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ARTICLES

NOTES

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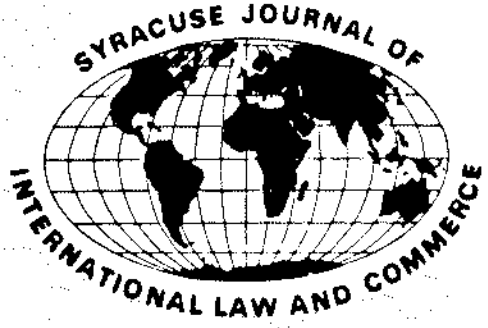

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HOW THE COMMANDER IN CHIEF'S "CALL FOR PAPERS" VEILS A PATH DEPENDENT RESULT OF TORTURE

Robert Bejesky[†]

CONTENTS

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† M.A. Political Science (Michigan), M.A. Applied Economics (Michigan), LL.M.

I. INTRODUCTION

Path dependence and critical junctures refer to decisive choices and events that prompt future trajectories, which are difficult to reverse because the progression of the political or institutional consequence involves entrenched behavior, anteceding determinations, and an elevated cost of altering course.[1] Path dependent methodology has been applied to diverse topics, such as economic behavior, party system dynamics, the incorporation of labor movements, and implementation of legislative agendas.[2] This article considers how the two primal risk-averse post-9/11 assumptions—that there was a global al-Qaeda network intent on perpetrating numerous catastrophic terror attacks and that severe psychological interrogation methods were essential for prying details of plots from suspected terrorists to prevent those attacks[3]—initiated a path dependent process that resulted in a rampant violation of human rights on suspected terrorists, combatants, and innocent people, both in and out of war zones.[4] Residing between the two causal premises and the result was the intervening variable of advisory memos that rationalized illicit interrogation practices[5] with loopholes to make

1. RUTH BERINS COLLIER & DAVID COLLIER, SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA 27-29 (2002); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 251-53 (2000).

2. Pierson, *supra* note 1, at 251-54.

3. Robert Bejesky, *A Rational Choice Reflection on the Balance Among Individual Rights, Collective Security, and Threat Portrayals Between 9/11 and the Invasion of Iraq*, 18 BARRY L. REV. 31, 34-43 (2012) [hereinafter Bejesky, *Rational Choice Reflection*]; Robert Bejesky, *The Utilitarian Rational Choice of Interrogation from Historical Perspective*, 58 WAYNE L. REV. 327, 330-32 (2012) [hereinafter Bejesky, *Utilitarian Rational Choice*].

4. Bejesky, *Utilitarian Rational Choice*, *supra* note 3, at 386-91; Robert Bejesky, *Pruning Non-Derogative Human Rights Violations into an Ephemeral Shame Sanction*, 58 LOY. L. REV. 821, 823-28 (2012) [hereinafter Bejesky, *Pruning*]; Robert Bejesky, *Closing Gitmo: The Epiphany Approach to Habeas Corpus During the Military Commissions Circus*, 7-10, 20-25 (unpublished manuscript) [hereinafter Bejesky, *Epiphany Approach*]; Elizabeth Rindskopf Parker, *A National Security Agenda*, 43 SUFFOLK U. L. REV. 829, 835 (2010) (speaking of the Bush Administration's interrogation techniques and noting that "[c]hoices made by earlier administrations are difficult to reverse abruptly, if at all, and as a result new approaches evolve slowly.").

5. *See generally* Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogations*, 66

legal restraints inapplicable.[6]

Yet if one discards the premises, signified by the reality that the first terrorist attack since 9/11 occurred at the 2013 Boston Marathon when two bombs exploded and killed three Americans and injured dozens more,[7] there has been virtually no credible evidence of sleeper cells, realistic plots, or preparation for an attack,[8] and that wars in Afghanistan and Iraq were not persuasively related to imminent threats inside American borders; legal advisory memoranda endowed government interrogation orders with a façade of legitimacy even as

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OHIO ST. L.J. 1231 (2005); Mary Ellen O'Connell, *Responses to the Ten Questions*, 36 WM. MITCHELL L. REV. 5127, 5132 (2010) [hereinafter O'Connell, *Responses*] (stating that "the memo on the Geneva Conventions and other torture memos are replete with errors, erroneous reasoning, omissions, and illogic," and the sole plausible "explanation for the shockingly poor quality of the memos . . . is that the authors intended to reach conclusions the law did not support."); *see also* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 855-61 (2005); Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 348 (2004); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1260 (2002); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002).

6. Linda M. Keller, *Is Truth Serum Torture?*, 20 AM. U. INT'L L. REV. 521, 551 (2005) (opining that the advice was tantamount to "the power to commit genocide, to sanction slavery, to promote apartheid, to license summary execution."); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 682 (2004) (noting that "lawyers for the Bush administration went from the legitimate conclusion that the Geneva Conventions cannot easily be applied to many modern conflicts, to the disingenuous and flawed conclusion that there were therefore no legal constraints at all on U.S. interrogation practices.").

7. Brian Z. Tamanaha, *Are We Safer from Terrorism? No, But We Can Be*, 28 YALE L. & POL'Y REV. 419, 419 (2010) (noting that there were no attacks on U.S. soil since 9/11); Palash R. Ghosh, *Boston Marathon Bombing: A Timeline Of Terrorist Attacks on US Targets Since 9/11*, INT'L BUS. TIMES (Apr. 15, 2013), *available at* http://www.ibtimes.com/boston-marathon-bombing-timeline-terrorist-attacks-us-targets-911-1193485?ft=k82h2 (last visited Nov. 18, 2013).

8. Ian S. Lustick, *Fractured Fairy Tale: The War on Terror and the Emperor's New Clothes*, 16 MINN. J. INT'L L. 335, 338 (2007); The Editorial Board, *Indisputable Torture*, N.Y. TIMES (Apr. 16, 2013), *available at* http://www.nytimes.com/2013/04/17/opinion/indisputable-torture-of-prisoners.html?ref=extraordinaryrendition&_r=0 (last visited Nov. 18, 2013) (stating that a recent "independent, nonpartisan panel's examination of the interrogation and detention programs" implemented by the Bush Administration found violations of international law and stated that there was "no firm or persuasive evidence that they produced valuable information that could not have been obtained by other means"); David Cole & Jules Lobel, *Are We Safer?*, L.A. TIMES (Nov. 18, 2007), *available at* http://www.latimes.com/la-op-cole18nov18,0,6931314.story (last visited Nov. 18, 2013) (noting that the Justice Department claimed that there were 261 "terrorism and terrorism-related" convictions, but only two cases "actually involve[ed] attempted terrorist activity.").

