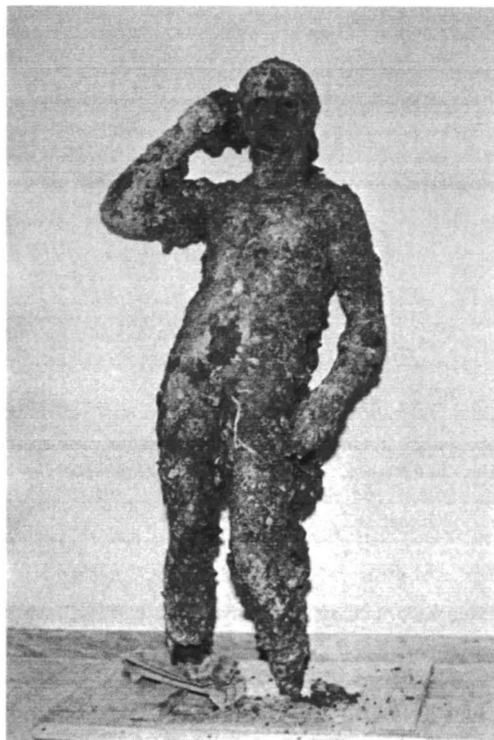
II. RECOVERY OF THE STATUE OF A VICTORIOUS YOUTH

The saga begins in the summer of 1964,[23] when fishermen from Fano, a coastal town in northeast Italy, discovered a statue tangled in their nets thirty to forty miles off Italy's coast in the Adriatic Sea.[24]

23. Trib. Ordinario di Pesaro, Ufficio del Giudice per le Indagini Preliminari in funzione di Giudice dell'esecuzione, *Ordinanza del 10 Febbraio 2010*, No. 2042/07 R.G.N.R. No. 3357/07 R.G.I.P. (10 Feb. 2010) at 4, *available at* http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (last visited Feb. 17, 2019) [hereinafter 2010 Ordinanza].

24. Jason Felch, *The Amazing Catch They Let Slip Away*, L.A. TIMES (May 11, 2006), *available at* http://articles.latimes.com/2006/may/11/local/me-bronze11 (last visited Feb. 17, 2019).

Figure 2: The Bronze before restoration.[25]



The fishermen had drawn up the Statue of a Victorious Youth, also known in Italy as the "Athlete of Fano," in their nets. Initially believed to be the work of the fourth century B.C. Greek sculptor Lysippos, the statue has been dated to the second or third century B.C. by contemporary studies.[26] The Statue of a Victorious Youth is considered to be one of the finest Greek bronzes to survive the classical era.[27] Likely looted by the Romans from its Grecian home and then lost at sea, the statue avoided the presumed fate (melt and recycle) of the many bronzes of Athens, Rhodes, Olympia and Delphi.[28]

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25. Getty Bronze Description, *supra* note 17.

26. Elisabetta Povoledo, *Italy Presses Its Fight for a Statue at the Getty*, N.Y. TIMES (Jan. 15, 2010), *available at* http://www.nytimes.com/2010/01/16/arts/design/16bronze.html?_r=0 (last visited Feb. 3, 2019). For more information about the Greek sculptor, Lysippos (Lysippus), *see also Lysippus*, ENCYCLOPAEDIA BRITANNICA (Apr. 21, 2018), *available at* https://www.britannica.com/biography/Lysippus (last visited Feb. 28, 2019).

27. *Id.*

28. Memorandum from Ronald L. Olson & Luis Li to the Delegation from the Italian Ministry of Culture 4 (Nov. 20, 2006), *available at* http://www.getty.edu/news/press/center/

The fishermen brought the statue ashore and the owners of the trawler allegedly hid the statue, burying it in a cabbage patch, before selling it to Giacomo Barbetti, a nearby antiquarian, and his brothers Pietro and Fabio Barbetti for 3.5 million lire in August of 1964.[29] The statue was later moved to the home of a priest, Father Giovanni Nagni, for safekeeping.[30] In June of 1965, the statue was sold by the Barbettis to an "unidentified person" from Milan.[31]

Shortly thereafter, the Barbettis and Father Nagni were charged with purchasing and concealing stolen property in violation of Article 67 of Italian Law No. 1089 of 1939. In May of 1966, all four men were acquitted after the Magistrate Court of Perugia found insufficient evidence that the statue had been found in Italian territorial waters and that the statue was of "historic and artistic value."[32] On appeal, the Court of Appeals of Perugia reversed.[33] This ultimately led to the conviction of the Barbettis for receiving stolen property and Father Nagni for aiding and abetting the crime on January 1, 1967.[34]

The case was appealed to the Court of Cassation, Italy's Supreme Court, where the Court overturned the sentence of the Court of Appeals of Perugia due to the lack of proof of the statue's provenance and a lack of evidence as to the "artistic and archaeological value" of the property, sending the case to the Court of Appeals of Rome.[35] On November 8, 1970, the Court of Appeals of Rome affirmed the Court of Cassation's ruling.[36]

III. THE GETTY'S PURCHASE OF THE BRONZE

After the statue was allegedly sold to the unidentified Milanese man, the Bronze resurfaced in Germany years later and in 1973, The New York Times reported it was up for sale in Munich, Germany for

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getty_italy_bronze_112006.pdf [hereinafter 2006 Brief]; Peter Steward, *The lost art of Greek bronzes*, APOLLO (July 25, 2019), *available at* https://www.apollo-magazine.com/the-lost-art-of-greek-bronzes/ (last visited Sept. 18, 2019).

29. 2010 Ordinanza, *supra* note 23, at 5; Povoledo, *supra* note 26.

30. 2010 Ordinanza, *supra* note 23, at 5.

31. *Id.* Translated by author, "*un personaggio non meglio identificato.*"

32. *Id.* Translated by author, "*sia sul valore storico ed artistico dell'oggetto.*"

33. *Id.*

34. *Id.*

35. 2010 Ordinanza, *supra* note 23, at 5-6. Translated by author, "*del valore artistico ed archeologico.*"

36. 2010 Ordinanza, *supra* note 23, at 6.

$3.5 million.[37] Art dealer Heinz Herzer had purchased the statue on behalf of the European art consortium, Artemis S.A., for $700,000 and was looking for a new buyer.[38] The New York Times reported the initial asking price for the statue was close to $5 million and it was offered to both the Metropolitan Museum of Art in New York and Mr. J. Paul Getty, an avid art and antiquities collector for his eponymous museum.[39] Getty turned down the opening offer due to concern over its title and high price, and later reportedly considered a fruitless deal with the Metropolitan Museum to jointly acquire the statue for $3.8 million.[40]

Getty allegedly expressed concern regarding the provenance of the statue and wished for a list of conditions to be met before proceeding with the purchase, including permission from the Italian Minister of Culture and proof of permission for exportation.[41] In August 1973, Heinz Herzer wrote to Jiri Ferel, the curator of antiquities for the Getty museum, in response to the Getty's concern over potential legal claims and asserted that "even the Italian government admits our incontestable property right to the Bronze."[42]

Getty died in 1976 before the conditions were fulfilled, but upon his death, the Getty Museum received a $700 million endowment from his estate, $3.95 million of which was used to purchase the statue from Artemis in 1977.[43] The Getty's acquisition of the statue was publicized internationally on November 26, 1977.[44] The Getty trustees consequently renamed the statue the "Getty Bronze" and displayed it in the museum in 1978, where it has remained ever since.[45]

IV. THE LEGAL BATTLE – ITALY'S ATHLETE OF FANO V. THE GETTY'S BRONZE

While negotiations over the Bronze were proceeding, Italy continued its pursuit. In 1973, the Italian government requested an

37. David L. Shirey, *Greek Bronze on Sale for $3.5-Million*, N.Y. TIMES, (Mar. 10, 1973), *available at* https://www.nytimes.com/1973/03/10/archives/greek-bronze-on-sale-for-35million-greek-bronze-on-sale-for.html (last visited Feb. 3, 2019).

38. *Id.*

39. *Id.*

40. *Id.*

41. Felch, *supra* note 24.

42. 2010 Ordinanza, *supra* note 23, at 13. Translated by author, "*anche lo Stato Italiano ammette il nostro diritto incontestabile di proprietà sul bronzo.*"

43. *Id.* at 8.

44. 2006 Brief, *supra* note 28, at 9.

45. Felch, *supra* note 24.

investigation by German authorities into Herzer and his purchase of the statue on the grounds of violation of Italian export laws, but the investigation was discontinued for lack of evidence.[46] The following year, Italy asked for the German authorities' participation in the seizure of the Bronze and extradition of Herzer for his alleged role in the illegal export of the statue from Italy.[47] However, the German authorities refused to proceed against Herzer and the investigation ceased.[48]

In December of 1977, Interpol requested that U.S. Customs look into the legal status of the Bronze, seeking further verification of proper exportation and due diligence by the Getty.[49] As a result, U.S. Customs officials established that the Getty trustees had reviewed the Italian cases and concluded that the statue had indeed been found in international waters and therefore, was not subject to Italian law prior to acquisition.[50] Interpol in Washington D.C. then conveyed to the Carabinieri that absent proof or further information supporting Italian ownership of the statue, the investigation would be closed.[51]

In 1989, Italy's Director General of the Italian Ministry of Cultural Heritage and Activities wrote to John Walsh, the Getty's Director, asking the Getty to consider returning the statue to Italy. Walsh replied that the request "came as an unwelcome surprise" and that the statue had "a tenuous relationship to Italian patrimony."[52]

A few years later, the Italian Ministry of Culture and the new Director of the Getty, Michael Brand, renewed negotiations, this time over a number of other antiquities in the Getty's collection.[53] The Italian government submitted an initial petition for fifty-two objects, including the Bronze, with both parties reaching an agreement in October of 2006 for the return of twenty-six objects, minus the statue.[54] The congenial negotiations reached a halt shortly thereafter, when the Ministry disavowed the agreement and refused any further talks without the additional transfer of the Getty Bronze.[55] In April of 2007,

46. 2010 Ordinanza, *supra* note 23, at 7.

47. 2006 Brief, *supra* note 28, at 8.

48. *Id.* at 8; 2010 Ordinanza, *supra* note 23, at 6.

49. 2010 Ordinanza, *supra* note 23, at 7; 2006 Brief, *supra* note 28, at 10.

50. 2010 Ordinanza, *supra* note 23, at 8.

51. *Id.* at 9.

52. 2006 Brief, *supra* note 28, at 10.

53. Michael Brand, *Italy and the Getty Must Find Common Ground*, L.A. TIMES (Nov. 28, 2006), *available at* http://www.getty.edu/news/press/center/latimes_brand_object_return_oped112806.html (last visited Feb. 17, 2019).

54. *Id.*; Felch, *supra* note 24

55. Brand, *supra* note 53.

Francesco Rutelli, Italy's Minister of Culture, announced a "cultural embargo" against the Getty Museum.[56] In response, the Getty urged Minister Rutelli to reconsider his position and take the Bronze off the table in order to proceed with the agreement.[57] In August of 2007, Minister Rutelli and Getty Director Michael Brand reached a new agreement to transfer forty pieces, including the notorious Cult Statue of a Goddess, from the Getty's antiquities collection back to Italy.[58] Discussions regarding the Statue of a Victorious Youth were suspended for the sake of the agreement while an Italian court conducted yet another inquiry into the discovery and exportation of the Bronze.[59]

The 2007 inquiry arose following a petition from a local group in Fano, Italy to the public prosecutor's office in Pesaro.[60] The prosecutor's office filed criminal charges against the fishermen and sought a forfeiture order.[61] The judge dismissed the petition because many of the fishermen were no longer alive, the charges would be barred by statute of limitations, and the Getty Museum was a good faith purchaser.[62] The members of the local group had anticipated the rejection, but nonetheless, appealed.[63]

In 2009, Pre-Trial Judge Mussoni in Pesaro re-examined the case and found that "the Tribunal had jurisdiction over the case and that Italian law applied."[64] Judge Mussoni conceded that the statue was

56. *J. Paul Getty Museum Responds to Imposition of a Cultural Embargo by Italy's Ministry of Culture*, J. PAUL GETTY TRUST (Apr. 20, 2007), available at http://www.getty.edu/news/press/center/cultural_embargo_response.html (last visited Feb. 17, 2019).

57. *Id.*

58. *Id.*; *Italian Ministry of Culture and the J. Paul Getty Museum Sign Agreement in Rome*, J. PAUL GETTY TRUST (Sept. 25, 2007), *available at* http://www.getty.edu/news/press/center/italy_getty_joint_statement_092507.html (last visited Feb. 17, 2019).

59. Elisabetta Povoledo, *Getty Agrees to Return 40 Antiquities to Italy*, N.Y. TIMES (Aug. 2, 2007), available at https://www.nytimes.com/2007/08/02/arts/design/02gett.html (last visited Feb. 17, 2019).

60. Jason Felch, *Italian Group's Bid for Getty Statue Rejected*, L.A. TIMES (Nov. 20, 2007), *available at* http://articles.latimes.com/2007/nov/20/world/fg-getty20 (last visited Feb. 17, 2019).

61. *History of the Statue of the Victorious Youth (The Getty Bronze)*, News from the Getty, J. PAUL GETTY TRUST (Dec. 2018), *available at* http://news.getty.edu//content/1208/files/History%20of%20the%20Statue%20of%20the%20Victorious%20Youth%20December%202018%20(1).pdf (last visited Mar. 6, 2019).

62. *Id.*

63. Felch, *Italian Group's Bid for Getty Statue Rejected*, *supra* note 60.

64. Alessandra Lanciotti, *The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the "Getty Bronze," in* CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY: NEW DEVELOPMENTS IN INTERNATIONAL LAW 301, 304 n.15 (Silvia Borelli & Federico Lenzerini eds., 2012).

likely found in international waters, but upon reference to a decision by the Tribunal of Sciacca, found that, because the Italian fishermen pulled up the statue on a trawler under the Italian flag, the statue was property of the Italian state.[65] In a subsequent 2010 ruling, Judge Mussoni found that the J. Paul Getty Trust could not be considered a good faith buyer and the statue was illegitimately held by the museum after its illegal export in violation of Italian cultural and export law.[66] As a result, Judge Mussoni ordered the forfeiture of the statue "currently held by the J. Paul Getty Museum wherever it is found."[67]

This decision was upheld in 2012 on appeal and in June of 2018 an Italian court ordered that the statue be seized.[68] The museum's grounds on which to claim ownership of the statue and exercise of due diligence in its acquisition have again come into question following the latest decision in December of 2018 by Italy's highest court, the Court of Cassation, reaffirming the demand for the statue's return.[69]

V. THE INTERNATIONAL FRAMEWORK FOR ISSUES INVOLVING CULTURAL PROPERTY, RELEVANT DOMESTIC LAW IN ITALY AND THE U.S.

A. Italian Law Regarding Illegal Export and Illegal Ownership of Italian Cultural Property

As the Italian courts have held that Italian law applies here, this note will explore relevant Italian law and Italy's claim to the Bronze under such laws before addressing the international framework and relevant law in the U.S.

Article 9 of the Italian Constitution states, "[t]he Republic... safeguards the natural beauties and the historical and artistic wealth of Italy."[70] In accordance with Article 9, Italy has enacted strict export

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65. Alessandro Chechi, Raphael Contel & Marc-André Renold, *Case Victorious Youth – Italy v. J. Paul Getty Museum*, ARTHEMIS, 4-5 (May 2012), *available at* https://plone.unige.ch/art-adr/cases-affaires/victorious-youth-2013-italy-v-j-paul-getty-museum (last visited Feb. 17, 2019).

66. 2010 Ordinanza, *supra* note 23, at 35.

67. *Id.* at 36. Translated by author, "*Ordina la confisca della statua denominata 'L'Atleta Vittorioso' attribuita allo scultore greco Lisippo attualmente detenuta dal J. PAUL GETTY MUSEUM ovunque essa si trovi.*"

68. Deb, *supra* note 19.

69. Gaia Pianigiani, *Italian Court Rules Getty Museum Must Return a Prized Bronze*, N.Y. TIMES (Dec. 4, 2018), *available at* https://www.nytimes.com/2018/12/04/arts/design/getty-bronze-italy-ruling.html (last visited Feb. 17, 2019).

70. Cost. art. 9 (Italy).

restrictions on a broad scope of cultural property in order to preserve and retain these objects as part of the State's cultural heritage.

The principal source for the Italian state's attitude towards cultural property and ownership claims is Law No. 1089 of 1939, titled *Tutela delle Cose di Interesse Storico e Artistico* ("Protection of Things of Artistic and Historic Interest").[71] As the fundamental Italian law for the protection of cultural heritage, Law No. 1089/39 was enacted for the protection of things, movable and immovable, of historic, artistic, archaeological or ethnographic interest.[72] Under Article 44 of Law No. 1089/39, an antiquity that falls under the scope of Article 1 belongs to the state unless a private party can establish ownership prior to 1902, which was when the first Italian law protecting antiquities was enacted.[73] Article 23 states that objects protected under Articles 1 to 2 are inalienable when they belong to the state, however, the Ministry of Culture may authorize the sale of art or antiquity in particular circumstances.[74] Nevertheless, under Article 61, an unauthorized alienation of cultural property belonging to the state is considered null and void.[75]

The export provisions of Law No. 1089/39 provide that objects falling under Article 1 may not be exported if export would constitute significant damage to the national patrimony.[76] In all cases, anyone who intends to export antiquities must obtain a license.[77] Further, under Article 66, an unlawfully exported item must be confiscated by Italian authorities, and the exporter fined.[78]

The Italian Civil Code of 1942 further articulates Italy's stance on antiquities and works of art as inalienable state property. Cultural property is either considered to be part of the public domain or of the inalienable State assets.[79] If within the public domain, the cultural

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71. Legge 1 giugno 1939, n. 1089, G.U. Aug. 8, 1939, n. 184 (It.) [hereinafter Law No. 1089/39].

72. *Id.* art. 1. Translated by the author, "*Sono soggette alla presente legge le cose, immobili e mobili, che presentano interesse artistico, storico, archeologico o etnografico.*"

73. *Id.* art. 44; Legge 12 giugno 1902, n. 185, G.U. June 27, 1902, n. 149 (It.) (Law No. 185 on the Protection and Conservation of Monuments and Objects of Valuable Art and Antiquities (June 12, 1902)).

74. Law No. 1089/39, *supra* note 71, art. 23-25.

75. *Id.* art. 61.

76. *Id.* art. 35.

77. *Id.* art. 36.

78. *Id.* art. 66.

79. Lanciotti, *supra* note 64, at 306. Article 822 of the Italian Civil Code of 1942 defines the extent of the public domain ("*demanio pubblico*"), which includes "state owned

property is absolutely prohibited from sale, whereas cultural property identified as an inalienable State asset may be transferred in specific circumstances with State authorization.[80] However, under either category, cultural property cannot be transferred privately or exported from Italy.[81]

Italian Law No. 42 of 2004 similarly pledges to protect Italy's cultural heritage, as well as "preserve the memory of the national community and promote cultural development."[82] Like Law No. 1089/39, Law No. 42/04 generally prohibits the export or sale of any cultural property.[83]

Beyond the extensive legal protection for antiquities that has existed in Italy for over 100 years, it is worthwhile to note that there are two police units that investigate matters in art theft and recover stolen or illegally exported art in Italy, the most well-known being the Carabinieri's Art Squad.

The Carabinieri Special Unit for the Protection of Artistic Patrimony (*Comando Carabinieri per la Tutela del Patrimonio Culturale*) has been in operation since 1969 in order to combat theft of cultural heritage property, including the illegal excavation of archaeological sites, as well as to prevent the trafficking of stolen art and cultural property.[84] The unit, known as the "Art Squad," inspects antique dealers and also traces stolen or illegally exported objects for their safe return to Italy. In order to do so, the Art Squad utilizes a comprehensive database of stolen art, known affectionately as "Leonardo."[85] The database contains the names and pictures of almost

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real property of historic archaeological or artistic interest as well as collections of paintings, archives and libraries of the State museums." The inalienable assets of the Italian State ("*patrimonio indisponibile dello Stato*") mentioned in Article 826(2) include "things of artistic, historical, archaeological, palethnological, paleontological and interest found by whosoever and by whatever means underground."

80. *Id.*

81. *Id.* at 307.

82. Decreto Legislativo 22 gennaio 2004, n. 42, G.U. July 6, 2002, n. 137 (It.) (Legislative Decree No. 42 of 2004, Code of the Cultural and Landscape Heritage), art. 1, *available at* https://en.unesco.org/cultnatlaws (follow "Database" hyperlink; then search for "Italy" and year "2004") (last visited Feb. 17, 2019) [hereinafter Law No. 42/04].

83. *Id.*; Lanciotti, *supra* note 64, at 306.

84. *Carabinieri for the Protection of Cultural Heritage and Anti-Counterfeiting*, Ministero della Difesa, CARABINIERI (2010), *available at* http://www.carabinieri.it/multilingua/en/english/carabinieri-for-the-protection-of-cultural-heritage-and-anti-counterfeiting (last visited Mar. 8, 2019) [hereinafter Carabinieri 2010].

85. *Id.*; Sylvia Poggioli, *For Italy's Art Police, An Ongoing Fight Against Pillage Of Priceless Works*, NPR (Jan. 11, 2017), *available at* https://www.npr.org/sections/parallels/

6 million registered works of art, mostly from Italy, and of those, 1.2 million are considered stolen, missing, smuggled, or illegally excavated.[86] The Art Squad's rate of recovery is high; in 2014 it recovered 137,000 works with an estimated value of $500 million.[87]

Armed with extensive legal protection for antiquities and a specialized police force that is internationally recognized as a leader in this field, Italy continues to actively pursue the return of stolen Italian art and antiquities.[88]

B. International Law and Treaties

The cornerstone of international law governing the conduct of nations regarding art repatriation and illicit trafficking of cultural property is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention").[89] Complementing the 1970 UNESCO Convention is the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ("1995 UNIDROIT Convention"), which provides for the return and restitution of stolen, illegally excavated or illegally exported cultural property under international law.[90] Taken together, the Conventions are the foundation of the international framework for the protection of cultural property.

C. 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

During the late 1960s and early 1970s, there was a rise in the theft and illicit exportation of art, while private collectors and institutions were increasingly offered objects that had been illegally imported or were of undisclosed origin.[91] In this context, the 1970 UNESCO

2017/01/11/508031006/for-italys-art-police-an-ongoing-fight-against-pillage-of-priceless-works (last visited Mar. 8, 2019).

86. Poggioli, *supra* note 85.

87. *Id.*

88. Carabinieri 2010, *supra* note 84.

89. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

90. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter 1995 UNIDROIT Convention].

91. *Illicit Trafficking of Cultural Property: 1970 Convention*, UNESCO, *available at* http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/ (last visited Feb. 17, 2019).

Convention was created with the aim of the Convention being to promote international cooperation in the return of illegally exported cultural property by addressing preventative measures and restitution.[92] Cultural property, under the 1970 UNESCO Convention, is defined as property "which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science" and also falls within a prescribed list of categories.[93]

The parties to the 1970 UNESCO Convention committed to a series of proactive measures to inhibit the illegal export and import of cultural property. In Article 5, the parties promised to establish "national services" where they do not already exist to protect the cultural heritage of each country.[94] These services include the creation of laws and regulations to prevent illicit import, export and transfer of ownership of cultural property, the establishment of a national inventory of protected cultural property, and the promotion of scientific and technical institutions to ensure the preservation of cultural property.[95] Additionally, the parties committed to supervise archaeological excavations, establish educational campaigns, and, under Article 6, introduce export certificates.[96] Per Article 6, cultural property must be subject to an export certificate, otherwise exportation of the property is illegal.[97]

The 1970 UNESCO Convention's restitution provisions are outlined in Article 7, under which the parties committed:

> (a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States . . .[98]

The parties also promised to prohibit the import of cultural property that was stolen from a museum or similar institution of another

92. *See* 1970 UNESCO Convention, *supra* note 89.

93. *Id.* art. 1.

94. *Id.* art. 5.

95. *Id.* art. 5(a)-(c).

96. *Id.* art. 5(d), (f); art. 6 (a)-(c).

97. 1970 UNESCO Convention, *supra* note 89, art. 6.

98. *Id.* art. 7(a).

party if the property was recorded in the inventory of that institution.[99] The party requesting restitution must provide documentation and other evidence to establish its claim, and the requesting party must compensate an innocent purchaser or a person who has valid title to the property that is being returned.[100]

Furthermore, the parties agreed to ensure the cooperation of internal services to facilitate the earliest possible return of property and to permit actions brought by rightful owners for recovery of lost or stolen cultural property.[101]

In the event of dispute over its implementation, the Convention offers a "good offices" mediation clause in order to reach a settlement.[102]

D. 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

The UNIDROIT Convention, adopted in Rome in 1995, provides rules for acquisition of title over stolen or illicitly exported cultural property, restitution and compensation of good faith purchasers that exercised due diligence, statutes of limitations on claims, and choice of law determinations.[103]

Under the Convention, a cultural object is defined as that which, on religious or secular grounds, is important for archaeology, prehistory, literature, art or science and belongs to one of the Convention's prescribed categories.[104] One of the initial provisions of the Convention explicitly states that a possessor of stolen cultural property is required to return it.[105] The Convention also specifies the statute of limitations, requiring a claim for restitution to be brought "within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft."[106] However, the Convention allows a State to declare that a claim is subject to a statute of limitations

99. *Id.* art. 7(b)(i).
100. *Id.* art. 7(b)(ii).
101. *Id.* art. 13.
102. 1970 UNESCO Convention, *supra* note 89, art. 17(5).
103. Francioni, *supra* note 5, at 14.
104. 1995 UNIDROIT Convention, *supra* note 90, art. 2
105. *Id.* art. 3(1).
106. *Id.* art. 3(3).

of seventy-five years or as long a period as is provided in that State's law.[107]

Once it is found that a possessor indeed holds stolen cultural property and is required to return it, the possessor will receive "fair and reasonable compensation" on the condition that the possessor "neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object."[108] A number of factors will be considered in determining whether the possessor exercised due diligence, including the price paid, the character of the parties, whether the possessor consulted a reasonably accessible record of stolen cultural property and any other relevant information that could have been reasonably obtained or whether the possessor took any additional steps that a reasonable person would have taken in the circumstances.[109]

In order to facilitate the return of illegally exported cultural objects, the 1995 UNIDROIT Convention provides that a state may request a court or other competent authority of another state to order the return of cultural property that was illegally exported from the requesting state.[110] Furthermore, a cultural object that was temporarily exported from the requesting party for purposes including exhibition, restoration or research, and has not been returned in accordance with the permit regulating its export, shall be considered illegally exported.[111] Additionally, the court or competent authority shall order the return of an illegally exported cultural object if the requesting state establishes that the removal of that object conflicts with one or more enumerated public interests, or if the requesting party establishes that the object is of significant cultural importance.[112] The Convention requires that any request made to a court or other competent authority be supported with factual and legal information that may assist in the determinations as to whether the object was illegally exported, if removal conflicts with public interests or if the object is of significant cultural importance.[113] Nonetheless, the Convention provides that if the export of the object is no longer illegal at the time which return was requested, or the object was exported during the lifetime of the creator of the cultural object or

107. *Id.* art. 3(5).

108. *Id.* art. 4(1).

109. 1995 UNIDROIT Convention, *supra* note 90, art. 4(4).

110. *Id.* art. 5(1).

111. *Id.* art. 5(2).

112. *Id.* art. 5(3).

113. *Id.* art. 5(4).

within fifty years of the creator's death, then the provisions regarding return shall not apply.[114]

The Convention also protects possessors of cultural property who acquired such property after illegal export. The possessor will be entitled to fair and reasonable compensation if the possessor neither knew nor reasonably ought to have known that the object had been illegally exported at the time it was acquired by the possessor, which shall be determined through consideration of the circumstances including the absence of an export certificate required by the law of the requesting state.[115]

Finally, the Convention is subject to ratification, acceptance, or approval by signatory States.[116] Accordingly, Italy has ratified the 1995 UNIDROIT Convention, but the U.S. has not.

E. U.S. – Italy Memorandum of Understanding in 2001 and 2016

In 2001, the U.S. government and the Italian government entered into a Memorandum of Understanding ("the MOU") with the goal of minimizing the incentive for looting objects from Italy's archaeological sites and encouraging the return of stolen antiquities ranging from approximately the ninth century B.C. to approximately the fourth century A.D.[117] The U.S. government pledged to restrict importation of objects within this range, unless accompanied by an export license or certificate.[118] Further, the U.S. committed to offer the return of any material on the MOU's Designated List.[119] In order to decrease instances of illegal export and import, the Italian government pledged to

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114. 1995 UNIDROIT Convention, *supra* note 90, art. 7. The first exception under this article recognizes that it would be contradictory for the court or competent jurisdiction to apply export rules that the State no longer has in place and seeks to avoid a temporal conflict of laws issue. The second exception recognizes that many national systems exclude the work of a living artist from the scope of cultural heritage laws. For further explanation, *see* Marina Schneider, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, UNIF. L. REV. 2001-3 476, 540, *available at* https://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-explanatory report-e.pdf (last visited Sept. 19, 2019).

115. 1995 UNIDROIT Convention, *supra* note 90, art. 6(1)-(2).

116. *Id.* art. 11(2).

117. Agreement between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy, Jan. 19, 2001, Art. I(A)., *available at* https://eca.state.gov/files/bureau/it2001mou.pdf (last visited Mar. 6, 2019) [hereinafter 2001 MOU].

118. *Id.* art. I(A).

119. *Id.* art. I(B).

reinforce the 1970 UNESCO Convention and continue to provide for the protection of its cultural property by instituting more severe penalties, promptly prosecuting looters, providing additional training for the Carabinieri Special Unit for the Protection of Artistic Patrimony, and intensifying investigations by this unit.[120] Both governments pledged to use their "best efforts" to facilitate contacts between U.S. and Italian museums for the promotion of increased and extended loans of Italian cultural objects.[121]

In January 2016, the U.S. agreed to extend the MOU ("the Revised MOU") and incorporate an amended Article II to replace the existing Article II provisions.[122] The revisions include a pledge by the Italian government to "create and pursue innovative and effective ways to detect and stop the looting of archaeological sites"[123] and remove the provision regarding the Italian government's commitment to strengthen cooperation with other Mediterranean countries to protect the cultural property of the region.[124] Additionally, the Revised MOU includes a reporting provision that requires each government to inform the other of the effectiveness of the agreement via interim reports.[125]

F. Relevant U.S. Law

On a national level, the U.S. adopted the National Stolen Property Act of 1934 (NSPA) which prohibits transportation in interstate or foreign commerce of goods, valued at $5,000 or more, that have been "stolen, converted or taken by fraud."[126] The 1970 UNESCO Convention is enforceable under the NSPA, which enables "foreign countries' cultural patrimony legislation to be effectively enforced within U.S. territory by U.S. courts."[127] In order for an object to qualify under the NSPA, it must be "stolen" and though the NSPA does not define the term, the Supreme Court has held that "stolen" should be

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120. *Id.* art. II(C).

121. *Id.* art. II(G).

122. Diplomatic Note, Embassy of Italy in Washington, D.C. to U.S. Dep't of State, Prot. N. 123 (Jan. 12, 2016) [hereinafter MOU Amended].

123. *Id.* art. II(D)(3).

124. 2001 MOU, *supra* note 117, art. II(D).

125. MOU Amended, *supra* note 122, art. II(K).

126. 18 U.S.C. §§ 2314-2315 (2006).

127. *Summary of Law – National Stolen Property Act*, COAST, *available at* https://coast.noaa.gov/data/Documents/OceanLawSearch/Summary%20of%20Law%20-%20National%20Stolen%20Property%20Act.pdf?redirect=301oc (last visited Feb. 17, 2019).

broadly construed.[128] Thus, "stolen" includes "all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny."[129]

The NSPA provides criminal sanctions, whereas the 1983 Convention on Cultural Property Implementation Act, to be addressed below, provides civil remedies.[130] Violators of the NSPA shall be fined and/or imprisoned for up to ten years.[131] Additionally, the NSPA's scienter requirement, which requires the knowledge that goods were illegally obtained from the country of origin, is a heavy evidentiary burden.[132]

The 1983 Convention on Cultural Property Implementation Act (CPIA) is the belated implementation of the U.S.'s acceptance of the 1970 UNESCO Convention.[133] The CPIA puts restrictions on the importation of cultural property from a nation with which the U.S. has a relevant agreement. It also authorizes the President to issue an emergency decree imposing import restrictions and the CPIA provides for the seizure and forfeiture of undocumented objects.[134]

A request may be filed by a state party to the 1970 UNESCO Convention that fears that the pillaging of cultural property is jeopardizing the requesting party's cultural heritage.[135] Requests will be considered by members of the Cultural Property Advisory Committee ("CPAC"), which is composed of eleven members appointed by the President in a number of categories including, (1) two members representing the interests of museums; (2) three members who are experts in the fields of archaeology, anthropology, ethnology, or related areas; (3) three members who are experts in the sale of

128. Yael Weitz, *Government Remedies Against Possessors of Stolen Art Objects*, HERRICK (Aug. 2011), *available at* http://www.herrick.com/publications/government-remedies-against-possessors-of-stolen-art-objects/ (last visited Mar. 6, 2019).

129. *Id.*; *see* U.S. v. Turley, 352 U.S. 407, 417 (1957).

130. *Summary of Law – National Stolen Property Act, supra* note 127.

131. 18 U.S.C. § 2314-2315 (20060.

132. *Summary of Law – National Stolen Property Act, supra* note 127.

133. 19 U.S.C. §§ 2601-2613 (2006).

134. *Convention on Cultural Property Implementation Act (CPIA) of 1983: Fact Sheet*, ARCHAEOLOGICAL INST. OF AM. (Apr. 1, 2010), *available at* https://www. archaeological.org/ convention-on-cultural-property-implementation-act-cpia-of-1983-fact-sheet/ (last visited Sept. 15, 2019) [hereinafter CPIA Fact Sheet].

135. *Id.*

archaeological, ethnological or other cultural property; and (4) three members who represent the general public's interests.[136]

In its criteria for recommendations, the CPAC must make four determinations: (1) that the cultural patrimony of the requesting state party is in jeopardy due to the pillage of archaeological materials; (2) that the requesting party has taken measures to protect its cultural patrimony; (3) that U.S. import restrictions, either alone or in concert with actions taken by other market nations, would be of substantial benefit in deterring the serious pillaging situation, and (4) import restrictions would promote the interchange of cultural property among parties for cultural, scientific, and educational purposes.[137] After its deliberations, the CPAC is to prepare a report for the President including the findings regarding the request and the Committee's recommendation.[138]

VI. WHAT LAW SHOULD APPLY AND WHAT SHOULD HAPPEN TO THE STATUE OF A VICTORIOUS YOUTH?

A. The Italian Courts' Incorrect Application of Italian Law and the Italian Government's Weak Claim under Italian Law

The Italian government's legal claim to the Getty bronze relies on Law No. 1089/39, which gives the Italian state title to any cultural property discovered on its territory and requires any cultural property to obtain a proper export license.[139] The Italian government relies on the Italian Civil Code of 1942 and Italian Law No. 42/04 to support its stance that because Italian antiquities are inalienable state property, the Bronze, too, was inalienable cultural property belonging to Italy.[140]

The Italian government argues that the discovery of the statue and subsequent transport of the statue into and within the Italian territory was not properly reported to the Ministry of Culture, nor to the relevant Customs Authority in breach of the Law No. 1089/39.[141] The Italian government also argues that the concealment of the statue "unequivocally demonstrates the awareness on the part of the suspects of the relevant historical and archaeological value of the find and the

136. 19 U.S.C. § 2605(b)(1)(A)-(D) (2006).
137. CPIA Fact Sheet, *supra* note 134.
138. 19 U.S.C. § 2605(f) (2006).
139. Law No. 1089/39, *supra* note 71, art. 23, 36, & 44.
140. Lanciotti, *supra* note 64, at 306; *see* Law No. 42/04, *supra* note 82.
141. 2010 Ordinanza, *supra* note 23, at 4.

will to avoid the particular protection regime provided by Italian legislation for the protection of its cultural heritage."[142]

Following the Bronze's discovery in 1964, it appears that neither the fishermen nor the Barbettis notified Italian government officials.[143] In addition, the Barbettis did not obtain an export certificate under Law No. 1089/39 before the sale of the Bronze to the unidentified person from Milan.[144] This is likely because the Italian Ministry of Culture did not issue an export license for the Bronze between 1964, the year of its finding, and 1973 when it reappeared.[145] However, it would not be necessary for the fishermen or the Barbettis to report the finding of the Bronze to the Italian government in 1974 if the statue was found in international waters – a likelihood that Judge Mussoni acknowledged in the 2009 decision.[146] Nevertheless, Judge Mussoni found that it was sufficient that the Bronze had been discovered by Italian fishermen and brought back to Italy on a vessel under the Italian flag.[147] This finding was based upon a previous decision from another Italian court regarding the discovery of a bronze statue in the fishing nets of an Italian vessel off the coast of Sicily.[148] Under that case, finds of this type are governed by the Italian Code of Navigation which states that Italian vessels are considered part of the Italian territory.[149] This application of Italian maritime law implicates questions of applicability of the international rules of the law of the sea and underwater cultural heritage that were in force at that time. As the specific location where the Bronze was found is still in contention, the Bronze's discovery could fall under differing legal frameworks depending on where the judge rules the statue was located.

Judge Mussoni's assertion that Italian law, particularly maritime law, is the proper governing law over the Getty Bronze is erroneous. The statue is undeniably of Greek origin, and despite the many court proceedings over the Bronze, no Italian court has found the statue's discovery to have taken place within Italian territorial waters. The extension of Italian maritime law to the Bronze following a 1963 Tribunal decision is a last-ditch effort by the Italian courts to justify the

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142. *Id.* at 4-5.
143. *See* 2006 Brief, *supra* note 28, at 14.
144. *See id.*
145. *Id.*
146. *See* Chechi, *supra* note 65, 4-6.
147. Lanciotti, *supra* note 64, at 308.
148. *Id.* at 309.
149. *Id.*

Italian government's claim to the Bronze. As the previous courts failed to tie the discovery of the Bronze to Italian territorial waters and there has been no conviction in Italy for illegal exportation for the statue, Italian law does not support the government's claim for return of the Bronze.[150] As stated by law professor and president of the Lawyers' Committee for Cultural Heritage Preservation, Patty Gerstenblith:

> If the bronze was found in international waters, rather than Italian national waters, I am doubtful that any U.S. court would recognize it as stolen. ... While the Italians claim that the bronze was illegally exported, illegal export does not, by itself, make the bronze stolen or otherwise illegal in the U.S.[151]

Under the principles of international law, to be addressed in the next section of this note, illegal export in a foreign country is not actionable in the courts of another country and as such, there is no legal basis for a claim to the Bronze in U.S. courts based on illegal export in violation of Italian law.[152]

B. International Law is Insufficient to Resolve Art Repatriation Issues between Nations

The 1970 UNESCO Convention is the only relevant international, multilateral treaty to which both the U.S. and Italy are member parties.[153] Under the 1970 UNESCO Convention, among the categories of cultural property defined within the Convention, the Bronze would be classified under "original works of statuary art."[154] The Convention further indicates that for the purpose of the Convention, property that is found within the national boundaries of a territory is part of that territory's cultural property.[155] Here, however, the statue was found in international waters and not within the Italian territory, and thus would not qualify as Italian cultural property under the 1970 UNESCO Convention. The statue would not qualify as stolen property under Article 7 of the Convention either as it was not stolen from an Italian

150. Under Italian laws it is necessary for there to be a conviction against an individual for illegal exportation of the cultural object in order for the Italian courts to impose liability for the value of the illegally exported item on such exporter. *See* 2006 Brief, *supra* note 28, at 15.

151. Leila Amineddoleh, *The Getty Museum's Non-Victorious Bid to Keep the "Victorious Youth" Bronze*, Arts & Cultural Heritage Law Newsletter, 3 ABA SEC. INT'L L. 30, 31 (2011).

152. *See id.*

153. Lanciotti, *supra* note 64, at 317.

154. 1970 UNESCO Convention, *supra* note 89, art. 1(g)(ii).

155. *Id.* art. 4(b).

museum or similar institution.[156] Additionally, when the Victorious Youth was discovered in 1964, the 1970 UNESCO Convention had not yet been drafted and is not retroactive.[157] Furthermore, the statue was imported into the U.S. following its sale to the Getty in 1977, at which point neither the U.S. nor Italy had ratified the Convention.[158] As a result, the Bronze does not fall within the U.S.'s obligation to return cultural property to Italy as the item was neither stolen under the terms of the Convention's provisions nor was it illegally exported after the Convention entered into force.[159]

The 1995 Convention could not apply here as the U.S. is not a party to the Convention. However, it is important to note that the 1995 UNIDROIT Convention requires that a claim for restitution be brought "within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft."[160] The Convention also allows for a State to declare that a claim is subject to a statute of limitations of seventy-five years or as long a period as is provided in that State's law.[161] These conflicting provisions leave an unclear statute of limitations that seems to be subject to easy manipulation at the discretion of the requesting party.

The U.S. and Italy did not enter into a treaty in the spirit of the 1970 UNESCO Convention until 2001. Under the 2001 MOU, the U.S. agreed to return any material on the "Designated List" to Italy.[162] However, the U.S. regulations that implement the 2001 MOU only apply to archaeological or ethnological material of the state, which means for the object to be of archaeological interest for the party, it must be of cultural significance, at least 250 years old, and normally discovered due to excavation, hidden or accidental digging or exploration.[163] Here, the Italians claim that the statue is of cultural significance and it is certainly more than 250 years old. Per the third requirement, the statue was discovered due to accidental digging or exploration, but the discovery did not take place on Italian territory, rather in international waters. Thus, the statue should not satisfy the

156. *Id.* art. 7(b)(i).
157. *See* 2006 Brief, *supra* note 28, at 16.
158. *Id.*
159. Lanciotti, *supra* note 64, at 319.
160. 1995 UNIDROIT Convention, *supra* note 90, art. 3(3).
161. *Id.* art. 3(5).
162. 2001 MOU, *supra* note 117, art. I(B); *see* 2006 Brief, *supra* note 28, at 16.
163. *See* 2006 Brief, *supra* note 28, at 16; *see* 19 CFR § 12.104.

meaning of archaeological material of the state, and therefore, does not qualify under the 2001 MOU.

Under international law, illegal export is not actionable in the courts of another country without an applicable and contrary treaty provision, and though the U.S. and Italy enacted the MOU in 2001, the provisions do not apply retroactively.[164] The Department of Justice has been silent on this issue thus far, though recently the Department has assisted numerous countries, including Italy, in the recovery of illicitly acquired cultural property.[165]

C. Domestic Law in the U.S. and Italy Should Not Apply to Issues of Cultural Patrimony between the Nations

Courts within the U.S. have been hesitant to accept the possibility of enforcing cultural heritage laws of a foreign State within the U.S.[166] In the absence of any specific applicable international rule or comprehensive protection framework for recovery of foreign cultural property, any claim from Italy for civil action within the U.S. to enforce its right to the Getty Bronze would have little chance of success.[167]

In cases where the U.S. courts have honored requests for return of cultural objects from a foreign State and demanded forfeiture of that property, the property was proven to be stolen and subject to the NSPA or the CPIA.[168] Here, however, neither the NSPA nor the CPIA will apply to the Bronze. The statue was legally imported into the U.S. by the Getty Museum in 1977 and thus, does not qualify under the NSPA which pertains to stolen property.[169] The Bronze is not subject to the CPIA as it was not enacted until 1983.[170]

Domestic laws of two opposing countries, in this case, the U.S. and Italy, should not be applied to disputes over the restitution of cultural property. Conflicting standards and an unclear method of enforcement between the two nations further complicate an already murky area of the law. The use of domestic law in restitution cases should be abandoned in favor of international law, which would clarify the types of objects

164. Stephen K. Urice, *Why the U.S. Should Not Assist Italy in Forfeiting a Rare Bronze*, N.Y. TIMES (Dec. 10, 2018), *available at* https://www.nytimes.com/2018/12/10/opinion/justice-department-italy-bronze-antiquities.html (last visited Feb. 17, 2019).

165. *Id.*

166. Lanciotti, *supra* note 64, at 322.

167. *Id.*

168. *Id.* at 323.

169. *Summary of Law – National Stolen Property Act*, *supra* note 127.

170. 19 U.S.C. §§ 2601, 2607 (2006).

that qualify as a nation's cultural property, the appropriate forum in which the claim is to be brought, and other significant variables such as statute of limitations, enforcement mechanisms and remedies. The application of international law will avoid conflict between nations at each phase of the litigation process, and avoid expensive, expansive legal battles like that over the Statue of the Victorious Youth.

VII. ETHICAL CONSIDERATIONS AND PUBLIC POLICY

In consideration of the pertinent public policies and ethical concerns surrounding Italy's claim for the return of the Bronze, it is critical to recognize the statue's undisputed Greek origin. Though Greece has not thrown its hat into the ring, the fight between Italy and the Getty over this object requires consideration of the strength of Italy's claim of cultural patrimony with respect to an object that was not created in Italy and spent very limited time on Italian soil.

Ron Hartwig, speaking for the Getty Museum, emphasized the Museum's stance that the Bronze "is not part of Italy's extraordinary cultural heritage. Accidental discovery by Italian citizens does not make the statue an Italian object. Found outside the territory of any modern state, and immersed in the sea for two millennia, the Bronze has only a fleeting and incidental connection with Italy."[171] Nonetheless, locals in Fano argue otherwise. In an interview, Stefano Aguzzi, the town's mayor, said, "[t]he statue and its discovery has become part of our culture and folklore," adding, "[i]t's clear we have a claim to it."[172] Numerous local businesses are named after the statue's alleged Greek sculptor, Lysippos, and a larger-than-life sized duplicate of the Bronze has been erected at the entrance of the town's port.[173] Despite the locals' obvious affinity for and attachment to the statue, the Getty contends that this is not enough for a claim of patrimony. The Statue of a Victorious Youth has spent over forty years on display at the Getty Museum, in contrast to the approximately two years that the statue spent in Italy. As a staple of the Museum's collection, it is arguable that the damage caused to the Getty and within the U.S. by forfeiture of the statue would be much greater than that in Fano. Few people were able

171. Deb, *supra* note 19.

172. Povoledo, *supra* note 26.

173. *Id.*

to interact with the statue during the Bronze's brief period in Italy, whereas the Getty boasts nearly two million visitors each year.[174]

U.S. action upon forfeiture orders issued by the Italian courts would require the expenditure of the resources of the Department of Justice and American taxpayers' money to retrieve the Bronze from the Getty Museum.[175] This action would be contrary to public policy in favor of museums that make good faith purchases of foreign art and would honor a weak claim by a nation with a tenuous connection to the object. The Getty Museum's publicized acquisition of the Bronze in 1977 following inquiries to the seller, Heinz Herzer, regarding the statue's provenance and review of the 1968 decision by the Italian courts indicate a proper, good-faith purchase of the statue. A return of the Getty Bronze based on Italy's current claim, without any new information, would dramatically impact the marketability of foreign art and raise concerns for museums worldwide regarding their claims to legally purchased foreign objects.

While restitution is the appropriate legal and ethical response in some cases, in other cases, the demand for repatriation of objects under the pretext of a cultural property claim pushes the boundaries of restitution beyond the scope of international cooperation. Italy's demands for the return of the Getty Bronze exemplify the latter situation, and for this reason, the U.S. cannot accept Italy's claim for the statue as legitimate Italian cultural property. The Getty's counterclaim for the Bronze as a good-faith purchaser with legal right to the statue illustrates that there must be logical limits to the reach of cultural patrimony law.

VIII. CONCLUSION

In conclusion, due to the lack of consistency, insufficient dispute resolution procedures, and the absence of a uniform mechanism for enforcement, the current international legal framework regarding the protection of cultural property fails miserably in a case like that of the Statue of a Victorious Youth. Differing notions as to what constitutes a country's cultural property, an absence of clear and consistent statutes of limitations, and inapplicability of the multilateral agreements to states which have not ratified them provide little clarity in a situation

174. *See About the Getty - Support from the Business Community*, J. PAUL GETTY TRUST, *available at* https://www.getty.edu/about/development/business_community.html (last visited Mar. 7, 2019).

175. Urice, *supra* note 164.

where the cultural property has a disputed history. The current international framework provides little to no guidance to courts in the U.S. or abroad as to the proper choice of law in a situation similar to this one, and as a result, the Getty Museum and Italy have engaged in a drawn-out, inconsistent legal battle with no end in sight. It is high time for organizations like UNESCO and UNIDROIT to promulgate new conventions on cultural property that provide concise, clear guidelines for the resolution of future repatriation cases. Until a new international framework is brought forth, courts will continue to rule inconsistently on claims of repatriation and objects like the Statue of a Victorious Youth will remain in limbo.

It is unclear which party will be declared victorious in the battle over the Bronze, but is evident that the international legal framework for cultural property restitution claims is in need of an overhaul and that under the current scheme, the Statue of a Victorious Youth should remain in the Getty Museum.

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RESOLVING THE CONFLICT ON THE KOREAN PENINSULA BY PREVENTIVE DIPLOMACY AND THE RULE OF LAW

Kitsuron Sangsuvan

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ABSTRACT

Even though an armistice agreement was signed in 1953, conflict and tension exist on the Korean Peninsula. A situation on the Korean Peninsula has recently made this tension worse. A tension escalates into a serious conflict when North Korea conducts nuclear weapons or ballistic missile tests. The international community is concerned about a serious conflict on the Korean Peninsula. Meanwhile, commentators and scholars are trying to offer new strategies for resolving this conflict and building peace. This article will address and explore how a conflict on the Korean Peninsula can be resolved by preventive diplomacy and the rule of law. This article will analyze and discuss how preventive diplomacy can create negative peace or an absence of war. This article will also address how the rule of law can build positive, or sustainable,

peace in the region. This article will examine how the rule of law can maintain peace and why North Korea should consider the rule of law.

I. INTRODUCTION

Although the Korean War began more than sixty years ago and was suspended by an armistice agreement in 1953, the conflict and tension have still existed on the Korean Peninsula. All parties have tried to protect their security interests through the use of military forces. The United Nations (U.N.) has tried to resolve the conflict and establish peace in the region. Many scholars and commentators have also tried to explore a conflict resolution; yet, there is no conflict resolution on the Korean Peninsula. Recently, the conflict and tension escalated when North Korea conducted nuclear weapons and ballistic missile tests. The international community is concerned that the conflict and tension may lead to a Second Korean War.

In fact, the conflict on the Korean Peninsula can be resolved by preventive diplomacy and the rule of law. Further, both strategies can also be used to build peace in the region. Preventive diplomacy is a first step to resolve the conflict and build peace. Preventive diplomacy can prevent disputes from escalating into conflicts, or prohibit the spread of conflicts. Preventive diplomacy may escalate the conflict or tension which resulted from nuclear weapons and ballistic missile tests. Preventive diplomacy can then create negative peace, or an absence of war. Nevertheless, preventive diplomacy cannot create permanent or sustainable peace on the Korean Peninsula. The rule of law can be used as a second step to build positive, or sustainable, peace in the region. This means that there would be no conflict on the Korean Peninsula. The rule of law can address the root causes of the conflict. The rule of law can also maintain peace or establish peaceful relations between two parties. More importantly, North Korea will probably seek self-sustaining non-violence under the rule of law.

This article will mainly explore and address how preventive diplomacy and the rule of law can resolve the conflict on the Korean Peninsula. Part II of this article will discuss the history of the Korean Peninsula conflict. Part III of this article will examine how preventive diplomacy can prevent the conflict or establish negative peace in the region. In particular, it will address the definition of preventive diplomacy and the role of preventive diplomacy on the Korean Peninsula. This part will also discuss and analyze the new elements of preventive diplomacy, which consist of communication, cooperation, and confidence. Part IV of this article will consider how the rule of law builds positive or sustainable peace in the region. Since the notion of the rule of law

involves regulations, this part will discuss the role of international law on the Korean Peninsula. It will later examine the importance and definition of the rule of law. This part will discuss a difference between the rule of law and North Korea's political ideology. It will also address how North Korea adopts the rule of law to create sustainable peace on the Korean Peninsula.

II. THE HISTORY OF THE KOREAN PENINSULA CONFLICT

In 1910, Korea was occupied by Japan. Korea regained its independence after Japan surrendered to the Allies in World War II. However, after the end of World War II, the Korean Peninsula was occupied by the United States (U.S.) and the Soviet Union.[1] Both countries used the 38th parallel (38 degrees north latitude) as a temporary demarcation line to avoid accidental collisions between themselves. The Korean Peninsula was then divided at the 38th parallel into a northern area and a southern area. The United States occupied a southern area while the Soviet Union occupied a northern area. The northern and southern area each established their administration and claimed jurisdiction over the entire Peninsula. The northern area, supported by the Soviet Union, became the Democratic People's Republic of Korea, or North Korea. The southern area, supported by the United States, became the Republic of Korea, or South Korea. North Korea was a communist state; South Korea, an anticommunist state. Both North Korea and South Korea wanted to eliminate the other's government and unify Korea under their rule.[2]

The Korean War began on June 25, 1950 when the North Korean army crossed the 38th parallel and invaded South Korea. The North Koreans captured the South Korean capital and advanced to the southern part of the Korean Peninsula. The purpose of the invasion was to unify the Korean Peninsula by force. The United Nations Security Council disagreed with the invasion and established a joint command force to assist South Korea. The United Nations forces, consisting of troops from sixteen member states, were sent to the Korean Peninsula under its command. The United Nations forces responded to North Korea by cutting off its supply lines. The North Korean war machine collapsed, and the country had to retreat across the 38th parallel. The United Nations forces retook South Korea in September 1950. The United Nations also expanded the objective from the preservation of South Korea to reunification of the Korean Peninsula. The United Na-

1. CHRISTOPH BLUTH, KOREA 1-2 (2008).

2. MATTHEW S. MUEHLBAUER & DAVID J. ULBRICH, WAYS OF WARS: AMERICAN MILITARY HISTORY FROM THE COLONIAL ERA TO THE TWENTY-FIRST CENTURY 425 (2014).

tions forces then crossed into North Korea and captured the North Korean capital. By November, the United Nations forces approached the Yalu River, the border of China and North Korea. The Chinese forces, called "volunteers," crossed the border and attacked the United Nations forces. The combined Chinese and North Korean forces recaptured the North Korean capital in December. The United Nations forces retreated below the 38th parallel. On January 4, 1951, the communist forces recaptured the South Korean capital. By March 1951, the United Nations forces pushed communist troops back across the 38th parallel again.

In July 1951, peace negotiations in the Korean Peninsula took place at the communist-controlled city of Kaesong in western South Korea. Both sides argued such issues as the exchange of prisoners of war and the exact location of the truce demarcation line that would become the new border of North and South Korea. Unfortunately, this negotiation collapsed in August 1951. Another negotiation resumed in October 1951 at the village of Panmunjom in southern North Korea. There was no substantial progress in the negotiation because neither side wanted to compromise on those issues.[3] Military operations continued in the form of limited attacks, air-to-air battles, and strategic bombing campaigns.[4] Eventually, peace negotiations proceeded again, resulting in an armistice on July 27, 1953. The armistice ended the Korean War even though it did not establish permanent peace. North and South have also been divided along a Demilitarized Zone, nearly parallel to the original border between the North and the South.[5] Among other things, both Dulles and Eisenhower claimed that the threat of introducing nuclear weapons had played a major role in completing the agreement that ended the war.[6] However, it is unclear whether the threat of nuclear retaliation was decisive. The severe losses that North Korea had suffered, the economic hardship in the People's Republic of China, and the expectation of reduced Soviet support in the war effort following Stalin's death seemed to be more influential at the time.[7] Thus, the armistice ending the Korean War resulted from nonnuclear considerations.

The tension between North and South Korea has existed since 1953. There have been several incidents and clashes triggered by North

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3. CARTER MALKASIAN, THE KOREAN WAR 1950-1953 7 (2001).

4. *Id.*

5. NAM P. SUH, COMPLEXITY: THEORY AND APPLICATIONS 255 (2005).

6. Michael Nacht et al., *Cross-Domain Deterrence in American Foreign Policy, in* CROSS-DOMAIN DETERRENCE: STRATEGY IN AN ERA OF COMPLEXITY 38 (Jon R. Lindsay & Erik Gartzke eds., 2019).

7. *Id.*

Korea.[8] More importantly, North Korea has posed a serious threat to the Peninsula and many countries by developing and testing nuclear weapons.[9] In fact, the North Korea nuclear development program started in the mid-1950s. North Korea gained access to advanced technologies from Moscow and its Eastern and central European satellite states.[10] This included nuclear technology. In 1956, the Soviets signed an agreement to train North Korean technicians in peaceful uses of nuclear technology at Soviet nuclear research facilities.[11] In 1959, the Soviets signed another deal with the North Koreans to provide them with a research reactor, which was completed in 1965.[12] The North Korean nuclear weapons program began in the early 1970s. More particularly, North Korea built several gas-graphite nuclear reactors in the Soviet style to generate electricity.[13] All produced the by-product plutonium, which could be used to manufacture hydrogen bombs.[14] North Korea also established missile development programs and gained missile-related technology from China. In 1985, the Soviet Union convinced Kim Il Sung to sign the Nonproliferation Treaty (NPT), which required inspections by the U.N. International Atomic Energy Agency (IAEA) to prevent military use of nuclear material.[15] From 1993-1994, North Korea did not cooperate with the IAEA inspecting nuclear facilities under the NPT. Since 2002, North Korea has withdrawn from the NPT and has tested nuclear weapons.

North Korea has developed nuclear weapons and ballistic missile programs which threaten international peace and security. Those have increased the tension between North and South Korea and have worsened the situation on the Korean Peninsula.[16] The United States tried to deter North Korea from developing and testing nuclear weapons and

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8. JACOB BERCOVITCH & MIKIO OISHI, INTERNATIONAL CONFLICT IN THE ASIA-PACIFIC: PATTERNS, CONSEQUENCES AND MANAGEMENT 17 (2010).

9. *Id.*

10. Jooeun Kim, *Rethinking the Origins of North Korea's Nuclear Program, in* NUCLEAR SCHOLARS INITIATIVE: A COLLECTION OF PAPERS FROM THE 2014 SCHOLARS INITIATIVE 74 (Sarah Minot ed., 2015).

11. *Id.*

12. *Id.*

13. PATRICIA BUCKLEY EBREY & ANNE WALTHALL, MODERN EAST ASIA FROM 1600: A CULTURAL, SOCIAL, AND POLITICAL HISTORY 498 (3d ed. 2013).

14. *Id.*

15. *Id.*

16. DAVID W. SHIN, RATIONALITY IN THE NORTH KOREAN REGIME: UNDERSTANDING THE KIMS' STRATEGY OF PROVOCATION 245 (2018).

other programs.[17] Unfortunately, it was not successful. During 2013 and 2016, North Korea launched missile tests and prepared for new nuclear tests. Those provocations escalated the tension and conflict with five countries – the United States, China, Japan, Russia, and South Korea. However, there have been attempts to reduce the tension and establish peaceful negotiations. Recently, denuclearization negotiations with North Korea have resumed. More particularly, on April 27, 2018, Kim Jong-un, the current supreme leader of North Korea, met Moon Jae-in, the current president of South Korea, in the demilitarized zone which separates North and South Korea. They pledged to convert the armistice that ended the hostilities of the Korean War into a formal peace treaty. They also confirmed the shared goal of achieving a nuclear-free Korean Peninsula. On June 12, 2018, President Donald Trump and Chairman Kim had a meeting in Singapore, where they signaled a desire to change the United States-North Korea relationship. On February 27-28, 2019, President Trump and Kim held a second meeting in Vietnam, but both leaders disagreed over sanctions relief and denuclearization. On June 30, 2019, President Trump and Chairman Kim had a meeting in Panmunjom at the demilitarized zone. Both leaders agreed to restart nuclear negotiations.

III. PREVENTIVE DIPLOMACY

A. *The Definition of Preventive Diplomacy*

In the past, the international community failed to resolve or terminate conflicts among states.[18] International entities and states felt that conflict prevention could be used to maintain international peace and security. After the end of World War II, the principle of conflict prevention was established and developed by the U.N. This principle can be found in paragraph 1 of Article 1 of the U.N. Charter.[19] In 1960, the

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17. GREGORY J. MOORE, NORTH KOREAN NUCLEAR OPERATIONALITY: REGIONAL SECURITY & NONPROLIFERATION 32 (2014).

18. Edward C. Luck, *Prevention: Theory and Practice*, *in* FROM REACTION TO CONFLICT PREVENTION: OPPORTUNITIES FOR THE UN SYSTEM 252 (Fen Osler Hampson & David M. Malone eds., 2002) ("Prevention is hardly a new goal for the United Nations. Its founders had identified conflict prevention as one of its primary purposes, given the failure of the League of Nations to prevent the chain of events that lead to World War II.").

19. *See* U.N. Charter art. 1, ¶ 1, *stating* "The Purposes of the United Nations are: (1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace [...]").

term "preventive diplomacy" was first introduced by Dag Hammarskjold, former U.N. Secretary-General.[20] It was described as an effort to preempt the escalation of superpower proxy wars in Third World countries into global confrontations during the Cold War.[21] However, after the end of the Cold War, the idea of "preventive diplomacy" was developed.[22] Former U.N. Secretary-General Boutros Boutros-Ghali's 1992 report, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, outlined suggestions for enabling intergovernmental organizations to respond quickly and effectively to threats to international peace and security in the post-Cold War era.[23] In particular, four major areas of activity were identified: preventive diplomacy, peacemaking, peacekeeping, and peace building.[24] Preventive diplomacy is then distinguished from other peace actions. Among other things, preventive diplomacy is defined as an "action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflict and to limit the spread of the latter when they occur."[25] Boutros-Ghali's view was not limited to securing peace between the United States and the Soviet Union.[26] His definition was much broader and aimed to prevent all types of violent conflict.[27] It also stopped dividing the world into two power blocs, but encouraged countries to work together for peace.[28]

In 2001, former U.N. Secretary-General Kofi Annan proposed that "preventive diplomacy" be renamed "preventive action."[29] In his opin-

20. THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO), LONG WALK OF PEACE: TOWARDS A CULTURE OF PREVENTION 42 (2018).

21. *Id.*

22. Luck, *supra* note 18, at 252 ("With the end of the Cold War, then, it was a logical progression for the Security Council, meeting at the summit level for the first time in 1992, to ask UN Secretary-General Boutros Boutros-Ghali to prepare an analytical report on "the capacity of the United Nations for preventive diplomacy, for peacemaking and for peacekeeping.").

23. Tim Murithi, *Peacemaking and African Traditions of Justice and Reconciliation*, *in* PEACEMAKING: FROM PRACTICE TO THEORY 276 (Susan Allen Nan et al., 2011).

24. *Id.*

25. U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

26. R.S. KALHA, THE DYNAMICS OF PREVENTIVE DIPLOMACY 2 (2014).

27. EMMA J. STEWART, THE EUROPEAN UNION AND CONFLICT PREVENTION: POLICY EVOLUTION AND OUTCOME 30 (2006).

28. KALHA, *supra* note 26, at 3.

29. J. Ododa Opiyo, *The Challenges of Preventive Diplomacy: The United Nations' Post-Cold War Experiences in Africa*, AFR. CTR. FOR THE CONSTRUCTIVE RESOL. OF DISPUTES (2012), *available at* http://www.accord.org.za/ajcr-issues/%EF%BF%BCthe-challenges-of-preventive-diplomacy/ (last visited Sept. 29, 2019).

ion, preventive diplomacy was used as a means to prevent human suffering and as an alternative to costly politico-military operations.[30] There are also several forms of action that could have useful preventive results. Those may include preventive deployment, preventive disarmament, preventive humanitarian action, and preventive peace building, as well as a wide range of actions in the fields of good governance, human rights, and economic and social development.[31] Additionally, Kofi Annan emphasized that "preventive action" should be limited mostly to measures stated under Chapter VI of the U.N. Charter, but enforcement action under Chapter VII of the U.N. Charter must remain a legitimate means of last resort to prevent massive violations of fundamental human rights or other serious threats to peace.[32]

Former U.N. Secretary-General Ban Ki Moon reconsidered the concept of preventive diplomacy.[33] He established four elements of preventive diplomacy. First, the strengthening of U.N. partnerships with all stakeholders should be emphasized.[34] This is because successful preventive diplomacy would require contributions of a range of actors at both the regional and international levels.[35] Second, the developments of preventive diplomacy should include the increasing use of international contact groups.[36] Progress can merely be accomplished through "partnership," which results in a combination of influence, impartiality, capacity, and capability.[37] Effective preventive actions depend on the willingness of parties in the conflict to engage. Neighboring states and other institutions may contribute or become key allies. Third, the international community should continue to invest in prevention.[38] The global economic crisis has put new pressures on resources and responses, when successful, are highly cost-effective. Fourth, women should have a role in preventive diplomacy.[39]

U.N. Secretary-General Antonio Guterres has focused on preventive diplomacy which has been used to respond to conflicts for decades. He has highlighted conflict prevention as the top priority for the U.N. characterized by, a comprehensive, modern, and effective operation

30. *Id.*
31. *Id.*
32. *Id.*
33. R.P. BARSTON, MODERN DIPLOMACY 248 (4th ed. 2014).
34. Opiyo, *supra* note 29.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

peace architecture, encompassing prevention, conflict resolution, peace-keeping, peace building, and long-term development – the "peace continuum."[40] He stressed that prevention must be integrated into the three pillars of the U.N.'s work, urging staff and member states to enhance the interlink-ages between peace and security, development, and human rights.[41] He has also promoted the sustaining peace vision as a new rationale and source of momentum for preventing conflicts.[42]

However, preventive diplomacy is considered a successful and unsuccessful strategy. For example, in the Cuban Missile Crisis of 1962, preventive diplomacy could deter a nuclear confrontation between the United States and the Soviet Union.[43] On the other hand, preventive diplomacy was unable to deter the invasion of Iraq in 2003 and the subsequent disastrous consequences.[44] Even though the U.N. encourages or supports preventive diplomacy, conflict prevention is less successful. More particularly, there are a number of obstacles to preventive diplomacy. First, it is difficult for third parties to influence or manipulate domestic policies within the countries where a violent conflict is to be prevented.[45] This is because preventive diplomacy may require third parties to resolve conflicts by intervening in the countries. However, inappropriate intervention may violate countries' sovereignty.[46] Second, it is difficult to find the long-term support.[47] This is because preventive diplomacy is a long, costly, and fragile process that can be easi-

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40. *At Security Council, UN Chief Guterres Makes Case for New Efforts to Build and Sustain Peace*, UNITED NATIONS (Jan. 10, 2017), *available at* https://www.un.org/sustainabledevelopment/blog/2017/01/at-security-council-un-chief-guterres-makes-case-for-new-efforts-to-build-and-sustain-peace/ (last visited Sept. 29, 2019); Remarks to the General Assembly High-Level Meeting on Peace building and Sustaining Peace, UNITED NATIONS (Apr. 24, 2018), https://www.un.org/sg/en/content/sg/speeches/2018-04-24/peacebuilding-and-sustaining-peace-remarks-general-assembly (last visited Sept. 29, 2019).

41. Adriana Erthal Abdenur & Giovanna Kuele, *Can the African Union Innovate in Conflict Prevention? Evidence from Mediation and Preventing and Countering Violent Extremism, in* CONTEMPORARY AFRICA AND THE FORESEEABLE WORLD ORDER 96 (Francis Onditi et al., 2019).

42. *Id.*

43. *Preventive Diplomacy at the United Nations*, UNITED NATIONS CHRON. (n.d.), *available at* https://unchronicle.un.org/article/preventive-diplomacy-united-nations (last visited Sept. 29, 2019).

44. Claude Rakisits, *Summary of "The Gulf Crisis: Failure of Preventive Diplomacy,"* BEYOND INTRACTABILITY, *available at* https://www.beyondintractability.org/artsum/rakisits-thegulf (last visited Sept. 29, 2019).

45. JACOB BERCOVITCH & RICHARD JACKSON, CONFLICT RESOLUTION IN THE TWENTY-FIRST CENTURY: PRINCIPLES, METHODS, AND APPROACHES 98 (2009).

46. *Id.*

47. *Id.*

ly derailed, especially if the root causes of the conflicts are not addressed.[48] Thus, preventive diplomacy is an expensive investment. Third, it is difficult to keep up preventive efforts even though preventive diplomacy is cheaper than massive reconstruction or humanitarian projects.[49] Preventive efforts may require the development of systematic and coordinated long-term engagement, as well as the integration of political, social, economic, military, and human rights measures.[50] Such cooperation is difficult to accomplish and costly to maintain. Fourth, it is difficult to determine whether and when preventive diplomacy is no longer needed.[51] Fifth, preventive diplomacy is a lack of political will.[52] This means that countries do not want to involve other situations or conflicts, but only focus on their interests.

B. The Role of Preventive Diplomacy on the Korean Peninsula

A question arises whether preventive diplomacy should be used on the Korean Peninsula. The situation on the Korean Peninsula is considered a "frozen conflict" that was the result of the Cold War.[53] The conflict is deeply complex and affects several countries in the region. The root causes of the conflict involve political ideology, divisions, discrepancy, hostility, military forces, and weapons development. Since the end of the Korean War, the conflict has hung between stalemate and escalation. There has been no peace treaty or international framework for resolving and ending a conflict. More particularly, peace on the Korean Peninsula has mainly been threatened by North Korea. The tension has recently escalated when North Korea conducted nuclear weapons and ballistic missile tests.[54] Those have posed a direct and serious threat to the peace and stability.[55] On the other hand, the United States and South Korea have responded to the threat by establishing joint military exercises and missile defense cooperation. North Korea has considered

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48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 99.

52. *Id.*

53. ROBERT DANIEL WALLACE, NORTH KOREA AND THE SCIENCE OF PROVOCATION: FIFTY YEARS OF CONFLICT-MAKING 164 (2016).

54. CHI YOUNG PAK, KOREA AND THE UNITED NATIONS 133 (2000).

55. *Id.* (This not only represents a challenge to the international regime of non-proliferation of nuclear weapons, but could also lead to the escalation of an arms race in the Asian region.).

joint military exercises to be the threats, escalating the tension on the Korean Peninsula.[56]

Furthermore, the tension has been escalated by verbal threats or the exchange of words. Generally, verbal threats are often considered costless communication or cheap talk which may not have any effect on behavior.[57] However, verbal threats may have an effect when they can change people's minds about their goals.[58] On the Korean Peninsula, verbal threats have been used several times, but they did not escalate the tension or conflict. Until 2017, verbal threats have escalated the tension when they have been used to support their physical actions. Thus, talk is probably not cheap anymore, but it is like pouring gasoline on the fire. For example, in August 2017, the United States and South Korea were conducting annual military drills.[59] About 17,500 U.S. troops and 50,000 South Korean troops were involved in the exercises.[60] At the U.N. General Assembly on September 19, 2017, President Trump stated that "[t]he United States has great strength and patience, but if it is forced to defend itself or its allies, we will have no choice but to totally destroy North Korea."[61] He also said, before using a belittling nickname for North Korean leader Kim Jong-un, "Rocket Man is on a suicide mission for himself and for his regime."[62] Meanwhile, Ri Yong-ho, North Korea's foreign minister, responded to President Trump's speech, noting that "[t]here is a saying that the marching goes on even when dogs bark[63] [...] If he was thinking he could scare us with the sound of a dog barking, that's really a dog dream."[64] North Korea has

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56. Choe Sang-Hun & Austin Ramzy, *South Korea and U.S. Begin Drills as North Wars of Rising Tensions*, N.Y. TIMES (Aug. 21, 2017), *available at* https://www.nytimes.com/2017/08/21/world/asia/south-korea-us-joint-exercises.html (last visited Sept. 29, 2019).

57. Dustin H. Tingley & Barbara F. Walter, *Can Cheap Talk Deter? An Experimental Analysis*, 55 J. CONFLICT RESOL. 994, 998 (2011).

58. *Id.* at 997.

59. *US-South Korea Hold Military Drills Amid Tension*, BBC NEWS (Aug. 21, 2017), *available at* https://www.bbc.com/news/world-asia-40957725 (last visited Sept. 30, 2019).

60. *Id.*

61. David Nakamura & Anne Gearan, *In U.N. Speech, Trump Threatens to 'totally destroy North Korea' and calls Kim Jong Un 'Rocket Man,'* WASH. POST (Sept. 19, 2017), *available at* https://www.washingtonpost.com/news/post-politics/wp/2017/09/19/in-u-n-speech-trump-warns-that-the-world-faces-great-peril-from-rogue-regimes-in-north-korea-iran/ (last visited Sept. 30, 2019).

62. *Id.*

63. Justin McCurry, *'Sound of A Dog Barking': North Korea Ridicules Trump Threat*, THE GUARDIAN (Sept. 20, 2017), *available at* https://www.theguardian.com/world/2017/sep/21/sound-of-a-dog-barking-north-korea-ridicules-trump-threat (last visited Sept. 30, 2019).

64. *Id.*

also increased its production of nuclear weapons and ballistic missiles. This could increase the tension on the Korean Peninsula.

Preventive diplomacy should be used to resolve the conflict and prevent serious hostilities on the Korean Peninsula. Preventive diplomacy can reduce tensions from escalating into armed violence or war between the United States and North Korea. More importantly, preventive diplomacy can prohibit or halt the nuclear weapons and ballistic missile tests. Peace built by preventive diplomacy is considered "negative" peace. Typically, negative peace refers to the temporary absence of war or direct physical violence.[65] Preventive diplomacy results in a circumstance in which no military forces and weapon development are taking place. Nevertheless, preventive diplomacy cannot resolve all the problems or build sustainable peace on the Korean Peninsula. The root causes of conflicts such as political ideology and hostility may not be resolved by preventive diplomacy. Preventive diplomacy may merely handle immediate causes which escalate tensions or lead to the conflict in the region. Since preventive diplomacy creates temporary peace, the conflict or tension may erupt again. Thus, preventive diplomacy cannot build positive peace in the region.

C. The Elements of Preventive Diplomacy

A question arises how preventive diplomacy can be used to resolve conflicts or prevent tensions on the Korean Peninsula. In *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, Boutros Boutros-Ghali established a strategy for preventive diplomacy. It required confidence-building measures.[66] It needed early warning based on information gathering and informal or formal fact-finding.[67] It also involved preventive deployment of peacekeepers and, in some situations, demilitarized zones.[68] However, the world has changed. More particularly, the world has become alarmed not because of the North's conventional military forces, but rather because it is pursuing a nuclear weapons program combined with a ballistic missile program.[69] The classical strategy for preventive diplomacy created by Boutros-Ghali may not resolve the conflict or cease this tension effectively. Perhaps,

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65. Eros Desouza et al., *Definitions of Peace and Reconciliation in Latin America*, *in* INTERNATIONAL HANDBOOK OF PEACE AND RECONCILIATION 99 (Kathleen Malley-Morrison et al. eds., 2013).

66. U.N. Secretary-General, *supra* note 25.

67. *Id.*

68. *Id.*

69. VICTOR D. CHA & DAVID C. KANG, NUCLEAR NORTH KOREA: A DEBATE OF ENGAGEMENT STRATEGIES 58 (2005).

the situation on the Korean Peninsula is more complex, uncertain, and unstable.[70] Some elements may not be applied to prevent the conflict or discourage hostilities in the region. For example, preventive diplomacy or the deployment of military forces has been applied to deter violence in the region. The Korean demilitarized zone or a prohibited military zone was established between North and South Korea along the 38th parallel.[71] This could prevent provocation and collision between the South and the North. However, tensions have still escalated between North and South Korea. Provocation has taken place near or in the Korean demilitarized zone. For example, on April 4, 1996, North Korea announced that it would give up its demilitarized zone maintenance duties.[72] North Korean soldiers entered the demilitarized zone and unloaded their mortars, recoilless rifles, and machine guns on their side of the joint security area.[73] This could increase the tension and violate the 1953 Armistice Agreement, which mandates that both sides suspend all hostile actions.[74] Thus, the new strategy for preventive diplomacy is required to resolve the conflict and maintain peace on the Korean Peninsula.

In particular, the new strategy for preventive diplomacy in the Korea Peninsula includes three elements: (1) communication, (2) cooperation, and (3) confidence.

1. Communication

Communication is a process of transferring data, information, opinion, and understanding from one person to another.[75] Communication has an important role in interaction among people.[76] Communication also has a vital role in international relations because states interact with each other in various ways. More importantly, communication is a means to resolve international conflicts. Thus, communication should

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70. Tsuneo Akaha, *Introduction: Uncertainty, Complexity, and Fluidity on the Korean Peninsula*, *in* THE FUTURE OF NORTH KOREA 1-3 (Tsuneo Akaha ed., 2002).

71. REUEL R. HANKS, ENCYCLOPEDIA OF GEOGRAPHY TERMS, THEMES, AND CONCEPTS 42 (2011).

72. JUNGSUP KIM, INTERNATIONAL POLITICS AND SECURITY IN KOREA 129 (2007).

73. LARS ASSMANN, THEATER MISSILE DEFENSE (TMD) IN EAST ASIA: IMPLICATIONS FOR BEIJING AND TOKYO 224 (2007).

74. KIM, *supra* note 72, at 129.

75. Parissa Haghirian, *International Knowledge Transfer as a Challenge for Communities of Practice*, *in* ENCYCLOPEDIA OF COMMUNITIES OF PRACTICE IN INFORMATION AND KNOWLEDGE MANAGEMENT 234 (Elayne Coakes & Steve Clarke eds., 2005); ARUNA KONERU, PROFESSIONAL COMMUNICATION 25-26 (2008).

76. JAMES W. NEULIEP, INTERCULTURAL COMMUNICATION: A CONTEXTUAL APPROACH 376 (4th ed., 2009).

be a part of preventive diplomacy. Communication in preventive diplomacy may include negotiation, conciliation, or mediation. Negotiation is a primary process of preventive diplomacy. Negotiation is a tool to resolve conflicts and balance competing interests.[77] Negotiation is flexible and informal.[78] It can also involve more than two parties and maintain relationships among parties. Mediation refers to the involvement of a third party in efforts to reach agreement between two or more parties to a dispute.[79] Mediation could be a good choice when negotiation fails. Conciliation is a process whereby parties are assisted by a conciliator to reach an acceptable solution to the dispute.[80] A third party may provide an informal communication link between conflicting parties.[81] Conciliation is different from mediation. Conciliation involves an inquiry and an investigation into the facts by a conciliator,[82] whereas a mediator has no such authority.

On the Korean Peninsula, a negotiation has been used to resolve the conflict between North Korea and its neighbors – South Korea, Japan, China, and Russia, as well as the United States. Negotiations have been in a bilateral or multilateral form. The key objective of negotiations is to halt or dismantle North Korea's nuclear and missile programs. This is because denuclearization can prevent or reduce the escalation of tensions leading to conflicts on the Korean Peninsula. More particularly, the United States engaged in four major sets of formal nuclear and missile negotiations with North Korea: (i) the Bilateral Agreed Framework (1994-2002); (ii) the bilateral missile negotiations (1996-2000); (iii) the multilateral Six-Party Talks (2003-2009); and (iv) the Bilateral Leap Day Deal (2012).[83] Additionally, in June 2018, the negotiation between the United States and North Korea resumed in Singapore. However, the negotiation has stalled since the Hanoi Summit in 2019. Among other things, each negotiation has been in a form of ex-

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77. BERCOVITCH & JACKSON, *supra* note 45, at 7-8.

78. JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 13 (2003).

79. DANIELLE BESWICK & PAUL JACKSON, CONFLICT, SECURITY AND DEVELOPMENT: AN INTRODUCTION 100 (2d ed., 2014).

80. Ann Black, *Finding the Equilibrium for Dispute Resolution: How Brunei Darussalam Balances a British Legacy With Its Malay and Islamic Identity*, 8 INT'L TRADE & BUS. L. REV. 185, 195 (2003).

81. A.B. FETHERSTON, TOWARDS A THEORY OF UNITED NATIONS PEACEKEEPING 110 (1994).

82. MALCOLM N. SHAW, INTERNATIONAL LAW 773 (8th ed., 2017).

83. Mary Beth D. Nikitin et al., *Nuclear Negotiations with North Korea: In Brief*, CONGRESSIONAL RESEARCH SERVICE, *available at* https://fas.org/sgp/crs/nuke/R45033.pdf (last visited Sept. 30, 2019).

change. North Korea would halt its nuclear programs while the United States would provide economic assistance and remove sanctions or restrictions.

Unfortunately, the negotiation between the two countries is the difficult task. The negotiations often broke down because of disagreements or incompatible demands. For example, the Hanoi Summit ended in failure. The two countries had incompatible demands, so an agreement could not be reached. In the United States' version of events, North Korea agreed to dismantle the nuclear and fissile material production facilities at Yongbyon in exchange for complete sanctions relief, but the United States wanted other nuclear facilities, including covert sites, disable as well.[84] On the other hand, the North Korean foreign minister, Ri Yong-ho, stated that North Korea had only demanded partial sanctions relief in return for closing Yongbyon.[85] He also said that the United States had wasted an opportunity that "may not come again," as Pyongyang's position would not change even if the United States sought further talks.[86] Thus, in order to conclude an agreement, the negotiation between the two countries should be designed to search for a compromise or establish the new element of the agreement which is acceptable to both sides.

The negotiation between two countries has stalled because North Korea has not relied on the negotiation processes. Instead, North Korea has acted against the negotiation process. More particularly, when North Korea was not satisfied with the deals, it conducted nuclear or missile tests during the round of negotiations. This could impede the negotiation process and escalate tensions in the region. For example, on February 29, 2012, the United States and North Korea unveiled an agreement, dubbed the "Leap Day Deal."[87] North Korea promised a moratorium on nuclear and long-range missile tests and allowed new in-

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84. *North Korean Nuclear Negotiations 1985-2019*, COUNCIL ON FOREIGN REL., *available at* https://www.cfr.org/timeline/north-korean-nuclear-negotiations (last visited Sept. 30, 2019).

85. Julian Borger, *Vietnam Summit: North Korea and US Offer Differing Reasons for Failure of Talks*, THE GUARDIAN (Mar. 1, 2019), *available at* https://www.theguardian.com/world/2019/feb/28/vietnam-summittrump-and-kim-play-down-hopes-of-quick-results-nuclear-talks (last visited Sept. 30, 2019).

86. *Id.*

87. Andrew Quinn, *Insight: Obama's North Korea Leap of Faith Falls Short*, REUTERS (Mar. 30, 2012), *available at* https://www.reuters.com/article/us-korea-north-usa-leap/insight-obamas-north-korean-leap-of-faith-falls-short-idUSBRE82T06T20120330 (last visited Sept. 30, 2019).

ternational inspections.[88] The United States also announced that the two countries would hold further talks to finalize details of a "target U.S. program consisting of an initial 240,000 metric tons of nutritional assistance."[89] The U.S. statement emphasized a range of issues, including the United States' continued commitment to the 1953 Armistice Agreement.[90] However, on March 16, 2012, North Korea announced plans for a new satellite launch in April using ballistic missile technology.[91] In April 2012, North Korea launched an "earth observation satellite," which violated the U.N. Security Council resolution.[92] The United States suspended its portion of the Leap Day Deal arrangement because the launch violated the terms of the agreement.[93]

Furthermore, when North Korea failed to win concessions in the negotiations, it carried on the nuclear test or adopted strategies designed to increase the threat of military aggression.[94] This would result in the collapse of nuclear deals and increase tensions in the region. For instance, the Six-Party Talks, involving China, Japan, North Korea, Russia, South Korea, and the United States, were launched in August 2003. The talks established the objective of a nuclear-free Korean Peninsula and set in motion the Korean peace process.[95] The talks went through several rounds. However, negotiations stalled when the U.S. Treasury Department targeted the Banco Delta Asia (BDA) in Macau as a "willing pawn for the North Korean government to engage in corrupt financial activities."[96] This also led to the freezing of $25 million worth of North Korean accounts at the BDA and efforts to shut down its hard

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88. Julia Masterson, *Chronology of U.S.-North Korean Nuclear and Missile Diplomacy*, ARMS CONTROL ASS'N, *available at* https://www.armscontrol.org/factsheets/dprkchron (last visited Sept. 30, 2019).

89. Nikitin et al., *supra* note 83.

90. *Id.*

91. IAN JEFFRIES, NORTH KOREA, 2009-2012: A GUIDE TO ECONOMIC AND POLITICAL DEVELOPMENTS 653 (2013).

92. Justin McCurry, *North Korea Rocket Launch: UN Security Council Condemns Latest Violation*, THE GUARDIAN (Feb. 7, 2016), *available at* https://www.theguardian.com/world/2016/feb/07/north-korea-launches-long-range-rocket-it-claims-is-carrying-a-satellite (last visited Sept. 30, 2019).

93. Nikitin et al., *supra* note 83.

94. HEATHER ELKO MCKIBBEN, STATE STRATEGIES IN INTERNATIONAL BARGAINING: PLAY BY THE RULES OR CHANGE THEM? 44 (2015).

95. Seung-Ho Joo, *Russia and the North Korean Nuclear Crisis*, *in* NORTH KOREA'S SECOND NUCLEAR CRISIS AND NORTHEAST ASIAN SECURITY 137 (Seung-Ho Joo & Tae-Hwan Kwak eds., 2016).

96. Mike Chinoy, *Six Party Talks: The Least Band Alternative*, 38 NORTH (Feb. 10, 2011), *available at* https://www.38north.org/2011/02/six-party-talks/ (last visited Sept. 30, 2019).

currency accounts around the world.[97] On October 9, 2006, North Korea tested a nuclear device for the first time. The Six-Party Talks resumed in February 2007. When negotiations began, North Korea pledged to begin dismantling its nuclear programs in exchange for the resumption of food and fuel aid.[98] North Korea also received 50,000 tons of fuel in exchange for allowing IAEA inspections of its facilities and shutting down production of fissile materials.[99] The Six-Party Talks collapsed in 2008 when North Korea did not allow IAEA inspectors to have access to its nuclear facilities, which was followed by a slowing of benefits from other countries.[100] After the collapse of the Six-Party Talks, North Korea shifted its policy away from the Six-Party Talks and toward more concerted effort to develop its nuclear weapons capability.[101] On May 25, 2009, North Korea tested its nuclear device.[102] North Korea also announced that it would perform a more powerful nuclear test.

The negotiations on the Korean Peninsula demonstrate a cyclical pattern: (1) North Korean provocation; (2) conflicts or tensions; (3) negotiations and package deals; and (4) the collapse of the nuclear deals.[103] The international community, especially the United States, is exploring new negotiating strategies. Among other things, the United States still emphasizes that the goal of diplomacy with North Korea is the "complete, verifiable, and irreversible denuclearization of the Korean Peninsula in a peaceful manner."[104] The negotiations are also based on a basic bargain of economic benefits and sanctions removal in exchange for nuclear weapons and missile dismantlement. However, it is unlikely that North Korea will give up its nuclear weapons or ballistic missile programs easily. This is because nuclear weapons and ballistic

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97. *Id.*

98. TOM LANSFORD, HISTORICAL DICTIONARY OF U.S. DIPLOMACY 194 (2007).

99. *Id.*

100. Nikitin et al., *supra* note 83.

101. *Id.*

102. Mimi Dougherty et al., *North Korea's Nuclear Test and its Aftermath: Coping with the Fallout*, NTI (June 25, 2009), *available at* https://www.nti.org/analysis/articles/north-koreas-nuclear-test-aftermath/ (last visited Sept. 30, 2019).

103. Bong-Geun Jun, *Cyclical Patterns of North Korean Nuclear Crises and Solution: A South Korean Perspective*, *in* ASSESSMENT OF THE NUCLEAR PROGRAMS OF IRAN AND NORTH KOREA 63 (Jungmin Kang ed., 2013).

104. *Joint Statement between the United States and the Republic of Korea*, WHITE HOUSE, *available at* https://www.whitehouse.gov/briefings-statements/joint-statement-united-states-republic-korea/ (last visited Sept. 30, 2019).

missiles can assure security in its regime.[105] North Korea does not have to rely on Russia and China for its own security. North Korea can use its nuclear weapons and ballistic missiles to protect itself. Nuclear weapons also provide diplomatic leverage for North Korea.[106] More particularly, its nuclear program has been used to extract concessions from the other countries, especially the United States. North Korea believes that its nuclear weapons can help the country to acquire the prestige which comes with the status. Meanwhile, it is unclear whether the United States will insist on joint military exercises as a precondition before the negotiations begin.[107] North Korea would reject dialogue on denuclearization unless joint military exercises do not exist.[108] Recently, the United States and South Korea have conducted joint military drills. Therefore, the negotiation in the Korean Peninsula will be more difficult and take longer time.

The process of the negotiation between the United States and North Korea has also relied on an incorrect approach. Typically, approaches to negotiations include a position-based approach and an interest-based approach. A position-based approach focuses on what each party needs.[109] Each party identifies his position and negotiates from his position.[110] Each party also defends his position by using power or influence to win against another party.[111] Some techniques such as manipulation, threat, or deception are frequently used in this approach. A position-based approach then results in win-lose or lose-lose outcomes.[112] On the other hand, an interest-based approach focuses on parties' interests rather than positions.[113] It includes cooperation between parties to identify interests and solve problems together.[114] Parties es-

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105. YOUNG WHAN KIHL & HONG NACK KIM, NORTH KOREA: THE POLITICS OF REGIME SURVIVAL 169 (2014).

106. Siegfried S. Hecker, *Lessons Learned from the North Korean Nuclear Crises*, *in* THE SURVIVAL OF NORTH KOREA: ESSAYS ON STRATEGY, ECONOMICS, AND INTERNATIONAL RELATIONS 224 (Suk Hi Kim et al. eds., 2011).

107. Nikitin et al., *supra* note 83.

108. *North Korea Launches Two 'projectiles' into the Sea*, DW (June 8, 2019), *available at* https://www.dw.com/en/north-korea-launches-two-projectiles-into-the-sea/a-49903822 (last visited Oct. 1, 2019).

109. JUDITH DWYER, COMMUNICATION FOR BUSINESS AND THE PROFESSIONS: STRATEGIES AND SKILLS 83 (5th ed., 2012).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 85.

114. JOHN JESTON & JOHAN NELIS, BUSINESS PROCESS MANAGEMENT: PRACTICAL GUIDELINES TO SUCCESSFUL IMPLEMENTATIONS 278 (2d ed., 2010).

tablish solutions to meet their similar and different interests.[115] There also is mutual openness and information sharing to better understand each other's needs and concerns. An interest-based approach thus results in win-win outcomes which bring benefits to both parties.[116] On the Korean Peninsula, the negotiations are based on an interest-based approach. Both countries find a creative solution in a problem-solving process. The interests of both countries are also identified or explored. More importantly, both countries exchange their interests to create the win-win situation. In this case, North Korea dismantles its nuclear and missile programs while the United States pledges to lift economic sanctions and provides economic assistance. Win-win outcomes can resolve conflicts and eliminate tensions, leading to peace in the Korean Peninsula. The successful example of the interest-based approach was the 1994 Agreed Framework. It was considered a win-win arrangement which created temporary peace in the region during 1994-2002.

However, the negotiations between the United States and North Korea have switched from an interest-based approach to a position-based approach. Although the exchange of interests is the key element of the negotiations, the two countries focus and hold their position to gain concessions. Their capabilities and interests have also been used as motivation which underpins their position. In particular, since North Korea has been recognized as one of nuclear-weapon states and the world's largest conventional military forces, the country has become more aggressive. North Korea has also been in a stronger position in the negotiations while talks have been in the certain issues for decades. North Korea knows exactly what the United States and other countries want. Discussing the same issues does not work anymore. Recently, despite the pressure of massive economic sanctions, North Korea disagreed with President Donald Trump's "grand bargain" of irreversible and immediate denuclearization for significant relief in the Hanoi Summit.[117] After the collapse of the Hanoi Summit, there is no sign of new incentive to change North Korea's strategies. Instead, North Korea has conducted a test of a new type of short-range ballistic missile on August 15, 2019. If North Korea holds its position, the negotiation will result in a lose-lose situation. This means that conflicts and tensions will still exist on the Korean Peninsula. Thus, the United States needs

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115. MARTIN A. FREY, ALTERNATIVE METHODS OF DISPUTE RESOLUTION 91 (2002).

116. DWYER, *supra* note 109, at 86.

117. Ferial A. Saeed, *A Republican Paradigm Shift on North Korea: Prospects and Implications*, 38 NORTH (July 26, 2019), *available at* https://www.38north.org/2019/07/fsaeed072619/ (last visited Oct. 1, 2019).

to change its policy to deal with North Korea. The United States should find new strategies to generate the new negotiation based on an interest-based approach.

2. Cooperation

According to the Oxford Dictionary, "cooperation" means "the action or process of working together to the same end."[118] Cooperation can also be defined as a situation where parties agree to work together to produce new gains for each of the participants unavailable to them by unilateral action.[119] The term "cooperation" has an important role in international relations because it can resolve joint problems or global conflicts. In preventive diplomacy, cooperation is a means of promoting or requiring countries or institutions to work together to resolve conflicts or prevent disputes from escalating into conflicts. In this circumstance, international conflicts exist, and a single country cannot resolve or prevent international conflicts by itself. A group of countries is then required to cooperate and participate in a resolution or prevention. Such cooperation results in peace, stability, security, and good governance. Those benefits are shared among participants and are given to the international community.

Cooperation on preventive diplomacy has been introduced in regionalism. Cooperation could prevent or resolve inter-and intra-state conflicts by peaceful means.[120] It could also promote peace building in a region. Recently, cooperation on preventive diplomacy has been a part of the broader process of U.N. cooperation with regional and subregional organizations.[121] The Security Council has also held meetings to discuss cooperation with regional organization for maintaining international peace and security, including preventive measures.[122] For instance, at its fourth meeting away from headquarters, held in Nairobi in 2006, the Security Council sought to intensify cooperation with the

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118. *Definition of Cooperation in English*, OXFORD DICTIONARY, *available at* lexico .com/en/definition/cooperation (last visited Oct. 1, 2019).

119. WILLIAM ZARTMAN & SAADIA TOUVAL, INTERNATIONAL COOPERATION: THE EXTENTS AND LIMITS OF MULTILATERALISM 1 (2010).

120. Valery Ferim, *African Solutions to African Problems*, *in* THE AFRICAN UNION TEN YEARS AFTER: SOLVING AFRICAN PROBLEMS WITH PAN-AFRICANISM AND THE AFRICAN RENAISSANCE 146 (Mammo Muchie et al. eds., 2013) (Regional groupings can be an instrumental path to political stability, economic growth, the consolidation of democracy and hence decrease the propensity for conflict.).

121. BERTRAND G. RAMCHARAN, PREVENTIVE DIPLOMACY AT THE UN 194 (2008).

122. *Id.*

peace and security institutions of the African Union and discuss cooperation between the Union and the U.N. on the situation in Darfur.[123]

On the Korean Peninsula, cooperation can bring the hostile parties to agreement. Cooperation can resolve conflicts or reduce tensions. Cooperation can also build or strengthen relationships between North Korea and other countries. Relationships based on cooperation help countries work together to bring peace, stability, and security to the region. Cooperation is not limited to denuclearization, as it extends to economic relations. Effective cooperation should be based on agreement rather than enforcement. Effective cooperation should also provide win-win outcomes rather than competition in the region. Furthermore, cooperation consists of several countries – South Korea, Japan, China, Russia, the United States, and North Korea. Bilateral and multilateral cooperation has then been established on the Korean Peninsula. However, bilateral cooperation is more effective than multilateral cooperation. Bilateral cooperation is less complicated than multilateral cooperation, and North Korea prefers bilateral relations or cooperation with the United States.[124] Perhaps North Korea views the United States as the most important and influential player in the conflict. Dealing with the United States directly and bilaterally would resolve the conflict. More importantly, North Korea would obtain the removal of sanctions and other restrictions on its interactions with the United States.[125] The normalization of relations with the United States would also help North Korea gain economic assistance or benefits. For example, the Agreed Framework established a road map to improve ties between the United States and North Korea.[126] The Agreed Framework required the termination of nuclear weapon development in North Korea.[127] In exchange, the United States offered to move toward normalization of political and economic relations and aid in the construction of two North Korean nuclear power reactors, subject to IAEA safeguards and based on existing Western light-water design.[128] The Agreed Framework established bilateral political and economic relations or cooperation be-

123. *Id.*

124. Nikitin et al., *supra* note 83.

125. *Id.*

126. CHARLES K. ARMSTRONG, THE KOREAS 101 (2d ed., 2013).

127. THOMAS GRAHAM, JR. & DAMIEN J. LAVERA, CORNERSTONES OF SECURITY: ARMS CONTROL TREATIES IN THE NUCLEAR ERA 1268 (2003).

128. *Id.*

tween two countries. It also temporarily reduced tensions on the Korean Peninsula.[129]

Unlike bilateral cooperation, multilateral cooperation did not work well on the Korean Peninsula. In fact, countries established multilateral cooperation to deal with North Korea's nuclear challenge through three stages: (i) the Korean Peninsula Energy Development Organization (KEDO); (ii) the Four-Party Talks; and (iii) the Six-Party Talks. The KEDO was created by the United States, Japan, and South Korea.[130] The KEDO provided for the implementation of other measures required to meet the objectives of the Agreed Framework.[131] The planned aid consisted of the construction of two light-water nuclear reactors (LWRs) and the provisions of 500,000 metric tons of heavy fuel oil annually while the reactors were built.[132] U.S. contributions covered only heavy fuel oil shipments and KEDO administrative costs.[133] The KEDO produced important positive externalities. It also increased security and reduced the threat of proliferation in North Korea for a decade. The KEDO was considered successful cooperation. On the other hand, the Four-Party Talks and the Six-Party Talks failed to create effective cooperation in the region. This may be because each party in the talks had its own objective and found it hard to compromise with one another. More particularly, in the Four-Party Talks, South Korea, China, the United States, and North Korea agreed to reduce tensions on the Korean Peninsula and replace the 1953 Armistice Agreement with a peace treaty.[134] The Four-Party Talks had six plenary sessions where North Korea repeatedly maintained that the Four-Party Talks deal with the two issues of U.S. troop withdrawal and the conclusion of a peace treaty between the United States and North Korea.[135] While South Korea maintained that it wanted to discuss those issues that were easily resolved, North Korea insisted that the two issues – the withdrawal of U.S. troops and a Washington-Pyongyang peace treaty – be resolved

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129. Amy E. Smithson, *North Korea: A Case in Progress*, *in* THE POLITICS OF POSITIVE INCENTIVES IN ARMS CONTROL 101 (Thomas Bernauer & Dieter Ruloff eds., 1999).

130. ANTHONY DIFILIPPO, US-JAPAN-NORTH KOREA SECURITY RELATIONS: IRREPRESSIBLE INTERESTS 24 (2013).

131. CHARLES L. PRITCHARD, FAILED DIPLOMACY: THE TRAGIC STORY OF HOW NORTH KOREA GOT THE BOMB 41 (2007).

132. Mark E. Manyin & Mary Beth D. Nikitin, *Foreign Assistance to North Korea*, *in* THE NORTH KOREAN THREAT 81 (Douglas C. Lovelace, Jr. ed., 2017).