U.S. integrity was undermined with widespread deprivation of human rights.[9] However, it is also possible that the memoranda were not a consequential intervening cause that modified Bush Administration decision-making, but instead human rights abuses may have been the foreseeable proximate cause of White House assumptions and solicitations for advice.[10] Consider the following causal flow:

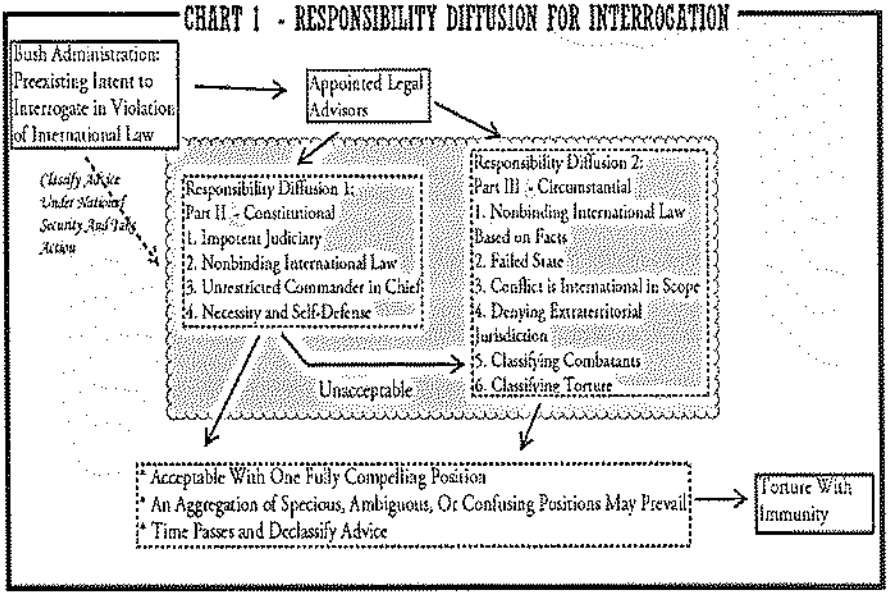

Chart 1 starts with an administration decision and request and the outcome is torture with immunity. *Newsweek* referenced an effective "call for papers" when it reported that President Bush petitioned White House lawyers to "find a way to exercise the full panoply of powers granted the president by Congress and the Constitution: If that meant pushing the boundaries of the law, so be

9. Bejesky, *Pruning*, *supra* note 4, at 823-28, 875-76; David Abraham, *The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights*, 62 U. MIAMI L. REV. 249, 249 (2008) (stating that "the Bush regime is known primarily for the international mess it has created as the world's only superpower, and for the way is has sacrificed long-accepted legal norms – military and civilian, international and domestic – in the name of its so-called War on Terror," which led to "domestic repression" and "the brutality and denial of legal obligations toward enemy non-Americans.").

10. Judith Resnick, *Detention, The War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 612 (2010) (stating that "[t]he Torture Memos sanctions actions that, as hundreds of pages of reports from an array of sources now document, took place.").

it."[11] Similarly finding specious that objective legal advice instigated interrogation operations, Human Rights Watch emphasized that "there is now substantial evidence that civilian leaders *requested* that politically appointed government lawyers create legal justifications to support abusive interrogation techniques, in the face of opposition from career legal officers."[12] In December 2008, the Senate Armed Service Committee Report explained that the solicitation "on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees."[13] Professor Jack Goldsmith, who was later appointed to head the Department of Justice Office of Legal Counsel (OLC) that was writing legal memoranda, stated that the Bush Administration wanted to "act aggressively and preemptively," but because officials feared prosecution, the solution required having lawyers "find some way to make what [Bush] did legal."[14]

Of the thousands of attorneys in the Department of Justice and American government, the White House repeatedly summoned the same demimonde of lawyers[15] who referred to themselves as the "War Council"—White House Counsel Alberto Gonzales, White House legal counsel David Addington, Department of Defense General Counsel William J. Haynes, and OLC Deputy Attorney General John Yoo.[16]

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11. Evan Thomas, *Full Speed Ahead: After 9/11, Bush and Cheney Pressed for More Power—and Got It. Now, Predictably, the Questions Begin. Behind the NSA Spying Furor*, NEWSWEEK (Jan. 8, 2006, 7:00 PM), *available at* http://www.thedailybeast.com/newsweek/2006/01/08/full-speed-ahead.html (last visited Nov. 18, 2013).

12. HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES 2 (July 2011), *available at* http://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf (last visited Nov. 18, 2013).

13. SENATE ARMED SERVICES COMMITTEE, INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY xii (2008), *available at* http://www.armed-services.senate.gov/Publications/EXEC%20SUMMARY-CONCLUSIONS_For%20Release_12%20December%202008.pdf (last visited Nov. 18, 2013).

14. Dan Eggen & Peter Baker, *New Book Details Cheney's Lawyer's Efforts to Expand Executive Power*, WASH. POST (Sept. 5, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/04/AR2007090402292.html (last visited Nov. 18, 2013).

15. Robert C. Power, *Lawyers and the War*, 34 J. LEGAL PROF. 39, 89–90 (2009).

16. Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389, 389, 392 (2010) (noting that advisory opinions on war-detention, and interrogation were "hijacked and dictated by a cabal of four highly placed government lawyers."); M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 396 (2006) (stating that Bush Administration legal advisors

The "War Council" produced legal opinions containing highly unpopular advice and the President classified the memos under national security so that other government lawyers could not critique the consultation prior to the predetermined action being taken.[17]

From witness experiences, Department of Defense investigations, congressional hearings, correspondence among top officials, and court records,[18] it is clear that military personnel, interrogators, and private contractors committed acts amounting to torture or inhuman treatment on detainees for several years[19] with the full cognizance of Bush Administration officials.[20] While top policymakers reportedly discarded some of the legal advice,[21] the damage still resulted in abuses that were condemned by Republicans, Democrats,[22] the global community,[23] and the Justice Department's Office of Professional Responsibility.[24]

"undermined the ethics of the legal profession and violated the U.S. Constitution and the laws of the U.S., which they were sworn to uphold.").

17. IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND 68, 77 (Jeremy Brecher, Jill Cutler, Brendan Smith, eds., 2005) (mentioning that an ACLU FOIA lawsuit uncovered classified legal memoranda indicating that the government implemented a common plan to execute abhorrent interrogation practices, covered up and lied about that scheme, isolated the plan from the law and courts, and rationalized how it was legal) [hereinafter IN THE NAME OF DEMOCRACY]; *See* Robert Bejesky, *National Security Information Flow: From Source to Reporter's Privilege*, 24 ST. THOMAS L. REV. 399, 420-26 (2012) (discussing leaked documentation that revealed controversies); *See e.g.* Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate,* 31 CARDOZO L. REV. 45, 85 (2009) (noting that the Bush Administration supposedly changed its opinion to treat al-Qaeda and Taliban members with some Geneva Convention protections, but this was declassified in January 2005); Michael P. Scharf, *Accountability for the Torture Memo: International Law and the Torture Memos*, 42 CASE W. RES. J. INT'L L. 321, 342 (2009).