133. *Id.*

134. Tae-Hwan Kwak, *The Six-Party Nuclear Talks and the Korean Peninsula Peace Regime Initiative: A Framework for Implementation*, *in* THE UNITED STATES AND THE KOREAN PENINSULA IN THE 21ST CENTURY 36 (Tae-Hwan Kwak & Seung-Ho Joo eds., 2006).

135. *Id.*

first.[136] Thus, the four participants in the talks failed to agree on agenda items for discussion at the Four-Party Talks.

In some cases, military cooperation can raise tensions, triggering conflicts on the Korean Peninsula. More specifically, a joint military exercise between South Korea and the United States can increase the tension and disturb bilateral relations with North Korea. Typically, the United States and South Korea joint military exercise is cooperation designed to enhance the ability of the two countries to carry out military operations. The joint military exercises may also be used as a strategy to reduce North Korea's aggression or brinkmanship. However, North Korea considers these joint military exercises as a threat or preparation for war.[137] North Korea has responded to the military drills by conducting armed attacks. For example, South Korea and the United States began the annual Hoguk joint military exercises in November 2010.[138] North Korea considered the exercise as a preparation for a combined armed attack on the country.[139] North Korea warned that it would not tolerate firing in what it regarded as its territorial water.[140] South Korea's forces went ahead with live-ammunition military exercises in waters off Baengyeong Island and Yeonpyeong Island within South Korean-held territory below the Northern Limit Line.[141] North Korea conducted a rock artillery attack on Yeonpyeong Island.[142] North Korea fired approximately 120 rockets while South Korea responded with eighty rounds of artillery.[143] This was the first artillery exchange after the end of the Korean War, escalating the tension in the region.[144]

Recently, North Korea has responded with missile launches. This could eventually interrupt bilateral cooperation and negotiations between the United States and North Korea. For example, after the collapse of the Hanoi Summit in February 2019, President Trump and Chairman Kim met each other at the inter-Korean border, or the demili-

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136. *Id.*

137. Thomas Maresca, *U.S., South Korea Start Military Drills Amid 'Second War' Threats from Pyongyang*, USA TODAY (Aug. 21, 2017), *available at* https://www.usatoday.com/story/news/world/2017/08/21/u-s-south-korea-military-drills/585250001/ (last visited Oct. 1, 2019).

138. Tae-Hwan Kwak, *The Denuclearization of the Korean Peninsula through the Six-Party Talks*, *in* NORTH KOREA AND SECURITY COOPERATION IN NORTHEAST ASIA 13 (Tae-Hwan Kwak & Seung-Ho Joo eds., 2014).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. WALLACE, *supra* note 53, at 114.

144. *Id.*

tarized zone, in June 2019 and agreed to resume working-level negotiations. However, South Korea and the United States held their annual joint military exercises in August 2019, despite warnings from North Korea that the drills could derail fragile nuclear diplomacy.[145] North Korea was ramping up its weapon tests, including two test firings of a new rocket artillery system in the same month.[146] North Korea also expressed frustration over the continuance of the military drills because the country considered the joint practices as a rehearsal for invasion.[147] This could slow down the pace of nuclear negotiations and the peace processes.[148]

3. Confidence

Confidence is an important component of preventive diplomacy. More significantly, preventive diplomacy can be exercised successfully only when there is a strong foundation of trust or confidence among parties involved.[149] However, trust or confidence is difficult to create especially when parties are engaged in conflict and when each side tends to emphasize the differences between itself and the other side.[150] Deception, manipulation, and suspicion are obstacles to create trust or confidence between parties. The term "confidence-building measures" then needs to be established and developed. In fact, the idea of confidence-building measures was first introduced in the European arms control during 1970s.[151] Confidence-building measures were implemented in the Helsinki Final Act of 1975.[152] Confidence-building measures also had a critical role in the bilateral arms control agreements between the United States and Russia. This could decrease tensions and improve the relations of the two countries during the Cold War.

In preventive diplomacy, confidence-building measures are designed to lower uncertainty, reduce the anxiety, and eliminate the mis-

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145. Kim Tong-Hyung, *US, South Korea Prepare Military Drills Despite North's Ire*, AP NEWS (Aug. 5, 2019), *available at* https://www.apnews.com/9833b64b2c944311bf9e296ba3a0dcbd (last visited Oct. 1, 2019).

146. *Id.*

147. *Id.*

148. *Id.*

149. RAMCHARAN, *supra* note 121, at 202.

150. BERCOVITCH & JACKSON, *supra* note 45, at 94.

151. Emily B. Landau, *Assessing the Relevance of Nuclear CBMs to a WMD Arms Control Process in the Middle East Today*, *in* WMD ARMS CONTROL IN THE MIDDLE EAST: PROSPECTS, OBSTACLES AND OPTIONS 29 (Harald Müller & Daniel Müller eds., 2016).

152. *Id.*

perceptions inherent in any unstable structure.[153] They also strive to reduce the escalation of tensions between the conflicting parties.[154] When parties have confidence in each other's intentions, various events that could likely trigger the emergence of violent conflict can be prevented from materializing.[155] Therefore, reducing and managing tensions between parties by fostering a relationship of trust or confidence is an important requirement for conflict prevention. Four types of measures can also be adopted: (1) Joint and explicit declaration on an internationally accepted code of conduct (respect for noncombatants, prohibiting the use of chemical and biological weapons, etc.); (2) Agreement on information exchange and increased communication to assuage each party's fears about military intentions and activities; (3) Observations and inspections, through the exchange of military officers or the use of low-orbiting satellites, to ensure genuine transparency of intentions; and (4) Mutual agreement on measures of constraints (each party in a potential conflict binds itself not to use force under some specified circumstances, to ban certain kinds of weapons, or to establish buffer zones).[156] All these measures can prevent the escalation of conflicts or tensions.

Building trust or confidence is a difficult task on the Korean Peninsula. North Korea's relationship with the United States and South Korea has been marked by conflicts and mistrust since 1945. Several confidence-building measures such as communication and constraints have been applied to reduce the escalation of conflicts or tensions. Nevertheless, trust or confidence between the two parties has not taken place. Instead, provocation between the two parties exists in the region. Provocation can result in mistrust and escalate the tension. North Korea has provoked the international community and the United States with nuclear weapons and ballistic missile tests. On the other hand, the United States has provoked North Korea with the joint military drills. This has escalated conflicts or tensions because North Korea believes that the joint military drills are the rehearsal for invasion.[157] North Korea has responded to the joint military drills by firing missiles. Therefore, effective negotiation and trust cannot be created easily when provocation has still been used as a strategy on the Korean Peninsula.

153. BERCOVITCH & JACKSON, *supra* note 45, at 94.

154. *Id.*

155. *Id.*

156. *Id.*

157. Peter Stubley, *North Korea Launches Two Missiles as South Korea and US Military Exercises Begin*, INDEP. (Aug. 6, 2019), *available at* https://www.independent.co.uk/news/world/asia/north-korea-missile-us-trump-kim-jong-un-japan-a9040626.html (last visited Oct. 1, 2019).

Mistrust can result from a negative belief, uncertainty, and self-isolation. Korea has had a long history of self-isolation.[158] After the end of the Korean War, North Korea became one of the most isolated countries in the world, with one of the world's most repressive regimes.[159] The government of North Korea strictly prohibits its citizens from travelling to even the nearest town in the country without permission.[160] North Korea also relies on a self-supporting national economy.[161] Since North Korea confronts economic difficulties,[162] it needs assistance from the United States and South Korea.[163] However, North Korea believes that South Korea and the United States are the enemies that cause problems on the Korean Peninsula.[164] After the collapse of the Soviet Blocs in the 1990s, North Korea was alone.[165] The survival of North Korea as a state is at risk, and the collapse of its regime is possible.[166] Thus, North Korea does not trust South Korea and the United States. In addition, North Korea does not trust foreigners because they may take advantage of its weakness and vulnerability.[167] North Korea establishes a set of practical policy applications to minimize foreign in-

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158. Charlotte Alfred, *How North Korea Became So Isolated*, HUFFINGTON POST (Oct. 17, 2014), *available at* https://www.huffpost.com/entry/north-korea-history-isolation_n_5991000 (last visited Oct. 1, 2019) (The Choson dynasty, which ruled Korea from the 14th to early 20th century, kept the country isolated from the outside world, both as a way to fend off foreign invasions and out of a belief in the superiority of its Confucian culture. Contacts with foreigners and foreign travel were banned, and after a series of invasions, the Choson rulers limited interaction with even neighboring China and Japan.).

159. FRED M. SHELLEY, NATION SHAPES: THE STORY BEHIND THE WORLD'S BORDERS 502 (2013).

160. C.H.R. Res. 2005/11, U.N. Doc. E/CN.4/RES/2005/11 (Apr. 14, 2005).

161. ADAM CATHCART ET AL., CHANGE AND CONTINUITY IN NORTH KOREAN POLITICS 3 (2016).

162. Steve Hanke, *North Korea's Economic Crisis – What Crisis?*, FORBES (Apr. 4, 2018), *available at* https://www.forbes.com/sites/stevehanke/2018/04/24/north-koreas-economic-crisis-what-crisis/#5b3e0373437a (last visited Oct. 1, 2019).

163. Choe Sang-Hun, *Trump Supports Food Aid for North Korea, South says*, N.Y. TIMES (May 7, 2019), *available at* https://www.nytimes.com/2019/05/07/world/asia/trump-north-korea-food-aid.html (last visited Oct. 1, 2019).

164. Haruki Wada, *Envisioning a Northeast Asian Community: Regional and Domestic Factors to Consider*, *in* REGIONAL COOPERATION AND ITS ENEMIES IN NORTHEAST ASIA: THE IMPACT OF DOMESTIC FORCES 47 (Edward Freidman & Sung Chull Kim eds., 2007) (North Korea has regarded the United States as its main enemy – as the chief threat to its security. During the Cold War era, the United States, the ally of South Korea, was a nuclear superpower. Consequently, North Korea felt that its safety could be secured only under the nuclear umbrella of the Soviet Union.).

165. HOWARD JISOO RYU, ORDERLY KOREA UNIFICATION: WITH THE GUARANTEE OF STABILITY IN EAST ASIA 19 (2007).

166. *Id.*

167. KIHL & KIM, *supra* note 105, at 28.

fluence. North Korea limits trade and transportation links with other countries and tightly restricts the circumstances under which foreigners may enter the country and interact with local citizens.[168] Foreigners can expect their communications to be monitored by North Korean officials.[169] This skepticism and distrust toward the outside world is also part of the North Korean attitude and policy toward South Korea.[170] North Korea then pursues a strategy of divide and conquer in the South through its united from campaign involving alliance with North Korean sympathizers and opposition political forces in the South.[171]

Mistrust also occurs when parties do not act in good faith or do not implement an agreement. Each party may be suspicious of the other. On the Korean Peninsula, the United States found that North Korea often broke agreements or promises to terminate its nuclear and missile programs. A breach of agreements or promises results in mistrust between the two countries. For example, in 1994, North Korea and the United States entered into an Agreed Framework with the goal of freezing and discontinuing North Korea's nuclear programs. However, the Agreed Framework was considered a monument to the highest levels of mistrust between two countries.[172] North Korea used loopholes of the Agreed Framework to develop other weapons and take more advantages from the United States. In August 1998, North Korea tested a long-range ballistic missile over Japan, which undermined the Agreed Framework.[173] The United States had additional negotiations to end all North Korean nuclear weapons activities and long-range ballistic missile testing, production, deployment and export in exchange for lifting sanctions, normalizing relations, and providing a security guarantee.[174] The Agreed Framework then broke down in December 2002 when the United States determined that North Korean had secretly pursued nuclear weapons.[175] North Korea also said it had a right to build nuclear weapons for defensive purposes.

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168. INTERNATIONAL BUSINESS PUBLICATIONS, NORTH KOREA: INVESTMENT AND BUSINESS GUIDE 276 (2002).

169. *Id.*

170. KIHL & KIM, *supra* note 105, at 28.

171. *Id.*

172. CHARLES LIPSON, RELIABLE PARTNERS: HOW DEMOCRACIES HAVE MADE A SEPARATE PEACE 148 (2013).

173. Nikitin et al., *supra* note 83.

174. *Id.*

175. *Factbox: History of Failure: Efforts to Negotiate on North Korean Disarmament*, REUTERS (Mar. 6, 2018), *available at* https://www.reuters.com/article/us-northkorea-missiles-talks-factbox/factbox-history-of-failure-efforts-to-negotiate-on-north-korean-disarmament-idUSKCN1GI2PQ (last visited Oct. 1, 2019).

Since the level of conflicts and mistrust is very high, negotiations may not be successful. More particularly, when both parties would hedge their bets, the process of denuclearization and peace building will not go forward. Instead, the process will move backward and become more difficult. Perhaps, in order to build trust or confidence on the Korean Peninsula, China as a third party is required to participate in the situation. China is North Korea's closest ally while North Korea heavily relies on China.[176] In this case, the United States must communicate with China about building confidence or trust with North Korea. China may convince North Korea that the United States will not transform North Korea's regime, but respect its national sovereignty. The United States and South Korea's joint military exercises should not exist in the region. More importantly, China must convince North Korea to implement or comply with an agreement. Conducting nuclear tests or firing ballistic missiles may not be the right resolution, but instead make the situation worse. Among other things, the role of China is to convince North Korea and build trust between the two countries. China does not have a role in pressuring or influencing North Korea. This is because trust or confidence is based on belief that the other side is trustworthy and is willing to reciprocate cooperation. Pressure or influence does not create trust or confidence between the two parties, but may result in the escalation of the conflict or tension. Thus, peace may not occur in the region.

IV. THE RULE OF LAW

A. The Role of International Law on the Korean Peninsula

After the conflict or tension is terminated by preventive diplomacy, peace will likely exist on the Korean Peninsula. Such peace may be characterized as negative peace or the absence of violence. However, the conflict or tension can erupt again. Peace should then be carried out as an ongoing process even though preventive diplomacy can halt the escalation of the conflict or tension. This means that, in addition to negative peace, positive peace should be established in the region. Positive peace refers to an absence of structural violence and a presence of factors which promote peace.[177] Positive peace can eliminate the root

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176. MORSE TAN, NORTH KOREA, INTERNATIONAL LAW AND THE DUAL CRISES: NARRATIVE AND CONSTRUCTIVE ENGAGEMENT 79 (2015).

177. JEAN DE DIEU BASABOSE, ANTI-CORRUPTION EDUCATION AND PEACEBUILDING: THE UBUPFURA PROJECT IN RWANDA 64 (2019); Barbara A. Kidney, *Promoting Peace: Some Perspectives from Counseling Psychology*, *in* THE PSYCHOLOGY OF PEACE PROMOTION:

causes of the conflict and create peaceful relations between North Korea and the United States.[178] Positive peace can also prevent violence or maintain peace on the Peninsula.

Generally, the peace treaty on the Korean Peninsula would establish the formal end to the Korean War. Although the peace treaty can create peace in the region, it may not be sufficient to build positive or sustainable peace. The peace treaty may not be able to resolve the root causes of the conflict. North Korea may eventually violate the peace treaty. A question may arise how relevant countries and the international community establish positive peace on the Korean Peninsula. In this circumstance, international law, especially the NPT and international humanitarian law, should be used as a tool to create positive peace and maintain peace in the region. International law should also be used together with the peace treaty. In fact, the purpose of international law is to promote or maintain peace and security.[179] International law also consists of rules and principles governing the relations and dealings of nations with each other, as well as the relations between states and individuals, and relations between international organizations.[180] Under international law, countries are required to conduct themselves peacefully in all relations with other countries. Such peaceful relations are considered positive peace. Like general international law, the NPT is regarded as the cornerstone of the global nuclear nonproliferation regime and an essential foundation for the pursuit of nuclear disarmament.[181] The NPT is designed to prevent the spread of nuclear weapons, to further the goals of nuclear disarmament and general and complete disarmament, and to promote cooperation in the peaceful

GLOBAL PERSPECTIVES ON PERSONAL PEACE, CHILDREN AND ADOLESCENTS, AND SOCIAL JUSTICE 45 (Mary Gloria C. Njoku et al. eds., 2019).

178. TUBA TURAN, POSITIVE PEACH IN THEORY AND PRACTICE: STRENGTHENING THE UNITED NATIONS'S PRE-CONFLICT PREVENTION ROLE 3-4 (2015) (Positive peace is defined as sustainable intra-state peace. Positive peace can also be defined as a lasting condition of non-violence within a state that is not imposed by force, but which is rather generated and maintained by the intrinsic dynamics of the given society. In other words, positive and sustainable intra-state peace signifies a society that is capable of 'self-sustaining' non-violence and the conditions of peace through its non-coercive internal dynamic and/or through the non-coercive engagements or facilitation efforts of external parties that would not contravene the self-determination of the given population.).

179. CECILIA MARCELA BAILLIET & KJETIL MUJEZINOVIC LARSEN, PROMOTING PEACE THROUGH INTERNATIONAL LAW 1-2 (2015).

180. *International Law*, LEGAL INFO. INST., *available at* https://www.law.cornell.edu/wex/international_law (last visited Oct. 1, 2019).

181. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT].

uses of nuclear energy.[182] International humanitarian law is described as "a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict."[183] International humanitarian law limits the use and the threat of use of weapons, including nuclear weapons.[184] International humanitarian law regulates the conduct of hostilities and protects the victims of armed conflicts.[185] Both the NPT and international humanitarian law result in positive or sustainable peace. They can also create peaceful relations among countries and maintain peace in the international community. The violation of the NPT, international humanitarian law, or international law can result in conflicts or violence in the international community.

North Korea is one of 193 member states of the United Nations and is bound by international law. North Korea has signed several treaties and conventions such as the Paris Agreement, the Basel Convention, the Geneva Declaration on Armed Violence and Development, and the Genocide Convention. As such, North Korea has obligations under international treaties and conventions. However, North Korea has violated peace treaties and conventions. For instance, North Korea signed the NPT as a non-nuclear weapon state in December 1985.[186] Although North Korea announced that it withdrew from the NPT, its withdrawal is not complete.[187] The NPT still applies to North Korea. In accordance with Article X of the NPT, a member country can withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.[188] A member country will have to give notice of such withdrawal to all other member countries to the Treaty and to the United Nations Se-

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182. *Id.*

183. *What is International Humanitarian Law?*, INT'L COMMITTEE OF THE RED CROSS (Dec. 31, 2014), *available at* https://www.icrc.org/en/document/what-international-humanitarian-law (last visited Oct. 1, 2019).

184. *Weapons*, INT'L COMMITTEE OF THE RED CROSS (Nov. 30, 2011), *available at* https://www.icrc.org/en/document/weapons (last visited Oct. 1, 2019).

185. *International Law on the Conduct of Hostilities: Overview*, INT'L COMMITTEE OF THE RED CROSS (Oct. 29, 2010), *available at* https://www.icrc.org/en/document/conduct-hostilities (last visited Oct. 1, 2019).

186. JITA MISHRA, THE NPT AND THE DEVELOPING COUNTRIES 119 (2008).

187. HALL GARDNER, AVERTING GLOBAL WAR: REGIONAL CHALLENGES, OVEREXTENSION, AND OPTIONS FOR AMERICAN STRATEGY 149 (2007) (North Korea announced it would withdraw from the NPT, but it did not offer explanations as to what extraordinary event justified its withdrawal from the treaty without following the requirements of article 10.1.).

188. *See* NPT, *supra* note 181, at art. X, *stating* "Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country [...]"

curity Council three months in advance.[189] North Korea has not done this, so the NPT applies to its action.[190] Moreover, Article II of the NPT requires each non-nuclear-weapon state not to manufacture nuclear weapons or other nuclear explosive devices.[191] Apparently, North Korea conducted nuclear weapons tests several times. It is unlikely that North Korea tested its nuclear weapons without manufacturing them.[192] Thus, North Korea has violated the NPT.

North Korea is bound by customary international humanitarian law.[193] Although customary international humanitarian law does not depend on the consent of the country, it is presumed to bind all members of the international community.[194] Customary international humanitarian law is then binding upon armed groups who are not affiliated with any state.[195] Nuclear threats and any use of such weapons can then violate the principles of customary international humanitarian law beyond the NPT.[196] According to the International Court of Justice's advisory opinion, *Legality of the Threat or Use of Nuclear Weapons* (Nuclear Weapons Case), the Court concluded that "[a] threat or use of nuclear weapons should also be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law."[197] More importantly, the majority of the Court also affirmed "[t]he threat or use of

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189. *Id.* Article X of the NPT continues, "[...] It shall give notice of such withdrawal to all other parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests."

190. Morse Tan, *International Humanitarian Law and North Korea: Another Angle for Accountability*, 98 MARQ. L. REV. 1147, 1172 (2015).

191. NPT, art. II (Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapon or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.).

192. Tan, *supra* note 190, at 1173.

193. Customary international humanitarian law is a set of rules that come from a general practice accepted as law. It is not necessary for a State to formally accept a rule of custom in order to be bound by it, as long as the overall State practice on which the rule is based is widespread, representative and virtually uniform.

194. JONATHAN CROWE & KYLIE WESTON-SCHEUBER, PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 26 (2013).

195. *Id.*

196. Tan, *supra* note 190, at 1174.

197. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law..."[198] Therefore, North Korea has violated customary international humanitarian law because nuclear weapons and ballistic missile tests are considered the violation of international humanitarian law. This can also affect both negative and positive peace in the international community.

A question may arise why North Korea has not complied with the NPT and international humanitarian law. First, North Korea has violated the NPT and international humanitarian law because its national identity and policy contradict international rules. North Korea has pursued the "military first policy or *Songun*" which gives priority to the military affair.[199] Under *Songun*, North Korea primarily focuses on developing nuclear weapons rather than on improving its citizens' lives although millions of North Koreans continue to suffer and die from starvation, poverty, and repression of the regime.[200] *Songun* then results in the violation of the NPT and international humanitarian law. Second, North Korea may not find interests or benefits from the NPT and international humanitarian law. Unlike national law, international law does not have enforcement mechanism.[201] Countries comply with international law when they can gain interests or benefits from international law.[202] On the other hand, countries may not fully comply with international law when interests or benefits are not sufficient, or countries gain nothing. North Korea has not gained primary interests or benefits from the NPT and international humanitarian law when it complies with them. Instead, North Korea may only gain ancillary interests or secondary benefits such as nonviolence from the NPT and international humanitarian law. Such ancillary interests or secondary benefits may not be able to help the country. North Korea has then chosen to violate international rules to strengthen its potential even though the international community would criticize the country. Nevertheless, North Korea

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198. *Id.*

199. Terence Roehrig, *The Roles and Influence of the Military*, *in* NORTH KOREA IN TRANSITION: POLITICS, ECONOMY, AND SOCIETY 56 (Kyung-Ae Park & Scott Snyder eds., 2013).

200. AHLAM LEE, NORTH KOREAN DEFECTORS IN A NEW AND COMPETITIVE SOCIETY: ISSUES AND CHALLENGES IN RESETTLEMENT, ADJUSTMENT, AND THE LEARNING PROCESS 15 (2016).

201. BONITA MEYERSFELD, DOMESTIC VIOLENCE AND INTERNATIONAL LAW 252 (2010) (International law lacks traditional enforcement mechanisms and there is no international policing authority that can compel states to comply with their international obligations.).

202. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2632 (1997).

would halt its nuclear development when it gains primary interests or benefits. For example, North Korea conducted nuclear tests in 2006, violating the NPT and international humanitarian law. In February 2007, a nuclear deal was signed in Beijing, under which North Korea – in exchange for heavy fuel oil or equivalent aid – agreed to shut down and seal its nuclear reactors. Third, North Korea has used nuclear weapons to gain international acceptance and recognition. Even though North Korea is an isolated country, it has sought international acceptance and recognition by conducting nuclear weapons tests. North Korea also wants to obtain its status as a nuclear weapon state.[203] Instead, North Korea's actions constitute a threat to international peace and security, violating the NPT and international humanitarian law. North Korea is directly and recklessly challenging the international community.[204] More importantly, North Korea increases tensions and undermines stability on the Peninsula. Thus, North Korea does not find international acceptance and recognition, but creates deeper isolation from the rest of the world.

B. The Importance of the Rule of Law

In order to create positive peace or maintain peace on the Korean Peninsula, North Korea will have to comply with the NPT and international humanitarian law. A question may arise as to which instrument should be used to make North Korea comply with the NPT and international humanitarian law. In this case, the rule of law can be used as an important tool to comply with the NPT and international humanitarian law. In fact, the rule of law can build positive peace and maintain peace on the Korean Peninsula. The rule of law also promotes fairness and good governance which may address the root causes of the conflicts between the United States and North Korea.

The rule of law does not have a single agreed definition,[205] and its meaning varies.[206] Its definitions and principles have been developed

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203. Sung Chull Kim, *North Korea's Nuclear Doctrine and Revisionist Strategy*, *in* ENTERING THE NEW ERA OF DETERRENCE: NORTH KOREA AND NUCLEAR WEAPONS 41 (Sung Chull Kim & Michael D. Cohen eds., 2017).

204. S. MAHMUD ALI, ASIA-PACIFIC SECURITY DYNAMICS IN THE OBAMA ERA: A NEW WORLD EMERGING 28 (2012).

205. CHRISTOPHER MAY, THE RULE OF LAW: THE COMMON SENSE OF GLOBAL POLITICS 33 (2014).

206. Marise Cremona, *Regional Integration and the Rule of Law: Some Issues and Options*, *in* BRIDGES FOR DEVELOPMENT: POLICIES AND INSTITUTIONS FOR TRADE AND INTEGRATION 137 (Robert Devlin & Antoni Estevadeordal eds., 2003).

by many legal scholars and institutions.[207] Among other things, the rule of law can simply mean that government officials and citizens are bound by and abide by the law.[208] Recently, the U.N. Secretary-General has also described the rule of law as:

> [A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure before the law, accountability to the law, fairness in the application of law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[209]

This is an important definition of the rule of law. It constitutes the elements of transparency, accountability, equality before the law, an independent judiciary, and protection of human rights. Based on this definition, the rule of law can also establish peace and security in two aspects. First, the rule of law requires all people or governments to be accountable to effective laws. This creates social justice, equality, economic equity, equal protection, and impartial enforcement of law. More importantly, this can bring peace and security to society. Second, the rule of law promotes and protects human rights. When human rights are protected and guaranteed by laws, peace and security occurs in society. Instead, there are no peace and security where human rights are violated. Peace and security are then connected to human rights.

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207. *See Rule of Law*, WORLD BANK, *available at* http://info.worldbank.org/governance/wgi/pdf/rl.pdf (last visited Sept. 19, 2019) (the World Bank's definition of the rule of law states that it "captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence"); *see also What is the Rule of Law?*, WORLD JUST. PROJECT, *available at* https://worldjusticeproject.org/about-us/overview/what-rule-law (last visited Sept. 19, 2019) (describing the rule of law as based on four universal principles: (1) "Accountability: The government as well as private actors are accountable under the law;" (2) "Just Laws: The laws are clear, publicized, and stable; are applied evenly; and protect fundamental rights, including the security of persons and contract, property, and human rights;" (3) "Open Government: The process by which the laws are enacted, administered, and enforced are accessible, fair, and efficient;" and (4) "Accessible Justice: Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.").

208. Brian Z. Tamanaha, *The Rule of Law and Legal Pluralism in Development*, *in* LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 34 (Brian Z. Tamanaha et al. eds., 2012).

209. *What is the Rule of Law?*, UNITED NATIONS, *available at* https://www. un.org/ruleoflaw/what-is-the-rule-of-law/ (last visited Oct. 1, 2019).

This definition should not be limited to national systems but should also apply in international relations. In the U.N. Secretary-General's report *Strengthening and Coordinating United Nations Rule of Law Activities*, the rule of law was given a further definition:

> At the international level, the rule of law accords predictability and legitimacy to the actions of States, strengthens their sovereign equality and underpins the responsibility of a State to all individuals within its territory and subject to its jurisdiction. Full implementation of the obligations set forth in the Charter of the United Nations and in other international instruments, including the international human rights framework, is central to collective efforts to maintain international peace and security, effectively address emerging threats and ensure accountability for international crimes.[210]

Like the rule of law, the elements of the international rule of law include compliance, implementation, predictability and transparency, peace and security, the equal application of the law, the protection of human rights, and the settlement of disputes. Those elements can create positive peace or prevent conflicts. They can also strengthen or maintain peaceful relations with other countries. More particularly, compliance is an important element of the international rule of law. This is because international law determines state behavior and establishes state obligations.[211] International law comprises of rules to which all states have consented.[212] States are then legally bound to comply with the rules.[213] In other words, compliance with international law is an observance of obligations. When states comply with international law, peace exists in the international community.

C. North Korea and the Rule of Law

The rule of law is incompatible with North Korea's political ideology. North Korea relies on the *Juche* idea, or the man-centered ideology: "Man is the master of everything and decides everything. It is the man-centered world outlook to materialize the independence of the popular masses and also a political philosophy which elucidates the the-

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210. U.N. Secretary-General, *Strengthening and Coordinating United Nations Rule of Law Activities*, ¶ 4, U.N. Doc. A/68/213 (July 29, 2013).

211. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 22 (1959); PRUE TAYLOR, AN ECOLOGICAL APPROACH TO INTERNATIONAL LAW: RESPONDING TO CHALLENGES OF CLIMATE CHANGE 63-65 (1998).

212. DAVID ARMSTRONG ET AL., INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 93 (2d ed., 2012).

213. HERMANN MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY 67 (1980).

oretical basis of politics that leads the social development correctly."[214] Being "the master" means that man rules the world and his own destiny.[215] "Decide everything" means that man plays the decisive role in transforming the world and in shaping his destiny.[216] The "popular masses" are the masters of revolution and construction, and they are also the motive forces of revolution and construction.[217] Under the *Juche* idea, a revolutionary party, government, and army are the most powerful political weapon for guaranteeing a revolutionary cause – its beginning, progress, and victory.[218] The party ensures the leader's guidance over the revolution and construction.[219] It also leads the masses to fulfill their responsibilities and role as the masters of the revolution and construction in loyal support of the party and the leader.[220] Therefore, the *Juche* turns the leader into an absolutist, supreme leader.[221] On the other hand, the rule of law is based on the idea: "a free society should be governed by laws rather than men."[222] The rule of law also connects to liberal democracy and the protection of human rights. The essence of the rule of law is the sovereignty or supremacy of law over man or individual will.[223] The rule of law insists that every person – irrespective of rank and status in society – be subject to the law.[224] For the citizen, the rule of law is both prescriptive – dictating the conduct required by law – and protective of citizens – demanding that government acts according to law.[225] The rule of law is then the opposition of the rule of power or arbitrary power.[226]

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214. DERMOT HUDSON, IN DEFENCE OF JUCHE KOREA 42 (2018).

215. Li Yongchun, *North Korea's Guiding Ideology and Its Impact*, *in* CHINA AND NORTH KOREA: STRATEGIC POLICY PERSPECTIVES FROM A CHANGING CHINA 228 (Carla P. Freeman ed., 2015).

216. *Id.*

217. *Id.*

218. Kim Jong Un, *Comrade Kim Il Sung is the Eternal Leader of Our Party and Our People*, *in* STUDY OF THE JUCHE IDEA 7 (Int'l Inst. Juche Idea ed., 2013).

219. *Id.*

220. *Id.*

221. James F. Person, *North Korea's Chuch'e Philosophy*, *in* ROUTLEDGE HANDBOOK OF MODERN KOREAN HISTORY 217 (2016).

222. FRIEDRICH KRATOCHWIL, THE PUZZLES OF POLITICS: INQUIRIES INTO THE GENESIS AND TRANSFORMATION OF INTERNATIONAL RELATIONS 126 (2011).

223. HILAIRE BARNETT, CONSTITUTIONAL & ADMINISTRATIVE LAW 44 (10th ed., 2013).

224. *Id.*

225. *Id.*

226. COLIN TURPIN & ADAM TOMKINS, BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT AND MATERIALS 77 (6th ed., 2007).

In fact, the rule of law is important to North Korea. Even China has applied the rule of law to build the country into a modern socialist country.[227] The rule of law will have a vital role when North Korea wants to pursue economic reform or development. More particularly, the rule of law is a foundation for a market economy, which provides an essential environment for the creation and preservation of wealth, economic security and well-being, and the improvement of the quality of life.[228] The rule of law is essential for economic growth and development.[229] The rule of law creates certainty, confidence, stability, security, and predictability which are necessary for sustainable economic growth and social development.[230] The rule of law also secures property and contract rights – the fundamental building blocks of market economies.[231] Thus, if North Korea wants to open up its highly centralized socialist economy or transform its economy into a market economy, the rule of law is a key element in achieving this goal. Further, North Korea is regarded as one of the worst countries for foreign investors.[232] North Korea has poor infrastructure, frequent policy reversals, high potential risks, and a totalitarian regime.[233] If North Korea wants to attract foreign investors, it will have to establish the rule of law as a new economic policy. The rule of law can eliminate obstacles by creating a guarantee and confidence for foreign investors. Under the rule of law, people or investors can be sure that their benefits will not be lost or stolen.

In international relations, North Korea should rely on the international rule of law by complying with the NPT and international humanitarian law. Compliance with the NPT and international humanitarian law can cause positive or sustainable peace on the Korean Peninsula. In addition to positive peace, the international rule of law may help North Korea normalize relations with other countries. It also helps North Korea gain international acceptance and recognition. When peace exists in

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227. LIN LI, BUILDING THE RULE OF LAW IN CHINA 1 (2017).

228. Samuel Bufford, *International Rule of Law and the Market Economy – An Outline*, 12 SW. J.L. & TRADE AM. 303 (2006).

229. Gary Goodpaster, *Law Reform in Developing Countries*, *in* LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES 106 (2007).

230. *Id.*

231. Takehiko Nakao, *Economic Development in Asia and Rule of Law*, ASIAN DEV. BANK (June 10, 2013), *available at* https://www.adb.org/news/speeches/economic-development-asia-and-rule-law (last visited Oct. 1, 2019).

232. YEONGSEOP RHEE & PATRICK MESSERLIN, NORTH KOREA AND ECONOMIC INTEGRATION IN EAST ASIA 102 (2019).

233. *Id.*

the region, the international community will appreciate and admire North Korea for complying with international law. Countries around the world will be willing to establish relations with North Korea.

V. CONCLUSION

Even though the Armistice Agreement was signed in 1953, there is still conflict on the Korean Peninsula. Recently, a conflict or tension has increased because North Korea has conducted nuclear weapons and ballistic missile tests. The Korean Peninsula has then been considered an area of a serious conflict. The international community raises concerns about a serious conflict which likely leads to war. Indeed, there have been several attempts to resolve the conflict and create peace in this region. Several theories were developed and applied to the Korean Peninsula. Among other things, preventive diplomacy and the rule of law can be used to resolve the conflict and build peace in the region. Preventative diplomacy can reduce the serious conflict and prevent it from spreading. Preventive diplomacy can also create negative peace or an absence of violence. This may not be sufficient for the Korean Peninsula. In addition to preventive diplomacy, the rule of law must be used to build positive peace or maintain peace in the region.

The rule of law is a difficult issue because it contradicts the *Juche* idea or North Korea's political ideology. Nowadays, the rule of law is an essential element in many countries around the world. The rule of law creates certainty, equality, predictability, confidence, and human rights protection. China, for example, has built or improved the rule of law to promote economic growth. More importantly, China has also created a modern socialist country under the rule of law. Like China, North Korea should consider or adopt the rule of law along with the *Juche* idea. The rule of law is an important element if North Korea wants to open up its highly centralized socialist economy. Additionally, the international rule of law can help North Korea gain international acceptance and recognition if the country complies with the NPT and international humanitarian law.

CHINA AND THE UNITED STATES: WHY CHINA SHOULD CONTINUE TO TRADE WITH LOWER BARRIERS

Chitra Dave*

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ABSTRACT

Consumer protection is the enforcement of consumer financial protection laws. It also enforces rules that protect consumers, takes consumer complaints, promotes financial education, researches consumer behavior, and monitors financial markets.

In the United States, consumer protection is enforced by the Federal Trade Commission ("FTC") at the domestic stage. The FTC works to protect consumers "by preventing anticompetitive, deceptive, and unfair business practices."[1] This is done through public understanding of the market process and not from burdening any business activity.

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* J.D. Candidate, 2020, Syracuse University College of Law. The author wishes to thank her parents for their unwavering support and love throughout her entire academic journey. Ms. Dave thanks Professor Gary J. Pieples for his mentorship and advice in the drafting of this note.

1. *About the FTC*, FED. TRADE COMM'N , *available at* https://www.ftc.gov/about-ftc (last visited Feb. 9, 2020).

The World Trade Organization ("WTO") plays a role in consumer protection in the United States at an international level. The WTO operates global trade rules, acts as a forum for trade agreements, and clears disputes between countries.[2] In the United States, the WTO allows the American government to conduct trade with other major countries that boost the American economy by increasing the imports and exports in a larger market such as China.

In China, consumer protection on the domestic level is monitored through the State Administration for Industry and Commerce ("SAIC"). The SAIC "maintains market order and protects the rights of businesses and consumers by regulating the market."[3] The SAIC's responsibilities include but are not limited to regulating the market through administrative enforcement, enforcing antimonopoly laws, and drafting laws and rules.[4]

In China, the WTO came into play on December 11, 2001. After joining the WTO, China quickly grew to the top of the trade market. In 2017, China was ranked first in exporting merchandise and second in importing merchandise and commercial services.[5] By joining the WTO, China lowered the deficit with the United States, boosting both economies.

With the introduction of the WTO, China began to expand its markets and saw a noticeable difference in its economy. However, China continues to have other restrictions that limit the country from expanding its global reach. The Chinese government and other consumer protection laws do now allow China's exporters and consumers to purchase nearly as many items as there are in other global markets. If China was to continue trading with countries like the United States, China would have an even more powerful economy because greater numbers of consumers would be purchasing products and more products would be sold internationally. With the introduction of Chinese products in the market, China's international relationships with other countries would strengthen and form more treaties and acts, resulting in more trade production.

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2. *What is the WTO?*, WORLD TRADE ORG., *available at* https://www.wto.org /english/thewto_e/whatis_e/whatis_e.htm (last visited Feb. 9, 2020).

3. *SAIC Mission*, STATE ADMIN. FOR INDUS. & COM., *available at* http://home.saic. gov.cn/english/aboutus/Mission/index.html (last visited Sept. 19, 2018).

4. *Id.*

5. *China Trade Profile*, WORLD TRADE ORG., *available at* https://www.wto.org/ english/res_e/statis_e/daily_update_e/trade_profiles/CN_e.pdf (last visited Feb. 9, 2020).

Through the introduction of the consumer protection policies, then the inception of the WTO, the importance of trade between the two countries, and counter arguments to the critics, it will be obvious that China should continue to have open barriers for international trade and continue to trade with the United States.

I. INTERNATIONAL CONSUMER PROTECTION POLICIES IN BOTH COUNTRIES

A. United States

Prior to the introduction of the WTO in 1995[6], the United States and China each had its own domestic consumer protection agencies that regulated trade on the international level.

In the United States, the FTC was the head authority for American trade. The FTC was signed into law in 1914 by Woodrow Wilson.[7] At the time the Commission was enacted, its sole purpose was to protect consumers and promote competition.[8] As time continued, the FTC began branching out to reach different levels of trade, including international trade.

The international branch also had the same mission, namely, to protect consumers while maximizing economic benefit and consumer choice.[9] As America began to open its trade borders, more consumers began to get caught in fraud coming from international scams. Infamous scams in America included foreign lottery and internet enabled fraud emails.[10] The foreign lottery emails falsely informed the recipient that they won the lottery in another country and asked the individual to provide them with their social security and bank account numbers so they can directly deposit the money. The FTC began protecting consumers from frauds like these by regulating trade agreements with countries to ensure that scams like this weren't legal, and that the senders would face consequences when caught.

The FTC International Branch's biggest accomplishment for international trade protection was the start of the US SAFE WEB Act.

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6. What is the WTO?, *supra* note 2.

7. *Our History*, FED. TRADE COMM'N, *available at* https://www.ftc.gov/about-ftc/our-history (last visited Nov. 3, 2018).

8. *Id.*

9. *Consumer Protection*, FED. TRADE COMM'N, *available at* https://www.ftc.gov/policy/international/international-consumer-protection (last visited Sept. 18, 2018).

10. *Id.*

The US SAFE WEB Act was enacted in 2006.[11] The act strengthened the FTC's authority in: 1) information sharing, 2) investigative assistance, 3) confidentiality, 4) enhanced investigative and litigating tools and 5) enforcement relationships. Information sharing authorized the FTC to share compelled and confidential information with foreign law enforcement agencies.[12] Investigative assistance created the International Antitrust Enforcement Assistance Act of 1994, which allowed the FTC to collect information that was needed as long as the other sided reciprocated and on the urgency of a possibly injury.[13]

The US SAFE WEB Act enables the FTC to obtain confidential information from foreign entities that were previously concerned with disclosure of their information.[14] Cross-border jurisdictional authority was also strengthened through the act and provided enhanced investigative litigation tools.[15] Lastly, the act aimed to strengthen enforcement relationships between foreign countries and the FTC.[16] However, following the introduction of the WTO, the FTC has tightened its international laws.

The International Branch continues to serve as the primary agency that protects American consumers from international scams and the Branch, through the US SAFE WEB Act, has strengthened trade relations with countries globally. The International Branch continues to focus on finding ways to keep American consumers protected and ensure that America is maximizing its economic benefit from international and domestic trade.

B. China

Prior to its adoption of the WTO in 2002, China had two different consumer protection agencies that watched over international trade: the State Administration for Industry and Commerce and the National Development and Reform Commission.

The SAIC was created for the protection and rights of consumers, maintenance of socio-economic order, and promotion of the market

11. *The U.S. Safe Web Act: The First Three Years*, FED. TRADE COMM'N (2009), *available at* https://www.ftc.gov/sites/default/files/documents/reports/u.s.safe-web-act-first-three-years-federal-trade-commission-report-congress/p035303safewebact2009.pdf (last visited Nov. 3, 2018).

12. *Id.*

13. *Id.*

14. *Id.* at 3.

15. *Id.* at 4.

16. *U.S. Safe Web Act*, *supra* note 11.

economy.[17] The SAIC is broken down into two different bureaus that supervise various parts of trade in China: a Consumer Protection Bureau and a Department for International Cooperation.[18] The Consumer Protection Bureau was in charge of overseeing the quality of goods in the market, drafting rules and directions and protecting consumers' rights in the service sector.[19] The Bureau also punished irregularities and handled complaints and appeals from the international networks.[20] The Department of International Cooperation carried out international cooperation and undertook management of international affairs.[21]

The SAIC also enacted a law on the Protection of Consumer Rights and Interests. The law was created to ensure that legitimate rights existed and that there was order and development in the market.[22] The articles create responsibility for the State to protect rights and interests of consumers and to ensure that consumer purchases are under the protection of the law.[23]

The SAIC focuses heavily on the protection of consumer rights. Unlike the FTC, the SAIC does not strengthen relations with other international countries and does not enforce international trade, rather, the SAIC focuses on consumer protection. The SAIC also do not try to benefit the economy or stimulate the marketplace.

The National Development and Reform Commission ("NDRC") is a branch of the consumer protection rights in China that enforces international trade protections.[24] The main functions of the NDRC are: 1) formulating and implementing national economic and social development strategies; 2) carrying out research and analysis on economic situations; 3) monitoring social development; and 4) summarizing and analyzing the financial situation.[25] Through analysis

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17. *SAIC Mission*, *supra* note 3.

18. *Our Organizational Set Up*, STATE ADMIN. FOR INDUS. & COM., *available at* http://home.saic.gov.cn/english/aboutus/Departments/index.html (last visited Nov. 3, 2018).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Law of the People's Republic of China on Protection of Consumer Rights and Interests*, STATE ADMIN. FOR INDUS. & COM., *available at* http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100053545.html (last visited Feb. 7, 2020).

23. *Id.*

24. *Main Functions of the NDRC*, NAT'L DEV. & REFORM COMM'N (Dec. 17, 2008), *available at* https://en.ndrc.gov.cn/mfdic_8235/200812/t20081218_1193946.html (last visited Feb. 7, 2020).

25. *Id.*

of China's financial situation, the NDRC controls and monitors China's foreign debts and promotes economic restructuring.[26]

The NDRC has an anti-monopoly bureau that controls the countries competition policies.[27] The bureau is responsible for drafting documents, anti-monopoly consultations and investigations and providing advice to enterprises that are having trouble overseas.[28]

The NDRC, just like the SAIC, focuses only on consumer protection rights and obeying the law. The consumer protection agencies in China do not foster relationships with other countries like the FTC does in the United States. In China, the focus is on whether the consumers are being protected and whether the sellers are following the laws. The agencies do not help to simulate the economy; they are not finding new ways to increase trade in China or to create acts or treaties to form trade relations with oversea consumers and sellers.

An appropriate example of the kind of trade agreement that China has formed under the SAIC is China's trade agreement with the FTC. The trade agreement focuses solely on cooperation among the two countries on consumer protection.[29] The agreement said that, "[t]he two countries agreed to cooperate on exchanging views on issues of common interest, information on laws, regulations and policies, working together to bring awareness and training in consumer protection, and visits when consumer protection issues arose."[30]

The agreement had no mention of fostering any relationship to create continuous trade between China and the United States. Rather, it simply stated that they would work together to ensure that any consumer protection policies that arose would be taken care of and that the two countries would ensure that they educated their sellers and consumers on their protections and rights to avoid any future issues.

Without nurturing relationships with countries, China is unable to showcase its market to its full potential, and thus, holding back valuable

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26. *Id.*

27. *Bureau of Price Supervision and Anti-Monopoly*, NAT'L DEV. & REFORM COMM'N (Dec. 18, 2008), *available at* https://en.ndrc.gov.cn/mfod_8236/201207/t20120719_1193957.html (last visited Feb. 8, 2020).

28. *Id.*

29. Memorandum of Understanding on Consumer Protection Matters Between the State Administration for Industry and Commerce of the People's Republic of China and the Federal Trade Commission of the United States of America, June 12, 2007, *available at* https://www.ftc.gov/system/files/documents/cooperation_agreements/070612chinamou.pdf (last visited Feb. 8, 2020).

30. *Id.*

Chinese exports and imports. It is not until the introduction of the WTO that China's economy got the boost it needed to begin trading on a large-scale market along with countries it was not previously connected to through its agencies.

II. THE INTRODUCTION OF THE WORLD TRADE ORGANIZATION

The WTO was created on January 1, 1995 to cover trade in services and intellectual property on an international level and create new procedures for dispute settlements.[31] Over time, the WTO expanded its functions to include: administering WTO trade agreements, providing a forum for trade negotiations, handling trade disputes, monitoring national trade policies, technical assistance and training for developing countries, and cooperation with other international organizations.[32] The WTO was created to help producers, exporters, and importers conduct their business. The organization continues to expand as the only global international organization among these nations.[33]

The WTO has three components: 1) providing a negotiating forum, 2) rulemaking, 3) and dispute resolution. The negotiating forum allows the nations to sort out trade problems including barriers.[34] The set of rules is the basis upon which the countries negotiate trades and provided legal framework to allow trade to flow freely.[35] The WTO settles disputes through a procedure that is grounded in the legal framework.[36]

The dispute settlement process provides for a panel of neutral experts that do not favor foreign government or try to make the process more challenging.[37]

In 2001, the WTO launched the Doha Round.[38] The purpose for this agreement was to reform the already existing international trading

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31. What is the WTO?, *supra* note 2.

32. *Id.*

33. *World Trade Organization*, U.S. HISTORY, *available at* https://www.u-s-history. com/pages/h2002.html (last visited Nov. 6, 2018).

34. *Id.*

35. *Id.*

36. *Id.*

37. *America and the World Trade Organization*, IATP, *available at* https://www.iatp.org/sites/default/files/America_and_the_World_Trade_Organization.htm (last visited Feb. 3, 2020).

38. *The Doha Round*, WORLD TRADE ORG., *available at* https://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Feb. 3, 2020).

system with lower trade barriers and revised trade rules.[39] The agreement was also meant to improve the trading prospects of developing countries.[40]

The introduction of the WTO boosted international trade globally. Membership expanded to 164 members that now represent 98% of international trade.[41] The countries involved have benefited greatly. Their economies are thriving, their markets have expanded to increase the production of exports and imports, and more importantly, their relations with other countries have improved. The WTO requires members to lower trade barriers for other members to allow products to flow freely and has foreign agreements already set up between countries to avoid any foreign dispute settlements.

Following the introduction of the WTO in the United States and China, it can be seen that their markets grew exponentially and that their economies benefitted. The Organization helped their international relations as well. Through the WTO the United States has increased treaties and acts with other countries and China has begun trading with nations that it previously did not have relations with.

A. United States and the World Trade Organization

The United States became a member of the WTO in January of 1948.[42] Upon the introduction of the WTO the United States noticed the growth of its market, exponentially. The United States no longer had barriers and boundaries; sellers were able to sell their marketable items globally. In 2017, the United States was ranked number one in importing merchandise and in exporting and importing commercial services.[43] Prior to 2017, the United States consistently ranked in the top ten percentile for imports and exports.

The WTO requires that countries within the Organization keep lower trade barriers for member countries.[44] As a result, the United

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39. *Id.*

40. *Id.*

41. What is the WTO?, *supra* note 2.

42. *United States of America and the WTO*, WORLD TRADE ORG., *available at* https://www.wto.org/english/thewto_e/countries_e/usa_e.htm (last visited Feb. 3, 2020) [hereinafter *U.S. & WTO*].

43. *United States of America Trade Profile*, WORLD TRADE ORG. (2018), *available at* https://www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/US_e.pdf (last visited Feb. 8, 2020).

44. Bryan Schonfeld, *Why the U.S. needs the World Trade Organization*, WASH. POST (Sept. 20, 2016), *available at* https://www.washingtonpost.com/news/monkey-cage/wp/

States has less trouble trying to sell its products globally.[45] The more nations that join the WTO the more nations that the United States has access to and the more convenient it is for countries to trade without any other obstacles in the way. Without the WTO, the United States would lose 60% of American trade.[46] Countries that are not members of the WTO miss the opportunity to reach full potential by not being on the platform that encourages further trade. If China were to back out of the WTO, China would lose a percentile of its trade. While China is a powerhouse for trade, not having the easier access and lower tariffs to the WTO countries would cause a fatal hit to the economy.

Workers and consumers would be greatly affected if the WTO were not in place because the GDP has grown exponentially since it started, rising to 30% in 2015.[47] From the start of the WTO, the number of jobs for exporters has grown by 1.3 million.[48] With the growth in the GDP, thousands of jobs are created in the U.S. to produce the goods and services being exported. Jobs created to export goods pay above the average wage by 13-16%.[49] Additionally, over 80% of American jobs are dedicated to the service sector that include transportation, environmental services and retailing.[50] The WTO helps to keep those jobs secure for Americans by allowing them a larger platform to sell those services. From 2010 through 2017, American merchandise exports and imports were ranked in third place compared to the remaining members.[51] America's second most exported good was cars for transportation, close to 5% and nearly 10% of all imports for Non-Agricultural Products.[52] The service sector is now growing, making it the United States' fastest growing sector while providing the most jobs.[53]

Because of the numerous job opportunities that the WTO brings to the United States, it also raises the living standards for Americans.

2016/09/20/would-the-u-s-be-better-off-without-the-wto-not-when-the-wto-guides-98-percent-of-global-trade/ (last visited Feb. 8, 2020).

45. *Id.*

46. *Id.* ("The United States has free trade agreements with twenty countries, but these agreements cover only 40% of American trade.").

47. *Id.*

48. U.S. HISTORY, *supra* note 33.

49. *Id.*

50. *Id.*

51. *U.S. & WTO*, *supra* note 42.

52. *Id.*

53. *Id.*

Everyday shopping for groceries, clothes, electronics, and even cars is more affordable because of the lower trade barriers that are required by the WTO. Lower prices generally meant that people are more likely to purchase more, generating more money in the marketplace to keep prices low and allow the economy to grow. Citizens are also not only purchasing American made products but imports from other countries, improving the economy globally. Due to the decrease in prices, by 2005 there was an increase of $1500-$3000 in purchasing power for an average American family.[54]

The United States' international relations have also strengthened with the connection of the WTO. Since members already have lower trade barriers for goods, it has also helped to increase the market access for American exporters of services.[55] The service sectors for foreign services include: finance, accounting, advertising, engineering and construction.[56] By selling these services, the American economy is boosting itself and these sectors. Through outsourcing companies, the United States can employ citizens from various countries to increase the jobs in other countries which leads to the same generation in their market since more people are spending money.

Imports play a crucial role in the American economy. Americans are allowed a greater variety of foreign items because of the vast market that the WTO promotes. With an increase in imports into the American market, competition causes prices to decrease to allow companies to stay relevant in the market, making it cheaper for Americans to buy foreign goods.[57] By purchasing foreign products, the United States is helping other countries stabilize their economies. A huge project of the WTO is to stabilize the economies in the third world[58] and by selling more products overseas, more money is being generated in their economies to create jobs for their citizens.

The WTO also helps to keep piracy levels low in world markets.[59] Piracy, the act of reproducing the work of someone else, is most common in movies and in material products.[60]

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54. *Id.*

55. *U.S. & WTO*, *supra* note 42.

56. U.S. HISTORY, *supra* note 33.

57. *Id.*

58. *Id.*

59. *Id.*

60. Piracy Definition, MERRIAM WEBSTER DICTIONARY, *available at* https://www.iatp.org/sites/default/files/America_and_the_World_Trade_Organization.htm (last visited Feb. 10, 2020).

B. China and the World Trade Organization

Unlike the United States, China was late in joining the WTO, officially becoming members in 2001.[61] Prior to joining the WTO, China relied solely on SAIC as its basis for international trade, lacking many of the global connections enjoyed by WTO members. Under the SAIC, China also did not have lower tariff barriers and there were difficulties in trading between countries without legal consideration already in place. Since joining the WTO China's economy has grown immensely, and with a larger marketplace China's exports, income, and positive trade balance have increased.

In 2017, China was ranked first in exporting merchandise, with a 12.77% share in total exports.[62] It was second in importing merchandise and commercial services, with world total imports of 10.75% and 9.49%, respectively.[63] Non-agriculturally, 7% of exports were automatic data processing machines,[64] and approximately 15% of imports were electronic integrated circuits.[65]

Since China's induction into the WTO, China has followed its rules and become a prominent member. Like other countries, China lowered its barriers to encourage more global trade, and remain supporters of the multilateral trading system.[66] A multilateral trading system is a "trading system that facilitates the exchange of financial instruments between multiple parties."[67] China has been a huge contributor to the multilateral system by allowing its trading barriers to be open, transparent, inclusive and non-discriminatory.[68] For China to participate in the market, it had to restructure its relationship between the government and the market to ensure that all decisions being made were not being directed by the government.[69] China also reframed a

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61. *China Trade Profile*, *supra* note 5.

62. *China*, WORLD TRADE ORG., *available at* https://www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/CN_e.pdf (last visited Feb. 5, 2020).

63. *Id.*

64. *Id.*

65. *Id.*

66. *China and the World Trade Organization*, STATE COUNCIL, CHINA (June 28, 2018), *available at* http://english.gov.cn/archive/white_paper/2018/06/28/content_281476201898696.htm (last visited Feb. 5, 2020).

67. Tim Smith, *Multilateral Trading Facility (MTF)*, INVESTOPEDIA (Apr. 11, 2019), *available at* https://www.investopedia.com/terms/m/multilateral_trading_facility.asp (last visited Feb. 9, 2020).

68. *China and the World Trade Organization*, *supra* note 66.

69. *See id.*

legal system that was more aligned to the multilateral trade rules by revising laws and regulations.[70] In 2004, China recreated a system for foreign trade authorization that increased foreign trade in the private sector and by 2017 that became China's largest export, totaling 46.6% of all goods and services exported.[71] China issued a document in 2014 that required the government to assess the new trade policies and by 2016 it set up a new legal mechanism to enhance its public participation in policy development.[72]

By joining the WTO, China serves as a template for other transition economies seeking membership.[73] Other countries, such as Russia, will see the speed with which China joined the WTO and the hope is that they too will want to become members.[74] China's involvement in the WTO also helps create a significant role in the agenda for the multilateral trade negotiations.[75] The size of China's economy could be a strong factor in changing trade negotiations and would be even more important for developing countries.[76] Developing countries do not have as much power as the developed countries that are members of the WTO and, therefore, with the assistance of a country like China, the developing countries will have more power in the new negotiations. China's membership in the WTO will further help developing countries by requiring adjustments to governing structures.[77] China has argued that developing countries are underrepresented, and that, by adjusting the government structures, it can gain more power for developing countries in the WTO.[78]

The introduction of the WTO in China had a greater effect on the countries that China is trading with than on the country itself. China is already considered a powerhouse due to the strength of its economy. Further, one of the strongest countries, the United States, is in debt to the China. The countries' membership in the WTO helped to stabilize

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70. *Id.*

71. *Id.*

72. *Id.*

73. Nicholas R. Lardy, *U.S.-China Economic Relations: Implications for U.S. Policy*, BROOKINGS (Apr. 25, 2001), *available at* https://www.brookings.edu/testimonies/u-s-china-economic-relations-implications-for-u-s-policy/ (last visited Feb. 10, 2019).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Lardy, *supra* note 73.

the world economy and allow it to become a driving force.[79] China focused on opening trade as long as both countries benefitted from the trade. Further, China wanted to make sure it was able to share opportunities and benefits, while also developing its own nation.[80] China's goal was also to enhance global well-being and common prosperity.[81] Undeniably, the notion of common prosperity squarely fits into the motives of the communist regime.

China's first method of supporting the WTO's goal of strengthening the world economy was through reducing import tariffs. Although every member is required to lower trade barriers, China reduced its rates from 15.3% to 9.8%, and cut its agricultural products far lower than those in other member countries.[82] China also lowered its unnecessary trade restrictions including import quotas, licenses, and other requirements for machinery and introduced quota authority for agricultural products.[83] Along with trade restrictions, China agreed to lift geographical restrictions in certain areas for enterprises in order to enter to increase the flow of foreign direct investment. In 2017, China's flow of foreign direct investment in services totaled 73% of all the foreign direct investment in China.[84] In order to do this China created 100 sub-sectors committed to the WTO.[85]

Since its induction to the WTO, China has continued to have a two-way investment that benefits all countries. In assurance, China has continuously topped the list of foreign direct investments since it has joined the WTO,[86] allowing large companies to come in and boost the economy and the companies' country of origin. China's outward investment cooperation also developed upon the introduction of the WTO. When China joined the WTO it was ranked in twenty-sixth place, and by 2017 it reached third place.[87] This growth was fostered by technology, economic development and improvement to its citizen's lifestyles.[88]

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79. *China and the World Trade Organization*, *supra* note 66.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *China and the World Trade Organization*, *supra* note 66.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*

Since commencing membership in the WTO, the Chinese government has made substantial efforts to comply with obligations that further the country's economic liberalization. The Chinese government has also made an effort to meet long-term economic goals.[89] This began with China's Congress amending domestic laws to make provisions consistent with those of the WTO.[90] Enjoinment has also fostered ideas of globalization for China. China's participation in the new round of trade liberalization has led to ideas for free trade areas in Asia.[91]

The WTO has also raised living standards in China. With China accelerating its change in domestic economic reform to comply with the WTO, it has begun to improve living standards for the population.[92] China is hoping that the increase in the living standards will change the political climate as well. A changing economy can generate pressure on political change, as seen in other Asian countries like Taiwan, South Korea and Thailand.[93] China hopes to see a political change that allows it to continue to have more open trade and to help the country flourish. With the change in domestic laws, China is becoming more like the other countries that are in the WTO and the hope is that this progress continues.

The WTO enables China to evaluate the benefits of loosening its trade barriers. By joining the WTO, China allows its economy to grow and allows for its citizens to have a better lifestyle. China has also strengthened its international relations and as members continue to join and more trade markets open up, its economy will flourish as more countries purchase Chinese exports.

III. TRADE BETWEEN THE UNITED STATES AND CHINA

In the current climate, China and the U.S. continue to be major players in the trade industry, especially in achieving their own bilateral trade agreements. China is currently America's largest goods trading partner. It has become the third-largest purchaser of products and services made in the U.S.[94] In 2018, China was the United States'

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89. Lardy, *supra* note 73.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Understanding the U.S.-China Trade Relationship*, OXFORD ECONOMICS (Jan. 2017), *available at* https://www.uschina.org/sites/default/files/Oxford%20Economics%20US%20Jobs%20and%20China%20Trade%20Report.pdf (last visited Feb. 13, 2020).

largest supplier of goods imports and the total between both the countries for trade was approximately 737.1 billion dollars.[95] Both of the countries rely on each other to have strong economies and due to this, continued trade has benefited both countries.

Since beginning trade with China, the U.S. now has 2.6 million jobs that are dependent on Chinese trade.[96] Many middle-class workers have taken up jobs that require them to travel to China, selling American made products and performing services. The majority of the products come from large firms and industries, including cars, construction equipment and financial firms that export and outsource to China.[97] With the middle class growing in the U.S., this growth from the Chinese trade expansion allows for the U.S. to tap into a new customer base to boost further employment and economic growth.[98] With the help of trade, the U.S. is able to keep consumer prices low in the marketplace which generates more money. If trade continues at this increasing rate, the United States' trade deficit could be reduced by half.[99] By continuing to trade with China, the United States is improving the lifestyle of its citizens. The more that Americans can afford marketplace items, the more they will continue to spend money and strengthen the economy. American companies also will gain more worldwide experience through this continuous trade because they provide the most essential exports and are making the most money in China. If those firms move to more countries than China, they will continue to generate more money that will come back to the American economy. It is important for the United States to continue to keep trading with China to keep the economy on a steady incline.

The United States is not the only side that is benefitting from this trade arrangement. China's middle class is growing at a steady rate due to the rapid increase of the Chinese market.[100] China has recently begun lowering its trade barriers and is allowing for more international imports and more exports. With the increase of imports, just as in America, more middle-class Chinese citizens can afford marketplace items because there is more competition to keep market prices low. By

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95. *The People's Republic of China*, OFFICE OF U.S. TRADE REP., *available at* https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china (last visited Feb. 13, 2020).

96. *Understanding the U.S.-China Trade Relationship*, *supra* note 94.

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.*

allowing more imports, American companies have become major contributors to the development of China's economy.[101] Companies such as Jeep, General Motors and Apple have planted roots in China, which are growing expansively, creating new sectors in the Chinese economy. Prior to the introduction of these companies, China did not allow foreign cars into the country and citizens that purchased foreign cars often paid double the price as American consumers. In 2002, only 4% of China's population was referred to as the "middle-class," but by 2022 76% of China's population will be considered middle-class.[102]

With the growth of the middle-class, they expect China's consumption to increase at 9% for every year until 2022.[103] With this growth, it is important for China to open its doors to foreign countries such as the United States because China can have the largest consumer market, even over all European countries. China is expected to continue to grow with the new influx of a generation of spenders and if it continues to remove market barriers, China will have one of the fastest growing economies.[104]

It is important for China to continue to trade with the United States, as described above, due to the interdependent relationship acquired via bilateral China-United States trade relations. If China were to stop trading with the United States, the Chinese economy would suffer a lethal detriment. It would not be selling as many exports and it would be restricting its consumer market. China and the United States have a symbiotic trade relationship. As long as that relationship continues, China's economy will continue to grow and strengthen.

A. Conflicts in Trade between the United States and China

Trade between the United States and China has not always been a smooth ride. Both sides have their critics that are against the constant trade between the two powerhouses because they find that the trade creates rift between the two countries.

Many foreign governments worry that China integrated too quickly and that foreign countries will gain too much control of China' economy. Much of China is growing because of the increase of

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101. *Understanding the U.S.-China Trade Relationship*, *supra* note 94.

102. Kim Iskyan, *China's middle class is exploding*, BUS. INSIDER (Aug. 27, 2016), *available at* https://www.businessinsider.com/chinas-middle-class-is-exploding-2016-8 (last visited Feb. 13, 2019).

103. *Id.*

104. Lardy, *supra* note 73

consumer consumption that has been powered by American companies like Jeep, Apple and General Motors.[105] Officials from the Chinese government fear that these companies will take over the Chinese economy because of how much power they currently hold. China has focused most of its trade on exporting products to other foreign countries, but because of this it has failed to develop a domestic consumption base.[106] With this type of economy, China has become vulnerable to a downturn in its export markets.[107] The fear of the Chinese officials could be concrete if the major American companies that are in China right now take a sudden fall or become less popular than they are now. Much of the Chinese middle class could go back to not being able to afford marketplace items and the Chinese economy could decline if more citizens generate less money. Jim Huang, a Brooks Fellow, said that "China's economic development is uneven."[108] By trading with the United States, China is helping to lower its trade deficit, but, according to Chinese officials, China is not getting anything in return. China's gross domestic product relies 80% on trade, and that is the biggest warning of the unevenness in the economy.[109] If anything were to go wrong in the trade between China and any of its international traders, China could suffer dramatically by not bringing more products to the marketplace and it would not be able to continue growth.

The introduction of China into the WTO has implications for the United States. There are policies that were in play in the United States that intended to threaten China's status as a major economic power.[110] These policies must be removed if the United States wants to continue trading with China and not cause more tension. The United States also remains the only country that has no systematic technical assistance program that assists the Chinese government in meeting its WTO obligations.[111] This refusal to help China makes the United States seem like it is more interested in imposing rough conditions on China than its enjoinment in the WTO.[112] The United States also should apply highly

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105. *Id.*

106. Eben Kaplan, *The Uneasy U.S.-Chinese Trade Relationship*, COUNCIL ON FOREIGN REL. (Apr. 19, 2006), *available at* https://www.cfr.org/backgrounder/uneasy-us-chinese-trade-relationship (last visited Feb. 13, 2020).

107. *Id.*

108. *Id.*

109. *Id.*

110. Lardy, *supra* note 73.

111. *Id.*

112. *Id.*

protectionist features that insisted China agree to as conditions for WTO membership.[113]

Just as there are problems on the Chinese side of trade, there are also problems on the American side regarding trade. As of 2005, the United States ran a bilateral trade deficit with China of $202 billion.[114]

Senator Charles Schumer stated that this should have been a red flag to Congress and the rest of the global economy.[115] Americans are now worried that the United States was too dependent on China for its imports.[116] The United States relies on imports from China to help keep the cost on other products in the American market lower by increasing competition. Americans worry that if China provides America with less products, less Americans will purchase products and services and the American economy will decline.

Adam Segal of the Council on Foreign Relations said that this trade deficit is a consequence of "China replacing all the Asian producers in the United States used to import from."[117] Upon China entering the trade market and joining the WTO, the United States slowly began only trading with China because the imports were cheaper in price and it helped strengthen the international relation. By cutting out other importers, many American officials are concerned that the trade deficit will not be shortened because America cannot continue to grow its economy without trading with China.

Another trade issue between the United States and China is the value of China's currency.[118] Critics claim that China is keeping the value of the Yuan 40% below what its value would be on the open market.[119] This disparity allows for Chinese goods to be cheaper in the United States, but United States goods to be more expensive in China, deterring Chinese citizens from purchasing American exports.[120] This also could be a huge cause of the deficit because China is manipulating America into purchasing more products and services from China than the Chinese are purchasing from America. China is allowing America to increase the deficit between the two countries by encouraging more

113. *Id.*

114. Kaplan, *supra* note 106.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Kaplan, *supra* note 106.

120. *Id.*

Americans to purchase Chinese products and services but not reciprocating.

Intellectual property rights ("IPR") are also causing issues in the United States and China trade relations. There are issues of IPR violations on products such as DVDs and other counterfeits in pharmaceuticals, automobiles, and airplane parts.[121] While China has imposed anti-counterfeiting laws and special courts, they have had little effect.[122] Many companies in the United States now have to train their company's general in-house counsel in Chinese intellectual property laws in order to pursue counterfeiters and enforcement actions.[123]

By selling counterfeit products on the market, people are more inclined to purchase those because they are sold at a cheaper price and forego the original American made products. As a result of not purchasing the American products, the Chinese are increasing the deficit in the United States and China trade. This is also unfair on American trade because China takes American products and recreates them with lower quality and sells them for a cheaper price. Though the initial product is American, and China steals the idea and mechanics behind it.

China faces implications as it continues to trade with the U.S. in the midst of its trade deficit, because there is a slim chance that the United States is able to reduce the trade if the current trade climate continues. China's accession was oversold by the administration that wanted to extend permanent trade relations, so China would not be cut off from the benefits of its WTO commitments.[124] China continues to have open markets and keeps a limited quota on incoming products but does not want to suffer as a result of the open markets. With the introduction of the WTO, China's rate of exports is not accelerating at the rate of its imports.[125]

With more exports being sold than imports being domestically purchased, China is concerned about the unbalanced growth of the economy and how the WTO will increase the unevenness on this balance. The WTO's entry conditions do not help to reduce the United

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121. *Id.*

122. *Id.*

123. DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS (3d ed. 2015).

124. Lardy, *supra* note 73.

125. *Id.*

States' overall trade deficit.[126] Due to the terms of the agreement China will continue to benefit from the phase out of quotas that that restricted international trade in certain benefits.[127] While the United States is not affected by the phase out, China will get the opportunity to increase trade in those products which does not allow the United States to catch up its deficit.[128] China also will continue to benefit from industries being relocated to Asia.[129] More technologically-based companies and companies that make toys, footwear and apparel[130] have shifted to Asia in the past few years and because of the easier access to these industrial sites. As such, China is able to produce more products and for a cheaper price. This ability to create faster at a smaller rate continues to make the gap in the deficit harder for the United States to fill.

Although there will always be critics, the critics are failing to see the benefits that have come from the start of the China-United States trade relation. China's economy may be dependent on foreign exports, but they are also one of the biggest markets in the nation. The United States is also getting closer to paying off its own trade deficit, as long as trade between the two countries continues to thrive. Both countries have also helped their citizens' lives flourish by enhancing their lifestyles and allowing for lower prices on everyday products. The benefits from trade between the two countries outweighs any of the negative effects that may result along the way. China and the United States must continue to trade to strengthen their economies.

B. Current Trade Climate between the United States and China

In the past few months China and the United States have begun having obstacles in their normal trade routines. In 2018, President Donald Trump started what would turn into a full trade war with China. During 2018, President Donald Trump put a tariff on $50 billion worth of Chinese imports sold in the United States.[131] President Trump enforced the tariffs to urge China to change its unfair practices and

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126. *Id.*

127. *Id.*

128. *Id.*

129. Lardy, *supra* note 73.

130. *Id.*

131. Jim Tankersley and Keith Bradsher, *Trump Hits China with Tariffs on $200 Billion in Goods, Escalating Trade War*, N.Y. TIMES (Sept. 17, 2018), *available at* https://www.nytimes.com/2018/09/17/us/politics/trump-china-tariffs-trade.html (last visited Feb. 10, 2019).

reciprocate fair treatment to American companies.[132] China has not succumbed to the pressure from the American government. Instead, China continues to enforce its current trade policies and remains unaffected by the American tariffs. Due to Chinese perseverance, President Trump chose to expend the tariff on September 24, 2018 to start at 10% and rise to 25% by January 1, 2019.[133] The American government staggered these percentages to ensure that during the holiday seasons Chinese imports would sell less,[134] while domestic good sales would rise, generating more money into the American economy.

Although China refrains from changing its trade practices, its economy is being affected by the tariffs. China's economy has begun to slow down because more consumers are not purchasing products and the infrastructure spending is declining.[135] America is taking a financial hit too. Prices are increasing for everyday consumer products such as electronics, food, tools, and housewares.[136] American companies are also concerned about their futures.[137] American companies are now unable to hire as many employees as they could when Chinese imports were still coming in and many are unable to produce replacement products for the imports.[138] If they are unable to produce replacement products and less consumers are purchasing products off the market, the economy is going to begin to slow down. According to a Morgan Stanley researcher, the United States economic growth was reduced by a 0.1% and could worsen if this trade war continues.[139]

America and Chinese international relations have declined as a result of this trade war. The two governments are not on speaking terms and have been threating their countries largest companies with punishment if they continue to trade. Neither President Trump nor President Xi Jinping are willing to back down from the trade fight. In fact, China is ready to retaliate to President Trump's current plan of increasing tariffs.[140] China has threatened to place a huge tariff on products that are being sold by American companies that are popular in

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132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. Tankersley and Bradsher, *supra* note 131.
137. *See id.*
138. *See id.*
139. *Id.*
140. *Id.*

China, which would further deter Chinese consumers from purchasing those products.[141]

The international relations have also had an effect on the European market. Sue Noffke, fund manager in United Kingdom equities said, "Germany is a big exporter so if China slows, Germany slows and if Germany slows, Europe generally slows."[142] If this affects Germany, the United States will have a hard time, especially in the automobile industry. Many German cars are purchased in the United States every year and if those cars are not able to be produced at the current rate, they will become more expensive for Americans to purchase and they will stick to cars that are more accessible and affordable. This will create issues between the United States and European countries.

However, European countries are not the only foreign third parties that are being affected by the China and United States trade dispute. Japan's Prime Minister, Shinzo Abe, revealed that Japan was showing an annual trade deficit for the first time since 2015.[143] He blames this deficit on the US and China trade tensions.[144] Based on statistics, exports to China only increased by 6.8%, when they increased by 20.5% in 2017 and exports from the United States slowed to 2.3% from 6.9%.[145] If this trade tension continues, more third party countries will be affected by it and more issues will arise for the United States and China. If China and the United States were to stop trading, both countries would have a difficult time trying to replace those products by finding a country that would provide them with products at a similar price.

Many analysts have come to terms with the fact that while the trade tension between China and the United States may come to an end, the tech war will continue. China is five years further ahead in technology than even Japan and the United States. Shenzhen has created a fifth-generation wireless technology that allows them to be able to run more virtual reality apps and play war video games.[146] This

141. Tankersley and Bradsher, *supra* note 131.

142. *Trade Row Chain Reaction Impacts Europe*, BBC (Sept. 18, 2018), *available at* https://www.bbc.com/news/topics/cxw7qng7vx8t/china-us-relations (last visited Feb. 10, 2020).

143. *Id.*

144. *Id.*

145. *Id.*

146. David Dodwell, *Expect the US-China trade war to come to a showy end, but the tech war to continue*, S. CHINA MORNING POST (Jan. 26, 2019), *available at* https://www.scmp.com/comment/insight-opinion/united-states/article/2183634/expect-us-china-trade-war-come-showy-end-tech (last visited Feb. 6, 2020).

five-year gap also allows for China to compete in technology for all major data applications ranging from health care to energy management.[147]

This has become a concern for the United States because the country is unable to match the rate at which China is creating technology. China will also produce these products in the open market, making the deficit harder to close for the United States. This comes as an issue to the United States because major companies have denied Chinese companies as being unreliable in the past. Huawei, a Chinese tech company that has created the products to extend the 5G platform, on multiple occasions approached companies like Motorola, but was dismissed for having products that would suit developing countries.[148] The United States' position as the top technical nation is at risk.

However, although they are at odds, they are both suffering as a result of this trade tension. If they were to end this issue, the United States could continue to close the deficit between the countries, and China could continue to flourish and build its trade market. However, with this trade war, both country's major companies are suffering losses because they are being tariffed higher than other everyday products. The trade war must end if both countries want to continue having a strong relationship as they currently do.

IV. CONCLUSION

The United States and China have a long history of upheaval and obstacles but have always served as a crutch to one another's economy.

Without the United States, China would not be able to sell exports at its current rate. Chinese trade barriers would still be in place, and thus, China would not have been able to grow its international trade market as it has over the past few years. The Chinese middle class also would not be growing at the rate that it has reached now. The middle class has grown exponentially due to the ability of more workers to afford American-made exports in China and the job opportunities offered by American companies that are planting factories and firms in China.

China's economy would also falter without the United States. China's imports are the biggest part of its fast-growing economy, but without its biggest consumer market, China's economy would slow down. China's economy already has an uneven export to import ratio

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147. *Id.*

148. *Id.*

because many Chinese consumers still choose to purchase Chinese counterfeit products that are cheaper. However, without the strength of their imports, the economy would be unbalanced.

China's trade barriers prevented China from expanding its exports to various international markets including the United States. Since the introduction of the WTO, China's economy sky-rocketed and now holds one of the biggest markets in the world. The introduction of the WTO has allowed China's market to thrive at its full potential.

Without the WTO, China will not be able to grow its economical empire. The country would have to return to its previous market layout which consisted of Chinese products being sold to Chinese consumers. With just Chinese products on the market, the Chinese consumers may not be able to purchase everyday products because there would not be competition to keep prices low. Also, all of China's economy would run on imports, whereas currently, the nation's economy strongly is based off of its exports. With just an import-based economy, China as a country would suffer.

China's international relations have strengthened through the increase in its international trade patterns. The Chinese government did not branch out to other countries before membership in the WTO and did not allow other countries to create firms or set up locations in China. Now that it has joined with other countries, China has strengthened ties with other nations and has better international relations. This is important for China because it can extend its relationships with different countries to create more trade relations.

These arguments indicate that although China holds the largest trading market in the world right now, and it would not be successful if it did not have open borders for international trade. Since the start of its membership with the WTO, China has continued to grow and strengthen its economy. As long as China continues to keep its trade barriers open to international trade, China will continue to have the strongest and fastest growing economy.

HIDING BEHIND A LEVEL PLAYING FIELD: HOW THE INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATION ATTEMPTS TO REGULATE THE FEMININE IDEAL BY PERPETUATING DISCRIMINATORY PRACTICES AGAINST FEMALE OLYMPIC RUNNERS FROM NON-WESTERN COUNTRIES

Davida Micaela Hawkes*

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IX. CONCLUSION: THE 2018 HYPERANDROGENISM REGULATIONS ARE DISCRIMINATORY ON THEIR FACE AND IN EFFECT, AND THUS SHOULD BE INVALIDATED 303

I. INTRODUCTION

This note concerns the validity of the International Association of Athletics Federations' ("IAAF") Regulations governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition (the "Hyperandrogenism Regulations"). It will discuss how these discriminatory regulations have halted the careers of non-western rising track and field stars Caster Semenya, and Dutee Chand. Caster Semenya and Dutee Chand had been successful competitors and were singled out for scrutiny because of their success as well as their physical appearances and the status of their countries of origin.

The Hyperandrogenism Regulations place restrictions on the eligibility of female athletes with high levels of naturally occurring testos-

terone to participate in competitive athletics.[1] This note will discuss the new IAAF regulations that govern eligibility of female athletes with hyperandrogenism to compete in women's competition and how these regulations are not only discriminatory on their face but also violate international human rights. Even if argued the regulations are not written in a discriminatory way, the regulations are discriminatory as applied, as they have only severely impacted non-western women runners to date. Therefore, the regulations, which establish a framework for the determination of the eligibility of females with hyperandrogenism to participate in international competitions in the female category, should be declared void. [2]

A. What Is Hyperandrogenism?

Hyperandrogenism is a medical condition which produces excessive levels of androgens/ testosterone in the female body.[3] There are various forms, but the form the IAAF regulations target is hyperandrogenism in intersex women. This condition leads women to have testosterone levels that are much higher than average for females.[4] Typically, women produce very small levels of testosterone.[5] The regulations were promulgated due to a belief that this additional testosterone gives these women a competitive advantage.

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1. *Dutee Chand v. Athletics Fed'n of India (AFI) & The Int'l Ass'n of Athletics Fed'ns (IAAF)*, Interim Arbitral Award, CAS 2014/A/3759, ¶¶ 41-44 [hereinafter *Chand*].

2. Regulation 1.1 states the regulations establish a "framework for the determination of the eligibility of females with Hyperandrogenism to participate in International Competitions in the female category." The Hyperandrogenism Regulations "replace the IAAF's previous Gender verification Policy and the IAAF has now abandoned all reference to the terminology "gender verification" and "gender policy" in its rules." *Id.*, ¶ 41.

3. LISA DAWN BAVINGTON, REGULATING HYPERANDROGENISM IN ELITE FEMALE ATHLETES: THE HISTORY AND CURRENT POLITICS OF SEX-CONTROL IN WOMEN'S SPORT 4 (Thesis, Doctor of Philosophy, University of Otago, Nov. 8, 2016), *available at* https://www.researchgate.net/profile/L_Bavington/publication/325828966_Regulating_Hyperandrogenism_in_Elite_Female_Athletes_The_History_and_Current_Politics_of_Sex-Control_in_Women%27s_Sport/links/5b284b3645851509895cb539/Regulating-Hyperandrogenism-in-Elite-Female-Athletes-The-History-and-Current-Politics-of-Sex-Control-in-Womens-Sport.pdf (last visited Jan. 28, 2019).

4. *Hyperandrogenism explained and what it means for athletics*, USA TODAY (Aug. 2, 2016), *available at* https://www.usatoday.com/story/sports/olympics/2016/08/02/hyperandrogenism-explained-and-what-it-means-for-athletics/87944968/ (last visited Feb. 1, 2019). The term "Intersex" stands for either a disorder or a difference of sex development. Estimates of the number of intersex people vary widely, ranging from one in 5,000 to one in 60. Ruth Padawer, *The Humiliating Practice of Sex–Testing Female* Athletes, N.Y. TIMES MAGAZINE (June 28, 2016), *available* at https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html (last visited Mar. 5, 2019).

5. BAVINGTON, *supra* note 3.

B. Who Are the Players?

The International Association of Athletics Federations is the international governing body for the sport of athletics and track and field.[6] The IAAF has a total of 215 member federations divided into six area associations.[7] The Olympic movement includes organizations, athletes and other persons who agree to be guided by the Olympic Charter.[8] The concerted, organized universal and permanent action, carried out under the authority of the International Olympic Committee (IOC) and all individuals as well as entities involved are committed to upholding the values of Olympism.[9] The Olympic movement is made up of the IOC, the International Federations (IFS), and the National Olympic Committees.[10] The IOC is a non-profit, international organization.[11] It is made up of a Congress, whose members are honorary and whose purpose, or role, is consultative; the Session, or the "supreme organ" of the IOC whose decisions are final; the Executive Board, which generally oversees the affairs of the IOC; and the President, whose duties are to make decisions when the Session cannot make them.[12] International Sports Federations seeking IOC recognition must ensure that their statutes, practice and activities conform with the Olympic Charter.[13]

The IOC has a judicial process in place for disputes that are not resolved through the Session or Executive Board. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.[14] The Code of Sports Related arbitration and mediation rules is the set of procedural rules which govern CAS procedures.

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6. *About The IAAF*, IAAF (2019), *available at* https://www.iaaf.org/about-iaaf (last visited Mar. 2, 2019).

7. *International Association of Athletics Federations (IAAF)*, DUCKSTERS (2019), *available at* https://www.ducksters.com/sports/track_and_field/iaaf.php (last visited Mar. 5, 2019).

8. *Factsheet: The Olympic Movement*, INTERNATIONAL OLYMPIC COMMITTEE (Apr. 2015), *available at* https://stillmed.olympic.org/Documents/Reference_documents_Factsheets/The_Olympic_Movement.pdf (last visited Jan. 25, 2019).

9. *See id.*

10. Linda Sheryl Greene, *Mirror, Mirror on the Wall – Gender, Olympic Competition and Persistence of the Feminine Ideal*, 31 WIS. J.L. GENDER & SOC'Y 57 (2016).

11. *Id.*

12. *Id.*

13. *Olympic Charter*, INT'L OLYMPIC COMM. (Sept. 15, 2017), *available at* https://olympics.com/ioc/olympic-charter (last visited Jan. 30, 2018).

14. *See* Greene, *supra* note 10.

The IOC formed the CAS because of increased disputes in international sports, and because there was no forum to hear the disputes, and no authority to settle them. The CAS is an international arbitral tribunal to provide a forum for the settlement of private disputes that arise in the sport.[15] The rules and regulations of the relevant sport organization which issued the challenged decision is the source of substantive law that is applicable to hearings in the CAS.[16] Where there is a discrepancy related to a regulation, the panel will use the law of the country where the federation that issued the challenged decision is domiciled. Often Swiss law is applied since many of the international federations are established in Switzerland.[17] The Olympic Charter states that the Charter governs and serves as statues for the IOC, and by being recognized through the IOC, the IAAF is also bound by the terms of the Olympic Charter. Lastly, the IAAF has its own constitution which describes the rules and regulations the IAAF must follow in addition to following the Olympic Charter.

II. HISTORY OF THE IAAF'S FOCUS ON REGULATING THE FEMININE IDEAL

Female athletes have endured discrimination since they were first allowed to compete at the highest level of athletics. It has been theorized that sex testing[18] originally surfaced to guard against men masquerading as women, in an attempt to compete and win women events.[19] While this may well be the source of the regulation, the only documented incident of this happening, was in 1936.[20] One can only conclude that their real purpose of such invasive discriminatory techniques was to discourage women or limit participation of women in the sport who defied gender norms. With only one such "masquerading incident," these tests have continued to progress and shifted the focus on targeting

15. Haley K. Olsen-Acre, *The Use of Drug Testing to Police Sex and Gender in the Olympic Games*, 13 MICH. J. GENDER & L. 207 (2007).

16. Louise Reilly, *Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes, A Symposium*, 2012 J. DISP. RESOL. 68 (2012).

17. *Id.* at 69.

18. For the purposes of this note "sex testing" and "gender verification" will be used interchangeably. These terms refer to the procedures that sport organizations implement to ensure that only females compete in the designated female events.

19. Olsen-Acre, *supra* note 15.

20. *See id.*

women who do not align with the traditional feminine ideal.[21] In addition, although men masquerading as women was the stated justification for the implementation of sex testing, these tests were never performed on male athletes.[22]

The institution of sport is formally organized around the notion that there are only two sexes, male and female, and sport is nearly solely segregated by binary sex category.[23] As a result, when athletes do not fit into the pre-conceived definitions of what a male or female athlete should be, or should look like, there is simply no place within the institution of competitive organized sport for those athletes.[24] Because they cannot fit into these traditional and narrow gender definitions, targeted female athletes are subjected to discriminatory gender tests.[25] Society has dictated the terms for who can identify as a man or a woman, and these regulations continue to protect its rigid definition of what a female should be and what characteristics she should possess.

It is easy to think of a list of characteristics that are attached to concepts of the societal norm for male and the norm for female, like testosterone vs. estrogen, or perhaps rational vs. emotional.[26] If a woman is associated with too much testosterone, or if she has too much muscle, society passes judgment because she does not fall into one of the rigid categories that society has designed for "normal" men and women. Therefore, those who cross the threshold into the gray area that society has not given much thought to, like transgender, intersex, or hyperandrogenic athletes, are subjected to rigid and embarrassing scrutiny. The discrimination against female athletes dates back to the nineteenth

21. Padawer, supra note 4. ("The rationale for decades was to catch male athletes masquerading as women, though they never once discovered an impostor. Instead, the athletes snagged in those efforts have been intersex women – scores of them.")

22. Olsen-Acre, *supra* note 15.

23. Cheryl Cooky & Shari L. Dworkin, *Policing the Boundaries of Sex: A Critical Examination of Gender Verification and the Caster Semenya Controversy*, 50 J. OF SEX RESEARCH 103 (2013).

24. *Id.* Therefore, historically there has been no formal place within the institution of competitive organized sport for athletes who exist outside of the dichotomous categories of male and female and who subsequently "fail" sex testing.

25. Serena Williams has often been called an "ape" and "gorilla." It's common for women athletes – especially when they win- to be derided as something other than women. In any sport in which a woman has to actually train to be a formidable competitor, and has a physique that reflects that, you'll find discussion of their reputed sexual desirability permeating the conversation. Erika Nicole Kendall, *Female athletes often face the femininity police – especially Serena Williams,* THE GUARDIAN (July 14, 2015), *available at* https://www.theguardian.com/commentisfree/2015/jul/14/serena-williams-female-athletes-femininity-police (last visited Mar. 7, 2019)

26. Olsen-Acre, *supra* note 15.

century when the Olympics were first established.[27] The organizers of the early Olympic Games heavily relied on sex or gender testing to disqualify athletes who appeared to have an unfair advantage.[28] In the very beginning stages of sex testing, visual and physical examinations of female competitors' genitalia by doctors were employed to verify gender but there was no such evaluation of men. To date, there is still no such evaluation of men. In fact, because men's bodies and sports competition are the "standard," men don't have to prove they are men, but in international competitions since the 1940s women's bodies underwent strict- public scrutiny. Yet, even in its 2019 decision to implement these discriminatory practices against women, the IAAF wants you to believe there is no other alternative and that the policing of women's bodies protects the integrity of the sport in its entirety, though the same checks and balances on men do not exist.[29]

If an athlete presents with XX chromosomes, the IOC defines her as female, and if the athlete presents with XY chromosomes then he is classified as male.[30] However, because of this rigid structure, the IOC does not account for athletes that have genetic anomalies, of which they have no control over, and which often do not provide a competitive advantage.[31] A female athlete could present with an XY chromosomal configuration, but her body does not properly respond to testosterone, so her body produces female features with very minimal male aspects.[32] Nevertheless, she would still be disqualified and humiliated for not fitting into the IOC's definitions of female.[33]

While the IOC has abandoned the practice of chromosomal sex testing, they have moved into the realm of disqualifying athletes due to their hormonal levels.[34] These tests are highly invasive, shame-

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27. *See id.*

28. *Id.*

29. Victoria Jackson, *The Decadelong Humiliation of Caster Semenya*, SLATE (May 1, 2019), *available at* https://slate.com/technology/2019/05/caster-semenya-testosterone-gender-appeal-ruling.html (last visited July 24, 2019.)

30. *Id.*

31. *Id.*

32. *Id.*

33. For example, female athletes who have hyperandrogenism, or androgen insensitive syndrome. Chromosomal disorders are congenital and sometimes hereditary, many do not offer any competitive advantage do people who have them. Interestingly, sex tests that rely on chromosomal analysis fail to recognize some disorders that might actually provide some type of advantage, such as androgen- secreting tumors. Olsen-Acre, *supra* note 15.

34. *IAAF introduces new eligibility regulations for female classification*, WORLD ATHLETICS (Apr. 26, 2018), *available at* https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica (last visited Mar. 2, 2019).

inducing practices which are historically fueled by discriminatory objectives.

The purpose of the Modern Olympic Games was to simultaneously develop the minds and bodies of young people.[35] It was hoped that resurrecting the Olympic Games would bring back the ideals of physical, mental, and spiritual excellence.[36] However, these goals were meant solely for male athletes. When the Modern Olympic Games were established in 1896, women were not allowed to compete.[37] The beginning stages of integrating women into the sport did not begin until over thirty years later, in 1928.[38] The IAAF excluded female athletes for even longer. It did not include female athletics until 1963.[39]

Since the early days of research into gender and its many facets, a woman's interest in competing in sports caused her femininity to become suspect which made her subject to surveillance and regulation.[40] The very participation of women in elite-level athletics serves as a highly visible challenge to traditional notions of femininity, as women are supposed to be fragile, petite beings, not muscular forces competing in, and training for similar events that men do.[41] Although Semenya is not the first athlete to have her identity as a woman challenged, she has en-

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35. *See The Modern Olympic Games*, SCHOLASTIC (2019), *available at* https://www.scholastic.com/teachers/articles/teaching-content/modern-olympic-games/ (last visited Jan. 29, 2019).

36. *Id.*

37. Greene, *supra* note 10.

38. *Id.*

39. Hans Bolling, *The Beginning of the IAAF: A Study of its Background and Foundation*, IAAF (2007), at 5, *available at* https://iaafmedia.s3.amazonaws.com/competition info/9ae4cea1-f84c-44ec-852f-74bb974d0f5a.pdf (last visited Jan. 28, 2019).

40. Visual observation and gynecological examination had been tried on a trial basis for two years at some competitions leading up to the 1968 Olympic Games, but these invasive and demeaning processes were jettisoned in favor of laboratory-based genetic tests. On-site gender verification has since been found to be highly discriminatory, and the cause of emotional trauma and social stigmatization for many females with problems of intersex who have been screened out from competition. Despite compelling evidence for the lack of scientific merit for chromosome-based screening for gender, as well as its functional and ethical inconsistencies, the IOC persisted in its policy for 30 years. L. J. Elsas, A. Ljungqvist et al., *Gender Verification of Female Athletes*, 2 GENET MED. 249 (2000).

41. *See* Kristin Wilde, *Women in Sport: Gender Stereotypes in the Past and Present*, *available at* http://wgst.athabascau.ca/awards/broberts/forms/Wilde.pdf (last visited Jan. 29, 2019); *see* Amanda Nicole Schweinbenz and Alexandria Cronk, *Femininity Control at the Olympic Games*, THIRD SPACE (2010), *available at* http://journals.sfu.ca/thirdspace/index.php/journal/article/view/schweinbenzcronk/329 (last visited Jan. 29, 2019); Carlie Minichino *Gender Specific Rules in Sport are Based on an Outdated Idea of Femininity*, (2009) (Honors Theses Paper 471, Colby College), *available at* https://pdfs.semantic scholar.org/6d49/344ccfd9e4c831d0140551f0e886068e80a3.pdf (last visited Jan 29. 2019).

dured this obsession over her eligibility in the women's category longer than any athlete in history.[42]

Sex and gender testing of female athletes can be seen through much of the twentieth century.[43] Testing began in the 1960s and has included various invasive as well as humiliating methods. These include nude parades before a panel of judges, chromosome and DNA analysis, and most recently, testosterone testing.[44] In 1968, the IOC implemented chromosomal testing, to determine which athletes lacked the ability to process testosterone. This method proved to be imperfect and excluded athletes that should have been allowed to compete.[45] Following these chromosomal procedures, the IOC permitted invasive gynecological inspections, and now fast forwarding to 2019, the IOC allows the proliferation of regulations requiring invasive inspections of the female body through testosterone testing.[46]

Routine sex testing was done in past Olympic competitions but was dropped only ten years ago because of the continued inaccuracies related to the reliance on a single trait to verify sex. In addition, similar problems arise when relying on testosterone levels alone to determine if an athlete is "too masculine to compete."[47] Yet, the re-emergence of sex testing for female athletes came in May of 2011 and June of 2012 when the IAAF and the IOC introduced these regulations governing the eligibility of females with hyperandrogenism.[48] At the center of the current dispute is South African middle–distance runner, Caster Semenya, as well as Indian sprinter Dutee Chand.[49]

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42. Jackson, *supra* note 29.

43. *See* Elsas, *supra* note 40.

44. Alex Hutchinson, *An Imperfect Dividing Line,* NEW YORKER (Mar. 27, 2015) *available at* https://www.newyorker.com/sports/sporting-scene/dutee-chand-gender-testing-imperfect-line (last visited Jan. 29, 2019).

45. *Id.*

46. *See* Martin Fritz Huber, *The Controversy Around Caster Semenya Explained,* OUTSIDE (July 12, 2017), *available at* https://www.outsideonline.com/2198906/caster-semenya-debate (last visited Jan. 29, 2019). No governing body has so tenaciously tried to determine who counts as a woman for the purpose of sports as the I.A.A.F. and the International Olympic Committee (I.O.C.). Those two influential organizations have spent a half-century vigorously policing gender boundaries.

47. Tracie White, *Media advisory on new Olympics testosterone policy: Stanford expert available to comment on unfair treatment of women athletes,* STAN. MED. (June 25, 2012), *available at* http://med.stanford.edu/news/all-news/2012/06/media-advisory-on-new-olympics-testosterone-policy-stanford-expert-available-to-comment-on-unfair-treatment-of-women-athletes.html (last visited Jan 29, 2019).

48. *Id.*

49. Huber, *supra* note 46.

III. THE IAAF'S INITIAL VICTIM: DUTEE CHAND'S RISING CAREER HALTED BY DISCRIMINATORY REGULATIONS

To enforce its perception of the feminine ideal in sports, the IAAF has implemented two sets of regulations that impose restrictions on female athletes' bodies.[50] The IAAF first enacted the Hyperandrogenism Regulations in April 2011. These regulations established a framework for the determination of the eligibility of females with hyperandrogenism to participate in international competitions.[51] These regulations are mandatory, and all inclusive, meaning they prohibit female athletes from competing in any event if, when tested, their testosterone levels fell above a certain level.[52] It is important to note that not all female athletes are tested, and that the initial basis for subjecting women to these tests is subjective, and based on a cursory review of their physical features.

Dutee Chand, now a twenty-two-year-old female athlete of Indian nationality, is a star athlete for India.[53] The spotlight has been on Dutee Chand since age eighteen when she rose to fame through her dominance in the women's 100m and 200m races. She has won a number of national junior athletics events in India and is currently a national champion in the women's 100me race.[54] In 2012, Chand became a national champion in the under-18 category in the 100m event.[55] In addition, she took bronze in the women's 200m event at the 2013 Asian Athletics Championships.[56] In the same year, she became a national champion in the 100m and 200m races at the Indian National Senior Athletics Championships. The following year, Chand won two gold medals at the Asian Junior Athletics Championships in 200m and 4x400m relays.[57] With these prestigious performances, Chand hoped to qualify to represent her country in the 2014 Commonwealth Games.[58] However, the

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50. *See Chand*, *supra* note 1, ¶ 41.

51. *Id.*

52. *Id.*, ¶ 42.

53. *Id.*, ¶ 1.

54. *See Dutee Chand Athlete Profile*, IAAF (2019), *available at* https://www.iaaf.org/athletes/india/dutee-chand-275950 (last visited Jan. 29, 2019)

55. *Dutee Chand breaks 100m record*, THE HINDU (July 14, 2012), *available at* https://www.thehindu.com/sport/athletics/dutee-chand-breaks-100m-record/article3636513.ece (last visited Jan. 29, 2019)

56. Greene, *supra* note 10.

57. *See Dutee, relay team clinch gold medals*, DECCAN HERALD (June 15, 2014), *available at* https://www.deccanherald.com/content/413832/dutee-relay-team-clinch-gold.html (last visited Jan. 29, 2019).

58. Padawer, *supra* note 4.

IAAF subjected her to sex testing and declared her ineligible to compete as a female athlete due to the hyperandrogenism policies. She was subsequently dropped from the roster. [59]

The IAAF prohibited Chand from competing in the female category of the 100m and 200m dash. Chand refused to comply with medical interventions to lower her testosterone levels and filed an appeal to the CAS.[60] In 2015, Chand challenged the regulations which led to a determination by the CAS that the 2011 regulations did discriminate against women and discriminated based on a natural physical trait.

In July 2015, the Court of Arbitration for sport suspended the 2011 IAAF regulations regarding Hyperandrogenism. The CAS held in their decision that the IAAF failed to establish that the hyperandrogenism regulations are necessary and proportionate to pursue the legitimate objective of organizing competitive female athletics to ensure fairness in elite women's competition.[61] The panel concluded that there was not enough scientific evidence to conclude that hyperandrogenic female athletes have a significant performance advantage that is necessary for exclusion or prohibition from competition.[62] The IAAF, however, did not simply accept this decision and move forward. Instead, the IAAF developed the 2018 Hyperandrogenism regulations as a response to the 2015 CAS ruling.[63]

A. The IAAF's Continued Attempts at Discrimination: the 2018 IAAF Regulations

The new regulations were largely based on a study published in the *British Journal of Sports Medicine.*[64] This study was conducted by Stephanie Bermon and Pierre Garnier, who work for the IAAF medical examiners. In addition, their study was jointly commissioned by the

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59. *See* Rohan Sen, *Asian Games 2018: Dutee Chand ends 16-year wait for India with silver in 200m,* INDIA TODAY (Aug. 29, 2018), *available at* https://www.indiatoday.in/sports/asian-games-2018/story/asian-games-2018-dutee-chand-ends-16-year-wait-for-india-with-silver-in-200m-1326566-2018-08-29 (last visited Jan. 29, 2019).