18. IN THE NAME OF DEMOCRACY, *supra* note 17, at 104, 107-09, 112-14, 193.

19. *See generally* Robert Bejesky, *The Abu Ghraib Convictions: A Miscarriage of Justice*, 32 BUFF. PUB. INT. L.J. (forthcoming Apr. 2013)[hereinafter "Bejesky, *Abu Ghraib Convictions*"]; Bejesky, *Pruning*, *supra* note 4, at 823-28, 852.

20. Sen. Patrick Leahy, Op-Ed, *There is No Justification for Torture,* BOSTON GLOBE, June 28, 2004, at A11 ("It is . . . clear that U.S. officials knew the law was being violated [during interrogations] and for months, possibly years, did virtually nothing about it."); Irene Zubaida Khan, *The Rule of Law and the Politics of Fear: Human Rights in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 1, 5 (2008) (stating that the Bush Administration "condoned torture.").

21. 153 CONG. REC. S27303 (Oct. 16, 2007) (reporting that Jack Goldsmith revoked legal memos, including those pertaining to warrantless surveillance and the Bybee torture memo); See *infra* notes 239, 244, 291 and accompanying text for additional ostensible retractions.

22. U.S. Senate Democrats, *Senate Republican Have Been Outspoken Against Torture—Will Their Votes Match Their Rhetoric?,* Feb. 13, 2008, *available at* http://democrats.senate.gov/2008/02/13/senate-republicans-have-been-outspoken-against-

Principal advisors issued opinions for the White House and secretary of defense that inverted the law in a broad range of areas,[25] ignored legal precedent, misrepresented laws to achieve a preordained result,[26] craftily carved loopholes on what was meant by torture, opined

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torture-will-their-votes-match-their-rhetoric/#.UxoZrT9dWa8 (last visited Mar. 21, 2014); Charles Babington & Shailagh Murray, *Senate Supports Interrogation Limits*, WASH. POST, Oct. 6, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/10/05/AR2005100502062.html (last visited Mar. 21, 2014) ("Forty-six Republicans joined 43 Democrats and one independent in voting to define and limit interrogation techniques that U.S. troops may use against terrorism suspects, the latest sign that alarm over treatment of prisoners in the Middle East and at Guantanamo Bay, Cuba, is widespread in both parties.").

23. Michael J. Kelly, *Responses to the Ten Questions*, 35 WM.MITCHELL L. REV. 5059, 5060 (2009) ("Because of Gitmo, torture at Abu Ghraib prison, the illegal invasion of Iraq, and other errors in judgment committed by the Bush administration, America is no longer regarded as a leader in human rights and an adherent to the rule of law."); *UN Demands Prosecution of Bush-Era CIA Crimes*, REUTERS, Mar. 4, 2013, *available at* http://rt.com/usa/un-crime-cia-bush-804/ (last visited Mar. 21, 2014) (reporting that "[a] United Nations investigator has demanded that the U.S. publish classified documents regarding the CIA's human rights violations under former President George W. Bush, with hopes that the documents will lead to the prosecution of public officials."); John H. Cushman Jr., *U.N. Condemns Harsh Methods in Campaign Against Terror*, N.Y. TIMES, Oct. 28, 2004, *available at* http://www.nytimes.com/2004/10/28/politics/28nations.html?_r=0 (last visited Mar. 21, 2014) ("The United Nations official charged with monitoring compliance with international prohibitions against torture has sharply criticized several practices adopted by the Bush administration in its campaign against terrorism").

24. DEP'T OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, REPORT: INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 132, 260-61 (2009), *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf (last visited Oct. 31, 2013); Philippe Sands, *Poodles and Bulldogs: The United States, Britain, and the International Rule of Law*, 84 IND. L.J. 1357, 1365 (2009) (criticizing the poor quality of the memos).

25. Several authors discussed the inversion of the rule of law. JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR 86-100 (2007) (stating that top Bush Administration officials knew they were engaging in habitual lawbreaking, but they used lawyers to exonerate actions); *see generally* STEPHEN GREY, GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM (2006); *see also* SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004); *see generally* MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004); DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003).

26. Scharf, *supra* note 16, at 389; Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 393 (2007) (stating that "Yoo and several others in the administration endorsed the theory . . . of necessity to violate international law."). Over one hundred lawyers, five former members of Congress and twelve former judges, contended that the legal advisors transgressed professional

that extraordinary defensive measures were imperative for gathering information from detainees, and contended that the series of four Geneva Conventions that define war crimes and prohibit torture[27] were inapplicable or unavailing.[28] Other scholars went further and called the opinions "embarrassing," "utterly unjustifiable" legal analyses,[29] teeming with blatant errors, "not an attempt in good faith to assess the law,"[30] "flout[ing] constitutional principle by establishing law-free zones and constitutional black holes," and offering "duplicitous parsing of legal obligations."[31]

With the Bush Administration's request for legal memos, predetermined preference, receipt of opinions from select lawyers, and classification of advice, perhaps the result of torture can be expected. The ultimate repercussion of the memoranda was a dissipation of responsibility that diminished the likelihood that policymakers would confront punishment for torture even though inconsequential intervening events do not sunder the chain of causation between an act and harm to a victim in tort or criminal law. In short, given the consistent bias on pivotal issues when there were alternative interpretations of the law, it is not clear that the attorney-advisors were

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obligations because the "memoranda . . . ignore and misinterpret the U.S. Constitution and laws, international treaties and rules of international law." Lawyers' Statement on Bush Administration's Torture Memos addressed to President George W. Bush, Vice President Richard B. Cheney, Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, and Members of Congress (Aug. 2004), *available at* http://uclaprofs.com/petitions/040800torturememos.html (last visited Oct. 31, 2013).

27. Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2371; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter "Geneva I"]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter "Geneva Protocol Additional"].

28. *See generally infra* Part III.

29. Keller, *supra* note 6, at 551; Power, *supra* note 15, at 100 ("As I absorbed the opinions, I concluded that some were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President.").

30. O'Connell, *Responses*, *supra* note 5, at 5134.

31. Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, The Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1142 (2007); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 1096-98 (2008) (stating that Bush Administration assertions contended there was a right to defy Congressional will, laws, and treaties via expansive interpretation of the Commander in Chief clause); Ralph Wilde, *Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L L. 739, 772-76 (2005) (remarking that commentators called these areas, such as Guantanamo Bay, a place where law does not apply).

relevant when policymakers ostensibly had the intention to do whatever they wanted. The article assesses the far from fluky exonerating legal positions by dividing the advice into core constitutional arguments (Part II), factual extrapolations for Afghanistan (Part III), and the use of national security secrecy to circumvent more serious condemnation for several years (Part IV).