60. BAVINGTON, *supra* note 3, at 6.

61. *See Chand, supra* note 1, ¶ 547.

62. Andrew, *New IAAF Testosterone Regulations are Bigoted and Targeted,* VICTORY PRESS (May 2, 2018), *available at* https://victorypress.org/2018/05/02/new-iaaf-testosterone-regulations-are-bigoted-and-targeted/ (last visited Jan. 29, 2019).

63. *See* White, *supra* note 47; *see also Mokgadi Caster Semenya,* SOUTH AFRICAN HISTORY ONLINE (2019), *available at* https://www.sahistory.org.za/people/mokgadi-caster-semenya (last visited Mar. 2, 2019); *see also* ELLEN SAMUELS, FANTASIES OF IDENTIFICATION: DISABILITY, GENDER, RACE 199 (Michael Bérube ed., 2014).

64. *See* Andrew, *supra* note 62.

IAAF.[65] In this study, when compared with the lowers female ft (free testosterone) tertile, women with the highest ft tertile performed significantly better in 400m, 400m hurdles, 800m, hammer throw, and pole vault.[66] The IAAF then tailored the 2018 regulations to fit these findings and lowered the acceptable blood testosterone levels for athletes participating in certain women events to no more than 5 nmol/L as opposed to 10 nmol/L which was the amount in the previous regulations.[67] Though the IAAF relied on the study, scientists in the field disagreed with the findings. These scientists felt that the data and conclusions drawn in the Bermon and Garnier article were so erroneous that they called for a retraction of their findings and demanded the study be performed again.[68]

Some of the errors cited by the experts included duplicated athletes, meaning there was more than one time recorded for an individual. Repeating the same time once or more than once for an individual athlete indicates a clear data error. Finally, sometimes no athlete in the sample could be found with the reported time for that event.[69] Even in the best of circumstances, the IAAF's reliance on this data to support the enactment of the regulations would be misguided. However, with the IAAF rushing to overcome the 2015 Chand decisions, by relying on scientifically flawed data, the IAAF's true purpose became clear: to target hyperandrogenic females from underrepresented countries and prohibit their participation.[70]

The testing methodology further proves this intent. The sample size of athletes Bermon and Garnier tested only contained women from non-western and developing countries.[71] Thus, strengthening the arguments that these 2018 IAAF regulations are targeting not only women, but women in particular from non-western countries.[72] As data is not

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65. *See id.*; *see also* Stéphane Bermon and Pierre-Yves Garnier, *Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes*, BRIT. J. SPORTS MED. (July 3, 2017), *available at* https://bjsm.bmj.com/content/51/17/1309.info (last visited Jan. 27, 2019).

66. *Id.*

67. *Id.*

68. Roger Pielke Jr., *A Call for Bermon and Garnier (2017) to be Retracted*, SPORTS INTEGRITY INITIATIVE (July 13, 2018), *available at* https://www.sportsintegrityinitiative.com/call-bermon-garnier-2017-retracted/ (last visited Jan. 28, 2019).

69. *Id.*

70. Andrew, *supra* note 62.

71. *See Chand*, *supra* note 1, ¶¶ 22, 355.

72. *See* WORLD ATHLETICS, *supra* note 34. The new Regulations require any athlete who has a Difference of Sexual Development (DSD) that means her levels of circulating testosterone (in serum) are five (5) nmol/L or above and who is androgen-sensitive to meet

being made public, there is no way for other scientists to verify, analyze, or fact check Bermon and Garnier's conclusions.[73] It should be noted that peer review is crucial especially in a scientific field, as this involves subjecting the author's work to the scrutiny of other qualified experts to check its validity.[74] This is needed to rule out false positives and other errors that could mislead the reader. "Without publicly available raw data, it is not possible to perform all the desired checks on the data."[75] As a result, it is "reasonably likely" that the connection found here between female athletes having a slight competitive advantage due to hyperandrogenism could have occurred by chance.[76] The IAAF needed scientific data to confirm that hyperandrogenic females hold an advantage over females with "normal" testosterone levels in order for the amended regulations to be accepted in 2018, and Bermon and Garnier, in a study the IAAF paid for, provided that data.[77]

IV. IAAF DISCRIMINATORY REGULATIONS STRIKE AGAIN, THIS TIME ENTANGLING RISING TRACK AND FIELD POWERHOUSE, CASTER SEMENYA

These new regulations for testosterone testing arose as a result of very speculative and subjective comments that were made regarding a South African runner, Caster Semenya.[78] Semenya's rise from unknown teenager to world champion catapulted her into sporting infamy and put a direct target on her back.[79]

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the following criteria to be eligible to compete in Restricted Events in an International Competition (or set a World Record in a Restricted Event at competition that is not an International Competition):(a) she must be recognized at law either as female or as intersex (or equivalent);(b) she must reduce her blood testosterone level to below five (5) nmol/L for a continuous period of at least six months (e.g., by use of hormonal contraceptives); and(c) thereafter she must maintain her blood testosterone level below five (5) nmol/L continuously (i.e., whether she is in competition or out of competition) for so long as she wishes to remain eligible.

73. Jacalyn Kelly, Tara Sadeghieh & Khosrow Adeli, *Peer Review in Scientific Publications: Benefits, Critiques, & A Survival Guide*, JIFCC (Oct. 24, 2014), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4975196/ (last visited Mar. 7, 2019).

74. *Id.*

75. Andrew, *supra* note 62.

76. *Id.*

77. *IAAF approves new rules on hyperandrogenism*, THE GUARDIAN (Apr. 12, 2011), *available at* https://www.theguardian.com/sport/2011/apr/12/iaaf-athletics-rules-hyperandrogenism-caster-semenya (last visited Jan. 27, 2019).

78. White, *supra* note 47.

79. *IAAF to fight Swiss Court Ruling on Caster Semenya* THE JAPAN TIMES (June 5, 2019) *available at* https://www.bbc.com/sport/athletics/48114137 (last visited July 24, 2019)

Mokgadi Caster Semenya, was born in Ga- Masehlong, a village near Polokwane in South Africa.[80] When Semenya was eighteen, she won both the 800m and 1500m races at the African Junior Championships in 2009 with record breaking times.[81] In August of that same year, she won gold in the 800m at the World Championships setting the fastest time in that event for the year.[82] Semenya, a trail blazer in the 800m and 1500m races, was receiving international attention for continual progression in these events as she was only eighteen, yet was ranked the number one women's runner in the 800m.[83] After Semenya shocked the track world with her win by 2.5 seconds in the 800m at the 2009 World Championship, complaints from her competitors arose relating to her physique.[84] For example, one of her fellow athletes said that Caster Semenya was "too masculine" and that "these kinds of people should not run with us... For me, she is not a woman. She is a man".[85] As a result, Semenya was forced to undergo sex testing that ultimately was not kept confidential and left her humiliated.[86] Furthermore, after her gold medal win at the Olympics in 2016, her opponent stated, "there were 'obvious' athletes with heightened testosterone."[87] The continued scrutiny and humiliation followed Semenya for years throughout her dominant career.

A. Newly Restricted Events in the 2018 Regulations Directly Target Caster Semenya

After creating a bold presence in the track and field world, the IAAF amended its regulations to prohibit Caster Semenya from contin-

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80. SOUTH AFRICAN HISTORY ONLINE, *supra* note 63.

81. *Id.*

82. *Id.* The South African began raising eyebrows when she won the world junior championships in 2008 and the senior world title the following year, with dramatic improvement in her times. As a result, the IAAF made Semenya take a sexual verification test, which was initially kept secret but revealed by the media in 2009. Mitch Phillips, *Athletics: Semenya's reign to be ended by new IAAF gender rule,* REUTERS (Apr. 25, 2018) *available at* https://www.reuters.com/article/us-athletics-iaaf-hyperandrogenism/athletics-semenyas-reign-to-be-ended-by-new-iaaf-gender-rule-idUSKBN1HW27R (last visited Feb. 28, 2019).

83. SOUTH AFRICAN HISTORY ONLINE, *supra* note 63.

84. *See* White, *supra* note 47; *see also* SOUTH AFRICAN HISTORY ONLINE, *supra* note 63.

85. *Id.*

86. *See id.*

87. Tom Morgan, *Caster Semenya wins 800m: beaten GB finalist Lynsey Sharp criticizes rule changes over 'obvious' hyperandrogenous women,* TELEGRAPH (Aug. 21, 2016), *available at* https://www.telegraph.co.uk/news/2016/08/21/lynsey-sharp-criticises-obvious-hypoadrogenous-women-having-bein/ (last visited July 24, 2019).

ued domination in the sport. The 2018 regulations are more specific than the 2011 IAAF regulations. In fact, the amended regulations that were proposed in 2018 restricted female athletes from competing in the following events if their testosterone level is above 5 nmol/L: 400m races, 400m hurdle races, 800m races, 1500m races, one mile races and all other track events over distances between 400m and one mile.[88] The scientific evidence the IAAF relied on when determining which events to regulate, stated that pole vaulters and hammer throwers with hyperandrogenism may potentially have an advantage as well.[89] Interestingly, it has been established that Poland, a western country, dominates the women's hammer throw.[90] However, these events are not restricted or subjected to this testing.[91]

Out of the five events listed in the regulations, Caster Semenya's main event, the 800m, showed the least amount of advantage at 1.78%, technically in the IAAF's own study.[92] Meaning, athletes with hyperandrogenism competing in the 800m have the least advantage.[93] Interestingly enough, the 1500m race , another event Semenya dominates, is subject to this regulation when the IAAF's own study showed no scientific evidence to support a correlation between high testosterone and high performance in the event.[94] Nevertheless, where women from nonwestern countries are dominating events, athletes such as Semenya are subjected to regulations such as these which are promulgated to stop their successes. With these facts, it is hard not to conclude that the IAAF is operating not for the betterment of sport, but instead based on discriminatory motives. It does not appear as though the IAAF is concerned with establishing a fair playing field as the organization argued.

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88. Andrew, *supra* note 62.

89. Interestingly the IAAF's policy omits hammer throw and pole vault- which the study showed had the highest margins of improved performance and throws. Instead, the policy regulates a range of events from the 400m through 1500m races, all in Semenya's specialty. James Maasdorp, *Commonwealth Games: IAAF rule change could end career of Caster Semenya,* ABC NEWS (Apr. 11, 2018), *available at* https://www.abc.net.au/news/2018-04-11/new-iaaf-rules-could-end-the-career-of-caster-semenya/9641160 last visited (Jan. 30, 2019).

90. Martin Bingisser, *Ranking the Best Throwing Nations*, HMMR MEDIA (Oct. 21, 2016), *available at* https://www.hmmrmedia.com/2016/10/ranking-the-best-throwing-nations/ (last visited Mar. 7, 2019).

91. But two events — hammer throw and pole vault — didn't make the IAAF's list of Restricted Events despite showing the highest percentage of advantage in the study. At 4.53%, hammer throw is about 1.5% higher than any of the other events flagged as showing a notable difference. *See* Andrew, *supra* note 62.

92. *Id.*

93. *Id.*

94. Huber, *supra* note 46.

Although the information in the Bermon article has been declared unreliable, the IAAF fully relied on this data when making conclusions regarding hyperandrogenism and accepted the advantage hammer throwers and pole vaulters receive by failing to regulate those events.

V. THE HYPERANDROGENISM REGULATIONS ONLY TARGET WOMEN AND ARE DISCRIMINATORY ON THEIR FACE

Like the 2011 regulations, the 2018 Hyperandrogenism regulations are discriminatory on their face and should therefore be invalidated. When the 2011 Hyperandrogenism regulations were suspended, CAS concluded that the regulations were prima facie discriminatory, being that they are a sex-based eligibility rule.[95] Such discrimination is, unless justified, contrary to the Olympic charter, the IAAF constitution, and the laws of Monaco. If the testosterone regulations cannot be justified as a reasonable and necessary response to a legitimate need, then they should be declared invalid.[96] "Reasonable and necessary" means there needs to be a rational connection between the regulations and the objectives the regulations are designed to meet, and the regulations should be minimally impairing on any right to freedom they regulate.[97]

The IAAF failed to establish that the 2011 regulations were a necessary and proportionate means of achieving a legitimate objective.[98] The IAAF still has not met this burden with the 2018 regulations as these regulations are still sex-based eligibility rules and therefore would be classified as prima facie discriminatory just as the 2011 regulations were.

In regard to the 2011 regulations, the CAS ruled that the IAAF failed to meet their burden.[99] CAS gave the IAAF two years to present evidence supporting the 2011 rules, and the IAAF was unable to do so. Because of this, the 2011 ruling still stands and Chand's events are excluded from the 2018 rules. The two main differences between the 2011 and 2018 regulations are the restricted events and the amount of testosterone that triggers the regulations. Substantively, the regulations are still written in a discriminatory fashion by only targeting women, and as applied, continue to only impact women from non-western coun-

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95. *Chand, supra* note 1.

96. *Revoke Discriminatory Athletics Gender Regulations,* HRW (July 26, 2018), *available at* http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (last visited Jan 29, 2019)

97. *Id.*

98. *Chand, supra* note 1, ¶¶ 536, 547.

99. *Id.*

tries.[100] As a result, the IAAF's new regulations continue to operate under the same discriminatory standards which were struck down by the CAS in the Chand case.[101]

The 2018 regulations also fail to meet the burden of showing the rational connection between the regulations themselves and the objective they are designed to meet. Here, since the 2018 regulations again prevent female athletes with hyperandrogenism from participating in certain events, the IAAF would need to meet the burden of showing a rational connection between regulating hyperandrogenic females and creating a fair playing field in the sport. The IAAF contends that these regulations are being implemented in order to foster a fair and competitive environment across all events.[102]

If there is a rational connection between sex-based regulations and the objective of protecting competition in sport, surely there must be similar regulations regarding male athletes? However, there are no such regulations that hinder men with higher levels of testosterone or different advantageous immutable traits from participating in any events. This leaves one to conclude either that the IAAF is not concerned with a fair and competitive environment across all events for men, or that the IAAF is simply targeting women. The evidence supports the latter. The organization cannot unilaterally decide to regulate some events where they have discovered disadvantages and not others. This blatantly highlights the IAAF's flawed argument that they are establishing these regulations to create a level playing field, as there is no such level playing field created in the male events.

Gender-based discrimination is a higher suspect class, and any gender-based classification must be substantially tailored to serve an important government interest.[103] The standard by which this regulation must be analyzed is whether the discriminatory effect of the regulation has a substantial relationship to achieving an important and legitimate government objective.[104] When reviewing such regulations, the CAS

100. *Chand, supra* note 1, ¶¶ 22, 42, 355.

101. *See id.*

102. Alice Dredger, *Redefining the Sexes in Unequal Terms,* N.Y. TIMES (Apr. 23, 2011), *available at https*://www.nytimes.com/2011/04/24/sports/24testosterone.html (last visited Jan. 29, 2019).

103. Letter from Human Rights Watch to Lord Sebastian Coe, President IAAF re: *Eligibility Regulations for The Female Classification* (July 24, 2019), *available at https://www.hrw.org/sites/default/files/supporting_resources/hrw_letter_iaaf_femaleclassification_20180724.pdf* (last visited Mar. 2, 2019); CAS 2014/A/3759, *supra* note 1; *see* BAVINGTON, *supra* note 3.

104. *Chand, supra* note 1, ¶¶ 536, 547.

must ask, do the ends justify the means? In other words, does this gender discrimination aimed solely toward women athletes, substantially relate to achieving the goal of preventing scandals and having fair competition? The idea behind this policy is to make a move toward creating the mythical "level playing field."[105] However, the only thing this regulation does is allow men to further regulate the female body of which they know nothing about, as well as put constraints on what classifies as a "gender appropriate" woman in the field of Olympic sports.

This idea of making elite sports a "level playing field" is quite frankly, unrealistic, as fair sporting competitions do not necessarily require that athletes be equal in every imaginable respect.[106] It is impossible to make every athlete equal, as each athlete is subjected to different environments that can contribute to their successes.[107] In fact, scientists and the media credit part of Usain Bolt's success to the very earth in which he was raised.[108] However, we do not see athletes from Usain Bolt's town being excluded from events solely for being born in a place where it has been known to give athletes an advantage. These athletes have no control over where they grow up and are not targeted, yet here, Caster Semenya is being punished for being born differently and not fitting into the begrudgingly accepted athletic feminine ideal. Punished for something of which she has no control over, even though the science suggests that she has very minimal advantage in her running events. There are a plethora of biological, psychological, sociological, and economic factors that influence athletic performance.[109] As a result, sports can never be a truly level playing field as we are not all born the same, thus these regulations implemented with the purpose of making competitions fair completely targets and victimizes many women who are born with naturally higher testosterone levels.[110]

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105. Dredger, *supra* note 102.

106. *See* Thomas Murray, *Making Sense of Fairness in Sports*, 40 HASTINGS CTR. REP. (2010), *available at* https://onlinelibrary.wiley.com/doi/full/10.1353/hcr.0.0241 (last visited Jan. 29, 2019).

107. One could argue to some extent that all elite athletes are freaks of nature – these athletes are in the best handful in the world at what they do, especially when considering a talent pool as large as that of Athletics. *See* Claire Thomas, *Built for speed: what makes Usain Bolt so fast?*, TELEGRAPH (Aug. 20, 2016), *available at* https://www.telegraph.co.uk/usain-bolt-worlds-fastest-man/0/built-for-speed-what-makes-usain-bolt-so-fast/ (last visited Feb. 28, 2019).

108. *Id.*

109. *Chand, supra* note 1, ¶ 116.

110. See Francisco J. Sánchez et al., *The New Policy on Hyperandrogenism in Elite Female Athletes Is Not About "Sex Testing,"* 50 J. SEX RES. (2013); *see* BAVINGTON, *supra* note 3, at 79.

The options are hard; perhaps even cruel. Either the athletes with hyperandrogenism submit to being made gender "normal" through hormone treatments, or they cannot compete.[111] Male athletes need not worry.[112] It is only women who are being limited in terms of natural biochemical advantage.[113] "There is no perfect solution, one that is reasonably objective universally applicable and universally satisfying."[114] But is requiring an individual to submit to hormone treatments to become "normal" a solution or a punishment? While there may not be a perfect solution, there is surely a solution that respects the individual human and civil rights of athletes while still promoting fairness in sport. Promoting fairness at such a high caliber of sporting events is a legitimate objective, however solely discriminating on one class of people based on their gender substantially prejudices this objective and does not serve to meet this interest.[115] The IAAF allows females to compete with certain testosterone levels that they classify as normal, but when women have "too much" testosterone the IAAF steps in and takes females out of the events for not being "female enough," since testosterone is something that is typically associated with male bodies.[116] In fact, the IOC policies in 2012 determined that athletes ineligible to compete in the female categories were eligible to compete in the male categories if they met a high enough testosterone level.[117] Based on this, one can clearly conclude that the IAAF believes that female athletes should be classified as ineligible because their testosterone levels are not feminine enough, and are considered to be too masculine to

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111. Dredger, *supra* note 102.

112. "The spectrum of identity stretches far beyond the binary, say human rights activists, so shouldn't Semenya's physical abilities be celebrated the same way as Usain Bolt's height and Michael Phelps's wingspan are? Either way this verdict does not signal the end of the debate." *Caster Semenya: Olympic 800m champion loses appeal against IAAF testosterone rules*, BBC (May 1, 2019), *available at* https://www.bbc.com/sport/athletics/48102479 (last visited July 27, 2019).

113. *See id.* American swimmer Michael Phelps owes his unique genetic endowment to physical traits associated with Marfan Syndrome (e.g., arm span, big feet stature), which contributes to his dominance over the rest of the field. Yet, despite the obvious advantages there are no arguments that they should be excluded from competition against lesser- males. *See* BAVINGTON, *supra* note 3, *at* 80.

114. *Id.*

115. *Chand*, *supra* note 1, ¶ 40.

116. *Id.*

117. BAVINGTON, *supra* note 3, at 82; *see generally* IOC Regulations on Female Hyperandrogenism, (IOC) (June 22, 2012), *available at* https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf (last visited Jan. 29, 2019)

compete in female categories. However, they are also likely not masculine enough to compete in male categories.

With the easily accessible evidence that men have varying testosterone levels and natural traits that provide them with advantages, can we believe that this regulation is trying to serve the greater good of the sport? However, men's bodies are not scrutinized in the same manner as female athletes.[118] In addition, when presented with such evidence that there is disparity between male athlete in their testosterone levels, as well as advantages because either genetic or physical traits, the IAAF has concluded that this has no bearing on their competition and has never regulated these known advantages.[119] So does this mean that men with lower testosterone levels are not "masculine" enough? Well, no. Since there is a disparity among male athletes' testosterone levels that is not addressed, how concerned really is the IAAF with creating a level playing field?

While the justification may be that these regulations serve to create a level playing field, this is not met when the IAAF is fully banning female athletes with higher than average levels.[120] Instead, women are allowed to compete with certain levels of testosterone, but if an athlete has what the IAAF arbitrarily determines is too much testosterone, the athlete is essentially not classified as a woman anymore by the IAAF and is instead, subjected to sex testing under this discriminatory regulation.[121] These regulations do not serve a legitimate purpose because they are wholly discriminatory against an entire gender. The regulations target the rights of an already marginalized minority, women from non-western countries, against the alleged need to ensure fair competi-

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118. BAVINGTON, *supra* note 3, at 99.

119. Despite the obvious advantages that Phelps and Bolt have over their peers, questions abound why there aren't more athletes like them rather than arguments that they should be excluded from competition against lesser-than males. *See* BAVINGTON, *supra* note 3, at 79, 97.

120. Since 1928, competition in Athletics has been strictly divided into male and female classification and females have competed in Athletics in a separate category designed to recognize their specific physical aptitude and performance. It is known from experience that there are rare cases of young females competing in Athletics today who are affected by hyperandrogenism which, if the condition remains undiagnosed or neglected, can pose a risk to health. Despite the rarity of such cases, their emergence from time to time at the highest level of women's competition in Athletics has proved to be controversial since the individuals concerned often display masculine traits and have an uncommon athletic capacity in relation to their fellow competitors. *See Chand*, *supra* note 1, ¶ 4, 116.

121. *See id.*

tion for the majority.[122] This perceived difference is through no fault of the athletes' own, as they were born with this condition. This stigmatizing and discriminatory paradigm does not belong in the world of sports.

As discussed earlier, the purpose of the Olympic Games was to bring back the ideals of physical, mental and spiritual excellence.[123] These women are being penalized for an immutable characteristic, whereas, when men have similar immutable traits, there are no invasive regulations or penalties.[124] As a result of the discriminatory regulatory scheme, the 2018 IAAF Hyperandrogenism regulations should be invalidated as it does not further the objectives of making the sport fair, and is contrary to the spirit of the sport itself, as well as the Olympic ideal.[125]

A. The 2018 Regulations Are Discriminitory on Their Face and in Effect and Thus Violate Human Rights, the IAAF Constitution and the Olympic Charter.

The IAAF regulations governing the eligibility of females with Hyperandrogenism to compete in women's competition should be declared invalid because the 2018 Hyperandrogenism regulations are sex-based eligibility restrictions and are therefore prima facie discrimination. Furthermore, women are specifically targeted through such regulations and men are not subjected to any such testing or regulations.[126] If testosterone is a driver of sport performance, the concern about guaranteeing physical equality based on hormonal characteristics should not be limited to female athletes, as not all male athletes have the same testosterone levels and therefore, some men are disadvantaged compared to

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122. Andy Bull, *Caster Semenya and Dutee Chand run ragged by IAAF's moving goalposts*, THE GUARDIAN (Jan. 23, 2018), available at https://www.theguardian.com/sport/2018/jan/23/caster-semenya-dutee-chand-iaaf-hyperandrogenic (last visited Nov. 7, 2018)

123. SCHOLASTIC, *supra* note 35.

124. Jamaican sprinter Usain Bolt's success centers on a genetic predisposition for known variables that naturally factor into his performance (i.e., height, fast- twitch muscle fibres, etc.)). Yet no action is taken to hinder his performance in the sport. BAVINGTON *supra* note 3, at 79.

125. *See Olympic Charter*, *supra* note 13.

126. Even where conditions that result from natural genetic variation have the potential to result in a competitive advantage, it is problematic to disqualify athletes on the basis of these while advantages resulting from the other genetic variations (for example, tallness that runs in one's family) are not cause for exclusion. This seems especially unfair given that sex differentiation among athletes is also surprisingly common: one study found that one in 504 female athletes competing in selected events, including the Olympic Games, between 1972 and 1990, was disqualified for failing the sex chromatin test. *See* Olsen-Acre, *supra* note 15.

other males based on this criterion. In fact, it has been established that male pole vaulters produce less testosterone than male sprinters.[127]

However, the difference in testosterone levels in the men's category remain unproblematic.[128] Additionally, the newly proposed regulations by the IAAF that did take effect on November 1, 2018 states that female athletes with testosterone levels above 10 nmol/L are not allowed to compete in the female category.[129] Women with elevated testosterone must reduce their level for six months, by medical intervention (e.g., by use of hormonal contraceptives) before being eligible to run and must maintain that lowered testosterone level.[130] A regulation that targets female athletes, more specifically female athletes from non-western countries, contributes to the discriminatory nature of the regulation.

The regulations allow for an investigation to be initiated into an athlete's gender, but do not include any scientific standards upon which to base the investigation. More specifically, the regulations allow the IAAF to investigate female athlete's biological autonomy if there are "reasonable grounds for believing" that a female athlete may have hyperandrogenism; however, there is no set procedure to determine which athletes may have this condition, it is based on pure observation and speculation.[131]

These new regulations violate internationally protected fundamental rights and discriminate against women on the basis of their sex and their sexual characteristic which violates Articles 2, 3, 5 and 12 of the Universal Declaration of Human Rights, as well as the Olympic charter, and IAAF constitution. It has long been held in matters before the CAS that where a regulation is inconsistent with a higher-ranking legal rule, such as a constitutional principle or the Olympic charter, the CAS must

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127. It's been shown in a study that male pole vaulters and hammer throwers had *lower* testosterone than the male sprinters. That means that the study shows high levels of testosterone was affecting male and female athletes differently, depending on the event. *See* Eric Niler, *Testosterone Ruling for Athletes Fuels Debate Over 'Natural' Ability*, WIRED (May 1, 2018), *available at* https://www.wired.com/story/testosterone-ruling-for-athletes-fuels-debate-over-natural-ability/ (last visited Mar. 6, 2019)

128. BAVINGTON, *supra* note 3, at 97 ("The IAAF Medical Manager may initiate a confidential investigation of any female athletes if he/she has reasonable grounds for believing that a case of hyperandrogenism may exist. The IAAF Medical Manager's reasonable grounds for belief in a case may be derived from any reliable source.").

129. *See* WORLD ATHLETICS, *supra* note 34.

130. *IAAF Rules to Limit Testosterone Levels for Female Runners*, U.S. NEWS (Apr. 26, 2018), *available at* https://www.usnews.com/news/sports/articles/2018-04-26/iaaf-rules-to-limit-testosterone-levels-for-female-runners (last visited Jan. 29, 2019).

131. BAVINGTON, *supra* note 3, at 84.

declare the regulation invalid.[132] Here, the arguments that follow discus how the regulations are in direct violation of the Olympic charter and therefore should be invalidated.

B. The Hyperandrogenism Regulations Violate the Olympic Charter and Should Be Declared Void.

The issue is whether the 2018 IAAF regulations are inconsistent with the Olympic charter, a higher-ranking legal rule. The relevant fundamental principles of Olympism in the Olympic charter provide: the goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity; the practice of sport is a human right.[133] Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play; the enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, color, sex, sexual orientation, language religion, political or other opinion, national or social origin, property, birth or other status.[134]

The practice of sport is a human right, yet this right is infringed upon while undergoing investigation by the IAAF. Here, without conclusive evidence of her having done anything wrong, Semenya was banned from further competition for almost a year, simply because her testosterone levels and outward appearance did not fit into society's ideal of feminism.[135] Therefore, she was denied access to an established human right. In addition, one of the stated goals of the Olympic charter is to preserve human dignity, but the actions taken by the IAAF when handling Semenya's case directly contradict that.[136] After recording record breaking times at national events, the IAAF made Semenya take a sexual verification test, which in and of itself is already degrading, as

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132. *See* Football Fed'n Iran (IRIFF) v. Féd'n Int'l de Football Ass'n (FIFA), Award, Nov. 4, 2009, CAS 2008/A/1708; *see also* United States Olympic Committee (USOC) v. Int'l Olympic Comm. (IOC), Award, Oct. 4, 2011, CAS 2011/O/2422.

133. *Olympic Charter, supra* note 13.

134. *Id.*

135. The IAAF initially banned Semenya from further competition, and it only cleared Semenya for future competition after an eleven-month ordeal and countless tests intended to provide guidance that would ultimately allow the IAAF to check a single box with satisfaction: female. *Athlete Semenya Cleared to Compete After Gender Test Controversy*, CNN (July 6, 2016), *available at* http://www.cnn.com/2010/SPORT/07/06/athletics.semenya.cleared.to.run/ (last visited Feb. 28, 2019).

136. *See Olympic Charter, supra* note 13.

your sex is being questioned. Tests such as this are to be kept confidential, nevertheless, this was revealed to the media in 2009.[137]

Furthermore, Caster Semenya is subjected to testing and scrutiny under these regulations, because she is a woman and no such scrutiny, testing, or regulation exists for men.[138] There is no objective procedure to determine whether an athlete does in fact have hyperandrogenism, these athletes are simply picked out to receive testing if they essentially look suspicious or have a masculine physique. As a result, this directly violates the principles set forth in the Olympic Charter that allow for all athletes to enjoy the freedoms and rights under this charter without discrimination of any kind, as this targets athletes' sex. Therefore, the 2018 regulations are inconsistent with the Olympic charter, a higher-ranking legal rule than an IAAF regulation and should thus be declared void.

C. The Regulations Target Female Athletes and Thus Are Discriminatory and Violate the IAAF Constitution.

Article 3 of the IAAF constitution sets out the objectives of the IAAF.[139] The applicable objectives in relation to discrimination and equal protection are: (1) to promote the sport of athletics and its ethical values as an educational subject and life affirming and life enhancing activity; (2) to encourage participation in athletics at all levels throughout the world regardless of age, gender, or race (3) to strive to ensure that no gender, race, religious, political or other kind of unfair discrimination exists, continues to exist or is allowed to develop in athletics in any form, and that all may participate in athletics regardless of their gender, race, religious or political views or any other irrelevant factor.[140]

Establishing fair competition does not necessarily mean making athletes equal in every imaginable respect. The fact that certain females have higher testosterone levels can be argued as an irrelevant factor, which is stated in number 3 of the IAAF Constitution. All may participate in athletics regardless of their gender it states, unless you are Caster Semenya, a powerful athlete from a non- western country with slightly elevated testosterone levels. Here, Caster Semenya is being targeted

137. Phillips, *supra* note 82.

138. Jeré Longman, *Understanding the Controversy Over Caster Semenya,* N.Y. TIMES (Aug. 18, 2016), *available at* https://www.nytimes.com/2016/08/20/sports/caster-semenya-800-meters.html (last visited Mar. 6, 2019).

139. *Chand, supra* note 1, ¶ 40.

140. *Id.*

because she enjoys a slight advantage from her natural genetic make-up, which should not be viewed differently from other natural advantages derived from exceptional biological variation.[141] The 2018 regulations directly permit unfair discrimination against women athletes, as it is known that other male athletes are genetically different due to birth, yet their biological differences are celebrated, while female athletes are scrutinized and punished for being born different.

For example, Usain Bolt, an Olympic sprinter, has a genetic predisposition known as the fast twitch muscle and is significantly taller than all of his opponents.[142] Due to the significant height difference, Bolt takes longer strides. More specifically, he takes 41 steps over an entire 100m race which allows him to leave his opponents, who take 43-50 steps throughout an entire race, in the dust.[143] Regardless, he is glorified for these differences that are advantageous to his performance, while female athletes like Caster Semenya are vilified as a result of her dominance. In fact, even with these known advantageous physical characteristics, Usain Bolt is classified as arguably the most naturally gifted athlete the world has ever seen.[144] This is due to his dominance in the 100m, 200m, and 4x100m relay race.[145] It is known that both Michael Phelps, a US swimmer, and Usain Bolt have some genetic predisposition that contributed to their success, yet they are celebrated and there are no such regulations that limit their abilities to compete in the sport.[146] In addition, Olympic swimmer Casey Legler admits to having a degenerative condition of connective tissue, which has symptoms such as long arms, big hands and large feet, all of which, coupled with discipline have contributed to her success as an Olympic swimmer. However, this has never been an issue that disallowed her from competition.[147]

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141. *See Chand, supra* note 1, ¶ 113, 116; *see also* BAVINGTON, *supra* note 3, at 79.

142. *See* Murray, *supra* note 106.

143. *Id.*

144. *See Usain Bolt Biography, available at* http://usainbolt.com/bio/ (last visited Mar. 6, 2019).

145. *See id.*

146. Like other athletes who can slam dunk, play soccer like they are dancing, and win a record-breaking 28 gold medals, Semenya has elevated the bar of speed toward which all women runners can gaze, and hope to one day beat. Casey Legler, *Some Of Us Are Born This Way: Female Athletes and Testosterone Limits*, THE CUT (May 3, 2019), *available at* https://www.thecut.com/2019/05/the-hypocritical-policing-of-caster-semenyas-body.html (last visited July 5, 2019).

147. "These genetic advantages, coupled with discipline and hard work, made me unstoppable in the water. Michael Phelps has a similar naturally occurring advantage, and Ian Thorpe here in Australia was so well known and celebrated for how disproportionately big his feet where that his nickname was 'Flippers.' All of us, even me as an unruly, irreverent

Furthermore, male athletes with testosterone levels notably above the upper limit of the "normal" range of male testosterone are permitted to compete without having to satisfy any medical criteria, undergo any medical examination, or undergo treatment as a precondition to eligibility.[148]

Here, however, female athletes exhibiting levels of testosterone that are not "normal" and present minimal advantage, are prohibited from competition by these regulations. As a result, these regulations are contrary to the IAAF constitution, and in no way encourage participation in the sport by females with this condition. In fact, the regulations are the opposite, and specifically discriminate against only woman athletes who uncoincidentally belong to non-western countries, therefore violating the IAAF constitution. The objective of the regulations is to create a level playing field yet, there has not been a rational connection made between the regulations and that objective since men are allowed to have naturally occurring characteristics that provide a competitive advantage without restrictions. Thus, only women athletes are being targeted because of their gender and these regulations are violative of the IAAF constitution and should be declared void.

D. The Regulations Violate Article 2 of the Universal Declaration of Human Rights

Article 2 states,

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or **international status of the country or territory to which a person belongs**, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.[149]

Because there are no objective procedures to determine which athletes to subject to hyperandrogenism testing, this allows the IAAF to target specific female athletes.[150] "This regulation is about targeting and impeding a few exceptional women of color from the global south,

athlete, were celebrated. One difference I cannot help but notice between myself, Phelps, and Thorpe versus Caster, is whiteness." *Id.*

148. *Chand, supra* note 1, ¶ 114.

149. Universal Declaration of Human Rights, G.A. RES. 217A (III) U.N. DOC. A/810, AT ART. 2 (1948) (emphasis added).

150. *See* BAVINGTON, *supra* note 3, 148-49, 158.

especially Caster Semenya."[151] Because of society's flawed ideal of what a women should be and what characteristics she should possess, Caster Semenya is de-feminized to the point where the only explanation for her successes is that she is a man.

The IAAF chose to believe Semenya, a female runner from South Africa, could only improve her times as rapidly as she did, with an advantage, and the fact that she trained and worked hard could not be the answer.[152] To the IAAF, these accomplishments by Semenya were so illogical that they jumped to the conclusion that she cannot be a woman and that she needed to undergo sex testing.[153] This is supported by the IAAF drafting the 2018 regulations to include hyperandrogenism testing and prohibitions on every event Caster Semenya participates in, even if their own flawed study did not concur.

On the other hand, Caucasian female athletes in other competitive sporting events, who dominate events similarly to Semenya, have not been subjected to degrading treatment that Semenya or Chand face. For example, Katie Ledecky, an Olympic swimmer from the U.S who is Caucasian, wins races by a larger margin than Semenya, and even produces times that would be competitive for elite men.[154] But Ledecky's gender is never being scrutinized on international platforms, and there are no headlines classifying her as too "muscular" or stating "she is not a woman."[155] Yet, here we are dealing with women from non-western countries dominating in their event similar to Ledecky, but are being heavily regulated and even prohibited from competition. Semenya's coach John Irven stated in an interview that "as much as she needs athletics, South African Sports need her more," and of course the IAAF

151. *See* Katrina Karkazis & Rebecca Jordan-Young, *The treatment of Caster Semenya shows athletics' bias against women of colour*, THE GUARDIAN (Apr. 26, 2018), *available at* https://www.theguardian.com/commentisfree/2018/apr/26/testosterone-ruling-women-athletes-caster-semanya-global-south (last visited Jan. 29, 2019); *see also* Huber, *supra* note 46.

152. The decade in the making legal standard announced boils down to Caster Semenya can't run because she has the characteristics of Caster Semenya. In other words, she's just too good, so she must be stopped in some way. Dennis Young, *The Only Point Of Track's Dumb New Testosterone Rules Is To Make It Illegal To Be Caster Semenya*, DEADSPIN (Apr. 26, 2018), *available at* https://deadspin.com/the-only-point-of-track-s-dumb-new-testosterone-rules-i-1825546141 (last visited Mar. 3, 2019).

153. SAMUELS, *supra* note 63.

154. Emma Gray, *Stop Attributing The Success Of Women Olympians To Men*, HUFF POST (Aug. 8, 2016), *available at* https://www.huffingtonpost.com/entry/women-olympians-dont-need-men-to-be-badass_us_57a87489e4b03ba68012ccbb (last visited Mar. 3, 2019).

155. *Id.*

could not have such an athlete from a nonwestern country dominating.[156]

The IAAF is no stranger to targeting successful female runners from non-western countries.[157] For example, Dutee Chand, the first runner to challenge these discriminatory regulations, is an Indian runner who grew up below the poverty line, and at age eighteen became the face of India as it related to women's track and field.[158] In addition, Semenya was an unknown runner from a rural village in South Africa which is referred to as "nowhere."[159] She ran with a rural running club that was impoverished and could not provide equipment or even shoes to its runners. Certainly, athletes from countries such as the United States or Germany would not be practicing under these conditions or running into these types of issues. The logical conclusion is that runners from Western countries with access to better opportunities have their athletes come out on top every time, yet these women completely shatter that notion.[160] Nevertheless, within a year of official racing Semenya became a powerhouse and put South African track on the map, by winning a gold medal in the 800m at the 2009 Berlin games.[161]

Specifically, South African runner Semenya and Indian runner Chand are both female athletes from non-western countries who were chosen to be subjected to these tests through speculative observations. Both runners are young talented women who burst into the international spotlight by winning events that they were not expected to at such a young age, representing countries that are not usually standing on the winning podiums at these competitions.[162] After winning a gold medal

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156. Ben Smith, *Caster Semenya: 'What I Dream of is to become Olympic Champion'*, BBC (May 19, 2015), *available at* https://www.bbc.com/sport/athletics/32805695 (last visited July 24, 2019).

157. Santhi Soundarajan, was a 25-year-old Track and Field runner from southern India. In 2010, she dominated in the 800m and the media noted her success was even more impressive given her roots as a member of India's impoverished "untouchable caste." The media noted that she wasn't just fast; she also had a deep voice and a flat chest. As a result, the athlete was subjected to a sex testing after her win, and her failed results were leaked to the media. She was subsequently rejected by the local sports federations, stripped of her silver medal, tormented by ongoing scrutiny and unbearably embarrassed, so she attempted suicide. Padawer, *supra* note 4.

158. *Id.*

159. Greene, *supra* note 10.

160. *See* Wilde, *supra* note 41; *see also* Schweinbenz, *supra* note 41; *see also* Minichino, *supra* note 41.

161. Greene, *supra* note 10.

162. Faith Karimi, *South Africa's Semenya makes Olympics debut 3 years after gender firestorm,* CNN (Aug. 8, 2012), *available at* https://www.cnn.com/2012/08/08/world/europe/olympics-semenya-debut/index.html (last visited Mar. 3, 2019).

in the women's 800m at the 2009 world championship, complaints arose regarding Semenya's masculine physique. A comment was also made stating "these kinds of people should not run with us... For me, she is not a woman. She is a man."[163] This hatred towards female athletes that do not fit into the societal definition of what a woman is, which is perpetuated even by other women, contributes to the stigma that female athletes have to be and look a certain way. This shows that she is being targeted directly because of her gender and possibly because of where she is from, and the IAAF feeds into these stereotypes through subjecting these females to discriminatory regulations.

The area in which Semenya is from is a poor rural community where she would not have access to qualified doctors to enhance her performance by changing her gender identity, nor would they be able to subject her to testing to decrease testosterone and bring it within the range of the IAAF regulations.[164] In addition, when these regulations were first published in 2011, it was reported that the only athletes impacted by these testosterone regulations were four female athletes ages eighteen to twenty-one that were from rural regions developing countries.[165] These women were taken away to France for invasive evaluations.[166]

However, the only two women who have challenged these regulations were Chand and Semenya.[167] Semenya and Chand are not the only successful female runners from non-western countries who are experiencing issues because of these discriminatory regulations.[168] Once Chand found out about Semenya she stated, overwhelmed with emo-

163. Ariel Levy, *Either/Or: Sports, sex, and the case of Caster Semenya*, NEW YORKER. (Nov. 30, 2009), *available at* https://www.newyorker.com/magazine/2009/11/30/eitheror (last visited Feb. 2, 2019); *see* White, *supra* note 47.

164. TSHISALIVE, *When I pee, I pee like a woman, says Caster Semenya*, TIMES LIVE (July 25, 2017), *available at* https://www.timeslive.co.za/tshisa-live/tshisa-live/2017-07-25-when-i-pee-i-pee-like-a-woman-says-caster-semenya/ (last visited Feb. 3, 2019).

165. *Id.*

166. Juliet Macur, *Fighting for the Body She Was Born With*, N.Y. TIMES (Oct. 6, 2014), *available at* https://www.nytimes.com/2014/10/07/sports/sprinter-dutee-chand-fights-ban-over-her-testosterone-level.html (last visited Feb. 3, 2019).

167. Much of the debate about female athletes and hyperandrogenism has focused on Semenya, winner of the 800m at the 2012 and 2016 Summer Olympics. *See* Longman, *supra* note 138.

168. Young, *supra* note 152. At the London Olympics, four female athletes all eighteen to twenty-one years old and from rural areas of developing countries, were flagged for high levels of natural testosterone. Each of them subsequently had surgery to remove internal testes, which produce testosterone, as well as procedures such as feminizing vaginoplasty, estrogen replacement therapy and a reduction in size of the clitoris.

tions, "Look, I'm not alone. There are other people like me."[169] Unfortunately, the fact that there are others like Chand seems to be the problem, and the IAAF as well as the IOC stated it as such.[170] They fear that nations will go out and find 'these women' that are like Caster Semenya, muscular and powerful that do not fit in with western societies feminine ideal where women are supposed to be dainty and petite.[171] Furthermore, the regulations have only impacted the careers of two female athletes from non-western countries, and the 2018 regulations specifically were drafted to target Caster Semenya, and prevent her from running the 400, 800, and 1500m.[172] As previously stated the science indicates that the category of hammer throw, which is dominated by throwers of a western country, provides the most competitive advantage for females with hyperandrogenism, yet these events are not regulated. On the contrary, here, Semenya's main events show that females with hyperandrogenism have very minimal competitive advantages but are extensively regulated.

These regulations make a distinction between female and male athletes, specifically only targeting female athletes for a naturally occurring difference, as well as target runners succeeding from non- western spaces and thus is violative of Article 2 of the universal declaration of human rights. As a result, the regulation should be declared void.

VI. THE REGULATIONS SUBJECT CASTER SEMENYA TO INHUMAN[173] AND DEGRADING TREATMENT AND VIOLATE ARTICLE 5 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[174] To degrade is to cause a loss of self-respect or to humiliate, both of which happened to Dutee Chand as well

169. Macur, *supra* note 166.

170. *See* Conference on the Eligibility to Participate in Women's Sports, *available at* https://www.up.ac.za/tukssport/news/post_2723776-invitation-to-a-conference-on-eligibility-to-participate-in-womens-sport (last visited Aug. 1, 2019).

171. *See id.*

172. Niler, *supra* note 127.

173. "I will not allow the IAAF to use my body again. The IAAF used me in the past like a human guinea pig to experiment with how the medication they required me to take would affect my testosterone levels." Kate Seamons, *Caster Semenya: They Used Me Like A 'Guinea Pig,'* NEWSER (June 18, 2019), *available at* https://www.newser.com/story/276703/caster-semenya-they-used-me-like-a-guinea-pig.html (last visited Aug. 1, 2019).

174. Universal Declaration of Human Rights, *supra* note 149.

as Caster Semenya at the hands of the IAAF.[175] For example, news that Semenya was required to take a sex verification test was revealed immediately after she won gold at the World Athletics Championship.[176] The IAAF said it had ordered gender tests because of Semenya's muscular build and rapid improvement in times which prompted doping concerns.[177]

The IAAF stated that the tests were required not because of doping concerns but because the sporting body wanted to determine whether she had an "unfair advantage."[178] As a result, instead of attending what is normally the celebratory news conference after such an incredible feat, Semenya was forced into hiding, as fellow athletes, and various commenters on social media had a field day questioning her gender.[179] Because of the leaked test results, Semenya was highly scrutinized and criticized across an international platform. Comments were made regarding her body, muscular physique, her deep voice, her flexed biceps pose, and her choice in wearing long shorts to run in, instead of the sexist bikini shorts traditional women runners are supposed to compete in.[180] Furthermore, media outlets wrote stories with headlines such as "Could This Women's World Champ Be A Man?"[181]

In addition, after being subjected to invasive sex testing by doctors, Chand faced immense pressure to either change her body to conform to the rules or quit the sport.[182] "I cried for three straight days after reading what people were saying about me. They were saying, 'Dutee: Boy or girl.'"[183]

In turn, this contributes to their athletic experiences' amounting to failures because they didn't conform to traditional notions of femininity that are expected of female athletes.[184] This psychological and physical disturbance all being pushed upon seventeen year-old Chand, a young Olympian simply trying to put her country on the athletic map as well as

175. *See* Macur, *supra* note 166; *see* Padawer, *supra* note 4.
176. Padawer, *supra* note 4.
177. *Id.*
178. *See id.*
179. *Id.*
180. *Id.*; Jackson, *supra* note 29.
181. Padawer, *supra* note 4.
182. *See id.*
183. Macur, *supra* note 166.
184. Greene, *supra* note 10.

do what she loves.[185] "It's been eight years since Caster Semenya was subjected to gender verification tests that made international headlines, but for the athlete, the pain and humiliation is etched in her memory."[186] In fact, Semenya spoke out and stated during this process that "I have been subjected to unwarranted and invasive scrutiny of the most intimate and private details of my being."[187] In addition, at the London Olympics in 2012, an opponent of Semenya's, Mariya Savinova, questioned Semenya's gender with a dismissive, "[j]ust look at her."[188]

The IAAF regulations regarding hyperandrogenism spell out the process of assessment for hyperandrogenism in meticulous detail, emphasizing confidentiality and professionalism at every step.[189] However, it is clear that from the IAAF's breach of confidentiality regarding the athletes' being subjected to sex tests contributed to the loss of respect from their competitors as well as deep humiliation.[190] Furthermore, the degradation did not just stem from Semenya's competitors, but she was also forced to take heat from commentators who have commented things like she has a "package" swinging between her legs, or even going so far as to call Semenya an "it" or "he."[191] This is extremely cruel and degrading as well as damaging to Semenya's career.

After it was revealed that Semenya would have to undergo sex testing, media outlets sensationalized this story. Some media outlets tried to "recuperate" Semenya by photoshopping here in more feminine clothes. For example, Semenya was featured in a cover story for the popular South African magazine *You,* in which they photoshopped her in a dress with makeup on and added various quotations regarding fem-

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185. *Gender Tests To Remain Private Matter*, ESPN (Nov. 19, 2009), *available at* http://www.espn.com/espnw/news-commentary/article/4669920/caster-semenya-keep-gold-gender-tests-remain-confidential (last visited Feb. 2, 2019).

186. TSHISALIVE, *supra* note 164.

187. Padawer, *supra* note 4.

188. Andrew, *supra* note 62.

189. SAMUELS, *supra* note 63.

190. Semenya's private life was headlining news for weeks after winning the 800m race in August 2009. She underwent- gender- verification tests to prove she is a woman, and medical professionals leaked those results to the public. The International Association of Athletics Federation has invaded her privacy, broken confidentiality, and challenged her identity. Emily Cooper, *Gender Testing in Athletic Competition— Human Rights Violations: Why Michael Phelps is Praised and Caster Semenya is Chastised*, 14 J. GENDER RACE & JUST. 233 (2010-2011).