II. DENYING RESTRICTIONS ON EXECUTIVE AUTHORITY

Legal advisors opined that there are minimal constitutional restrictions on executive war powers authority, by espousing a capacious and unreviewable political question doctrine, abjuring applicability of substantive international law, assuming *carte blanche* for the Commander in Chief authority, and premising that exigency obviated the need for reasonable adherence to human rights law. If these foundational constitutional assertions had been convincing, advisors would have had no rationale for generating fact-specific opinions, which will be addressed in Parts III and IV. However, there were prima facie weaknesses in the constitutional advice.

First, the Bush Administration assumed that courts should not be involved in restricting government actions during the "war on terror," which invariably would abnegate detainees from attaining remedial relief for torture or receiving a review for the justification for imprisonment via habeas corpus challenges.[32] Pursuant to *Marbury v. Madison,* the judiciary is the ultimate arbiter of constitutional interpretation, but will refrain from "questions, in their nature political."[33] Courts are not prohibited from hearing cases with relations to foreign affairs.[34]Additionally, a judiciary that too broadly sidesteps

32. Bejesky, *Pruning*, *supra* note 4, at 841-52; Robert Bejesky, *War Powers Pursuant to False Perceptions and Asymmetric Information in the "Zone of Twilight,"* 44 ST. MARY'S L.J. 1, 86-87 (2012) [hereinafter "Bejesky, *War Powers*"] (Yoo contending that the judiciary does not have a role in war powers cases despite much contrary evidence). Other denials were aimed at foreign petitioners. Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chem., 373 F. Supp. 2d 7, 15-16, 43-44, 48, 81-82 (E.D.N.Y. 2005) (court dismissing Agent Orange case brought by Vietnamese plaintiffs against U.S. corporations because it would open the federal courthouse to "all of the Nation's past and future enemies," and the Bush Administration argued that herbicides were not banned, hearing the case would judge Executive war operations, and the Executive position prevailed over potential customary international law restrictions).

33. Marbury v. Madison, 1 Cranch 137, 170, 177 (1803); Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 COLO. L. REV. 65, 68 (1977) (noting that because there is no political question doctrine in the Constitution, it is a common law development).

34. Lucien J. Dhooge, *The Political Question Doctrine and Corporate Complicity in*

questions with tangential political overtones may forsake constitutional responsibilities[35] and not serve justice, prevent executive wrongdoing, uphold the integrity of the American judicial system, fulfill reciprocal obligations to other states, or support the democratically-derived public choice of American citizens who heighten human rights. Indeed, the Supreme Court disagreed with legal advisors on habeas corpus challenges at Guantánamo Bay in a succession of cases—*Hamdi v. Rumsfeld*, *Rasul v. Bush*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*.[36]

Second, legal advisors attenuated the binding nature of U.S. obligations owed to other states under treaties and customary international law.[37] Obscuring what were personal inclinations of appointed agents as institutional dissension, John Yoo stated: "The State Department and OLC often disagreed about international law. State believed that international law had a binding effect on the President, indeed on the United States, both internationally and domestically."[38] Regarding the interpretation of treaties, Attorney General John Ashcroft, the Bush Administration's first attorney general, wrote that the President's "determination against treaty applicability would provide the highest assurance" that courts would not entertain charges against American agents for violating "Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees."[39]

Extraordinary Rendition, 21 TEMP. INT'L & COMP. L.J. 311, 332 (2007). *But see* Raines v. Byrd, 521 U.S. 811, 829-30 (1997) (holding that Congress persons can lack standing without a cognizable injury from the President's acts).

35. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 535-37 (1966).

36. Bejesky, *War Powers*, *supra* note 32, at 88.

37. Tel-Oren v. Lybian Arab Republic, 726 F.2d 774, 792 (D.C. Cir. 1984) (citing J. BRIERLY, THE LAW OF NATIONS 287 (6th ed. 1963)) (stating that the law of nations has been defined as "the body of rules and principles of action which are binding upon civilized states and in their relations with one another").

38. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 33 (Atl. Monthly Press) (2006); David Scheffer, *Tenth Annual Grotius Lecture Series: For Love of Country and International Criminal Law, Further Reflections*, 24 AM. U. INT'L L. REV. 665, 667-68 (2009) (stating that none of the principal legal advisors had a distinguished background in international law); Allen Buchanan, *Democracy and the Commitment to International Law*, 34 GA. J. INT'L COMP. L. 305, 307-08 (2006) (critiquing Posner and Goldsmith and their *realist* book) ("[N]ormative claims, if valid, would lend support to the view that it is wholly permissible for the U.S. government to take a purely instrumental stance toward international law, and that its citizens do not have a moral obligation to try to prevent their government from doing so.")

39. *Document – USA: Torture, War Crimes, Accountability: Visit to Switzerland of Former US President George W. Bush and Swiss Obligations Under International Law:*

Ashcroft's point does not clearly jibe with Supreme Court precedent that affirms the President's war powers are circumscribed by Congress, jurisprudence that affirms the judiciary is the ultimate arbiter of the Constitution,[40] Article 26 of the Vienna Convention which makes treaties binding on states and required to "be performed by them in good faith,"[41] or the U.S. Supremacy Clause which states that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land."[42] An executive act, legislation, or court judgment can prevail over an inconsistent international law provision due to the last-in-time rule,[43] but transgressing treaty obligations may still be an international law violation vis-à-vis other countries.[44] There is also no evidence that Congress sanctioned the Bush Administration for violating the Geneva Conventions or authorizing interrogation techniques amounting to torture pursuant to the Joint Resolution for the Use of Force, the Patriot Act,[45] or other executive war powers authority.[46]

A constitutional basis for discretionarily abrogating international law obligations is sorely lacking when government action eventuates into probable violations of *jus cogens* norms, universal jurisdiction crimes, and federal statutes prohibiting torture.[47] From this

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Amnesty International's Memorandum to the Swiss Authorities, AMNESTY INT'L, *available at* http://amnesty.org/en/library/asset/AMR51/009/2011/en/e82562ec-75c9-4092-9a3a-d2d51484e67d/amr51009201 1en.html (citing position of Ashcroft on Feb. 1, 2002) (last visited Nov. 3, 2013).

40. Bejesky, *War Powers, supra* note 32, at 10, 64, 86-87.

41. Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331.

42. U.S. CONST. art. VI, § 2.

43. The Paquete Habana, 175 U.S. 677, 700 (1900).

44. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (1987); Nicaragua v. Reagan, 859 F.2d 929, 938 (D.C. Cir. 1988).

45. Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 134 (2004).

46. Robert Bejesky, *Dubitable Security Threats and Low Intensity Interventions As the Achilles' Heel of War Powers*, 32 MISS. C. L. REV. 9, 19 (2013) (noting that Congress defines the scope of the president's war powers).

47. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."); O'Connell, *Responses*, *supra* note 5, at 5128 (noting that "[n]o government official has 'authority' to violate international law – no government official should wish to do so."); Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 186 (2006) (noting that the advisor's contention that the President's decision "concerning the detention of al-Qaeda and Taliban prisoners constitutes a 'controlling Executive act' that is completely at odds with relevant Supreme Court precedents."); *Id.* at 179 (espousing that the legal advisors "twisted, in small and large ways, international

vista and the fact that the U.S. law absolutely criminalizes torture,[48] one should not need to rehash the obvious, but Congress did pass a ban on torture in December 2005 by a vote of 90-to-9. However a few days later, Bush inserted a signing statement indicating that he would interpret the law "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch."[49] Signing such statements are potentially unconstitutional and the use of "unitary" in this context is a solecism,[50] but the practical impact was that the President was evidently still endeavoring to unilaterally define the fact-intensive conditions for detention and interrogation and thereby returning to the tantamount supposition that the Executive was not subject to constitutional constraints.

OLC advisors also denied the applicability of customary international law when it wrote "customary international law, as a matter of domestic law, does not bind the President, or restrict the actions of the U.S. military, because it does not constitute either federal law made in pursuance of the Constitution or a treaty recognized under

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law.").

48. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 5 CAT/C/28/Add.5, U.S. DEP'T OF ST. (Feb. 9, 2000), *available at* http://www.state.gov/documents/organization/100296.pdf (last visited Nov. 3, 2013) ("No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification for torture."); Harold Hongju Koh, WASH. MONTHLY (Jan./Feb./Mar. 2008), available at http://www.washingtonmonthly.com/features/2008/0801.koh.html (last visited Nov. 3, 2013) (Harold Hongju Koh, assistant secretary of state for democracy, human rights, and labor, testifying to a U.N. committee in 2000) ("In every instance, torture is a criminal offense. No official of the government . . . is authorized to commit or instruct anyone else to commit torture.").

49. George W. Bush, *President's Statement on Signing of H.R. 2863, Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and the Pandemic Influenza Act, 2006*, WHITE HOUSE (Dec. 30, 2005), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051230-8.html (last visited Nov. 3, 2013); ALFRED M. MCCOY, A QUESTION OF TORTURE 217 (2006); Eric Schmitt, Editorial, *House Delays Vote on U. S. Treatment of Terrorism Suspects*, N.Y. TIMES, Nov. 4, 2005, at A25 (reporting that the White House and the CIA lobbied to exempt the CIA from the restrictions).

50. Bejesky, *War Powers, supra* note 32, at 90-92; Jennifer Van Bergen, *The Unitary Executive: Is the Doctrine Behind the Bush Presidency Consistent with a Democratic State?* FINDLAW (Jan. 9, 2006), *available at* http://writ.news.findlaw.com/commentary/20060109_bergen.html (last visited Nov. 18, 2013) (noting that Bush issued 435 signing statements in his first term and used the term "unitary" in the statements 95 times, but signing statements could be unconstitutional under *Chadha* and *Bowsher*).

the Supremacy Clause."[51] Alternatively, the Restatement (Third) of U.S. Foreign Relations Law states "Customary law that has developed since the United States became a state is incorporated into United States law as of the time it matures into international law."[52] Scholars concur that torture is universally proscribed and that every state is bound to ensure that no one is subjected to torture as a *jus cogens* norm and customary international law.[53]

Third, legal advisors expressed that the President, as Commander in Chief, is not bound by law prohibiting torture when acting to provide national security and that "any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."[54] If this position is accurate, international law that forbids

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51. Jay S. Bybee, Assistant Attorney General, to Alberto Gonzalez, Gen. Counsel to the President & William J. Haynes, General Counsel of the Department of Defense, Memorandum Re: Application of Treaties and Laws to al-Qaeda and Taliban Detainees 2 (Jan. 22, 2002), *available at* www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf (last visited Nov. 18, 2013). Courts decide cases based on "the Constitution, laws, and treaties of the United States [but do] not . . . conform the law of the land to norms of customary international law." United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991). Yoo wrote that no one previously thought to argue that the President has disregarded customary international law. However, there is actually a substantial literature delving into the issue. John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1226-30 (2007); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 844-46 (1997); Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987); Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930 (1986); Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321 (1985).

52. RESTATEMENT, *supra* note 44, at chap. 2, Introductory Note; Louis B. Sohn, *The Universal Declaration of Human Rights*, 8 J. INT'L COMMISSION JURISTS 17, 26 (1967) (noting that the Universal Declaration on Human Rights, which has been called "a part of the common law of the world community," together with the Charter of the United Nations, has achieved the character of the world law superior to all other international instruments and to domestic laws.").

53. *See* Bejesky, *Pruning*, *supra* note 4, at 829-35; Paust, *supra* note 26, at 418 (stating that "[t]he claim that the President has authority to violate international laws of war, human rights law, and domestic legislation is patently unconstitutional and unacceptable."); Alvarez, *supra* note 47, at 186 (calling the torture memoranda "shoddy and incomplete" on the question of treaties and a "cavalier" and "reckless" treatment of custom).

54. Jay S. Bybee, Memorandum for Alberto R. Gonzales re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A 34-35, 39 (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf (last visited Nov. 16, 2013) ("In light of the President's complete authority over the conduct of war . . . the prohibition against torture . . . must be construed as not applying to interrogation undertaken pursuant to

torture may be facially or upon application unconstitutional any time the President issues authorizations to conduct alleged terrorism- or combatant-related interrogations that eventuate into detainee abuse.[55] Moreover, the Justice Department could not prosecute interrogators for violating the law if interrogators perpetrated torture pursuant to directives issued under the Commander-in-Chief authority.[56] This advice is peculiar when official government investigations revealed, and media reports frequently surfaced with interrogators and military personnel being accused of significant harm and Bush affirmed that he

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his Commander in Chief authority."). Similarly, in a March 2003 memo, Pentagon General Counsel William Haynes concurred and claimed that "in order to respect the President's inherent constitutional authority to manage a military campaign," the prohibition against torture "must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority." Ingrid Arnesen, *Detainees Not Covered by Geneva Conventions, Report Concluded,* CNN (June 9, 2004), *available at* http://www.cnn.com/2004/LAW/06/09/detention.report/ (last visited Nov. 16, 2013); *see* MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW (2009) (critiquing Posner and Goldsmith's realist-oriented book and stating that "[a] policy-maker reading the book might well conclude that compliance with international law, such as the 1949 Geneva Conventions or the Convention against torture, is optional.").

55. Bybee, *supra* note 54, at 31 ("Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign."); Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture,* WASH. POST (June 8, 2004), *available at* http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html (last visited Nov. 16, 2013) (noting that the legal advisors asserted that "international laws against torture 'may be unconstitutional if applied to interrogations' conducted in President Bush's war on terrorism.").