191. Commentors have declard, "She looks like a bloke, sounds like a bloke, has more muscles than any female runner since the days of the East Germans and even seems to have a package swinging between her legs when 'she' runs." *See* SAMUELS, *supra* note 63, at 201.

ininity that Semenya had supposedly spoken as a reaction to the photo.[192] For example, " I'd like to dress up more often and wear dresses, but I never get the chance; "I'd also like to learn to do my own makeup"; and "Now that I know what I can look like, I'd like to dress like this more often."[193]

It was never confirmed whether Semenya agreed to this, said any of these things, or actually felt that way, but it can be argued that this was done by a magazine from her home Country to combat the idea of her being a man, and to familiarize the world with a more feminine side of Caster Semenya. Contrarily, other media outlets focused on headlining photos of Semenya in baggy "boys" sporting clothes, no makeup, and cornrows.[194] To have your gender identity and sense of self questioned solely for being born with natural traits is truly degrading, humiliating and disheartening.[195] Even more so when you have to defend your sex on a global scale. In fact, Caster Semenya stated "it felt like the entire world had seen her stripped naked."[196] All of this treatment, results from the implementation of these discriminatory regulations, and negates the purpose of the sport.

The only way around competing with hyperandrogenism was if they took hormone-suppressing drugs or had surgery to limit the amount of testosterone their bodies produced.[197] In an interview, Caster states "I was born like this and I don't want any changes," which makes it clear that these regulations are forcing her to change the way in which she was born.[198] While the Universal Declaration of Human Rights states that "No one shall be subjected to torture or to cruel, inhuman

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192. *Id.* at 200.

193. *Id.*

194. Cornrows are an ancient traditional African style of hair grooming, in which the hair is braided very close to the scalp. It is a hairstyle traditionally worn by men, however depending on what part of the country you are in, it's a style worn by men and women.

195. SAMUELS, *supra* note 63, at 200 (A story in 2009 asserting that leaked medical results showed that Semenya had "male sex organs and no womb or ovaries.").

196. TSHISALIVE, *supra* note 164.

197. Caster and others have argued that the I.A.A.F.'s rules will force some women to undergo hormone therapy that could adversely affect their health; will be humiliating; will disproportionately affect women from developing nations who do not conform to Western standards of femininity; and will ultimately lead to some elite women quitting the sport." Jeré Longman, *Track's New Gender Rules Could Exclude Some Female Athletes*, N.Y. TIMES (Apr. 25, 2018), *available at* https://www.nytimes.com/2018/04/25/sports/caster-semenya.html (last visited Aug. 1, 2019).

198. *Caster Semenya Q & A: Who is she; what is DSD; why is her case important*, BBC (May 1, 2019), *available at* https://www.bbc.com/sport/athletics/48114137 (last visited Aug. 1, 2019).

treatment or punishment", here, the regulations require women who have a naturally occurring blood testosterone level higher than five nmol/L to have medically unnecessary hormone therapy to reduce their testosterone levels if they want to be eligible to compete in the female category.[199]

More specifically, female athletes affected must take medication for six months before they can compete, then they must maintain a lower testosterone level.[200] If women refuse to be tested or have hormone therapy, the regulations state that they may only compete in the male category or in a hypothetical, not-yet-created intersex category – both of which would expose women's private sex characteristics to the global public.[201] Female athletes with elevated testosterone levels will essentially face a "choice of no choice."[202] But to force them to take hormone suppressing drugs infringes on these athlete's physical integrity, their rights to economic freedoms and goes against the respect that should be had for one's human dignity.[203] Furthermore, it can potentially be medically unsafe to medicate someone who is not in need of medication. Semenya felt the effects of the unnecessary medication and stated "I was constantly sick" as she was forced to take an avoidable drug that was not needed to function in her everyday life.[204] "A medical treatment is only justified when there is a medical need, and the mere existence of an intersex condition, without the person indicating suffering and expressing the desire for an adequate treatment, does not constitute a medical indication."[205] It is ethically, morally and scientifically unacceptable and should be impermissible to force female athletes to alter their bodies with drugs, particularly when drug usage is explicitly banned from the sport.[206] It has been declared that the practice of sport is a human right, and being forced to undergo medically invasive treatments in order to participate in this sport, is a violation of Article 5 of

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199. Universal Declaration of Human Rights, *supra* note 149.

200. *See* Laurel Wamsley, *Court Rules Against Caster Semnya, Says She Must Lower Testosterone to Compete*, NPR (May 1, 2019), *available at* https://www.npr.org/2019/05/01/719119864/court-rules-against-caster-semenya-says-she-must-lower-testosterone-to-compete (last visited Aug. 1, 2019).

201. Longman, *supra* note 138.

202. *See id.*

203. *S. African Athlete Semenya Appeals Testosterone Ruling*, VOA (May 29, 2019), *available at* https://www.voanews.com/arts-culture/s-african-athlete-semenya-appeals-testosterone-ruling (last visited Aug.1, 2019)

204. Seamons, *supra* note 173.

205. *Id.*

206. *See id.*

the universal declaration of human rights.[207] As a result, the regulations should be declared void.

A. The IAAF Regulations Arbitrarily Interfered with Caster Semenya's Privacy and Violate Article 12 of the Universal Declaration of Human Rights

The issue is whether 2018 hyperandrogenism regulations violate Article 12 of the universal declaration of human rights. "No one shall be subjected to ***arbitrary interference with his privacy***, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."[208] The IAAF has regulations that allow for its members to subject female athletes to testing based on "reasonable grounds" which leaves the organization free reign to discriminate against these female athletes solely because they are not fitting into society's requirements of femininity.[209] In fact, the IAAF regulations relied on deeply problematic stereotypes such as having a "deep voice" to identify athletes with intersex variations, and the 2018 regulations make no mention of criteria for identifying these athletes.[210] Women that have hyperandrogenism, which means they have higher testosterone levels, have characteristics that are not socially and culturally accepted as feminine. Although the IAAF wanted the world to believe that Semenya was being tested due to her rapid progression within a short amount of time, it is known that there is a specific ideal for appearance of a female athlete. Drug testing regulations focusing on testosterone levels leave women with high testosterone levels that result in "male like" characteristics as targets of suspicion.[211] Here, complaints were raised regarding Semenya because of her "masculine appearance" and this triggered her being subjected to sex testing that proved she had hyperandrogenism.[212]

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207. *See* Longman, *supra* note 138; *see also Olympic Charter*, *supra* note 13.

208. Universal Declaration of Human Rights, *supra* note 149 (emphasis added).

209. BAVINGTON *supra* note 3, at 9.

210. *Revoke Discriminatory Athletics Gender Regulations: New Athletics Federation Rules Force Women With Intersex Variations Out of Competition*, HRW (July 26, 2018), *available at* https://www.hrw.org/news/2018/07/26/revoke-discriminatory-athletics-gender-regulations (last visited Mar. 3, 2019).

211. Olsen-Acre, *supra* note 15; *see* Cooky, *supra* note 23.

212. It was made quite from the outset that Semenya's "masculine" appearance was the main reason that she was challenged. Press coverage included many pictures of her at competitions, and her "deep voice and masculine physique," were widely discussed in the media and the blogosphere. Samuels, *supra* note 63; *see also* White, *supra* note 47.

There is no objetive procedure for determining which female athletes to subject to hormone testing. Relying on stereotypes and visual observations to determine which runners should be subjected to these tests is in and of itself arbitrary and violative of Article 12 of the Universal Declaration of Human Rights. In addition, Dutee Chand was pulled from the Commonwealth games at the last minute, because a competitor at the Asian Junior Athletics championship where Chand had won two gold medals requested that she be tested because of her recent success and masculine physique.[213]

It was only after she was arbitrarily subjected to a blood exam upon many other invasive tests, was it determined that Chand did in fact have hyperandrogenism.[214] Similarly, here, it was only after Semenya was arbitrarily subjected to testing and gender verification that it was confirmed she had hyperandrogenism. As previously stated, it was leaked that the reason the IAAF had ordered gender tests for Caster Semenya was because of her muscular build.[215] In fact, details about the testing procedures and purported results were usually reported in the media before they were even communicated to Semenya.[216] Not only was her identity as a women analyzed and scrutinized on international platforms, but to top it off, while her reputation is being dragged through the mud, communication between the IAAF and Semenya was slim to none, often leaving Semenya's focus glued to the television to determine what was going on with the testing status.[217] The fact that the information regarding the investigation into her gender identity was made public, especially since the results had not yet concluded, subjected her to public humiliation, and constitutes an arbitrary interference with her privacy, as well as a direct attack on her honor and reputation, as the tests were only requested due to subjective comments made about her.[218] Therefore, violating Article 12 of the Universal Declaration of Human rights, and the regulations should be declared invalid.

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213. *See* Macur, *supra* note 166.

214. *Id.* Unlike in any previous sex testing, the fact of the testing was made public at the outset, and for the next year Semenya's story unfolded worldwide in excruciating detail. *See also* SAMUELS, *supra* note 63.

214. *Id.*

215. *See* Macur, *supra* note 166.

216. The day before the Berlin championship, Semenya was found glued to the television's coverage about the announced sex tests: "and they were talking about her and she's trying to understand what they're saying. Because nobody has spoken to her, to tell her, look this is what these tests might mean.") SAMUELS, *supra* note 63.

217. *Id.*

218. Hutchinson, *supra* note 44; Andrew, *supra* note 62.

VII. THE IAAF SUCCOMBS TO SOCIETAL PRESSURES OF REGULATING THE FEMALE BODY BY ALLOWING FOR THE IMPLEMENTATION OF DISCRIMINATORY PRACTICES[219]

On May 1, 2019 the IAAF ruled that Caster Semenya would have to take hormones that would lower her naturally occurring testosterone levels in order to "ensure fair competition in women's sports."[220] If she declines, the suppressants she cannot compete in the 800m race at the Olympics as well as other international competitions. Although CAS ruled in favor of the IAAF, it expressed obvious and significant concerns with the implementation of such an unfair and blatantly discriminatory regulation. CAS conveyed concerns about the practical application of the regulations as the implementation of such discriminatory regulations is on its face unfair. CAS explicitly expressed its worries that athletes might unintentionally break the strict testosterone levels set by the IAAF; questions about the advantage higher testosterone gives athletes over 1500m and the mile and the practicalities for athletes of complying with the new rules.[221] In fact, CAS suggested that the IAAF postpone the implementation of the regulations for the 1500m and mile run, as the science the IAAF relied on to pass this regulation is significantly flawed, so flawed other scientists called for the statistics to be retracted.[222] Furthermore, the World Medical Association stands firm against any practice requiring physicians to use their competence and skills for any other purpose than providing medical care in the best interest of their patients and in respect of their dignity," and is in opposition of these regulations.[223] As a result of the IAAF's disregard of the lack of scientific confirmation, and the concerns CAS has expressed regarding the implementation of these regulations, it becomes clear that the IAAF is acting with discriminatory intent and targeting women from non-western countries. The IAAF continues to hide behind the notion that this discrimination is necessary and proportionate to protect fairness in women's sports, however, in the absence of really compelling evidence, something discriminatory can in no way be justifiable.[224] In ad-

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219. Legler, *supra* note 146.

220. *Id.*

221. *See id.*

222. Jackson, *supra* note 29.

223. *Physician Leaders Reaffirm Opposition to IAAF Rules*, WORLD MED. ASS'N (May 15, 2019), *available at* https://www.wma.net/news-post/physician-leaders-reaffirm-opposition-to-iaaf-rules/ (last visited July 24, 2019).

224. *AP Explains: Ruling Against Olympian Caster Semenya*, VOA (May 1, 2019) *available at* https://www.voanews.com/arts-culture/ap-explains-ruling-against-olympian-caster-semenya (last visited July 24, 2019).

dition, the makeup of the board determining these decisions suggests that the IAAF is acting based on discriminatory motives. The fact of the matter is the makeup of the council is not representative of the diverse group of athletes the IAAF is making decisions about.[225]

A. The IAAF's Discriminatory Regulations Continue to Target Female Runners from Non-Western Countries

Thus far, these hyperandrogenism regulations have only impacted rising female athletes from nonwestern countries. Most recently, Burundi's Francine Niyonsaba, and Kenya's Margaret Wambui have come under scrutiny after winning silver and bronze behind Caster Semenya in the 2016 Olympics.[226] The fact of the matter is, Wambui and Nyonsaba both have hyperandrogenism, but only after their dominating performances are their bodies being scrutinized.[227] Francine Niyonsaba put Burundi on the map, by finishing second behind Caster Semenya's record breaking times in the 800m at the world championships in 2016 and 2017. Niyonsaba's times and dominating performances slate her as Caster Semenya's closest rival.[228] Again the argument that forcing some women with naturally occurring conditions to take medication, or undergo surgery is not done to ensure fairness in sport, but rather is a tactic used to allow blatant discrimination against female runners from non- western countries. Ironically, no Caucasian female athletes have come under scrutiny since the proposal of theses hyperandrogenic regulations. Or are there cases that the IAAF has chosen to ignore? The IAAF has records that show numerous athletes who have this condition but has never identified them because confidential medical details are involved. However, we know that the IAAF has made clear that they actually do not care about confidentiality when it comes to medical records, as shown by their actions in leaking Caster Semenya's "confiden-

225. The ruling party of the CAS (the body that litigates grievances brought by athletes to the IAAF and who submitted the final ruling) has 19 members, nine women, only one of whom is a black woman. The majority of the judges are from the global north, almost all of whom have been educated in a former colonial empire like the U.K.

226. Morgan, *supra* note 87.

227. This ruling is very unfair," she said. "I have grown up knowing that I want to do athletics as a career and achieve a lot through it. Why wait for me to establish myself as an 800-meter athlete then tell me that I need to take medication to compete in the same event? *Another female Olympic athlete slams testosterone rules, refuses medication*, NBC (May 22, 2019), *available at* https://www.nbcnews.com/news/sports/another-female-olympic-athlete-slams-testosterone-rules-refuses-medication-n1008691 (last visited July 24, 2019).

228. *Burundi's Francine Niyonsaba reveals she has 'hyperandrogenism,'* REGION WEEK (Apr. 18, 2019), *available* at https://regionweek.com/burundis-francine-niyonsaba-reveals-she-has-hyperandrogenism/ (last visited Aug. 1, 2019).

tial" medical details. What evidence is there to dispute the clear racial argument to be made here; which is that the IAAF may be keeping these records confidential in order to protect white female runners from western countries? This argument is based on the direct actions of the IAAF which show that leveling the playing field is not the primary concern, and in fact these regulations hold a discriminatory intent.

VIII. RULING SUSPENDED

As a result, on June 3, 2019, the federal supreme court of Switzerland ordered the IAAF to immediately suspend the implementation of the eligibility regulation against Caster Semenya, allowing her to compete without restriction in the female category while her appeal is pending.[229] This temporary ruling will stand until the IAAF makes submissions to the court on why the regulations should be kept in place.[230] Semenya has appealed to the Supreme court to permanently overturn the rules, but there has not yet been a date set for this hearing.[231]

IX. CONCLUSION: THE 2018 HYPERANDROGENISM REGULATIONS ARE DISCRIMINATORY ON THEIR FACE AND IN EFFECT, AND THUS SHOULD BE INVALIDATED

Because of society's narrow definition for what is "normal" for the female body, women like Caster Semenya, who do not exhibit characteristics that fit this definition are severely scrutinized. The IAAF intentionally targeted not only Indian runner Dutee Chand in 2015, but also South African 800m runner Caster Semenya for discriminatory reasons focused on their masculine physique as female athletes, as well as the non- western countries they represent.[232] The IAAF relies merely on stereotypes and profiling when identifying which athletes may potentially have hyperandrogenism, and thus in effect, these regulations are discriminatory in nature and a violation of international human rights. Protecting the fairness within the sport is an important and legitimate objective, but it cannot be achieved through the discriminatory means of these regulations the IAAF has implemented. These regulations, as

229. *Caster Semenya IAAF ruling suspended,* eNCA (June 3, 2019), *available* at https://www.enca.com/news/caster-semenya-iaaf-ruling-suspended (last visited Aug. 1, 2019).

230. *Semenya lawyers: IAAF ordered to suspend testosterone rules* (June 3, 2019), *available at* https://www.foxnews.com/world/semenya-lawyers-iaaf-ordered-to-suspend-testosterone-rules (last visited July 31, 2019).

231. *Id.*

232. The questioning of Semenya's gender is based on stereotypic views of the physical features and abilities attributable to women. Such stereotypes demonstrate the extend of patriarchy within the world's sporting community. Cooper, *supra* note 190.

written and in application, single out and punish women simply because they were born different; they punish these athletes for something they cannot control and will only allow them to compete if they undergo medically invasive treatment, none of which are fair options. Furthermore, there are no such standards for men, which directly corroborates the IAAF's discriminatory intent to target Caster Semenya, a non-western runner who doesn't fit into society's feminine ideal. As a result, the 2018 Hyperandrogenism regulations are discriminatory and should be declared invalid.

CUSTOMARY INTERNATIONAL LAW AS A CHECK ON PRESS FREEDOM'S STRONGMEN

Natalie Maier*

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ABSTRACT

In today's society, it is almost impossible to go about the day without consuming a single piece of news. We rely on the press to bring us information that informs our decisions, whether it be what to eat or who to vote for. But not everyone is appreciative of these so-called watchdogs. Authoritarian dictators and their regimes have historically presented a threat to the press, undercutting its basic rights in order to cover up human rights abuses and other serious crimes. The force of these anti-press "strongmen" is effective and, thus far, unmatched. If the right to free press is to be protected, violations must be met with opposing force. The only mechanism strong enough to combat the influence of these individual regimes is customary international law. This note proposes that states employ political and economic sanctions against one another to establish the *opinio juris* element of accountability, thereby further crystalizing a free press in customary international law.

I. INTRODUCTION

In 2017, the independent watchdog organization Freedom House released its annual report on the status of international press freedom.[1] The report found that global press freedom had declined to its lowest point in thirteen years in 2016.[2] Legal analysis of 199 countries and territories included criteria such as constitutional or legal guarantees for freedom of expression, penalties for libel and defamation, the existence and ability to use freedom of information legislation, the independence of judiciary and regulatory bodies, and the ability for media and journalism organizations to operate freely.[3] Researchers also looked at the political environment of each country, evaluating the "degree of political

1. Michael J. Abramowitz, *Press Freedom's Dark Horizon*, FREEDOM HOUSE, *available at* https://freedomhouse.org/report/freedom-press/2017/press-freedoms-dark-horizon (last visited Mar. 7, 2019).

2. *Id.*

3. *Methodology, Freedom of the Press 2017*, FREEDOM HOUSE, *available at* https://freedomhouse.org/report/freedom-press-2017-methodology (last visited Mar. 7, 2019).

influence" current administrations have over news outlets.[4] Collectively, the findings demonstrated that the decline is now occurring not only in authoritarian governments, but also in democracies.[5] In the thirty-eight years that Freedom House has been monitoring the global press, the United States is more prominent in the global debate on the subject than ever before.[6] President Donald Trump has used familiar political rhetoric to antagonize the media, resembling that of dictatorships like present-day Philippines, Adolph Hitler's Nazi Germany, and Joseph Stalin's Russia. Domestic lawsuits over American journalists' accessibility to information have made international news.[7] Recent attacks on journalists overseas, like the murder of *Washington Post* writer Jamal Khashoggi in Istanbul, have positioned the U.S. as complacent toward such offenses after leadership failed to condemn Saudi Arabia for its involvement.[8]

A. Issue: Absence Of Customary International Law Emboldens Anti-Press Strongmen

The biggest threat to press freedom, both today and historically, is the presence of anti-press "strongmen" who use nationalist rhetoric and delegitimization methods to strip the press of legal and social protection.[9] A lack of binding international law has allowed such actors to go unchecked, empowering them to achieve serious undercuts to an otherwise widespread ideology that freedom of the press is a basic human right. Declarations and treaties have proven unsuccessful because of their lack of enforceability and failure to reach non-party states. The only force more powerful than these seemingly unstoppable individual dictatorships is customary international law. Without requiring any express consent or ratification by parties, customary international law

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4. *Id.*

5. Jennifer Dunham, *Press Freedom's Dark Horizon,* FREEDOM HOUSE, *available at* https://freedomhouse.org/report/freedom-press/freedom-press-2017#overview-essay (last visited Mar. 7, 2019).

6. Michael J. Abramowitz, *Hobbling a Champion of Press Freedom*, FREEDOM HOUSE, *available at* https://freedomhouse.org/report/freedom-press/freedom-press-2017#overview-essay (last visited Mar. 7, 2019).

7. CNN v. Trump, Knight Foundation v. Trump, 302 F.Supp.3d 541 (2018).

8. Grace Sparks, *CNN Poll: Majority say US response to Khashoggi's murder hasn't been tough enough*, CNN (Dec. 13, 2018), *available at* https://www.cnn.com/2018/12/13/politics/poll-khashoggi-response/index.html (last visited Mar. 7, 2019).

9. *The Global slump in press freedom*, THE ECONOMIST (July 23, 2018), *available at* https://www.economist.com/graphic-detail/2018/07/23/the-global-slump-in-press-freedom (last visited Mar. 7, 2019).

would bind any actor that violates the understood right. In order for the right to exercise free press to fully crystalize as customary international law, there must be a widespread state practice of an established right, and a subjective understanding by the states that they are bound by a duty to enforce the law in question (known as "*opinio juris*"). While widespread state practice of a free press already exists via declarations and treaties, the second element of *opinio juris* is not fulfilled due to current gaps in legal framework. Therefore, this note proposes that states employ political and economic sanctions against one another in response to violations of press freedom, in order to establish the element of *opinio juris* and crystalize customary international law of press freedom. Because of deteriorating state of press freedom on a global scale, many scholars feel that the right to a free press is now a luxury limited to the west. Therefore, with an urgent need for customary international law, the responsibility is heavily on western powerhouses like the United States to be a leader in solidifying the global right to a free press.[10]

Part I of this note has briefly outlined the context leading to a call for crystalized customary international law of free press. Part II of this note looks back at the historical development of the right to a free press and explores the current state of press freedom by region. Additionally, Part II reviews the extensive body of United States common law that demonstrates the country's long-lasting appreciation for the right to a free press. Part III takes an extensive look at press freedom's biggest offenders of past and present – Adolph Hitler, Joseph Stalin, Vladimir Lenin, Rodrigo Duterte, Mohammed Bin Salman, and Donald Trump. This note will analyze how these "strongmen" have used common tactics to chip away at press protections, given a lack of counterbalance from effective international protections for press freedom. Finally, Part IV of this note will propose that states employ political and economic sanctions in response to violations of press protections, thereby fulfilling the *opinio juris* requirement necessary to crystalize customary international law of a free press. This note will review the existence of the first element, widespread state practice, via declarations and treaties speaking to the desire for a free press. Further, this note will explain how gaps in current legal framework have left the second element unfulfilled, ultimately allowing anti-press regimes to be an unmatched force.

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10. *Id.*

II. HISTORY OF A RIGHT TO A FREE PRESS

The struggle to establish and support free press internationally is not new. The United Nations has called journalism one of the most dangerous professions in the world.[11] But it was centuries ago that efforts first began to legislate and codify laws to establish a free press, amidst pressure to protect the free and independent dissemination and receipt of information.[12]

In 1644, British poet John Milton published his pamphlet *Areopagitica*, in response to a law that the parliament had passed requiring the government to approve of and license all books for publication.[13] In the pamphlet, Milton advocated that the free circulation of ideas was essential to moral and intellectual development.[14] The piece was one of the first to address the government's influence on people's dissemination of information.[15]

One hundred years later, in Sweden, parliament narrowly passed the Freedom of the Press Act, now recognized as the world's first law supporting press freedom.[16] The law, passed in 1766, abolished the Swedish government's role as a censor of printed matter, and it allowed for the official activities of the government to be made public.[17]

Around that same time, in the United States, Massachusetts Chief Justice William Cushing felt the newly-established America needed legislation of its own to codify protections for the press.[18] On February 18, 1789, Cushing wrote a detailed letter to John Adams concerning the "liberty of the press."[19] At the time, Article XVI of the Massachusetts Declaration of Human Rights read that "the liberty of the press is essen-

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11. Natalia Mazotte, *UN names journalism one of the most dangerous professions in the world*, KNIGHT CTR. FOR JOURNALISM IN THE AMERICAS, *available at* https://knightcenter.utexas.edu/blog/un-names-journalism-one-most-dangerous-professions-world (last visited Mar. 7, 2019).

12. Lennart Weibull, *Freedom of the Press Act of 1766*, ENCYCLOPEDIA BRITANNICA, *available at* https://www.britannica.com/topic/Freedom-of-the-Press-Act-of-1766 (last visited Mar. 7, 2019).

13. Jay Black, *Areopagitica in the Information Age*, 9 J. MASS MEDIA ETHICS 131 (1994).

14. *See generally* JOHN MILTON, AREOPAGITICA (1644).

15. Kathleen Kuiper, *Areopagitica*, ENCYCLOPEDIA BRITANNICA, *available at* https://www.britannica.com/topic/Areopagitica (last visited Mar. 7, 2019).

16. Weibull, *supra* note 12.

17. *Id.*

18. Original draft of letter from William Cushing, Chief Justice, to John Adams (Feb. 18, 1789) in Mass. L.Q. (Oct. 1942) at 12 [hereinafter Cushing Letter].

19. *Id.*

tial to the security of freedom in a state: it ought not, therefore, to be restrained by this commonwealth."[20] Cushing wondered whether a libel directed against public officeholders could be punishable under the clause.[21] He wrote, "suppressing this liberty by penal laws will it not more endanger freedom than do good to government?"[22]

Adams' reply conveyed a larger constitutional purpose for the press.[23] The exchange as a whole illuminated that the founding generation approached liberty of the press as a crucial instrument to the success of the American public.[24]

Sure enough, just two years later, the United States codified the concept in its First Amendment, asserting, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[25]

But protections under the First Amendment would not effectively vest until centuries later, with the development of common law. History has shown the tensions between these ideological protections and the reality of lacking security for journalists.

Global codification did not occur until 1948, when the United Nations attempted to establish an international standard of press freedom in Article 19 of the Universal Declaration of Human Rights.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[26]

Many countries have adopted laws similar to the United States' First Amendment. But, even in countries where a free press is constitutionally protected, anti-media leadership threatens the legal security of today's journalists.

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20. Mass. Const. art. XVI (annulled 1948).

21. Cushing Letter, *supra* note 18.

22. *Id.*

23. Patrick J. Charles and Kevin Francis O'Neill, *Saving the Press Clause from Ruin: The Customary Origins of a "Free Press" as Interface to the Present and Future*, UTAH L. REV. 1691, 1694 (2012).

24. *Id.* at 1695.

25. U.S. CONST. amend. I.

26. G.A. Res. 19, Universal Declaration of Human Rights (Dec. 10, 1948).

A. Freedom of Press by Country

According to Freedom House's 2017 report, only 13% of the world enjoys a free press.[27]

1. Africa

Eritrea and Egypt have both landed on the Reporters Without Borders (RSF) list of worst offenders of press freedom.[28] Eritrea has not allowed any independent media since President Isaias Afwerki shut it down in 2001.[29] As of December 2018, there were sixteen journalists imprisoned in Eritrea – more than any other sub-Saharan country.[30] It is unclear whether some of the imprisoned journalists are even still alive.[31] In Egypt, twenty-five journalists are currently imprisoned, with more than twenty of those cases occurring in the six months leading up to the country's presidential election in March 2018.[32] Rights groups believe the surge in arrests was a part of a campaign to silence dissenting voices before elections.[33] President Abdel Fattah el-Sisi has suggested that speaking against the government or police is high treason, and he has opened up telephone lines for citizens to report "false news." The government has also increased online censorship, blocking over 496 websites between May 2017 and February 2018. In Tunisia, despite press freedom being enshrined in the 2014 constitution, the country's government uses much older penal codes against the press to target those in the media who criticize of the government.[34] Rights groups are concerned that the country's democracy is at risk considering the rollback

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27. Abramowitz, *supra* note 1.

28. *2018 World Press Freedom Index*, REPS. WITHOUT BORDERS, *available at* https://rsf.org/en/ranking (last visited Mar. 7, 2019) [hereinafter *2018 World Press Freedom Index*].

29. Elana Beiser, *Hundreds of Journalists jailed globally becomes the new normal*, COMMITTEE TO PROTECT JOURNALISTS (Dec. 13, 2018), *available at* https://cpj.org/reports/2018/12/journalists-jailed-imprisoned-turkey-china-egypt-saudi-arabia.php (last visited Mar. 7, 2019).

30. *Id.*

31. *Id.*

32. Egypt's jailed journalists: in numbers, ALJAZEERA (May 3, 2018), *available at* https://www.aljazeera.com/news/2018/05/egypt-jailed-journalists-numbers-180502195324128.html (last visited Mar. 7, 2019).

33. *Id.*

34. Dokhi Fassihian, *Democratic Backsliding in Tunisia: The Case of Renewed International Attention*, FREEDOM HOUSE, *available at* https://freedomhouse.org/report/special-reports/democratic-backsliding-tunisia-case-renewed-international-attention (last visited Mar. 7, 2019).

of press liberties as another election cycle approaches.[35] In Liberia, investigative journalist Rodney Sieh was sentenced to 5000 years in prison under an egregious libel charge in 2013.[36] At the intense trial before the Liberian Supreme Court, Sieh told the Justices that they were "behaving like dictators."[37] Overall, the status of press freedom varies considerably by country across the African continent.[38] There are more African countries in the bottom half of RSF's index than in the top, and Africa's largest states by population are all ranked in the bottom half.[39]

2. Asia and the Middle East

Many Asian countries have also adopted legislation formally guaranteeing freedom of speech, but enforcement appears lacking in many instances involving the press. In Burma, Cambodia, Vietnam, and Thailand, blogging journalists are censored for dissenting opinions.[40] In Singapore and Malaysia, libel and internal security laws are used against journalists.[41] In the Philippines, under the regime of Rodrigo Duterte, journalists have been imprisoned and killed.[42] In China, many media outlets are owned by the communist-party-led-government.[43] Despite the Constitution of the People's Republic of China reading that its citizens "enjoy freedom...of the press," many outlets are banned from using social media.[44] Chinese writer and activist Liu Xiaobo was

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35. *Id.*

36. RODNEY SIEH, JOURNALIST ON TRIAL (2018).

37. *Id.*

38. John Campbell, *Press Freedom Varies Considerably Across Africa*, COUNCIL ON FOREIGN REL. (Apr. 26, 2018), *available at* https://www.cfr.org/blog/press-freedom-varies-considerably-across-africa (last visited Mar. 7, 2019).

39. *Id.*

40. Freedom Plummets in Cambodia, RADIO FREE ASIA (Jan. 13, 2011), *available at* https://www.rfa.org/english/news/cambodia/freedom-01132011155053.html (last visited Mar. 7, 2019); *see also* Mike Nizza, *Burmese Government Clamps Down on the Internet*, N.Y. TIMES (Sept. 28, 2007), *available at* https://thelede.blogs.nytimes.com/2007/09/28/burmese-government-clamps-down-on-internet/ (last visited Mar. 7, 2019).

41. Ahmad Masum & Md Rejab Md Desa, *Media and the Libel Law: The Malaysian Experience*, INT'L CONF. ON COMM. & MEDIA (Oct. 18, 2014), *available at* https://cyberleninka.org/article/n/211400 (last visited Mar. 7, 2019).

42. *Case Files: The 12 Journalists Killed under the Duterte Administration*, PHILIPPINE CTR. FOR INVESTIGATIVE JOURNALISM (Nov. 23, 2018), *available at* https://pcij.org/stories/case-files-the-12-journalists-killed-under-the-duterte-administration/ (last visited Mar. 7, 2019).

43. Beina Xu and Eleanor Albert, *Media Censorship in China*, COUNCIL ON FOREIGN REL. (Feb. 17, 2017), *available at* https://www.cfr.org/backgrounder/media-censorship-china (last visited Mar. 7, 2019).

44. *Id.*

incarcerated repeatedly throughout his lifetime for his writing advocating for an end to the communist party.[45]

Press freedom advocacy groups have repeatedly listed Myanmar as one of the worst countries in the world for journalists.[46] In 2018, the country made international news for its imprisonment of Reuters journalists Wa Lone and Kyaw Soe Oo.[47] Despite the country moving from a military dictatorship to an electoral democracy, the government in Myanmar still maintains vigilant control over the media via old and oppressive laws, which it shows no intention of amending.[48] Arrests have under a new telecommunications law that prosecutes peaceful speech.[49] The government's main premise for controlling the media has been to discourage coverage of the crisis in the Rahkine state, where hundreds of thousands of Rohingya Muslims have fled due to mass genocide.[50]

South Korea's constitution also guarantees free press, but the country has strict laws that go into effect approaching an election.[51] The law prohibits speech that supports or criticizes any candidate from either party in the upcoming election.[52] The United Nations Human Rights Commission has expressed concern about the country's deterioration of free speech online.[53]

The Middle East is by far one of the worst regions for journalists.[54] In Iran, an estimated 860 journalists have been imprisoned in the three

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45. Chris Buckley, *Liu Xiaobo, Chinese Dissident Who Won Nobel While Jailed, Dies at 61*, N.Y. TIMES (July 13, 2017), *available at* https://www.nytimes.com/2017/07/13/world/asia/liu-xiaobo-dead.html (last visited Mar. 7, 2019).

46. *RSF Warns Myanmar about threat to world press freedom index ranking*, REPS. WITHOUT BORDERS (Oct. 1, 2018), *available at* https://rsf.org/en/news/rsf-warns-myanmar-about-threat-world-press-freedom-index-ranking (last visited Mar. 7, 2019).

47. John Chalmers, *Special Report: How Myanmar punished two reporters for uncovering an atrocity*, REUTERS (Sept. 3, 2018), *available at* https://www.reuters.com/article/us-myanmar-journalists-trial-specialrepo/special-report-how-myanmar-punished-two-reporters-for-uncovering-an-atrocity-idUSKCN1LJ167 (last visited Mar. 7, 2019).

48. *Dashed Hopes: The Criminalization of Peaceful Expression in Myanmar*, HUM. RTS. WATCH (Jan. 31, 2019), *available at* https://www.hrw.org/report/2019/01/31/dashed-hopes/criminalization-peaceful-expression-myanmar (last visited Mar. 7, 2019).

49. *Id.*

50. Chalmers, *supra* note 47.

51. Stephan Haggard & You Jong-Sung, *Freedom of Expression in South Korea*, 45 J. CONTEMP. ASIA 167 (2014).

52. *Id.*

53. *Id.*

54. *Middle East most dangerous region for journalism*, MIDDLE EAST MONITOR (Apr. 26, 2018), *available at* https://www.middleeastmonitor.com/20180426-middle-east-most-dangerous-region-for-journalism/ (last visited Mar. 7, 2019) [hereinafter MIDDLE EAST MONITOR.

decades since the 1979 Iranian Revolution.[55] At least four of those journalists were killed.[56] *Washington Post* reporter and former Tehran bureau chief Jason Rezaian is suing the country's government after being imprisoned for 544 days under charges of espionage.[57] In Turkey, most mainstream media is owned by relatives or allies of President Erdogan, which means negative news about the country almost never reaches its citizens.[58] Critical journalists are fined or jailed, and many have been forced into self-censorship.[59] On October 2, 2018, *Washington Post* writer Jamal Khashoggi was brutally tortured and killed inside the Saudi consulate in Istanbul.[60] Khashoggi, who once lived in Saudi Arabia, had published various criticisms of the new regime under Crown Prince Mohammed Bin Salman.[61] Intelligence officials in the United States and Turkey later linked the murder directly to Bin Salman.[62] In the kingdom, blasphemy is illegal and punishable by death.[63] Of the twenty worst-ranked countries for press freedom in 2018, all but four were in the Middle East, Asia, or North Africa.[64]

3. Australia

Australia does not explicitly protect freedom of the press in its constitution, but the country's common law recognized freedom of

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55. *Iran jailed hundreds of journalists after 1979 revolution: RSF*, AL JAZEERA (Feb. 7, 2019), *available at* https://www.aljazeera.com/news/2019/02/iran-jailed-hundreds-journalists-1979-revolution-rsf-190207135401749.html (last visited Mar. 7, 2019).

56. *Id.*

57. Rick Gladstone, *Jason Rezaian, Washington Post Reporter, Sues Iran over Imprisonment*, N.Y. TIMES (Oct. 3, 2016), *available at* https://www.nytimes.com/2016/10/04/world/middleeast/iran-jason-rezaian.html (last visited Mar. 7, 2019).

58. Zia Weise, *How Did Things Get So Bad for Turkey's Journalists?*, THE ATLANTIC (Aug. 23, 2018), *available at* https://www.theatlantic.com/international/archive/2018/08/destroying-free-press-erdogan-turkey/568402/ (last visited Mar. 7, 2019).

59. *Id.*

60. *Jamal Khashoggi: all you need to know about the Saudi journalist's death*, BBC (Dec. 11, 2018), *available at* https://www.bbc.com/news/world-europe-45812399 (last visited Mar. 7, 2019) [hereinafter *Khashoggi*].

61. *Id.*

62. *Jamal Khashoggi: CIA 'blames Saudi prince for murder'*, BBC (Nov. 17, 2018), *available at* https://www.bbc.com/news/world-middle-east-46245167 (last visited Mar. 7, 2019).

63. *National Laws on Blasphemy: Saudi Arabia* (n.d.), GEO. U. BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFF. (n.d.), *available at* https://berkleycenter.georgetown.edu/essays/national-laws-on-blasphemy-saudi-arabia (last visited Mar. 7, 2019).

64. *2018 World Press Freedom Index*, *supra* note 28; *see also* MIDDLE EAST MONITOR, *supra* note 54.

speech in *Lange v. Australian Broadcasting Company.*[65] Yet the government has been known to issue gag orders on reporters for covering corruption cases involving Australian parties.[66] Most recently, the country has been at the center of controversy on metadata reform, after journalists' private sources were infiltrated and exposed as a result of lax metadata law.[67]

4. Europe

In RSF's press freedom index, Europe had the most countries in the top half of rankings than any other region.[68] Of the top twenty best countries in the world for press freedom, thirteen are in Europe. The European Convention on Human Rights (in conjunction with the European Court of Human Rights) regulates many of the member countries on issues such as press freedom.[69] For example, recently the court found that extended prison sentences for criminal defamation are disproportionate and have a "chilling effect" on public discussion.[70]

Despite Europe being the continent where press freedom is the safest, it is also the region where press freedom has declined the most in the past year.[71] In democracies like Poland and Hungary, political leaders used influence over public broadcast to shape the media's coverage.[72] In 2016, one of Hungary's most notable newspapers, *Népszabadság,*

65. *Lange v Australian Broad. Co.* (1997) 189 CLR 520 (Austl.).

66. In 2014 the Supreme Court of Victoria issued a blanket media gag order on the reporting of a high-profile international corruption case regarding bribes presented to high-ranking officials of Malaysia, Indonesia and Vietnam by senior executives of the Reserve Bank of Australia in order to secure the adoption of the Australian invented and produced polymer banknote technology. *See* Robert Booth & Rob Evans, *Australian court's gagging order condemned as 'abuse of legal process,'* THE GUARDIAN (July 30, 2014), *available at* https://www.theguardian.com/world/2014/jul/30/australian-court-gagging-order-abuse-legal-process (last visited Mar. 7, 2019).

67. Melissa Clarke, *Metadata laws under fire as 'authority creep' has more agencies accessing your information*, ABC (Oct. 19, 2018), *available at* https://www.abc.net.au/news/2018-10-19/authority-creep-has-more-agencies-accessing-your-metadata/10398348 (last visited Mar. 7, 2019).

68. *2018 World Press Freedom Index*, *supra* note 28.

69. Abramowitz, *supra* note 1.

70. *Paraskevopoulos v. Greece*, COLUM. U. GLOBAL FREEDOM EXPRESSION (2018), *available at* https://globalfreedomofexpression.columbia.edu/cases/paraskevopoulos-v-greece/ (last visited Mar. 7, 2019).

71. *2018 World Press Freedom Index*, *supra* note 28.

72. Bartosz T. Wielinski & Gazeta Wyborcza, *Polish government continues efforts to stifle free media*, EURACTIV (May 11, 2018), *available at* https://www.euractiv.com/

closed and was subsequently sold, along with many other outlets, in murky deals that were suspected to have government ties.[73] Four of the five biggest falls in RSF index were European countries: Malta, Czech Republic, Serbia, and Slovakia.[74]

5. South America

In 2018, Mexico became the world's second deadliest country for journalists, second only to Syria.[75] Eleven journalists were killed, some for their coverage of local politicians' involvement in organized crime.[76] During a referendum vote on Cuba's constitution in February 2019, the Cuban government blocked citizen's access to multiple news websites.[77] The country currently employs a constitutional ban on private ownership of news outlets, thereby enabling total state ownership of media and earning the title of the Western Hemisphere's worst-ranked country for press freedom.[78] In Venezuela, authoritarian president Nicholas Maduro has caused press freedom in the country to significantly decline. Journalists are often targeted and arbitrarily arrested in attempts to minimize their reporting on the economic crisis. In Bolivia, the government prosecutes journalists under charges of "sedition" and "political violence," even driving some to exile. Jamaica is one of the best countries in the region, and even the world, for press freedom. But a proposed data protection act would broadly protect "personal data," including political opinions that are often the subject of reporting.[79]

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section/freedom-of-thought/news/polish-government-continues-efforts-to-stifle-free-media/ (last visited Mar. 7, 2019).

73. Abramowitz, *supra* note 1.

74. *RSF Index 2018: Hatred of Journalism threatens democracies*, REPS. WITHOUT BORDERS, *available at* https://rsf.org/en/rsf-index-2018-hatred-journalism-threatens-democracies (last visited Mar. 7, 2019).

75. *RSF Index 2018: Mixed performance in Latin America*, REPS. WITHOUT BORDERS, *available at* https://rsf.org/en/rsf-index-2018-mixed-performance-latin-america (last visited Mar. 7, 2019).

76. *Id.*

77. *Critical news cites blocked during referendum vote*, COMMITTEE TO PROTECT JOURNALISTS (Feb. 25, 2019), *available at* https://cpj.org/2019/02/cuba-referendum-news-website-internet-blocked.php (last visited Mar. 7, 2019).

78. *2018 World Press Freedom Index*, *supra* note 28.

79. *Jamaica - RSF concerned over proposed Data Protection Act's potentially 'chilling effect' on press freedom*, REPS. WITHOUT BORDERS (May 17, 2018), *available at* https://rsf.org/en/news/jamaica-rsf-concerned-over-proposed-data-protection-acts-potentially-chilling-effect-press-freedom (last visited Mar. 7, 2019).

Across the region, poor economic conditions, violent crime, and populist governments present serious threats to the press.[80]

B. The United States as an Established Leader

Often regarded as "the country with the First Amendment,"[81] the United States has historically been considered a leader in free speech legislation and promotion of free press. The press has been regarded as the fourth pillar of democracy, alongside the three branches of government.

1. A Rich Body of Common Law

Decades of common law have solidified support for a liberal press. The United States Supreme Court's rulings on First Amendment issues have consistently recognized the press and its functions as a vital organ of the democracy.[82] Three of the most important rulings came in *Near v. Minnesota, New York Times v. Sullivan* and *United States v. New York Times.*

In June 1931, the United States Supreme Court addressed a Minnesota gag law that had the effect of censoring local newspapers for content that might otherwise be out of reach under libel or defamation laws.[83] The statute provided that any person "engaged in the business" of regularly publishing or circulating an "obscene, lewd, and lascivious" or a "malicious, scandalous and defamatory" newspaper or periodical was guilty of a nuisance, and could be enjoined for continuing with the activity.[84] The court held that the chief purpose of the guaranty of a free press under the First Amendment was to prevent such restraints on upon publication. In a victory for the Minnesota newspaper, Chief Justice Hughes wrote that under the free press clause of the First Amendment, and with limited exception, government may not censor or prohibit a publication in advance. The liberty of a free press, essential to

80. *Americas*, FREEDOM HOUSE, *available at* https://freedomhouse.org/regions/Americas (last visited Mar. 7, 2019).

81. *See* Hadas Gold, *Annapolis Shooting: a day newsrooms have feared*, CNN BUS. (June 29, 2018), *available at* https://money.cnn.com/2018/06/29/media/capital-gazette-newsroom-safety/index.html (last visited Mar. 7, 2019).

82. Neb. Press Ass'n v. Stewart, 427 U.S. 539 (1976) (Chief Justice Burger noted the important role the press played in the system of checks against public officials, police officers, and courts during criminal trials. The court characterized the press as "the handmaiden of effective judicial administration ... in the criminal process.").

83. Near v. Minnesota, 283 U.S. 697 (1931).

84. *Id.*

the nature of a free state, required protection from prior restraint rather than freedom from censure after publication.[85] Furthermore, the court made clear that the right of a free press was safe from invasion by state action under the due process clause of the fourteenth amendment. The *Near* decision has been called one of the court's first great press cases,[86] and served as a key precedent in the subsequent *Times v. Sullivan* ruling.[87]

While *Near* prohibited proactive censorship of certain publications, citizens who found themselves at the center of a defamatory or libelous story still had a private cause of action after the story had been published. In 1964, the court established a standard that would filter such libel suits, requiring that a public official show that the information was published with actual malice.[88] The court said that the higher standard was employed in light of a "profound national commitment" to debate on public issues and transparency of public officials.[89] The actual malice standard still serves to protect the press from endless libel suits in their critical coverage of public officials. In 1966, the court agreed to extend the reach of the *Sullivan* ruling to public figures, business tycoons and celebrities.[90]

One of the most crucial First Amendment questions that has come before the court has been the balance of protecting press freedom during times of national security. In 1971, in the midst of America's involvement in the Vietnam War, the *New York Times* obtained a copy of an internal Department of Defense report, detailing critical information about the war.[91] These confidential papers would later become known as the "Pentagon Papers."[92] The government sought a temporary injunction

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85. *Id.* at 713.

86. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 90 (1991).

87. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

88. *Id.* During the heat of the Civil Rights movement, The *New York Times* ran a full-page ad for donations to defend Martin Luther King, Jr., on perjury charges. The ad, which contained several minor factual inaccuracies, was critical of the city's police force and their motivation to arrest King. Montgomery city police chief, L.B. Sullivan, brought libel charges against the *Times*, claiming that criticism of the police force reflected on him, personally. In a unanimous decision, Justice Brennan ruled that the target of an allegedly libelous statement must prove that it was made with knowledge or reckless disregard for its falsity.

89. *Id.* at 375.

90. Curtis Publ'g v. Butts, 388 U.S. 130 (1967).

91. N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

92. *Id.*

ordering the *Times* not to publish the documents, claiming that the release of the information contained in the papers would endanger national security. But the Supreme Court held that the government had not overcome the "heavy presumption against" any form of prior restraint of the press. Justices Black and Douglas criticized the vague use of "security" in instances of attempts to infringe on the constitutional protections awarded to journalists via the First Amendment. Without an inevitable, direct, and immediate event imperiling the safety of American forces, prior restraint was not justified. The effect of this particular decision would appear to separate the United States from many other countries where journalists are regularly sanctioned, and even imprisoned, under the guise of "national security."

With a rich body of common law in place, nevertheless the 2016 presidential election marked a shift in climate for the country's media. In the Trump era, landmark press freedom legislation faces the possibility of repeal.[93] Justice Clarence Thomas has suggested revisiting *Sullivan* and opening up libel laws.[94] This new legal vulnerability is one of many results of decades of anti-press ploys by anti-watchdog authoritarian regimes.[95]

III. PRESS FREEDOM'S BIGGEST OFFENDERS AND THEIR COMMONALITIES; NATIONALIST RHETORIC, DELEGIMIZATION, AND ANTI-WATCHDOG MOTIVATION

The world's most notable anti-press strongmen have used two common methods to construct an enemy out of the press, all for one ultimately common goal.[96] First, leaders often use nationalist rhetoric to characterize the media as threat to the state, against which government action must be taken in order to protect the people.[97] Second, leaders use both rhetoric and law to delegitimize the media, usually coming in the form of denied access.[98] This delegitimization signals to the public

93. Hadas Gold, *Donald Trump: we're going to 'open up' libel laws*, POLITICO (Feb. 26, 2016), *available at* https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866 (last visited Mar. 7, 2019).

94. Adam Liptak, *Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling*, N.Y. TIMES (Feb. 19, 2019), *available at* https://www.nytimes.com/2019/02/19/us/politics/clarence-thomas-first-amendment-libel.html (last visited Mar. 7, 2019).

95. Charles & O'Neill, *supra* note 24.

96. *Id.*

97. RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301 (2017).

98. Charles & O'Neill, *supra* note 24.

that the media are "outsiders," unworthy of constitutional protection.[99] These attempts to construct an enemy of the media and disable press freedom are ultimately motivated by the need to cover up crime or corruption, most often taking the form of actual human rights abuses.[100] With the press limited in their role as a "watchdog," such evils are more likely to succeed.

Six notable leaders who have used these common tactics to undercut the press are Adolph Hitler, circa Nazi Germany; Joseph Stalin and Vladmir Putin, in the Soviet Union and modern-day Russia; Rodrigo Duterte in the Philippines; Mohammed Bin Salman in Saudi Arabia; and Donald Trump in the United States.[101] The following portion of this note outlines how each of these leaders have used nationalist rhetoric and signaled delegitimization to infringe upon press freedom in their respective countries. Ultimately, as I will go on to explain, a lack of crystalized customary international law of free press has enabled them all to go unchecked.