56. SENATE ARMED SERVICES COMMITTEE, *supra* note 13, at xviii, xxi-xxii (stating that CIA and military officials were concerned about the legality of the methods, but Yoo advised that subordinates could not be prosecuted); Bybee, *supra* note 54, at 35, 31-39 (contending that U.S. officials carrying out orders could not be held responsible because they "would be aiding the President in exercising his exclusive constitutional authorities."). Yoo contended that "Congress doesn't have the power to 'tie the President's hands in regard to torture as an interrogation technique'. . . It's the core of the Commander-in-Chief function. They can't prevent the President from ordering torture." Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program,* NEW YORKER, Feb. 14 & 21, 2005, at 114; IN THE NAME OF DEMOCRACY, *supra* note 17, at 89-90 (stating that Haynes's memo asserted that the President could authorize any physical and psychological techniques to obtain "intelligence" to protect Americans, and that a presidential directive pursuant to wartime powers could be used by interrogators who torture suspects to avoid liability); Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda and the Mistreatment of Prisoners in Abu Ghraib,* 36 CASE W. RES. J. INT'L L. 541, 623 (2005) (stating that the Yoo/Delahunty Memorandum apply an eccentric "theory of ratification" that contends that the President has implied constitutional powers to issue orders to make actions of his subordinates inherently legal).

"never ordered torture"[57] and mandated that interrogators "stay within U.S. law."[58]

If the advice contending that war crime prohibitions did not restrict either the Commander-in-Chief authority or derivative acts committed by subordinates had been sound, the President would not need to refute anything, or direct subordinates to remain within U.S. law, because Presidential directives and subsequent subordinate acts were above criminal laws restricting torture. Additionally, it is puzzling that states contemplated, negotiated, and ratified treaties applicable to war and armed combat with provisions that explicitly prohibited interrogation and accepted conventions proscribing torture under all circumstances, but these obligations were now inapplicable to the U.S. President[59] when acting as "Commander in Chief," which is activated by Congress and foremost germane to directing U.S. troops into armed combat.

Fourth, one of Bybee's memoranda to Gonzales and Haynes also maintained that the Commander in Chief authority prevails over international and domestic law because self-defense and necessity can permit suspending legal obligations (such as the Geneva Conventions),[60] allow harsh interrogations, and absolve interrogators from criminal liability.[61] If the reasonableness of necessity and self-defense are systematized as philosophical lenses of the world, such as with *realist* views of Thomas Hobbes who emphasized self-preservation at one pole and *liberalist* views of Immanuel Kant who emphasized the importance of human dignity at the other pole, Bush nestled closely to

57. Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics is Disavowed,* WASH. POST (June 23, 2004), *available at* http://www.washingtonpost.com/wp-dyn/articles/A60719-2004Jun22.html (last visited Nov. 16, 2013).

58. *President Bush Holds Press Conference Following the G8 Summit,* WHITE HOUSE (June 10, 2004), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040610-36.html (last visited Nov. 16, 2013).

59. *See generally* STEPHEN KRASNER, SOVEREIGNTY 6 (1999) (stating that "[s]tronger states can pick and choose among different rules selecting the one that best suits their instrumental objectives," which may only require rationalizations to justify the action predominantly for the domestic audience).

60. Bybee, *supra* note 51, at 10-15, 27-29; Paust, *supra* note 26, at 356 (quoting John Yoo: "It seems to me that if something is necessary for self-defense, it's permissible to deviate from the principles of Geneva [including the prohibition of torture].").

61. Bybee, *supra* note 54, at 31-40; W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals,* 91 CORNELL L. REV. 67, 84 (2005) (stating that if such notions are relayed down the chain of command, loose talk regarding necessity and self-defense might persuade interrogators to conceive that their operations were justified).

Hobbesian notions of self-preservation[62] and therein impaired the opposing Kantian position as those of critics who were "soft on terrorism" and who unreasonably desired to limit presidential authority.[63] There are several weaknesses in this position.

First, as the opening chart imparted, the driving perception of peril cast by the government into societal discourse may not be a rational and sober portrayal. Second, even with a gap between perception and reality, the President's core preclusive constitutional authority to suspend certain laws and take preemptive action refers to responding to an exigent and substantiated jeopardy that imperils the nation.[64] The Bush Administration issued annual and ongoing public emergency inside the U.S. for several years,[65] which was ostensibly specious when the country continued to function as usual. The post-9/11 world is not the American Civil War,[66] which enveloped two

62. Samuel Vincent Jones, *The Ethics of Letting Civilians Die in Afghanistan: The False Dichotomy Between Hobbesian and Kantian Rescue Paradigms*, 59 DEPAUL L. REV. 899, 905, 907-08, 911-12 (2010); Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 44-47 (2011) (discussing the division between risk-averse *realist* and cooperative *liberalist* positions). Rumsfeld justified severe interrogation techniques by calling them "hardened criminals willing to kill themselves and others for their cause," and Cheney called captives "the worst of a very bad lot. They are very dangerous." PETER IRONS, WAR POWERS 248 (2005).

63. PHILIPPE SANDS, TORTURE TEAM 213 (2008).

64. President Thomas Jefferson stated that the "law of necessity, of self-preservation,. . .[involves] saving our country when in danger." DANIEL FARBER, LINCOLN'S CONSTITUTION 193 (2003) (quoting Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in THOMAS JEFFERSON: WRITINGS 1231, 1231 (Merrill D. Peterson ed., 1984)). Secretary of State Daniel Webster explained that to use military force requires "a necessity of self-defense, instant, overwhelming, leaving no choices of means, and no moment for deliberation." R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938) (expressing that "acts of self-defense must occur only during the last feasible window of opportunity in the face of an attack that is almost certainly going to occur"). *Rome Statute of the International Criminal Court*, Int'l Law Comm'n, U.N. Doc. A/CONF.183/9 (July 17, 1998), *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm (last visited Sept. 22, 2013) ("A personal shall not be criminally responsible if, at the time of that person's conduct . . .[t]he person acts reasonably to defend himself or herself or another person," or engaged in an act of military necessity required for survival that is proportionate to the danger).

65. Bejesky, *Utilitarian Rational Choice*, *supra* note 3, at 330-32, 340-41; Bejesky, *Rational Choice Reflection*, *supra* note 3, at 6-14, 21; A v. Secretary of State (No. 1) [2005] 2 A.C. [96]-[97] (British high court deciding that post-9/11 laws to respond to terrorism did not meet the definition of a public emergency under the ECHR because "[t]he real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.").

66. Eric K. Yamamoto, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on Their Sixtieth Anniversary: White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for*

halves of a country seeking domination. Accepting similar conceptions of danger might permit any country to suggest national peril during criminal crackdowns and to engage in torture, suspend habeas corpus, and exonerate the crimes of government officials.