A. Adolph Hitler, WWII Nazi Germany

Adolph Hitler and his Nazi regime used some of the most powerful political rhetoric in history, despite its horrific consequences.[102] The press in Germany was a strategic target of such rhetoric. *Lügenpresse*, or "lying press," was a term appropriated by Hitler and the Nazis to weaken opposition to the regime, mostly accusing Jews, communists, and the foreign press of disseminating false news. The Nazi party also tightly controlled interpretation and access to alternative sources.[103] The use of such propaganda was crucial in "defining the enemy," and establishing the press as a threat to the security of the state.[104] This ideology that the press was the enemy of the people has led free press scholars to identify *lügenpresse* as the predecessor to Trump's modern-day "fake news."[105]

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99. *Id.*

100. *Id.*

101. *Id.*

102. KLAUS FISHER, NAZI GERMANY: A NEW HISTORY 141 (1995).

103. *The Press in the Third Reich*, U.S. HOLOCAUST MEMORIAL MUSEUM, *available at* https://encyclopedia.ushmm.org/content/en/article/the-press-in-the-third-reich (Mar. 7, 2019) [hereinafter *Third Reich Press*].

104. *Id.*

105. Alexander Griffing, *A Brief History of 'Lugenpresse,' the Nazi era predecessor to Trump's 'Fake News,'* HAARETZ (Oct. 8, 2017), *available at* https://www.haaretz.com/us-

Hitler also used legal methods to delegitimize the press in Germany. Shortly after coming to power, he established the Propaganda Ministry, in an effort to consolidate control over all forms of mass media.[106] Via the new agency, censorship laws worked to diminish the publication of opposing viewpoints.[107] The Ministry took control of the Reich Association of German Press, which regulated entry into the profession.[108] The new Editor's Law of October 4, 1993, "Schriftleitergesetz," excluded "non-Aryans" from working as journalists.[109] The law also enforced a prior restraint on publication of anything "calculated to weaken the strength" of the regime.[110] Journalists or editors who failed to follow detailed content regulations from the Propaganda Ministry could be seen as "acting with intent to harm the Nazi party," and consequently sent to concentration camps.[111]

Hitler's control of the German press was inarguably a fundamental piece in his strategy to achieve the systematic mass murders of millions of Jews during the Holocaust.[112] For Hitler, the carrying out of a genocidal operation, especially of such magnitude, required the submission and obedience of all citizens of the state.[113] With the press being a so-called watchdog over such atrocities, the media in Nazi Germany be-

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news/the-ominous-nazi-era-precedent-to-trump-s-fake-news-attacks-1.5438960 (last visited Mar. 7, 2019).

106. *Third Reich Press*, *supra* note 103. When Adolph Hitler took power in Germany in 1933, the Nazi party controlled less than three percent of the country's 4700 newspapers. By 1944, only 1100 of those 4700 papers remained. Of those 1100, only half were still in the hands of private or institutional owners, who operated in strict compliance with German press regulations. The Propaganda Ministry subsidized the production of the "People's Radio," designed with few dial positions and a limited range so as not to allow certain censored broadcasts. This way, Hitler's speeches were broadcast over the air, rather than covered by independent newspapers. By 1941, an estimated fifteen million radios had been sold in Germany. *See also Propaganda*, U.S. HOLOCAUST MEMORIAL MUSEUM, *available at* https://www.ushmm.org/propaganda/transcripts/people-radio.html (last visited Mar. 7, 2019).

107. *Control and opposition in Nazi Germany*, BBC, *available at* https://www.bbc.com/bitesize/guides/z2p3k2p/revision/4 (last visited Mar. 7, 2019).

108. *Third Reich Press*, *supra* note 103.

109. *Editor's Law*, U.S. HOLOCAUST MEMORIAL MUSEUM, *available at* https://www.ushmm.org/learn/timeline-of-events/1933-1938/editors-law (last visited Mar. 7, 2019).

110. *Third Reich Press*, *supra* note 103.

111. *Id.*

112. *See* RON ROSENBAUM, EXPLAINING HITLER: THE SEARCH FOR THE ORIGINS OF HIS EVIL (1998).

113. ALAN BULLOCK, HITLER AND STALIN: PARALLEL LIVES 325 (New York: Alfred A. Knopf, 1992).

came an obvious target in the effort to cover up one of the greatest human rights violations in world history.

B. Joseph Stalin, Soviet Union; Vladimir Putin, Modern-Day Russia

Restrictions on free press in Russia date back to the beginning of the Soviet Union.[114] Both Vladimir Lenin and Joseph Stalin employed nationalist rhetoric and legal delegitimization to undercut the press and coverage of the country's human rights issues.[115] Under Vladimir Lenin in 1917, the Soviet Union passed the Decree on Press, which outlawed the publication of views that opposed the revolution.[116] At the time, the Communist Party of the Soviet Union (CPSU) controlled appointment to media jobs, based on political and ideological considerations, not unlike the Nazi party in World War II Germany.[117] Both leaders used the term *vrag naroda*, meaning "enemy of the people," to refer to anyone who disagreed with the ideology of the state, including the press.[118] But Stalin took matters further by codifying such rhetoric into the country's penal code.[119] Under Article 58.10, "anti-Soviet agitation and propaganda," the activity of spreading any anti-Soviet idea amongst the masses, was seen as a counter-revolutionary crime punishable by law.[120] Because of the broad definition of the crime, any opposition could be made to fall under its reach. Increased numbers of prosecutions under

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114. *From Revolution to Glasnost: Soviet Press from 1917-1984*, MIAMI U. HAVIGHURST CTR. FOR RUSSIAN & POST-SOVIET STUD., *available at* https://miamioh. edu/ cas/academics/centers/havighurst/cultural-academic-resources/havighurst-special-programing/journalism-under-fire/journalism-history/index.html (last visited Mar. 7, 2019) [hereinafter *From Revolution to Glasnost*].

115. *See* TIMOTHY SNYDER, BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN (2010). Stalin has been condemned for allegations of genocide under his rule. Between widespread famine, ordered executions, and ethnic cleansing, one American historian credits Stalin as being ultimately responsible for nine million deaths in the Soviet Union. Nevertheless, and perhaps as a result of his control of the press during his rule, he is still revered by many Russian nationalists. *See also* ROBERT SERVICE, STALIN: A BIOGRAPHY (2004).

116. *Revolution to Glasnost*, *supra* note 114.

117. *Id.*

118. Veronika Bondarenko, *Trump keeps saying 'enemy of the people' – but the phrase has a very ugly history*, BUS. INSIDER (Feb. 22, 2017), *available at* https:// www.businessinsider.com/history-of-president-trumps-phrase-an-enemy-of-the-people-2017-2 (last visited Mar. 7, 2019).

119. Sarah Davies, *The Crime of "Anti-Soviet Agitation" in the Soviet Union in the 1930s*, 39 CAHIERS DU MONDE RUSSE 149 (1998).

120. *Id.*

the code correlated with periods of increased political and social repression in the country.

In modern-day Russia, nationalist rhetoric is regularly employed to stifle the press. Despite the Russian constitution providing for a free press, the country's current political climate has created a corrupt judicial system that enables authorities to harass journalists who expose abuses of power. Recently, officials have been using Russia's broad "anti-extremism" laws to suppress criticism of the country's involvement in Ukraine.[121] Under the guise of concerns about "extremism," the government has blocked over 30,000 independent and opposition websites.[122] On May 2, 2015, just a day before World Press Freedom Day, Vladimir Putin increased the maximum fine on Russian news organizations accused of inciting extremism.[123] With the same nationalist rhetoric, Putin passed a stringent law requiring non-governmental organizations to re-register with the government, subjecting themselves to stricter oversight.[124] The 2006 NGO law enabled authorities to deny registration to any organization whose activities "create a threat to the sovereignty, political independence, territorial integrity, national unity, unique character, cultural heritage, and national interests of the Russian Federation."[125] As a result, outside organizations like Human Rights Watch and Committee to Protect Journalists now have increased difficulty fighting for press rights within the country.[126]

The Russian government has worked to delegitimize opposition media by monopolizing the country's major media outlets under state

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121. *FSB Increasingly Involved in Misuse of 'Anti-Extremism' Laws, SOVA Says*, THE INTERPRETER (Mar. 29, 2015), *available at* http://www.interpretermag.com/fsb-increasingly-involved-in-misuse-of-anti-extremism-laws-sova-says/ (last visited Mar. 7, 2019).

122. *Russia Profile*, FREEDOM HOUSE, *available at* https://freedomhouse.org/report/freedom-press/2017/Russia (last visited Mar. 7, 2019).

123. Howard Amos, *Putin Raises 'Extremism' Fines for Russian Media Tenfold*, THE MOSCOW TIMES (May 4, 2015), *available at* https://themoscowtimes.com/articles/putin-raises-extremism-fines-for-russian-media-tenfold-46297 (last visited Mar. 7, 2019).

124. Saskia Brechenmacher, *Delegitimization and Division in Russia*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 18, 2017), *available at* https://carnegieendowment.org/2017/05/18/delegitimization-and-division-in-russia-pub-69958 (last visited Mar. 7, 2019).

125. Katherin Machalek, *Factsheet: Russia's NGO Laws*, FREEDOM HOUSE (Feb. 6, 2013), *available at* https://freedomhouse.org/sites/default/files/2020-02/SR_Contending_with_Putins_Russia_PDF.pdf (last visited Aug. 2, 2019).

126. *History of Russian Journalism*, MIAMI U. HAVIGHURST CTR. FOR RUSSIAN & POST-SOVIET STUD., *available at* https://miamioh.edu/cas/academics/centers/havighurst/cultural-academic-resources/havighurst-special-programing/journalism-under-fire/journalism-history/index.html (last visited Aug. 1, 2019).

control and abusing defamation laws.[127] Difficult economic conditions have given the state a major financial advantage over small, privately-owned newspapers. The television networks with the largest audiences (NTV, First Channel, and RTR) are now under state control.[128] As a result of the high punitive damage awards and prison sentences associated with defamation laws, many journalists in the country have taken to self-censorship.

Putin's anti-watchdog motivation results from the country's involvement in a number of human right violations.[129] In 2014 the Russian military invaded Ukraine, and annexed Crimea. The UN believes that over 10,000 people have been killed in the Ukraine since the invasion.[130] Abroad, Putin has backed Bashar al-Assad's genocide in Syria.[131] The Kremlin's regime has conducted tens of thousands of airstrikes targeting civilian populations in Syria and has been accused of committing war crimes in Aleppo.[132] The Russian government has also persecuted its own citizens for religious beliefs and sexual orientation.[133] In Chechnya, security officials detained and tortured dozens of gay male citizens as a part of an anti-gay "purge."[134] And the press is arguably a targeted minority itself. Journalism is a dangerous trade in Russia.[135] It is estimated that more than thirty-four Russian journalists have been killed since 2000, with questionable causes of death such as falling out windows or allegations of suicide.[136] Putin's track record of human rights violations makes for an obvious agenda against the media who seek to hold his regime accountable.

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127. *Id.*

128. *Id.*

129. *Helsinki Summit: A Review of Vladimir Putin's Record of Human Rights Violations and Attacks on Democratic Institutions*, HUM. RTS. FIRST, *available at* https://www.humanrightsfirst.org/sites/default/files/factsheet-Putin-July-2018.pdf (last visited Aug. 1, 2019).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Russia, Events of 2017*, HUM. RTS. WATCH, *available at* https://www.hrw.org/world-report/2018/country-chapters/Russia (last visited Aug. 1, 2017).

134. *Id.*

135. Scott Simon, *Why Do Russian Journalists Keep Falling?*, NPR (Apr. 21, 2018), *available at* https://www.npr.org/2018/04/21/604497554/why-do-russian-journalists-keep-falling (last visited Aug. 1, 2019).

136. *Id.*

C. Rodrigo Duterte, Philippines

In 2016, Rodrigo Duterte was elected as President of the Philippines after a promising campaign to end the country's rampant drug crimes.[137] During his two years in office, the country's media outlets have worked to document Duterte's brutal war on drugs as the government has released very little information about the number of killings, under the premise of national security.[138] In his own form of nationalist rhetoric, he has called opposition reporters "traitors," claiming that they are not "true Filipinos."[139] The environment has become so hostile that Duterte has said that "corrupt" journalists "are not exempt from assassination."[140] As a result of such rhetoric, violent attacks against journalists, including two murders in 2016, usually go unpunished.[141]

Since Duterte took power, the government has used a three predominant methods to delegitimize the media in the Philippines; verbal assaults, social media attacks, and threats to revoke groups' licenses or invade their commercial interests.[142] While Duterte perpetuates accusations of "fake news," his own campaign reportedly spent $200,000 on internet "trolls" to attack critics and spread pro-government propaganda that appears as legitimate news.[143] Police have been known to make unexpected stops into reporting bureaus, such as Reuters, to check reporters' credentials.[144] Duterte has also targeted certain outlets, such as Rappler, and banned its journalists from reporting at the presidential palace.[145]

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137. Austin Ramzy, *Philippines' New President, Rodrigo Duterte, Vows Tough Stance on Crime*, N.Y. TIMES (June 30, 2016), *available at* https://www.nytimes.com/2016/07/01/world/asia/philippines-duterte.html?searchResultPosition=87 (last visited Aug. 1, 2019).

138. Shawn Crispin, *Mission Journal: Duterte leads tri-pronged attack on press amid condemnation of controversial policies*, COMMITTEE TO PROTECT JOURNALISTS (July 5, 2018), *available at* https://cpj.org/blog/2018/07/mission-journal-duterte-leads-tri-pronged-attack-o.php (last visited Aug. 1, 2019).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Nyshka Chandran, *'Fake news' can be very dangerous, and events this year in Asia proved it*, CNBC (Dec. 25, 2017), *available at* https://www.cnbc.com/2017/12/25/fake-news-was-a-weapon-in-asia-in-2017.html (last visited Aug. 1, 2019).

144. Crispin, *supra* note 138.

145. *Id.*

Rappler, an online news site, has become a prominent source of information for the readers in the Philippines.[146] The cite is known for its vigilant reporting on the death toll of Duterte's drug war, and so Duterte has gone to extreme legal lengths to silence the company.[147] In late 2018, Rappler CEO Maria Ressa was formally indicted on multiple counts of tax evasion.[148] Earlier in that same year, the Philippines Securities and Exchange commission revoked the outlet's registration on the basis that it had violated foreign-ownership rules.[149] Under the constitution, media companies in the Philippines cannot be owned by a foreign entity.[150] The charges against Rappler and Ressa appear to be politically motivated, in an attempt to send a message to the outlet to stop reporting on the war.

The International Criminal Court has begun a preliminary investigation into whether Duterte's drug war has resulted in crimes against humanity.[151]

D. Mohammed Bin Salman, Saudi Arabia

While the Kingdom of Saudi Arabia currently considers itself to be experiencing a modernizing revolution, press freedom has taken hits as new Crown Prince Mohammed Bin Salman cracks down on coverage that conflicts with the narrative of a new, less repressive state.[152] The Kingdom is one of the most restrictive press environments in the world, landing at number 169 of 180 countries on the RSF press freedom in-

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146. John Geddie & Martin Perry, *INSIGHT - The Philippine journalists taking the rap in Duterte's latest war*, REUTERS (Mar. 28, 2019), *available at* https://www.reuters.com/article/philippines-media/insight-the-philippine-journalists-taking-the-rap-in-dutertes-latest-war-idUSL8N21607C (last visited Aug. 1, 2019).

147. *Id. See also* Julia Webster, *Libel Trial Opens Of Maria Ressa, Philippine Journalist Critical of President Duterte*, TIME (July 23, 2019), *available at* https://time.com/5632472/maria-ressa-duterte-philippines/ (last visited Aug. 1, 2019).

148. Joshua Berlinger, *Maria Ressa, Rappler formally indicted by the Philippines on tax evasion charges*, CNN (Nov. 29, 2018), *available at* https://www.cnn.com/2018/11/29/asia/maria-ressa-rappler-intl/index.html (last visited Aug. 1, 2019).

149. Darryl Coote, *Rappler CEO and Duterte critic arrested over foreign ownership charges*, UPI (Mar. 29, 2019), *available at* https://www.upi.com/Top_News/World-News/2019/03/29/Rappler-CEO-and-Duterte-critic-arrested-over-foreign-ownership-charges/6461553831214/ (last visited Aug. 1, 2019).

150. *Id.*

151. *Id.*

152. Editorial Board et. al., *Saudi Arabia's attacks on free press continue*, THE BLADE (Oct. 15, 2018), *available at* https://www.toledoblade.com/opinion/editorials/2018/10/15/saudi-arabia-journalists-marwan-al-mureisi-prince-salman/stories/20181015011 (last visited Aug. 1, 2019).

dex.[153] Despite its already restrictive environment, arrests and disappearances of journalists have increased under Bin Salman.[154] In October 2018, the country made international headlines when ex-Saudi insider and contributing *Washington Post* columnist Jamal Khashoggi was murdered inside the Saudi consulate in Istanbul.[155] Khashoggi was notorious for his critical coverage of the new regime.[156] The United States' Central Intelligence Committee obtained phone calls in which Crown Prince Mohammed Bin Salman ordered to "silence the journalist as soon as possible."[157] Khashoggi had been critical of the new regime under Salman, making him an obvious target of the Crown Prince.[158]

In common with other authoritarian leaders, Mohammed Bin Salman's crackdown on the media seems motivated by the pressure to cover up human rights violations. Human rights advocacy groups have accused the Crown Prince of violations of international law related to the country's involvement in the armed conflict in Yemen.[159] The Saudi-led coalition has launched numerous airstrikes on Yemeni civilians, hitting homes, schools, mosques, and markets, and amounting to possible war crimes.[160] Rights groups allege that Saudi authorities have also committed abuses against their own citizens, like detaining and torturing Saudi female activists. Since 2017, Saudi officials under Bin Salman have made a sweep of arrests targeting critics in an effort to shift control of the country's narrative and attract foreign investors.[161]

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153. *2018 World Press Freedom Index*, *supra* note 28.

154. *Id.*

155. *Khashoggi*, *supra* note 60.

156. *Id.*

157. *Saudi Prince 'ordered Jamal Khashoggi be silenced' in call heard by CIA*, NEWS CORP. AUSTL. NETWORK (Nov. 23, 2018), *available at* https://www.news.com.au/world/europe/saudi-prince-ordered-jamal-khashoggi-be-silenced-in-call-heard-by-cia/news-story/23e4ca113604dac96f921420c52df183 (last visited Aug. 2, 2019).

158. *Id.*

159. *G20: Saudi Crown Prince Faces Legal Scrutiny*, HUM. RTS. WATCH (Nov. 26, 2018), *available at* https://www.hrw.org/news/2018/11/26/g20-saudi-crown-prince-faces-legal-scrutiny (last visited Aug. 2, 2019).

160. *Id.*

161. Ishaan Tharoor, *Don't be fooled by the comforting rhetoric coming from Saudi Arabia's Crown Prince*, WASH. POST (Nov. 8, 2017), *available at* https://www.washingtonpost.com/news/made-by-history/wp/2017/11/08/dont-be-fooled-by-the-comforting-rhetoric-coming-from-saudi-arabias-crown-prince/?utm_term=.d44d1f23360c (last visited Aug. 1, 2019).

F. Donald Trump, United States

Although Trump's offenses certainly do not rise to the level of human rights violations, the horizon of press freedom in America looks dark. In the aftermath of the election of Donald Trump in 2016, the United States slid from thirty-seven to forty-five on the list of 180 countries and their relative statuses of press freedom.[162] Historians and free press advocates have expressed concerns that his attitudes toward the media, and strategies to delegitimize them, resemble those of infamous dictators such as Hitler and Stalin.[163]

But the tumultuous relationship between the President and the media in the United States predates Trump. John F. Kennedy regularly pushed back at the press, stating that national security was his "primary obligation," and so warranted significant limitations on what the government shared with the press.[164] Lyndon B. Johnson was "obsessed" with the media's coverage of the Vietnam War, with three televisions in the oval office, one tuned to each of the major broadcast networks.[165] He took critical coverage of the war so personally that he once accused CBS anchor Walter Cronkite of being out to get him.[166] He worked tirelessly to "manipulate, punish, and seduce" the media for its coverage of Vietnam so that more Americans would have a positive outlook on the country's involvement.[167] Richard Nixon used war and enemy terminology to characterize the press, writing in his memoir that he "considered the influential majority of the news media to be part of my political opposition" and that he "was prepared to have to do combat with the media."[168] He regularly referred to the press as the "enemy," and

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162. *2016 World Press Freedom Index*, REPS. WITHOUT BORDERS, *available at* https://rsf.org/en/ranking (last visited Aug. 1, 2019).

163. Jones & Sun, *supra* note 97.

164. John F. Kennedy, Address to the American Association of Newspaper Editors (Apr. 20, 1961) (recording archived at the University of Virginia's Miller Center), *available at* https://millercenter.org/the-presidency/presidential-speeches/april-20-1961-address-american-association-newspaper-editors (last visited Aug. 2, 2019).

165. Chester Pach, *Lyndon Johnson's Living Room War*, N.Y. TIMES (May 30, 2017), *available at* https://www.nytimes.com/2017/05/30/opinion/lyndon-johnson-vietnam-war.html (last visited Aug. 3, 2019).

166. *Id.*

167. BRIGITTE LEBENS NACOS, THE PRESS, PRESIDENTS, AND CRISES 82 (1990); *see also* JOHN TEBBEL & SARAH MILES WATTS, THE PRESS AND THE PRESIDENCY 489 (1985) (noting that Johnson's behavior toward the press left "scarcely one redeeming feature to permit a charitable conclusion.").

168. Debra Gersh Hernandez, *Nixon and the Press*, 127 EDITOR & PUBLISHER 82, 86 (1994).

went so far as to remove reporters out of the west wing of the White House and into different quarters to impede their observations.[169] Gerald Ford restricted access to the media, opting only to answer certain questions of his choosing.[170] Jimmy Carter's administration was known for overtly lying to the press about the president's whereabouts.[171] Ronald Reagan's staff imposed bans on certain questions and restricted press access to appearances, which were also explicitly limited.[172] George W. Bush called the media an "unrepresentative, irresponsible interest group."[173] But it was Barack Obama who pursued more criminal charges against whistleblowers than all previous presidents combined. The Obama administration seized records of over twenty Associated Press phone lines and was highly critical of major outlets' use of confidential, anonymous sources.[174]

Yet it is Donald Trump's relationship with the media that seems to have risen to a new extreme. Unlike the seemingly petty antics of past presidencies, Trump's tactics more closely resemble the two major themes anti-press dictators around the globe. First, Trump has used extreme nationalist rhetoric to demonize the media, repeatedly referring to journalists as the "enemy of the people." He has infamously coined the phrase "fake news," and incites animosity toward media coverage at his events, often pointing to reporters and calling them various insults. At rallies, his supporters have been heard yelling "*lugenpresse*," a derogatory anti-media phrase originally used by Hitler and the Nazis during World War II.[175] Trump has accused mainstream media outlets, such as

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169. WILLIAM E. PORTER, ASSAULT ON THE MEDIA: THE NIXON YEARS 65 (1976).

170. JOSEPH C. SPEAR, PRESIDENTS AND THE PRESS: THE NIXON LEGACY 4 (1984).

171. *Id.* at 3 (describing how Carter's staff lied to the media by claiming Carter "was at the executive mansion when he was in fact at the opera" and how Carter had Secret Service lead the press "on wild goose chases in Carter's car while Carter sped off in the opposite direction in a different vehicle.").

172. *Id.* at 4-5, 10 (describing administration efforts to have "known friendlies" at news conferences and to drown out questions by starting the engine of the presidential helicopter before the President appeared).

173. Jon Marshall, *Nixon Is Gone, but His Media Strategy Lives On*, THE ATLANTIC (Aug. 4, 2014), *available at* http://www.theatlantic.com/politics/archive/2014/08/nixons-revenge-his-media-strategy-triumphs-40-years-after-resignation/375274/ (last visited Aug. 1, 2019); *see also* Ken Auletta, *Fortress Bush*, NEW YORKER (Jan. 19, 2004), *available at* https://www.newyorker.com/magazine/2004/01/19/fortress-bush (last visited Aug. 1, 2019) (discussing the distance that the George W. Bush Administration maintained with the press because of Bush's view that the press was not on his side).

174. Marshall, *supra* note 173.

175. *Id.*

the *New York Times*, of working against the security of the nation.[176] In the wake of the September 11th attacks on the World Trade Center, "national security" was used as a mechanism to compromise other basic liberties, including but not limited to press access and release of government information. The courts have been willing to accept the argument that national security requires some exceptions to basic liberties. With the media at a historically weak point, it is increasingly likely that the courts would accept the argument when assessing freedom of the press. In further attempts to paint the enemy as a threat that needs to be held accountable, his administration has sent out a "Mainstream Media Accountability Survey," which asked participants to answer loaded questions, such as whether the media reports "unfairly" or spreads "false stories."[177] Efforts like this are more passive-aggressive, yet could pose a larger threat than mere use of anti-press rhetoric, because they ask the public to engage in the anti-press narrative.[178]

Second, by branding the press as the enemy of the people, Donald Trump has positioned American society to accept the stripping of legal and constitutional protections that the press currently enjoys. Since being elected, he has made clear his intentions to open up libel laws, which would make it easier to sue journalists and publications.[179] This would require altering the court's actual malice standard from *Sullivan*. Of course, the executive cannot do this unilaterally. But the threat exists, as Supreme Court Justice Clarence Thomas recently called for the Court to revisit the standard in *Sullivan*, claiming that it has no basis in the constitution as it was understood by the original framers of the document.[180] In a concurring opinion on appeal involving a libel claim against a public figure,[181] Thomas wrote that discretion should be left to

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176. *See* Peter Baker, *Trump Says He Has 'Complete Power' to Pardon*, N.Y. TIMES (July 22, 2017), *available at* https://www.nytimes.com/2017/07/22/us/politics/donald-trump-jeff-sessions.html (last visited Aug. 2, 2019) (In a tweet posted July 22, 2017, Trump accused the "failing *New York Times*" of foiling an attempt to capture wanted terrorist Al-Baghdadi, claiming that the paper had a "sick agenda over national security.").

177. *Mainstream Media Accountability Survey*, GOP, *available at* https:// gop.com/ mainstream-media-accountability-survey/ (last visited Jan. 31, 2019).

178. Jones & Sun, *supra* note 97.

179. Gold, *supra* note 93; *see generally* CHARLES J. GLASSER JR., INTERNATIONAL LIBEL AND PRIVACY HANDBOOK (Bloomberg Press, New York, 2009).

180. Liptak, *supra* note 94.

181. Patricia Montemurri, *Bill Cosby accuser from Detroit takes defamation suit to supreme court*, DETROIT FREE PRESS (May 4, 2018), *available at* https://www.freep.com/ story/news/2018/05/04/detroit-bill-cosby-accuser-kathy-mckee-supreme-court/577468002/ (last visited Mar. 7, 2019).

the states to decide an "acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm" – a suggestion that severely conflicts with the high standard currently employed via *Sullivan*.[182] Trump himself has been more specific about his intentions for the standard. At a campaign rally in Fort Worth, Texas, he said: "I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money."[183] Ironically, what the President describes as desirable would require no change to current law. Any publication involving a legitimate reckless disregard for the truth would be successfully sued under current defamation standards.[184] Trump has been a party in fourteen such defamation cases to date,[185] but he has never been able to successfully meet the actual malice standard in a public trial court.[186] His seemingly personal agenda to loosen libel and defamation laws has earned him a reputation as a "libel bully."[187] Whether or not he will actually achieve change, his ideology is a signal of delegitimization in itself, suggesting that current laws are too lax and allow journalists to get away with more than they should.[188]

While the loosening of libel standards remains hypothetical, the consequences of high damages in Trump-era defamation suits are all too real. In 2016, Terry Bollea, known by his wrestling alias "Hulk Hogan," sued Gawker Media for defamation, seeking a whopping $100 million in damages.[189] The Gawker team had suspicions about the mo-

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182. *Id.*

183. Gold, *supra* note 93.

184. Jonathan Turley, *Trump's not being defamed. If he was, he wouldn't need to change the libel laws.*, USA TODAY (Jan. 11, 2018), *available at* https://www.usatoday.com/story/opinion/2018/01/11/trumps-not-being-defamed-if-he-wouldnt-change-libel-laws-michael-wolff-jonathan-turley-column/1021999001/ (last visited Mar. 7, 2019).

185. Nick Penzenstadler et al., *Donald Trump: Three decades, 4,095 lawsuits*, USA TODAY, *available at* https://www.usatoday.com/pages/interactives/trump-lawsuits/ (last visited Mar. 3, 2019).

186. Susan E. Seager, *Donald Trump Is A Libel Bully But Also A Libel Loser*, MEDIA L. RESOURCE CTR., *available at* https://www.medialaw.org/component/k2/item/3470-donald-j-trump-is-a-libel-bully-but-also-a-libel-loser (last visited Mar. 3, 2019).

187. *Id.*

188. Charlie Savage & Eileen Sullivan, *Leak Investigations Triple Under Trump, Sessions Say*, N.Y. TIMES (Aug. 4, 2017), *available at* https://www.nytimes.com/2017/08/04/us/politics/jeff-sessions-trump-leaks-attorney-general.html (last visited Mar. 3, 2019) (under President Trump, Department of Justice investigations into leaked information have tripled.).

189. Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War With Gawker*, N.Y. TIMES (May 25, 2016), *available at* https://www.nytimes.com/2016/05/26/

tives behind the suit, particularly after Bollea selectively dropped claims of Intentional Infliction of Emotional Distress, thereby preventing Gawker's insurance company from paying any of the damages.[190] It became clear that the lawsuit was a blatant attempt to bring down the media company and its executives – an agenda of Silicon Valley mogul Peter Thiel's ever since Gawker had published articles outing Thiel of being gay. It was later revealed that Thiel had paid all of Bollea's legal fees – and not for nothing. The jury sided with Bollea and the Florida State Court judge ordered Gawker and its executives to pay over $140 million in damages.[191] The outlet was forced to file for bankruptcy and was later bought by Univision Communications.

Many in the journalism community felt the judgement had a chilling effect on freedom of the press. First Amendment Attorney Floyd Abrams felt Gawker would be the first of many:

> The reason to save Gawker is not because Gawker was worth saving. The reason to save it is that we don't pick and choose which sort of publications are permissible. Because once we do, it empowers the government to limit speech in a way that ought to be impermissible even the most disagreeable speech is, as a general matter, fully protected by the First Amendment.[192]

Abrams' floodgate suggestion proved to be right, as defamation cases seeking egregiously high damages awards remain a popular tactic in silencing media outlets. In early 2019, Covington Catholic High School teen Nicholas Sandmann brought charges against the *Washington Post*, seeking $250 million in damages.[193] Sandmann's legal team say the total is the same amount that Amazon founder Jeff Bezos paid for the paper in 2013. Although many such lawsuits are a longshot, the potential consequences for defendant media outlets are detrimental. And in a perfect storm, the current economic situation in the United States has further prevented journalists from pursuing First Amendment claims as they have in the past. A recent survey of editors at the na-

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business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html (last visited Mar. 3, 2019).

190. Gawker Media, LLC v. Bollea, 129 So. 3d 1196 (Fla. Dist. Ct. App. 2014); Gawker Media, LLC v. Bollea, 170 So. 3d 125 (Fla. Dist. Ct. App. 2015).

191. *Id.*

192. NOBODY SPEAK: TRIALS OF A FREE PRESS (Netflix & First Look Media 2017).

193. Sophia Barnes, *Nick Sandmann's Lawyers Sue* Washington Post *for $250 Million*, NBC WASH. (Feb. 20, 2019), *available at* https://www.nbcwashington.com/news/local/Nick-Sandmanns-Lawyers-Sue-Washington-Post-for-250M-506091181.html (last visited Mar. 3, 2019).

tion's major news organization showed that more than half felt that news organizations are no longer prepared to go to court to preserve First Amendment freedoms.[194]

Trump has also expressed opposition to current laws that prevent large media mergers. As have anti-press leaders of other regimes, Trump seems to idealize the possibility of consolidating networks, particularly conservative ones that are more likely to promote positive coverage of his administration.[195]

During his presidency, Trump has limited individual reporters' access to White House press briefings, blacklisting multiple outlets including the *Washington Post*, *Des Moines Register*, *Buzzfeed*, and *Politico* from getting press credentials.[196] In November 2018, CNN finally sued the President after the White House revoked a reporter's press pass.[197] Several media companies filed amicus briefs, including Fox News, NBC, and the Associated Press.[198] Presiding Judge and Trump-appointee Jim Kelly avoided the substantive First Amendment question, ruling instead on due process in favor of CNN.[199] He did, however, make a point during arguments to suggest that subjectively banning certain reporters from the press room was not likely to survive the First

194. Eric Newton, *A News Industry 'Less Able' to Defend Freedom*, JOHN S. & JAMES L. KNIGHT FOUND. (Apr. 21, 2016), *available at* https://www.knightfoundation.org/articles/news-industry-less-able-defend-freedom (last visited Aug. 1, 2019).

195. Scott Nover, *The Sudden Demise of Sinclair's Merger with Tribune*, The Atlantic (July 25, 2018), *available at* https://www.theatlantic.com/politics/archive/2018/07/the-sudden-demise-of-sinclairs-merger-with-tribune/566099/ (last visited Mar. 2, 2019) (Media giants like the conservative Sinclair Broadcasting group have expressed intent to buy out other, smaller networks like Tribune Media. The FCC was skeptical of a Sinclair deal, which involved plans for the company to control certain stations via sidecar agreements, in some instances, without even owning them. The deal was ultimately prevented by the Communication Act, a 1934 piece of legislation put in place to limit control of smaller affiliation stations by large broadcasting entities. The localism principle at the heart of the Act aimed to assure that small licensees would serve their local communities. President Trump expressed his disappointment when the deal fell through, tweeting that it would have been "a great and much needed conservative voice for and of the people.").

196. Paul Farhi, *CNN, New York Times, Other Media Barred from White House Briefing*, WASH. POST (Feb. 24, 2017), *available at* https://www.washingtonpost.com/lifestyle/style/cnn-new-york-times-other-media-barred-from-white-house-briefing/2017/02/24/4c22f542-fad5-11e6-be05-1a3817ac21a5_story.html?utm_term=.1df8da46c5fd (last visited Mar. 2, 2019).

197. Cable News Network, Inc. v. Trump, No. 1:18-cv-02610-TJK (D.C.C. Nov. 13, 2018).

198. *Id.*

199. *Id.*

Amendment.[200] In response to the ruling, the Trump White House released a list of four rules for press room reporters;[201] (1) reporters will ask a single question and then will yield the floor to the other journalists, (2) follow-up questions will be permitted at the discretion of the president or other white house officials taking questions, (3) "yielding the floor" is defined as "physically surrendering" the microphone (4) failure to abide by any of the rules may result in suspension or revocation of the journalists' hard pass.[202]

Unlike the presidents before him, Donald Trump has a unique and relatively new tool that has further helped him to perpetuate anti-press attitudes – social media. With access to Twitter, which he frequently uses, the President no longer has to rely on the media to speak to the people. There is no incentive to maintain a positive working relationship with the press, because the President can speak to the people directly and unfiltered; vice versa, because citizens no longer have to rely on the media to hear from the President and other leaders, the media is much more susceptible to enemy construction than in the past.[203]

While other anti-press totalitarian leaders have employed these strategies in an effort to cover up human rights violations, it appears that Trump's motivations may be linked to his involvement in white collar crimes. The President has taken especially poorly to the media's hunt for his tax returns, and interviews with ex-insiders such as former FBI Director James Comey. The media has broken controversial stories like child interriment camps at the southern border, and even personal affairs such as Trump's extramarital relationship with porn star Stormy Daniels.

These offenses are inarguably less serious than the human rights violations of leaders such as Hitler, Stalin, and Bin Salman. But many feel that Trump's anti-media crusade is a test. If he can successfully construct an enemy of the media and strip constitutional protections from journalists without check, minorities like Muslims and Mexican immigrants, or even the American judiciary could be future targets. The tactic of delegitimization could be applied to a number of other crucial

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200. *Id.*

201. Cheyenne Haslett, *White House drops effort to suspend press pass for CNN's Jim Acosta; outlines rules to reporters*, ABC NEWS (Nov. 19, 2018), *available at* https://abcnews.go.com/Politics/white-house-jim-acostas-press-pass-cnn-seeks/story?id=59291734 (last visited Mar. 2, 2019).

202. *Id.*

203. *Id.*

democratic mechanisms. Trump's attacks on the press ultimately interfere with the security of the democracy itself, which is dependent upon the strength of the media in providing citizens with information about their government.[204] The decline of press freedom in the United States has shifted the country away from its position as a leader of press freedom, and magnified similarities to anti-media dictatorships. If the United States fails to safeguard its own democracy, the backsliding of democracy and press freedom on a global scale could only worsen.

IV. A CHECK TO POWER: CUSTOMARY INTERNATIONAL LAW AS A PILLAR OF PRESS FREEDOM

A. A Human Rights Crisis

As of 2018, 251 journalists remain imprisoned, internationally.[205] Some of the highest numbers of incarcerations come from Turkey, China, Eritrea, Egypt, and North Korea.

In Malta, blogger Daphne Caruana Galizia was killed by a car bomb after her coverage of ties between government officials and big businesses amounting to corrupt concentrations of wealth.[206] The investigation into the order of her killing is being done by the same officials that Galizia wrote about and criticized. In response to the murder, European Commission spokesman Margaritis Schinas called for journalists' rights to "ask uncomfortable questions and report effectively" to be "guaranteed at all times."[207]

Victoria Marinova, a Bulgarian journalist who had been reporting on corruption involving European union funds, was raped and murdered in the town of Ruse in early October.[208] The European Federation of

204. *See* Emily Howie, *Protecting the human right to freedom of expression in international law*, 20 INT'L J. SPEECH-LANGUAGE PATHOLOGY 12, 12-15 (2018).

205. *Imprisoned 2018*, Committee to Protect Journalists (n.d.), *available at* https://cpj.org/data/imprisoned/2018/?status=Imprisoned&start_year=2018&end_year=2018&group_by=location (last visited Mar. 3, 2019).

206. Joanna Kakissis, *Who Ordered The Car Bomb That Killed Matlese Journalist Daphne Caruana Galizia?*, NPR (July 22, 2018), *available at* https://www.npr.org/2018/07/22/630866527/mastermind-behind-malta-journalist-killing-remains-a-mystery (last visited Mar. 2, 2019); *see also* INVICTA: THE LIFE AND WORK OF DAPHNE CARUANA GALIZIA (Joseph A. Debono & Caroline Muscat eds. 2017).

207. Kakissis, *supra* note 206.

208. *Bulgarian journalist Viktoria Marinova killed in Ruse*, BBC (Oct. 8, 2018), *available at* https://www.bbc.com/news/world-europe-457779482 (last visited Mar. 2, 2019).

Journalists is now calling for increased protections for journalists, as they think the attack was an attempt to silence those in the profession.[209]

In Somalia, radio reporter Abdirizak Said Osman was stabbed to death after leaving his radio station on September 18.[210] Osman had recently done several reports for his radio show, *Voice of Peace,* about the decline in the security situation in the region, alluding to the terrorist methods used by the Islamist rebel group Al-Shabaab.[211] UNESCO's Director-General condemned the attack and called for the perpetrators to be held accountable to assure that "others do not feel emboldened to attack the media."[212]

After *Washington Post* writer Jamal Khashoggi was murdered in Istanbul, many countries did what they could to send a message to Saudi Arabia by pulling out of trade deals. Countries like Germany and Denmark banned weapon sales to Saudi Arabia in a statement against the murder.[213]

As journalists around the globe are harassed, imprisoned, tortured, and even killed, it is clear that the current state of press freedom is violative of the basic ideology of human rights. The preamble of the Universal Declaration on Human Rights speaks to these ideals:

> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
>
> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law [...]

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209. *Id.*

210. *Radio reporter stabbed to death in central Somalia*, REPORTERS WITHOUT BORDERS (Sept. 20, 2018), *available at* https://rsf.org/en/news/radio-reporter-stabbed-death-central-somalia (last visited Mar. 2, 2019).

211. *Id.*

212. *Director-General condemns attack on radio reporter Abdirizak Said Osman in Somalia*, UNESCO (Sept. 20, 2018), *available at* https://en.unesco.org/news/director-general-condemns-attack-radio-reporter-abdirizak-said-osman-somalia (last visited Mar. 2, 2019).

213. Darin Graham, *Denmark suspends arms sales to Saudi Arabia – but which European countries continue to supply it?*, EURONEWS (Nov. 23, 2018), *available at* https://www.euronews.com/2018/11/22/denmark-suspends-arms-sales-to-saudi-arabia-but-which-european-countries-continue-to-suppl (last visited Mar. 2, 2019).

> [...] Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom [...][214]

B. Customary International Law as a Mechanism

Press freedom's biggest offenders, both past and present, have gone unchecked due to gaps in international law and lack of enforceability. If the international community wishes to protect a free press, there must be international law stronger than the force of individual anti-press strongmen. Current declarations are non-binding, and treaties fall short of implicating numerous offending countries. Therefore, we must turn to custom as a source of international law that would serve to protect press freedom.[215]

1. UDHR and ICCPR as Widespread State Practice

The first element of any customary international law is widespread state practice. Some legal scholars would argue that widespread state practice of freedom of expression already exists, supported by recognition in the Universal Declaration on Human Rights, and implemented via the International Covenant on Civil and Political Rights.[216]

Indeed, the UDHR does seemingly recognize the right to a free press in Article 19. But the declaration is exactly that – a declaration. The Declaration is not a legal instrument, and it would be a far cry to characterize some of its provisions as representative of legal rules. Alternatively, some of its provisions either constitute general legal principles or represent fundamental humanitarian considerations.[217]

There is no force of law behind the protected rights outlined in the UDHR, and so it can hardly be said that those rights are protected at all.

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214. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

215. Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH Y.B. INT'L L. 1, 1-53 (1976).

216. *Freedom of Expression as a Human Right*, CTR. FOR L. & DEMOCRACY (2015), *available at* http://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefing notes-1.pdf (last visited Mar. 1, 2019). *See also* Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Convention on the Rights of a Child, G.A. Res. 44/25, U.N. GAOR (1989); and Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, G.A. Res. 61/106, 76th plen. mtg., U.N. Doc A/RES/61/106, each of which outlines freedom of expression.

217. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 570 (1990).

Because the declaration is not a treaty, it does not imply any legal obligation. While member nations appear to recognize the right to a free press, the provisions are open to interpretation, which often allows offenders of press freedom to justify "necessary exceptions." A common example of this is the use of "national security" concerns to justify censorship and imprisonment of journalists. And, under Article 2, any nation's use of national security concerns as an instrument to infringe on journalists' rights would be out of reach of a UN tribunal's jurisdiction.[218] The UDHR, alone, does not serve as legitimate legislation protecting press freedom. However, the declaration of freedom of expression as a human right under Article 19 supports the idea that respect of a free press is a widespread state practice.

Slightly stronger than the UDHR is the International Covenant on Civil and Political Rights. Today, over 172 countries are party to the multilateral treaty, which outlines the right to a free press in Article 19, Section 2:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[219]

A treaty such as the ICCPR is stronger than a declaration with regard to enforceability.[220] However, it is only binding on the countries that are a party to the resolution.[221] Two notable offenders of press freedom – Myanmar and Saudi Arabia – are not parties to the ICCPR.[222] Furthermore, under Article 2 of the resolution, the parties are ultimately responsible for assuring that any violation of the treaty receives an "effective" remedy, determined by "competent" judicial, administrative, or legislative authorities.[223] It is safe to assume that, even where a country is a party, the treaty may fall short of its desired effect because of this

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218. UDHR, *supra* note 214, at art. 2, § 7 ("Nothing contained in the present charter should authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state [. . .]").

219. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter ICCPR].

220. Kaiutan Venerando et al., *Enhancing access to justice through the concert between formal and informal justice*, JUSTICA ENQUANTO RESPONSABILIDADE (2014), *available at* http://sinus.org.br/2014/wp-content/uploads/2013/11/AU.pdf (last visited Mar. 2, 2019).

221. Malcolm Shaw, *Treaty*, ENCYCLOPEDIA BRITANNICA, *available at* https://www.britannica.com/topic/treaty (last visited Mar. 2, 2019).

222. ICCPR, *supra* note 219.

223. *Id.* at art. 2.

discretion. Nevertheless, Article 19 of the ICCPR supplements the UDHR in demonstrating a widespread acceptance of press freedom as a human right.[224]

2. Opinio Juris in the Form of Political and Economic Influence

The second element necessary to establish customary international law is *opinio juris*, or the subjective belief on behalf of a state that it is bound to the law in question.[225]

Under traditional theory, *opinio juris* would come in the form of a rule or a law. A state in violation would be subject to judicial decision by a court of law. In application, there are such legal avenues for persons charging states with violating the principles of press freedom. But as a whole, the international legal framework protecting the press presents noticeable gaps. For example, treaties allow plaintiffs to bring suit before a relative tribunal. But, as we have seen with the ICCPR, treaties may only reach the parties who ratify them. This is a problem for journalists like Wa Lone and Kyaw Soe Oo, the two Reuters journalists currently serving a 7-year prison sentence in Myanmar. As ideal plaintiffs, they cannot utilize the ICCPR's Article 19 or bring charges against Myanmar because the country is not a party to the treaty and has not consented to suit.[226] As another legal avenue, many states fall under the jurisdiction of a regional human rights court. Plaintiffs may bring press freedom challenges to the appropriate court of their region. However, some countries and territories fall outside of any regional court jurisdiction. A glaring example of this is the lack of a human rights court or commission for the region of Asia.[227] Lastly, even where a regional court may take the case and issue a decision, these courts are often lame in application of scrutiny and lack methods of enforceability. For example, the European Court on Human Rights actively handles defamation cases, including those coming out of Russia. But its failure to closely circumscribe "national security" exceptions has left gaping deference to the state.[228] If any of the courts, international or domestic, with jurisdiction over libel, defamation, or other anti-press mechanism

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224. *See generally* Howie, *supra* note 204.

225. Jo Lynn Slama, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603, 606.

226. *Id.*

227. *Id.*

228. Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, E.T.S. No. 5, 213 U.N.T.S. 221, entered into force Mar. 9, 1953 [hereinafter European Convention on Human Rights].

cases accept vague "national security" exceptions with no standard to meet, the current dilution of press freedoms will continue to occur. Furthermore, Russia recently indicated that it was considering withdrawing from the ECHR, citing that many of the court's decisions conflicted with the country's interests.[229] Recognizing these gaps, the current legal avenues for press freedom litigation are not sufficient to fulfill the *opinio juris* element, and so they have fallen short of establishing customary international law.

Because existing legal framework has failed to establish any real understanding of accountability among offenders, we should instead look to the states to exercise political and economic force in the wake of violations of press freedom. As we saw with the brutal murder of Jamal Khashoggi, dictatorships like Saudi Arabia are currently enabled to act with impunity without consequence from political or economic allies, like the U.S. In the Trump era, the U.S. has tilted away from holding other nations accountable, and instead remains silent or even seemingly endorses the behavior of anti-press regimes. The President refrained from commenting on Crown Prince Mohammed Bin Salman's involvement in ordering the journalist's killing. The Trump administration has also expressed strong support for Russia. The President has made it a priority to mend relations between the two countries, despite a series of disappearances of prominent critics of the Russian government, blatant attacks on its citizens, and alleged interference in the 2016 United States presidential election. In fall of 2018, Russia sued the *New York Times* for failing to disclose financial information under its "Foreign Agents" law.[230] Trump has waged numerous Twitter wars with the *Times*,[231] but did not comment on the Russian suit. As the leader of the free world, the President's failure to respond to these offenses sends the message to authoritarian governments that the U.S. does not value a global right to free press.[232]

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229. Andrew Griffin, *Russia could withdraw from European Convention on Human Rights, state news agency RIA reports*, THE INDEP. (Mar. 1, 2018), *available at* https://www.independent.co.uk/news/world/europe/russia-echr-human-rights-european-convention-putin-kremlin-eu-a8234086.html (last visited Mar. 3, 2019).

230. *Russia uses 'foreign agents' law to hit independent outlet with massive fine*, COMMITTEE TO PROTECT JOURNALISTS (Oct. 29, 2018), *available at* https://cpj.org/2018/10/russia-uses-foreign-agents-law-to-hit-independent-.php (last visited Aug. 2, 2019).

231. Trump's Twitter history with the *New York Times* is extensive.

232. John McCain, Opinion, *Mr. President, Stop Attacking the Press*, WASH. POST (Jan. 16, 2018), *available at* https://www.washingtonpost.com/opinions/mr-president-stop-attacking-the-press/2018/01/16/9438c0ac-faf0-11e7-a46b-a3614530bd87_story.html?utm_term=.ba6de8f0376f (last visited Aug. 2, 2019).

Therefore, it must be understood that the individual right to press freedom only exists as a counterpart and a product of the duties of the states.[233] Where a state is in clear violation of the widespread state practice of a free press, powerhouse countries like the U.S. should retaliate with economic or political sanctions. This system would have a two-fold effect. First, the possibility of sanction would serve to deter offending countries from continuing to act with impunity. An offender like Saudi Arabia could anticipate economic backlash, such as the U.S. pulling out of the Mutual Defense Agreement.[234] Second, the implementation of sanctions on the world stage would further support a common global understanding that states have a binding duty to respect a free press. Imminent sanction would force offending countries to weigh any motivation behind individual violations with the magnitude of retaliatory political and economic consequence. Countries that regularly violate journalists' rights would be forced to curb their offensive behaviors, or at least legitimize necessary charges against those journalists actually involved in criminal activity, to avoid the possibility of intervention by outside forces. The establishment of accountability would fulfil the *opinio juris* element, crystalizing customary international law of a free press and thereby creating a force stronger than offensive regimes.

V. CONCLUSION

In the United States, trust and confidence in the media peaked during the Watergate era, a pinnacle of investigative journalism.[235] This correlation shows that confidence in the media, and a value for press freedom, are at their highest when the media is able to do its job to the fullest extent and produce illuminating results. This is true of journalism on a global scale. In America and many other countries, current press freedoms come from "non-legal safeguards," and a sort of abstract societal understanding that press freedom is important. Lack of a binding, counteractive force of law has allowed the world's anti-press strongmen to achieve major undercuts to the freedoms that the press need enjoy. It has long been understood that sovereign states are at lib-

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233. *Id.*

234. Mutual Defense Agreement, Jan. 30 & Feb. 9, 1951, 2 U.S.T. 1499, T.I.A.S. No. 2293, 132 U.N.T.S. 273.

235. Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), *available at* https://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx (last visited May 1, 2020).

erty to employ "exceptions," stripping legal and constitutional protections from an "enemy" at their discretion.[236] A force stronger than state sovereignty is therefore necessary if we are ever to protect a globally recognized right to a free press from discretionary attacks by individual regimes. With the widespread state understanding of free press already in effect, the *opinio juris* element remains necessary to crystalize customary international law of a free press. And where traditional legal framework falls short, we must instead rely on political and economic diplomacy between states to deter offenders from continuing to act with impunity. As with any other blatant abuse of human rights, strongmen and their respective states that offend the universally understood principle of a necessarily free press, should expect consequences.

236. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (2005).

PAYING THEIR FAIR SHARE: THE RELATIONSHIP BETWEEN FUNDING AND MUTUAL DEFENSE OBLIGATIONS IN NATO

Richard Pado*

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ABSTRACT

The North Atlantic Treaty Organization (NATO) has been the bedrock of western foreign policy since the beginning of the Cold War. While many Americans might not think of NATO on a regular basis, the military Alliance is an imposing force that sends a message to the enemies of the United States and its allies. At the heart of the Alliance is the central tenet that an attack on one member of the Alliance is an attack on all members of the Alliance. No member needs to fight alone if they are attacked. While there will always be some tension between allies, tension between the United States and other members of NATO has recently come to the forefront of media attention and has thus been subsequently called to the consciousness of many Americans. Many have likely heard President Trump declare that it is "not fair" that the other members of NATO are not "paying their fair share."[1] This disparity has greatly frustrated President Trump and, in his characteristic style, he had no issues with publicly airing his grievances.[2] President Trump even went so far as to publicly question whether it was worth abiding by the mutual defense obligations created in the North Atlantic Treaty (Treaty).[3] This begs the question: If the other countries that are a party to the Treaty did not pay their "fair share," would the United States still be obligated to abide by the mutual defense obligations in NATO?

This is not merely a theoretical question, as President Trump reportedly secretly discussed withdrawing from NATO,[4] though it should be noted that President Trump has publicly stated that American ties to

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1. Alexander Mallin & Meridith McGraw, *Trump Blasts NATO Allies for not Paying Fair Share*, ABC NEWS (May 25, 2017), *available at* https://abcnews.go.com/International/trump-blasts-nato-allies-paying-fair-share/story?id=47608155 (last visited Jan. 28, 2019); Nahal Toosi, *Trump Demands Other NATO Members Pay Their Fair Share*, POLITICO (Feb. 28, 2017), *available at* https://www.politico.com/story/2017/02/donald-trump-congress-speech-nato-235543 (last visited Jan. 28, 2019).

2. *See* Mallin & McGraw, *supra* note 1.

3. When asked by an interviewer why American soldiers should die to defend Montenegro from attack, President Trump replied that he had asked the same question before. President Trump then described Montenegro as "aggressive," and said that Montenegro's aggression could start World War III. Eileen Sullivan, *Trump Questions the Core of NATO: Mutual Defense, Including Montenegro*, N.Y. TIMES (July 18, 2018), *available at* https://www.nytimes.com/2018/07/18/world/europe/trump-nato-self-defense-montenegro.html (last visited Jan. 28, 2019).

4. Julian E. Barnes & Helene Cooper, *Trump Discussed Pulling U.S. From NATO, Aides Say Amid New Concerns Over Russia*, N.Y. TIMES (Jan. 14, 2019), *available at* https://www.nytimes.com/2019/01/14/us/politics/nato-president-trump.html (last visited Jan. 28, 2019).

NATO are very strong and that they remain strong.[5] Questions of whether President Trump was right to push NATO allies to spend more, or if it was right for President Trump to question mutual defense in NATO, or even whether the United States should withdraw from NATO are all irrelevant to the question at hand. Instead, this article will simply examine whether insufficient funding on the part of NATO allies would allow members of NATO to have an immediate right to renounce any mutual defense obligations invoked under Article 5 of the North Atlantic Treaty.

While President Trump's appeal to NATO member countries may have received considerable coverage in the news, he is not the first American president to criticize NATO members for "not paying their fair share."[6] President George W. Bush and President Obama had both requested more NATO spending, which shows that the issue has had bipartisan concern.[7] This also shows that President Trump is not breaking precedent or acting in a manner wholly inconsistent with past presidents.

There are two main types of funding which Alliance members are required to provide: direct and indirect. Direct funding is what would commonly be thought of as "funding." Direct funding consists of direct payments to the NATO, which are used by the Alliance to maintain its infrastructure and fund projects. This type of funding, while relevant to the discussion, is not what has been causing controversy recently. The source of recent controversy has been indirect funding. Indirect funding benefits NATO, but it is not given directly to NATO to spend as it chooses. Instead, indirect funding is money that each member country's government spends on its own national defense. While it may not be obvious at first, NATO indirect funding is important as it contributes the health of the Alliance more than the direct funding itself. As NATO is based on the idea of mutual defense, members of the Alliance must maintain their militaries to a level where they could easily be utilized to defend a member of the Alliance from an attack if such an instance were to arise. If members of the Alliance did not maintain their militaries sufficiently, NATO would provide a benefit to weak member countries only, by binding the stronger members to protect them.

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5. Louis Nelson, *Trump Says U.S. Ties to NATO 'Very Strong,'* POLITICO (July 12, 2018), *available at* https://www.politico.com/story/2018/07/12/trump-nato-spending-714976 (last visited Jan. 28, 2019).

6. Peter Baker, *Trump Says NATO Allies Don't Pay Their Share. Is That True?*, N.Y. TIMES (May 26, 2017), *available at* https://www.nytimes.com/2017/05/26/world/europe/nato-trump-spending.html (last visited Oct. 21, 2018).

7. *Id.*

A failure to properly meet a funding guideline under NATO does not allow other members of NATO to immediately renounce their mutual defense obligations. First, failure to provide the requested amount of direct funding to NATO for its own infrastructure does not allow this to happen under international treaty law. As direct funding is not mentioned in the North Atlantic Treaty, failure to provide it does not constitute a material breach which would justify a renunciation in the purpose of the Charter. Despite this, failure to meet the funding requirement could give a member the political will to withdraw from the treaty, which would be allowed, though it would require one year's notice. This would mean that parties to the treaty would still need to engage in any Article 5 invocations before one year passed after announcing withdrawal, and therefore, would not be immediate. In terms of the 2% funding figure, neither the 2006 implementation of the guideline or the 2014 guideline are legally binding on the members. The 2006 implementation was specifically stated to be a non-binding target, and the 2014 reaffirmation of that target was specifically chosen to place political pressure on members of NATO without applying legal pressure. Under international treaty law, members of NATO would have to be unable to uphold their own ability to defend themselves and other members before members of the Alliance would be able to immediately suspend their mutual defense obligations. Members who wished to do so would also have to take action promptly, as conduct that could be viewed as acquiescing to the situation could potentially cause them to forfeit their ability to renounce their mutual defense obligations under international treaty law. Due to the high level to constitute a material breach worthy to suspend a treaty under international law though, simply failing to meet the 2% guideline would not give a member of NATO the ability to renounce their mutual defense obligations.

I. WHAT IS NATO?

NATO was originally conceived by Western countries as a counterbalance to potential communist expansion.[8] NATO was created on April 4th, 1949 with the signing of the North Atlantic Treaty in Washington D.C.[9] Initially comprised of twelve member countries,[10] NATO

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8. *NATO*, HIST. (Aug. 21, 2018), *available at* https://www.history.com/topics/cold-war/formation-of-nato-and-warsaw-pact (last visited Oct. 26, 2018).

9. *What is NATO?*, NATO, *available at* https://www.nato.int/nato-welcome/index.html (last visited Oct. 26, 2018).

10. The twelve countries that were the original members of NATO at the time of its founding are: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, the United Kingdom, and the United States of America. *Id.*

currently has twenty-nine member countries.[11] NATO states the goals of the Alliance in the North Atlantic Treaty. The preamble of the charter establishes a commitment to pre-existing obligations of each of the individual members of the Alliance by stating, "The Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments."[12] This sentence served to allay the fears of potential Alliance members or other interested parties that NATO could potentially usurp the United Nations or become an imperialist organization. The next sentence of the North Atlantic Treaty preamble was then meant to paint the Alliance as a force for good by stating, "[t]hey are determined to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law."[13] The drafters of the North Atlantic Treaty then decided to reiterate the geographic area on which the treaty was most focused by stating, "They seek to promote stability and well-being in the North Atlantic area."[14] The preamble then stated the primary purpose of the Alliance by providing the phrase, "[t]hey are resolved to unite their efforts for collective defense and for the preservation of peace and security."[15]

To shed light on the historical period in which the formation of NATO took place, World War II had just concluded, and the Soviet Union had shown signs that they did not intend to evacuate formerly Nazi held territory that they had conquered during the war. In June 1948, the year before NATO was formed, the Soviets attempted to force Western nations outside of the Allied-controlled parts of Berlin by closing all of the transportation routes into the city from Allied-controlled Western Germany.[16] The Western governments brought in humanitarian supplies by air to Berlin until the Soviets, then led by Joseph Stalin, abandoned the plan and reopened the transportation routes in what would

11. The current countries that are members of NATO are: Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, the United Kingdom, and the United States of America. *Id.*

12. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter Treaty].

13. *Id.*

14. *Id.*

15. *Id.*

16. *Berlin Airlift*, HIST. (Sept. 12, 2018), *available at* https://www.history.com/ctopics/cold-war/berlin-airlift (last visited Oct. 26, 2018).

become to be known as the Berlin Airlift.[17] It is also strongly believed that this event lead to the creation of NATO as a military Alliance to combat Soviet attempts to spread communism around the globe.[18]

The principle of mutual defense is at the heart of the NATO Alliance.[19] Mutual defense is meant to guarantee that if one member of the organization is attacked, the other members of that organization will react to protect the member that was attacked. This principle provides safety as well as a deterrent for potential aggressors, as a war against one country could potentially mean a war against all countries that are a party to the Alliance. The principle of mutual defense was set forth in Article 5 of the North Atlantic Treaty.[20] Article 5 of the North Atlantic Treaty starts by stating, "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all" and that the other NATO countries shall act together for collective defense.[21] The charter justifies the mutual defense in Article 5 by invoking the "right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations."[22] Article 51 of the United Nations Charter allows a member of the United Nations the right to exercise individual or collective self-defense until the United Nations Security Council takes steps to re-establish international peace and security.[23] These same references to the United Nations Security Council are in the North Atlantic Treaty,[24] which demonstrated that NATO does not intend to challenge the supremacy or authority of the United Nations' charter, or the Security Council.[25]

Throughout the history of NATO, the invocation of Article 5 for collective defense has been quite rare. This is surprising considering

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17. *Id.*

18. *Id.*

19. *Collective Defence - Article 5*, NATO (June 12, 2018), *available at* https://www.nato.int/cps/en/natohq/topics_110496.htm (last visited Oct. 26, 2018).

20. Treaty, *supra* note 12.

21. *Id.*

22. *Id.*

23. U.N. Charter art. 51.

24. *What is NATO?*, *supra* note 4.

25. It should be noted that NATO is not underrepresented in the Security Council. The United Nations Security council has fifteen members, with ten of the members serving a term in a term in temporary position before switching with another member country. There are five permanent members that never rotate, and they hold a large amount of power on the Security Council. Among these powers is a veto to any Security Council resolutions. Three of the five permanent Security Council members are NATO members, those being the United Kingdom, France, and the United States. *Id.*

that NATO describes the mutual defense as "at the very heart of NATO's founding treaty" and saying that it "remains a unique and enduring principle that binds its members together."[26] Despite all of the military conflicts that NATO members have been involved in over the year, such as the Wars in Vietnam and Korea, Article 5 has only been invoked a single time in the history of NATO.[27] Article 5 was invoked for the first time by the United States in response to the terrorist attacks on September 11, 2001.[28] The likely reason that Article 5 has only been invoked once is because Article 5 is grounded in self-defense, while many actions by NATO members are pre-emptive or humanitarian. These are cases when Article 5 could not necessarily be invoked since no NATO member would have actually been attacked in those scenarios.

Though the United States was indisputably attacked, the fact that the attackers were part of a terrorist organization, and not a traditional state actor, makes the invocation of Article 5 a little more curious. To begin with, terrorism was not new to NATO, as the Alliance's 1999 Strategic Concept identified terrorism as a threat to the security of NATO.[29] On September 12, 2001, the allies made the decision to invoke Article 5, and the NATO Secretary General informed the UN Secretary-General of the Alliance's decision.[30] The North Atlantic Council, NATO's principal decision-making body, decided that the September 11th attacks were an attack from abroad that was directed at the United States, which meant that it was covered under Article 5 and NATO commenced its first anti-terror operations to defend the United States.[31]

II. FAILURE TO MEET NATO DIRECT FUNDING GOALS DOES NOT PROVIDE A RIGHT TO IMMEDIATELY RENOUNCE NATO MUTUAL DEFENSE OBLIGATIONS. IT IS NOT MENTIONED IN THE NORTH ATLANTIC TREATY, AND THEREFORE DOES NOT CONSTITUTE MATERIAL BREACH UNDER INTERNATIONAL TREATY LAW.

While NATO indirect funding is the more commonly discussed in the media, a discussion of NATO funding would be incomplete without

26. *Collective Defence - Article 5*, NATO (June 12, 2018), *available at* https://www.nato.int/cps/en/natohq/topics_110496.htm (last visited Oct. 30, 2018).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Collective Defence - Article 5*, *supra* note 26.

discussing NATO direct funding. NATO direct funding are direct contributions to NATO that are made to finance the infrastructure of NATO that are utilized by all twenty-nine members.[32] The NATO direct contributions are not the responsibility of any single member, and the costs are born collectively, often by utilizing a common funding principle.[33] NATO-wide air defense, and command and control systems are examples of programs that are funded by direct contributions from NATO member countries.[34] When utilizing the principle of common funding, "all 29 members contribute according to an agreed cost-share formula, based on Gross National Income, which represents a small percentage of each member's defence budget."[35] The common funding arrangement is used to fund NATO's principal budgets.[36] These principal budgets include: the military budget, which funds the costs of the integrated command structure; the civil budget, which funds the NATO headquarters running costs; and the NATO security investment program, which funds military capabilities.[37] NATO direct contributions mostly come in the forms of joint funding or common funding, but they can also come in the form of "trust funds, contributions in kind, *ad hoc* sharing arrangements and donations."[38]

Joint funding arrangements were described by NATO sources as "structured forms of multinational funding within the terms of an agreed NATO charter."[39] When projects are funded jointly the countries participating can "identify the requirements, the priorities and the funding arrangements," though NATO has political and financial oversight.[40] Joint funding arrangements can vary in the number of participating countries, cost-share arrangements and management structures.[41] Since NATO member countries are not forced to participate and the cost and management of such programs is variable, it is unlikely that joint funding arrangements could raise serious questions about a member country's commitments to NATO, as such programs are variable, and a

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32. *Funding NATO*, NATO (June 27, 2018), ***available at*** https://www.nato.int/cps/en/natohq/topics_67655.htm (last visited Nov. 2, 2018) [hereinafter *Funding NATO*].

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Funding NATO*, *supra* note 32.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

member country that does not wish to participate would not be required to.

The amount of direct funding that each country gives to NATO is organized by the Alliance. When the need for an expenditure is identified, authorities in NATO decide if the expenditure in question will benefit all members of the Alliance.[42] If the aforementioned authority determines that the expenditure would benefit all of the members, the principle of common funding is applied, as it is believed that all members should share in the cost of the program.[43] Common funding contributions by each individual member country are determined in accordance with a cost-sharing formula as determined by Gross National Income.[44] This means that each NATO member country pays in accordance with the size of their respective economies. The United States has the highest percentage of the cost, as the United States is expected to fund over 22% of all common funding arrangements.[45] France and the United Kingdom both have the next highest amount of common funding required, which is over 10% for both countries.[46] Montenegro has the lowest amount of common funding required, with less than 0.03% as based on the cost-sharing formula utilized by NATO.[47]

There are international sources of law that govern treaties and whether they are binding, and under which conditions they can be withdrawn from. The Vienna Conventions on the Law of Treaties (VCLT) is one such source of international law. While the United States has signed the VCLT, the Senate has not given its advice and consent to the treaty, which means that the United States is not officially a party to the treaty.[48] Despite this, the U.S. Department of State officially recognizes that the United States considers many parts of the VCLT to be customary international law.[49] Customary international law is considered a very important primary source of international law,[50] and is therefore binding on members of NATO.

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42. *Funding NATO*, *supra* note 32.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Funding NATO*, supra note 32.

48. *Vienna Convention on the Law of Treaties FAQs*, U.S. DEPT. OF STATE, *available at* https://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Jan. 31, 2019).

49. *Id.*

50. MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 166 (1999).

Article 44 of the Vienna Conventions on the Law of Treaties creates law that governs the separability of treaty provisions as it relates to selective withdrawal from specific provisions.[51] Article 44 provides that separability of treaty provisions cannot be accomplished if the treaty does not provide for it.[52] Article 44 states that, "to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty."[53] As a result, the United States, or any other member of NATO, cannot selectively refuse to engage in Article 5 actions of collective defense under the North Atlantic Treaty without withdrawing from the entire treaty, as the North Atlantic Treaty does not provide a right to refuse participating in an invocation of Article 5.[54]

VCLT Article 57 provides that a treaty which contains provisions regarding withdrawal or denunciation of the treaty can have its operation suspending in accordance with its provisions.[55] The North Atlantic Treaty is an example of a treaty with such a provision.[56] Article 13 of the North Atlantic Treaty provides that, "[a]fter the Treaty has been in force for twenty years, any Party may cease to be a Party one year after its notice of denunciation has been given to the Government of the United States of America, which will inform the Governments of the other Parties of the deposit of each notice of denunciation."[57] This provision would apply to the United States as it has been more than twenty years since the United States founded NATO. This provision does allow the United States to withdraw from NATO, though it requires a notice of one year before any party to the treaty can cease to be a party.[58] A member of NATO would likely not have notice of over one year before an attack that is eligible for the invocation of Article 5, which means that Article 13 of the North Atlantic Treaty could not be invoked to refuse mutual defense obligation unless such obligations could be predicted a year in advance. The United States, or other members of NATO, could withdraw from NATO, but such an act would require one-year notice and would eliminate all obligations on the part of NATO to the withdrawn country. This would differ from a scenario

51. Vienna Convention on the Law of Treaties art. 44, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

52. *Id.*

53. *Id.*

54. Treaty, *supra* note 12.

55. VCLT, *supra* note 51, art. 57.

56. Treaty, *supra* note 12.

57. *Id.*

58. *Id.*

where a country refused a select instance of mutual defense while still remaining a part of NATO.

Article 60 of the Vienna Conventions on the Law of Treaties could potentially allow a country to refuse mutual defense obligations under NATO.[59] Article 60 governs the termination or suspension of the operation of a treaty as a consequence of its breach.[60] According to Article 60, a material breach of a multilateral treaty entitles:

> any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.[61]

Article 60 also gives a definition of material breach to determine if a failure on the part of other member to give the appropriate amount of funding to NATO would constitute a "material breach."[62] According to VCLT Article 60, a material breach is "a repudiation of the treaty not sanctioned by the present Convention; or the violation of a provision essential to the accomplishment of the object or purpose of the treaty."[63] A failure to give NATO direct funding could not fall under either of these definitions of material breach under the convention.

A failure to provide direct funding to NATO for the organization to fund its infrastructure can neither be a repudiation of the treaty, nor can it be a violation of a provision essential to the treaty. The reason behind this is simple: NATO direct funding is not established in NATO's founding charter.[64] The closest that the charter gets to mentioning NATO direct funding is in Article 3, which states: "In order to more effectively achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack."[65] The term "mutual aid" could be interpreted as applying to funding for NATO infrastructure, though in the context of that clause, mutual aid refers to members of NATO aiding each other to ensure that their militaries are ready to mobilize, as opposed to funding

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59. VCLT, *supra* note 51, art. 60.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. Treaty, *supra* note 12.
65. *Id.*

for NATO infrastructure. Funding for NATO infrastructure is not mutual aid, it is instead the creation of ancillary organizations to manage NATO. Since NATO direct funding is not mentioned in the North Atlantic Treaty, it cannot constitute a material breach of the treaty and therefore would not justify a renunciation of the mutual defense obligations in the North Atlantic Treaty.

III. NATO INDIRECT FUNDING: THE ARTICLE 5 MUTUAL DEFENSE OBLIGATIONS IN THE NORTH ATLANTIC TREATY ARE NOT DISMISSED SIMPLY BECAUSE ALLIANCE MEMBERS FAIL TO SPEND 2% OF THEIR GDP ON NATIONAL DEFENSE ANNUALLY

NATO members' failure to spend 2% of their GDP on their national defense does not create an immediately exercisable option to renounce mutual defense obligations in NATO. Indirect funding is the type of NATO funding that has received more controversy recently. Indirect funding is not funding that goes directly to NATO for NATO itself to fund its operational infrastructure.[66] Instead, indirect funding to NATO actually refers to the amount of funding that NATO member countries spend on their own defense by investing money in their own military and domestic defense infrastructure.[67] At first it may not seem to matter how much NATO member countries spend on their defense, as domestic spending does not affect the funds that NATO is receiving as an organization to cover the organization's operating costs.[68] The reason for this is actually based on the mutual defense principle that is present in the founding charter of NATO.[69] Since an attack on one NATO country is meant to be considered an attack on all of NATO, NATO members countries are supposed to rush to the defense of the country that was attacked, and the indirect funding goals are meant to ensure that the NATO member countries have a military that would be properly fit to fight a defensive war.[70] While funding may not always directly correlate to military prowess, military funding is easy to measure with

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66. Millie Dent, *NATO: Everything You Need to Know About the Alliance Donald Trump Says Is 'Obsolete'*, YAHOO! FIN. (Apr. 24, 2016), *available at* https://finance.yahoo.com/news/nato-everything-know-Alliance-donald-213500967.html (last visited Oct. 31, 2018).

67. *Id.*

68. Ivana Kottasová, *How NATO is Funded and Who Pays What*, CNN (May 25, 2017), *available at* https://money.cnn.com/2017/05/25/news/nato-funding-explained-trump/index.html (last visited Oct. 31, 2018).

69. *Id.*

70. *Id.*

objective tests, and it is most probable that a properly funded military will have a better ability to defend any members of the Alliance.[71]

IV. ESTABLISHMENT OF THE 2006 INDIRECT FUNDING GUIDELINE DID NOT CREATE A BINDING COMMITMENT, THEREFORE FAILURE TO MEET THE GUIDELINE DOES NOT ALTER MEMBERS' COMMITMENT TO MUTUAL DEFENSE

After understanding what indirect funding of NATO is, we must examine the origins or the funding guideline to further understand the nature of the indirect funding guideline and how it may affect the NATO of mutual defense. Currently, NATO member countries are required to spend 2% of their gross domestic product (GDP)[72] on defense spending.[73] Currently, the majority of NATO members do not meet this requirement.[74] Only five of the Alliance's members currently meet the 2% guideline for defense spending in 2017.[75] Even though some NATO member countries meet the funding guidelines, NATO funding is still widely disproportionate when one compares American defense spending to the defense spending of other allies.[76] American defense spending is actually twice the amount that all other twenty-eight NATO member countries are spending on their defense combined.[77] This figure actually became more disproportionate after the September 11th attacks, at which point the United States further increased its defense spending.[78] Those countries reaching the 2% figure were: The United States, The United Kingdom, Poland, Greece, and Estonia.[79] The 2%

71. *See id.*

72. Gross domestic product is the measure of the monetary value of all goods and services that are produced within a country's borders during a specific period of time. *Gross Domestic Product – GDP*, INVESTOPEDIA, *available at* https://www.investopedia.com/terms/g/gdp.asp (last visited Nov. 2, 2018). GDP is usually calculated annually, though it can be calculated in different time increments, such as quarterly. *Id.* To summarize it generally, GDP is a measure of the total economic output of a country. *Id.*

73. *Funding NATO, supra* note 32.

74. Ian Bremmer, *The Only 5 Countries That Meet NATO's Defense Spending Requirements*, TIME (Feb. 24, 2017), *available at* http://time.com/4680885/nato-defense-spending-budget-trump/ (last visited Nov. 2, 2018).

75. These countries are the United States, the United Kingdom, Poland, Greece, and Estonia. Niall McCarthy, *Defense Expenditures of NATO Members Visualized [Infographic]*, FORBES (July 10, 2018), *available at* https://www.forbes.com/sites/niallmccarthy/2018/07/10/defense-expenditure-of-nato-members-visualized-infographic/#1760f72a14cf (last visited Nov. 2, 2018).

76. *Funding NATO, supra* note 32.

77. *Id.*

78. *Id.*

79. *Id.*

figure can best be described as an "arbitrary figure," but a figure that did have "symbolic value" nonetheless.[80] According to NATO itself, "[t]his guideline principally serves as an indicator of a country's political will to contribute to the Alliance's common defence efforts."[81]

The 2% guideline was originally created in 2006.[82] The number was established at a meeting of NATO defense ministers at NATO headquarters in Brussels, and the number was unveiled to the press on June 8 of that year.[83] The introduction of the 2% figure is rather complex, and it was rolled out in a more indirect manner.

First, to understand the origin of the 2% figure, we have to first understand the origin and purpose of the NATO Comprehensive Political Guidance.[84] The NATO Comprehensive Political Guidance was a document that set out the "framework and priorities for all Alliance capability issues, planning disciplines, and intelligence" for the succeeding ten to fifteen years.[85] The Comprehensive Political Guidance "set out the kinds of operations the Alliance had to be able to perform in light of the Alliance's 1999 Strategic Concept and the kinds of capabilities the Alliance would need."[86] This document does address the issue of sufficient funding in NATO, though it does not provide specific numbers to analyze the funding.[87]

The comprehensive Political Guidance starts off with a statement describing the necessity of sufficient funding by stating that, "[t]he development of capabilities will not be possible without the commitment of sufficient resources."[88] The Comprehensive Political Guidance then reiterates the need to effectively spend the funds dedicated to defense, by stating that, "it will remain critically important that resources that Al-

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80. *NATO 2% Defence Spending Target Should Be Met, MPs Say*, BBC NEWS (Mar. 12, 2015), *available at* https://www.bbc.com/news/uk-politics-31857044 (last visited Nov. 2, 2018).

81. *Funding NATO*, *supra* note 32.

82. *Funding NATO*, *supra* note 32.

83. James Appathurai, *Press Briefing*, NATO (June 8, 2006), *available at* https:// www.nato.int/docu/speech/2006/s060608m.htm (last visited Nov. 3, 2018).

84. *See* Paul Savereux, *The Comprehensive Political Guidance: A primer*, NATO (Jan. 1, 2007), *available at* https://www.nato.int/docu/review//2007/Reviewing_Riga/Comprehensive_political_guidance/EN/index.htm (last visited Dec. 29, 2018).

85. *Comprehensive Political Guidance (Archived)*, NATO (June 1, 2015), *available at* https:// www.nato.int/cps/en/natolive/topics_49176.htm (last visited Dec. 29, 2018).

86. *Id.*

87. *See id.*

88. *Comprehensive Political Guidance (Full Text)*, NATO (July 13, 2009), *available at* https://www.nato.int/cps/en/natohq/official_texts_56425.htm (last visited Dec. 30, 2018) [hereinafter *Political Guidance*].

lies make available for defence, whether nationally, through multinational projects, or through NATO mechanisms, are used as effectively as possible and are focused on priority areas for investment."[89] The Comprehensive Political Guidance then provides guidelines on how to determine if national defense funds are being spent properly, without providing specific guidance on how they should be spent by stating that, "[i]ncreased investment in key capabilities will require nations to consider reprioritisation, and the more effective use of resources, including through pooling and other forms of bilateral or multilateral cooperation."[90] The Comprehensive guideline then commands NATO member countries to follow the previous guidelines by declaring that, "NATO's defence planning should support these activities."[91]

The Comprehensive Political Guidance then describes readiness standards that NATO member countries should aspire to abide by, though those guidelines are qualitative and do not provide specific numeric targets for NATO member countries.[92] The 2% figure is not specifically established in the Comprehensive Political Guidance.[93] Despite this, the adoption of the Comprehensive Political Guidance was necessary for the genesis of the 2% figure, even if it did not directly create it.

The Comprehensive Political Guidance was fully adopted by NATO. According to NATO, the Comprehensive Political Guidance was agreed to by NATO defense ministers at their June 2006 meeting at the NATO headquarters in Brussels.[94] At the highest political level, the NATO heads of state and government agreed to the Comprehensive Political Guidance in November 2006 at the Riga Summit.[95] Agreement to the terms of the Comprehensive Political Guidance was also agreement to supplementary documents that would provide additional terms that NATO member countries should abide by. While this may seem strange at first, the purpose of this becomes clearer as one comes to understand the purpose of the Comprehensive Political Guidance itself.

NATO itself describes the Comprehensive Political Guidance as a "high-level guidance document which provides a framework and politi-

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89. *Id.*
90. *Id.*
91. *Id.*
92. *Political Guidance*, *supra* note 88.
93. *See id.*
94. *Political Guidance*, *supra* note 88.
95. *Id.*

cal direction" for NATO's future.[96] Ultimately, the Comprehensive Political Guidance "provides the agreed vision and priorities for NATO's ongoing transformation."[97] The Comprehensive Political Guidance attempted to predict the future strategic landscape for NATO, though it also simultaneously acknowledges the possibility that this strategic vision could change.[98] Due in part to this, the NATO Comprehensive Political Guidance expressed the kind of strategic capabilities that NATO would have to be able to perform, the specific manner in which these capabilities would have to be fulfilled was intentionally left open.[99] These specifics were meant to be determined both individually by nations and collectively by NATO.[100] The Comprehensive Political Guidance "does not delve into sufficient detail to give exhaustive guidance for each specific planning discipline and other capability-related bodies;" therefore, a requirement for "lower level guidance still remains."[101] The Comprehensive Political Guidance did not contain quantitative information on what allies expected NATO to be able to do.[102]

It appears that the 2% of GDP towards defense spending figure was first unveiled in a document that would be considered lower-level guidance. NATO sources explicitly stated this: "For force planning, this is done in a subordinate, classified document (Ministerial Guidance 2006), which is based on the CPG and was agreed by the nations concerned in June 2006."[103] This appears to be the document in which the 2% figure was initially introduced to NATO member countries. We have some clues that suggest that this is the case. When NATO spokesman James Appathurai first unveiled the 2% figure to the media, the press briefing took place on June 8, 2006,[104] which is the same time period within which the primer stated that the Ministerial Guidance was created.[105] The press briefing was also described as taking place after "the meeting of the North Atlantic Council at the level of Defence Ministers."[106]

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96. Savereux, *supra* note 84.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. Savereux, *supra* note 84.
102. *Id.*
103. *Id.*
104. Appathurai, *supra* note 83.
105. Savereux, *supra* note 84.
106. Appathurai, *supra* note 83.

Why is it important to establish that the 2% figure was first unveiled in the NATO Ministerial Guidance? The Ministerial Guidance is classified.[107] Due to this, it is not possible to review the document in which the 2% figure was originally introduced.[108] Instead, the most direct source we have is the contemporary press briefing by NATO Spokesman James Appathurai, in which he educates members of the media on the 2% and describes the expectations surrounding it.[109]

In the meeting, Appathurai told the press that NATO member countries, "through the comprehensive political guidance have committed to endeavour, to meet the 2% target of GDP devoted to defence spending."[110] He also stated, "[l]et me be clear, this is not a hard commitment that they will do it. But it is a commitment to work towards it."[111] The NATO spokesman also stated that the 2% was the first attempt by NATO to put forward a specific commitment for NATO member countries to work towards.[112] Furthermore, as Appathurai answered a question, he refered to the 2% figure as a "target", not a requirement or other similar language, and stated that he believes that seven NATO member countries were meeting the deadline at that time, without speaking of any way that the remaining non-compliant members may be forced to reach the 2% mark, and he also fails to give any type of deadline.[113] In 2005, the last year of information that the NATO spokesman would have had available to him, supports this claim.[114] The countries that met the 2% mark were: Bulgaria, France, Greece, Romania, Turkey, the United Kingdom, and the United States.[115] As a reference for compliance in other years, NATO data shows that six Alliance members made the 2% target in 2006.[116] All of the same member

107. Savereux, *supra* note 84.

108. As I was unable to find the NATO Ministerial Guidance, it appears that the document is still classified. This is likely so that NATO's true capabilities will be hidden, which would prevent enemies of NATO from properly preparing for and anticipating a conflict from NATO, thus preserving the element of surprise for NATO member countries in the event of an armed conflict.

109. Appathurai, *supra* note 83.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Press Release, NATO, *NATO-Russia Compendium of Financial and Economic Data Relating to Defence* (Dec. 20, 2007), *available at* https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2007_12/20090327_p07-141.pdf (last visited Nov. 8, 2018) [hereinafter *Compendium*].

115. *Id.*

116. *Id.*

countries made the target, except for Romania, which was not in compliance.[117] Based on Appathurai's words, when the 2% guideline was originally created, it was not intended to be a binding commitment with specific consequences for failing to meet the deadline. Appathurai referred to the 2% figure as a "target" and he explicitly said that it was not a hard commitment.[118] Additionally, the lack of specific consequences that were not set up by NATO defense ministers at the time of the drafting of this specific guideline further supports this point.

When looking at the circumstances surrounding the introduction of the 2% figure in 2006, we can come to no other conclusion except that the guideline was not intended to be legally binding at the time. Official NATO sources even described the figure "as not a hard commitment," and that the figure was instead a "target."[119] There were also no specific consequences set for NATO member countries who failed to meet the funding goals, which would likely have been created if the target was meant to affect the status of NATO member countries. While the guideline was first unveiled in 2006, the analysis cannot stop as the guideline continue has received further attention, including in 2014 when the guideline was recommitted to by NATO member countries.

V. THOUGH POLITICALLY PERSUASIVE, MEMBERS' 2014 RECOMMITMENT TO 2% GDP DEFENSE SPENDING IS NOT LEGALLY BINDING

While it appears that the 2% guideline was not originally intended to be legally binding on the members of the Alliance, the analysis cannot stop there and rest on that conclusion. The 2006 meeting at the NATO headquarters was not the only time that the guideline was specifically laid out, nor was it the only time that members of the Alliance agreed to try to reach it. NATO countries actually agreed to commit themselves to make the 2% guideline in the year 2014.[120] This recommitment to the target was likely caused by the perceived need on the part of NATO officials to try to gain compliance on the part of Alliance members. Military spending at that time had actually decreased, and more countries had fallen out of compliance with the 2% guideline since

117. *Id.*

118. Appathurai, *supra* note 83.

119. *Id.*

120. Jan Techau, *The Politics of 2 Percent: NATO and the Security Vacuum in Europe*, CARNEGIE EUR. (Sept. 2, 2015), *available at* http://carnegieeurope.eu/2015/09/02/politics-of-2-percent-nato-and-security-vacuum-in-europe-pub-61139 (last visited Nov. 9, 2018).

the original target was created in 2006, despite what an observer would assume.[121] In 2013 – the last year that NATO officials would have had data for, as 2014 was not yet complete – there were only three members of the Alliance that actually reached the 2% threshold.[122] The only three Alliance members that actually complied with the 2% figure were Greece, the United Kingdom, and the United States.[123] For NATO officials, this was likely an alarming sign, as three countries complying is less than half of the seven countries complying in 2005 before the 2% target was even introduced.[124]

In 2014, the eyes of the world were on Newport in the United Kingdom, where all twenty-eight NATO member countries[125] were represented, and many world leaders were converging to discuss the business and future of NATO moving forward.[126] At the Wales Summit, national leaders of the NATO member countries agreed to commit themselves to spending goals.[127] The text of the Wales Summit Declaration (Declaration) is expansive and covers many issues discussed and decided on at the Summit.[128] There was clear intent on the on the part of the drafters of the Wales Summit Declaration to show that assent to the declaration was given by officials at the top level of the respective governments of each country, as opposed to the many ministerial, or bureaucratic-type decisions that are made in NATO.[129] The opening sentence of the Declaration states, "We, the Heads of State and Government of the member countries of the North Atlantic Alliance, have gathered in Wales at a pivotal moment in Euro-Atlantic security."[130]

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121. Press Release, NATO, *Defence Expenditures of NATO Countries (2008-2015)* (Jan. 28, 2016), *available at* https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_01/20160129_160128-pr-2016-11-eng.pdf (last visited Nov. 9, 2018).

122. *Id.*

123. *Id.*

124. *Compendium*, *supra* note 114.

125. At the time of the Wales Summit in 2014, there were only twenty-eight countries that comprised NATO, as Montenegro only joined the Alliance in 2017. *See Montenegro Ratifies NATO Membership in Historic Shift to Western Alliance*, THE GUARDIAN (Apr. 28, 2017), *available at* https://www.theguardian.com/world/2017/apr/28/montenegro-ratifies-nato-membership-in-historic-shift-to-western-Alliance (last visited Nov. 9, 2018).

126. *See World Comes to Wales for 2014 NATO Summit in Newport,* BBC NEWS (Sept. 4, 2014), *available at* https://www.bbc.com/news/uk-wales-29053052 (last visited Nov. 9, 2018).

127. *2014 NATO Summit in Wales*, RT (Sept. 4, 2014), *available at* https:// www.rt.com/uk/184944-nato-summit-live-updates/ (last visited Nov. 9, 2018).

128. Press Release, NATO, Wales Summit Declaration (Sept. 5, 2014) [hereinafter Wales Summit Declaration].

129. *Id.*

130. *Id.*

This signals that consent for the polices and positions within the declaration have received approval at the highest levels of government.

The Declaration then reiterates NATO's fundamental principles and goals, and gets into the discussion of funding. The discussion of funding in paragraph fourteen by stating, "We agree to reverse the trend of declining defence budgets, to make the most effective use of our funds and to further a more balanced sharing of costs and responsibilities."[131] The Declaration also states that any countries that were currently meeting the 2% minimum for defense spending would continue to do so.[132] The Declaration also has a stipulation that any countries that were currently spending twenty percent of their defense budget on major equipment, which included research and development, would continue to do so as well.[133] This stipulation is used as a way to guarantee that the 2% of GDP being used on defense spending is not being wasted on other types of funding that may not be as effective in creating a readily mobile and deployable national defense force.

To address the situation where certain NATO member countries were not meeting their domestic defense spending goals for NATO, the Declaration then goes on to lay out three different directives for countries that were currently failing to meet the 2% of GDP funding for defense spending target.[134] First, they are to "halt any decline in defence expenditure" as a starting point.[135] Second, those countries out of compliance are to "aim to increase defence expenditure in real terms as GDP grows," which means that countries should continue to increase their defense spending as their GDP increases.[136] The third goal sets a deadline for the defense spending to comply with the "aim to move towards the 2% guideline within a decade with a view to meeting their NATO Capability Targets and filling NATO's capability shortfalls."[137] The Declaration also specifies that any countries that "spend less than 20% of their annual defence spending on major new equipment, including related Research & Development, will aim, within a decade, to increase their annual investments to 20% or more of total defence expenditures."[138] In an attempt to reiterate the general purpose of the funding,

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131. *Id.*
132. *Id.*
133. Wales Summit Declaration, *supra* note 128.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. Wales Summit Declaration, *supra* note 128.

so as not to make the discussion solely about the amount of funding, the Declaration required all allies to "ensure that their land, air and maritime forces meet NATO agreed guidelines for deployability and sustainability and other agreed output metrics," and it also requires them to "ensure that their armed forces can operate together effectively, including through the implementation of agreed NATO standards and doctrines."[139] The discussion of the funding is finished with a reminder that the progress would be reviewed annually.[140]

The nature of the Wales Summit Declaration, and even the document's name itself, can help us answer whether or not this commitment was meant to be binding. While it is certainly persuasive to members of the Alliance, the Declaration does not appear to be politically binding. According to United Nations sources, a declaration is not binding by its nature.[141] According to the United Nations Educational, Scientific, and Cultural Organization, a "Declaration and a Recommendation is generally a document of intent, and, in most cases, does not create a legally binding obligation on the countries which have signed it."[142] As a result, a declaration is a document that cannot be ratified.[143] The term "declaration" is "often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations."[144] Accordingly, it would appear that the creators of the Wales Summit Declaration intentionally chose to make it a declaration, as opposed to some other title for the document which would suggest that it was meant to be binding, such as a treaty.

While the name of the Wales Summit Declaration is suggestive that the document was meant to be non-binding, it is not a strict rule that all declarations are not binding on signatories. Though declarations are often not binding, it is possible that they could "be treaties in the generic sense intended to be binding at international law."[145] This determination, though, has to be done by looking at the original intent of the people who drafted the Declaration.[146] In this case, it appears unlikely that

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139. *Id.*

140. *Id.*

141. *Declaration*, UNESCO, *available at* https://wayback.archive-it.org/10611/20171126022619/http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/declaration/ (last visited Nov. 11, 2018) [hereinafter *Declaration (definition)*].

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Declaration (definition)*, *supra* note 141.

this was the intent. Originally, when the guideline was first drafted, the guideline was explicitly intended to be non-binding on the members of the Alliance.[147] Since the 2% figure was originally intended to be non-binding, it stands to reason that there would have to be a clear intention on the part of the drafters of the Wales Summit Declaration that the re-commitment to the figure was meant to be binding, as it would be changing the nature of the 2% target. Throughout the Wales Summit Declaration, there does not appear to be any indication of intent on the part of the drafters of the declaration to turn the 2% target into a legally-binding target.[148] The Declaration does not explicitly state that the 2% figure was to become binding.[149] Similarly, it did not establish any type of consequences for countries that failed to meet the 2% target.[150] Since it is "therefore necessary to establish in each individual case whether the parties intended to create binding obligation,"[151] it must be concluded that the Wales Summit Declaration did not bind the members of NATO to the 2% target for defense spending, as there was no language in the Wales Summit Declaration to suggest that it would.[152]

After examining the history of the figure, it does not appear that any NATO member countries can renounce NATO mutual defense obligations simply because other members of the Alliance do not apply 2% of their GDP on their domestic defense budget. Instead, the figure is merely suggestive and a failure to meet the figure is not meant to have real consequences on the Alliance.

VI. INTERNATIONAL TREATY LAW LETS NATO MEMBERS RENOUNCE MUTUAL DEFENSE OBLIGATIONS IF ANOTHER NATO MEMBER CANNOT UPHOLD ITS OWN. FAILURE TO MEET THE 2% GUIDELINE ALONE IS INSUFFICIENT TO SUSPEND SUCH OBLIGATIONS

It appears that members of NATO are not legally bound to the 2% figure for defense spending. Since the target is persuasive and not legally binding, failing to meet that guideline would not cause the mutual defense described in Article 5 of the North Atlantic Treaty to be affected.[153] The 2% target for NATO funding is simply just that: a target. It

147. Appathurai, *supra* note 83.

148. *See* Wales Summit Declaration, *supra* note 128.

149. *See id.*

150. *See id.*

151. *Declaration (definition)*, *supra* note 141.

152. Wales Summit Declaration, *supra* note 128.

153. *See* Treaty, *supra* note 12.

is an aspiration and a goal for NATO member countries to try to achieve, it is not a necessary part of remaining a member of NATO. It is not a prerequisite which allows the other members of the Alliance to ignore the mutual defense principle of NATO if they fail to make the target of 2% of their GDP dedicated to defense spending. There were not treaties that enforced the 2% target, and it was both implicitly and explicitly stated that the target was not meant to be binding.

Though the 2% figure does not specifically bind NATO members, that does not mean that members of the Alliance are not legally bound to have a military that can readily be used for conflict. While spending is not totally determinative of the health of a military, it certainly can affect it. The North Atlantic Treaty, which created NATO and therefore binds NATO and controls its conduct, creates an obligation for members of the Alliance to maintain a competent military.[154]

There are sources of international law that regulate treaties between countries in the international system. A prominent source of such laws is the Vienna Convention on the Law of Treaties. It should be noted that the United States is not officially a party to the Vienna Convention on the Law of Treaties, though the United States signed the Vienna Convention on the Law of Treaties.[155] Despite the United States not being a party to the convention, the State Department has stated that it is the position of the United States that many parts of the Vienna Conventions on the Law of Treaties are considered customary international law.[156] Customary international law is considered a very important primary source of international law,[157] and it is therefore binding on members of NATO.

Article 60 of the Vienna Convention of the Law of Treaties states that "[a] material breach of a multilateral treaty" by one of the parties entitles

> any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.[158]

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154. *Id.*

155. *Vienna Convention on the Law of Treaties FAQs*, *supra* note 48.

156. *Id.*

157. Byers, *supra* note 50.

158. VCLT, *supra* note 51, art. 60.

Article 60 defines a material breach as "(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."[159] If members of NATO do not sufficiently fund their military forces, it could potentially be considered a material breach under Article 60 which could allow a member of NATO to suspend their involvement in the treaty.

Article 3 of the North Atlantic Treaty states, "In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack."[160] Article 3 of the North Atlantic Treaty requires that members of NATO maintain their armed forces to a degree where they can resist armed attack. This is a necessary for the mutual defense requirements in NATO to be effective, as members of the Alliance would need to the ability to assist militarily if mutual defense was to be effective. If members of NATO could not resist armed attack, this would violate a provision essential to the purpose of NATO, which was a mutual defense organization.

Though Article 60 of the Vienna Convention on the Law of Treaties could allow members of NATO to withdraw from the treaty if members of NATO did not have the capacity to resist armed attack, countries not meeting the 2% of funding figure would not immediately be such a material breach. Garrett Martin and Balazs Martonffy both believe that the 2% figure is flawed and should be abandoned in favor of a better way to measure NATO spending.[161] The authors state that the 2% figure was originally chosen because staff at the NATO headquarters in Brussel determined that the median defense spending of NATO member countries from 1991-2003 was approximately at 2%, so that figure was adopted.[162] They also believe that the figure provides issue as each country can decide what they consider defense spending with a different criteria from each other.[163] The authors also believe that the figure focuses too much on inputs and no the outputs, meaning that even though Greece met the guideline, it still had trouble projecting

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159. *Id.*

160. Treaty, *supra* note 12.

161. Garrett Martin & Balazs Martonffy, *Abandon the 2 Percent Obsession: A New Rating for Pulling Your Weight in NATO*, WAR ON THE ROCKS (May 19, 2017), *available at* https://warontherocks.com/2017/05/abandon-the-2-percent-obsession-a-new-rating-for-pulling-your-weight-in-nato/ (last visited Nov. 2, 2018).

162. *Id.*

163. *Id.*

its power abroad, though Denmark failed to meet the guideline and boasts a military that can be easily deployed abroad at any time.[164] Discussion of the military readiness is outside of the scope of this article, and would be more in the realm of military experts. Without evaluating the military preparedness of every member of NATO though, it is still safe to conclude that countries failing to meet the 2% of GDP for defense spending guideline would not constitute a material breach that would allow members of NATO to immediately renounce mutual defense obligations under NATO.

Additionally, Article 45 of the Vienna Convention on the Law of Treaty states that a party may no longer invoke a ground for suspending a treaty under Article 60, after becoming aware of the facts, "it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."[165] This could mean that a member could lose its ability to withdraw from NATO, if knowing that another member of NATO did not have the ability to resist armed attack, that member of NATO continued to support abide by its mutual defense obligations.

International treaty law provides the possibility that a member of NATO could suspend its mutual defense obligations if other members of NATO did not have the ability to resist armed attack, though it does not allow members of NATO to do that simply because other members of NATO failed to spend 2% of their GDP on defense spending. While it is possible, it is still unlikely to occur. A material breach in Article 60 is a rather high standard in terms of NATO. It would not allow the mutual defense obligations to be renounced simply because a military was not as powerful as it should be. Instead, a country would need to provide no assistance whatsoever militarily to constitute a material breach. Additionally, if a country was aware of the breach, if it did not act timely enough, other members of NATO could be considered to have acquiesced to that conduct, and suspension would not be allowed at that point.

VII. CONCLUSION

A failure on the part of a NATO member country to spend 2% of its GDP on national defense spending would not allow another member of NATO to suspend its mutual defense obligations to NATO immediately. Under international treaty law, a member of NATO may be able to suspend its mutual defense obligations to NATO when other mem-

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164. *Id.*

165. VCLT, *supra* note 51, art. 45.

bers are unable to assist in the repelling of an armed attack. This is somewhat unlikely to happen, however, as such an inability to uphold its own defense obligations under the North Atlantic Treaty is unlikely to occur. The standard for that would be quite high, and relative weakness of a military would not constitute a material breach. Additionally, members of NATO could be perceived as acquiescing to such arrangement, which would also remove their ability to suspend their mutual defense obligations. A failure to give the requisite amount of direct funding to NATO would also not allow for a country to suspend its mutual defense obligations under international treaty law.

While a failure on the part of some countries to meet the 2% funding guideline may be frustrating to the members of NATO that meet it, it does not trigger an immediate right to renounce mutual defense obligations under the treaty. Instead, if members of NATO wish to be released from their mutual defense obligations, they need to withdraw from NATO by giving one-year notice. Without taking such action, it appears likely that the central focus of NATO will continue to bind its members as the Alliance moves forward into the future.