Third, the Bush Administration engaged in a bait-and-switch by stating that interrogation was necessary to thwart terrorism, but extended notions of self-defense and necessity inside and outside of war zones even though international agreements and customary international law expressly prohibit torture outside war zones, and the Geneva Conventions additionally prohibit interrogations inside war zones.[67] Fourth, issuing orders for interrogations that approximate torture and violate *jus cogens* norms are prohibited under all circumstances.[68]

III. APPLYING INTERNATIONAL LAW TO AFGHANISTAN

A. Gainsaying International Law by Factual Application

As depicted in the last part, the claim that the President, under the Commander in Chief authority or other constitutional powers, can order subordinates to execute actions that constitute human rights violations is unpersuasive.[69] Had the constitutional arguments been compelling, the legal advisors would not technically have needed to offer fact-specific exemptions for Afghanistan that sought the same outcome via legal contextualization. However, advisors did offer fact-intensive positions, including that Afghanistan was a failed state under Taliban control, combat in Afghanistan was "international in scope" but that the Geneva Conventions were not binding, the characteristics of

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National Security Abuses, 68 L. & CONTEMP. PROBS. 285, 288 (2005) (contending that "claims of urgent need" are false and are raised to "justify aggressive actions" and individual threat misrepresentations are only "the tip of proverbial iceberg" of a larger pattern of misrepresentations.)

67. Bejesky, *Pruning*, *supra* note 4, at 829-36.

68. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 2(2), *opened for signature* Dec. 10. 1984, 1465 U.N.T.S. 85 [hereinafter CAT] ("No exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."). In October 2004, Theo van Boven, UN Special Rappoteur on torture, responded to the Bush Administration's legal arguments involving "necessity" and "self-defense" as justifications to attain information, and stated: "The condoning of torture is, per se, a violation of the prohibition of torture." *Many Countries Still Appear Willing to Use Torture, Warns UN Human Rights Official*, UN DAILY NEWS (Oct. 27, 2004), *available at* http://www.un.org/news/dh/pdf/english/27102004.pdf (last visited Nov. 8, 2013).

69. Bejesky, *Pruning*, *supra* note 4, at 823-35; Harold Hongju Koh, *Friedmann Award Essay: A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 642, 648-49 (2005).

combatants made them unprotected under the Geneva Conventions, approved interrogation techniques were not torture, and extraterritorial jurisdiction did not requisition elevated human right protections. If claims are sufficiently compelling, or are at least effectively immune from discredit, the likelihood of imposing liability for human rights abuses is reduced.

B. Failed State

In January 2002, legal advisors wrote that the Geneva Convention and the U.S. War Crimes Act did not apply to al-Qaeda or Taliban captives in Afghanistan because Afghanistan was a "failed state."[70] The White House rapidly endorsed the opinion,[71] but the underlying consultation is bothersome for several reasons.

First, under the 1933 Montevideo Convention, to qualify as a state there must be a defined territory, a permanent population, and a government in control that can enter into international relations.[72] The question of political recognition is separate from state recognition[73] and even if a state effectively collapses and the government does not discharge basic sovereign functions, the international community does not typically revoke recognition,[74] but recognition can be employed by stronger states as a political instrument.[75] Likewise, foreign powers

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70. Bybee, *supra* note 51, at 2; Memorandum from Alberto R. Gonzales, Counsel to the President, to President George W. Bush (Jan. 25, 2002), *available at* http://www.torturingdemocracy.org/documents/20020125.pdf (last visited Nov. 8, 2013) (stating that international conventions did not apply to Afghanistan because the Taliban "did not exercise full control over the territory or over the people" of Afghanistan, "was not recognized by the international community," "could not fulfill international obligations," and was a militant group rather than a government, which made the Geneva Conventions "obsolete" and inapplicable in this new type of war); *see also* S.C. Res. 1378, U.N. Doc. S/RES/1378 (2001) (condemning the Taliban's governance over Afghanistan); Lawrence Azubuike, *Status of the Taliban and al-Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT'L. L. 127, 134 (2003); David Akerson & Natalie Knowlton, *President Obama and the International Criminal Law of Successor Liability*, 37 DENV. J. INT'L L. & POL'Y 615, 633 (2009).

71. Paust, *supra* note 5, at 831.

72. Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

73. *Id.* art. 3 (stating that the "political existence of the state is independent of recognition by other states").

74. Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 A.J.I.L. 244, 249 (2011).

75. KRASNER, *supra* note 59, at 15 (noting that weaker states have typically argued that recognition should be automatic, whereas stronger states have selectively use recognition as a political instrument); Milena Sterio, *A Grotian Movement: Changes in the Legal Theory of Statehood*, 39 DENV. J. INT'L L. & POL'Y 209, 234-35 (2011) (noting that whether dominant

cannot violate another state's sovereign rights even if a state lacks recognition[76] because there are different types of sovereignty that do not covary; a state can have one form of sovereignty but not another, such as by retaining international law and Westphalian rights even when it does not exhibit convincing domestic sovereignty or cogent control.[77] If the level of violence is an effective indicator, perhaps the Taliban was the legitimate government in control and did instill meaningful authority prior to the invasion, whereas Afghanistan slid more into a failed state status under U.S. occupation because the insurgency and fighting became more intense over the past eleven-year occupation.[78]

Second, Pakistan, Saudi Arabia, the UAE,[79] some U.S. allies, and other countries officially recognized the Taliban as the legitimate government in power,[80] which means that some states did regard the

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and regional countries grant statehood is telling).

76. Sterio, *supra* note 75, at 217-18 (stating that as long as a territory has state sovereignty it has a sovereignty shield that a non-state does not necessarily possess); Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule*, 19 MINN. J. INT'L L. 137, 148-49 (2010) (noting that there are some anomalies where a territory could be treated as a state when it does not possesses the four elements or a territory not being treated as a state when the four elements exist).

77. KRASNER, *supra* note 59, at 3-4, 12 ("A state with very limited effective domestic control could still have complete international legal sovereignty" and be recognized as a "juridical equal by other states.").

78. Stuart Hendin, *Extraterritorial Application of Human Rights: The Differing Decisions of Canadian and UK Courts*, 28 WINDSOR REV. L. & SOC. ISSUES 57, 68 (2010) (pointing out that from 2005 to 2008, *Foreign Policy* published a list of "failed states" since 2005 and Afghanistan has been on the list); Seth G. Jones, *The Rise of Afghanistan's Insurgency*, 32 INT'L SEC. 7, 7-8 (2008) (noting that from 2002 to 2006, insurgent-initiated attacks increased by 400%, and insurgent-initiated attacks increased another 27% in 2007); Deb Riechmann, *Insurgent Attacks in Afghanistan Increase*, ASSOCIATED PRESS, (July 27, 2012), *available at* http://www.newsday.com/news/world/insurgent-attacks-in-afghanistan-increase-1.3865838 (last visited Nov. 8, 2013) (insurgent attacks spiked in 2010 and exceeded that violence in 2012). Increased violence followed the invasion and occupation. As an example of similarly loose treatment in which no attributes of official sovereignty existed, in mid-December 2012, the U.S. recognized a purported coalition of rebel groups as the representative of the Syrian people. Jessica Golloher, *Russia Slams US over its Syria Stance*, VOA NEWS, (Dec. 12, 2012), *available at* http://www.voanews.com/content/russia-criticizes-us-for-recognizing-syrian-opposition/1563252.html (last visited Nov. 8, 2013). The Assad family has ruled the country for decades. Erin McClam, *Who are the Assads? Inside the family that has ruled Syria for decades*, NBC NEWS.COM (Aug. 30, 2013) *available at* http://worldnews.nbcnews.com/_news/2013/08/29/20247267-who-are-the-assads-inside-the-family-that-has-ruled-syria-for-decades?lite (last visited Nov. 8, 2013).

79. Srividhya Ragavan & Michael S. Mireles, Jr., *The Status of Detainees from the Iraq and Afghanistan Conflicts*, 2005 UTAH L. REV. 619, 628 (2005).

80. Joshua S. Clover, Comment, *"Remember, We're The Good Guys": The Classification and Trial of the Guantanamo Bay Detainees*, 45 S. TEX. L. REV. 351, 359 (2004).

Taliban as the *de jure* government.[81] Afghanistan also remained a member of international institutions during the 1990s.[82] Denying recognition to Afghanistan also seems affected and inconsistent with the facts because both the Clinton and Bush Administrations held diplomatic relations with the Taliban as they discussed a potential contract with multinational energy companies for constructing a trans-country pipeline.[83] Consequently, even without being legally-recognized or holding membership in organizations, the Taliban was at least the *de facto* government of Afghanistan.[84]

Third, Afghanistan was a party to the Geneva Conventions,[85] which binds the territory and successive regimes after ratification. Legal advisers recognized that Afghanistan had been a party to the Geneva Conventions prior to the Taliban coming to power.[86] The Geneva Conventions apply during all conflicts and to all combatants[87] and humanitarian law is designed to protect human rights of everyone during combat and wars,[88] which obviates the logic that inhabitants of a

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81. Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 539 n.19, 543-44 (2002). Former State Department legal advisor William Taft IV wrote, "before, during, and after the emergence of the Taliban . . . Afghanistan constituted a state." Mayer, *supra* note 56, at 112.

82. JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 116 (3d ed. 2010).

83. Robert Bejesky, *Geopolitics, Oil Law Reform, and Commodity Market Expectations*, 63 OKLA. L. REV. 193, 265-71 (2011) [hereinafter "Bejesky, *Geopolitics*"]; Azubuike, *supra* note 70, at 133 (stating that the U.S., through the CIA, reportedly helped bring the Taliban to power).

84. Annyssa Bellal, Gilles Giacca & Stuart Casey-Maslen, *International Law and Armed Non-State Actors in Afghanistan*, 93 INT'L REV. OF THE RED CROSS 25 (Mar. 2011), *available at* www.icrc.org/eng/assets/files/review/2011/irrc-881-maslen.pdf (last visited Nov. 6, 2013) (stating that "the Taliban before and in 2001 . . . surely fulfilled the criterion of de facto authority over a population"); Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L. Q. 1, 7 (2004) ("Before the armed conflict started, the Taliban government had been in effective control of Afghanistan."). Examples of de facto states include Abkhazia, Northern Cyprus, Northern Kosovo, Republika Srpska, Southern Ossetia and Taiwan. Sterio, *supra* note 75, at 226.

85. Int'l Comm. of the Red Cross, *Signatories to Protocol Additional to the Geneva Conventions of 12 August 1949*, *available at* http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P (last visited Nov. 11, 2013) (Afghanistan signed in 1949 and became a party in 1956).

86. Bybee, *supra* note 51, at 10-11, 14-20.

87. Lawyers' Statement on Bush Administration's Torture Memos addressed to President George W. Bush, Vice President Richard B. Cheney, Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, and Members of Congress, *supra* note 26 (over one hundred legal professionals signing).

88. Coard v. United States, Case 10.951, Inter-Am. C.H.R. 1283, OEA/Ser.L/V/II.106, doc.6 rev., at 1291 (1999), *available at* http://www1.umn.edu/humanrts/cases/us109-99.html

territory cannot derive rights when present in a "failed state."[89] Moreover, it is not clear that Geneva requires Afghanistan to be a party for the rules to be binding because Geneva law is non-derogative and is not premised on reciprocal compliance, but on obligations owed by and to all humankind.[90] Common Article 3 of the Geneva Conventions mandates that all detainees "shall in all circumstances be treated humanely," which is an assurance that is not subject to the Executive discretion of a participant country.[91]

Fourth, as a practical argument, Bush's legal advisers maintained that a blanket non-suspension approach would be unwise because "international law would leave an injured party effectively remediless if its adversaries committed material breaches of the Geneva Conventions."[92] Ergo, irrespective of whether obligations are driven by universality, American soldiers could not be guaranteed to receive protected treatment from a foe that is not bound to the Geneva Conventions when hospitable treatment is normally based on reciprocity.[93] It is unfortunate that wartime humanitarian abuses can

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(last visited Nov. 6, 2013) (Geneva rights should be viewed broadly because "individual rights inhere simply by virtue of a person's humanity"); Mayer, *supra* note 56, at 114 (A former State Department lawyer remarking: "There is no such thing as a non-covered person under the Geneva Conventions."); Robert A. Peal, *Combatant Status Review Tribunals and the Unique Nature of the War on Terror*, 58 VAND. L. REV. 1629, 1634 (2005) (noting distinctions between a war and armed conflict, such as the intensity of the violence, and capability of the parties to endure sustained fighting).

89. Memorandum from William H. Taft, IV, to Alberto Gonzales, Counsel to the President (Feb. 2, 2002), *available at* http://www.fas.org/sgp/othergov/taft.pdf (last visited Nov. 11, 2013) (responding to Yoo's draft and noting that carte blanche denial of POW status to the Taliban, assuming Afghanistan ceased to be a party to Geneva, that the president can suspend Geneva's applicability in Afghanistan, and that customary international law does not bind the U.S., are all wrong).

90. Paust, *supra* note 5, at 815, 830 (calling the January 9, 2002 memo another "attempted avoidance of international and domestic criminal responsibility for interrogation tactics."); Scharf, *supra* note 17, at 94-95 (former JCS General Richard Myers explaining: "We train our people to obey the Geneva Conventions, it's not even a matter of whether it is reciprocated—it's a matter of who we are.").

91. Paust, *supra* note 26, at 407; Steyn, *supra* note 84, at 5 (noting that "[w]hatever their status, such prisoners are entitled to humane treatment"); 3 COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 35-37 (Jean S. Picteted., 1960) (stating that Common Article 3 is "applicable automatically, without any condition in regard to reciprocity"); Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2796 (2005) (referencing that the ICRC also interprets Article 3 expansively and reasoned that "nobody in enemy hands can be outside the law"); *Id.* at 2795-96 (holding that Article 3 of the Geneva Conventions applies to all expansive combat between countries and non-state actors).

92. Bybee, *supra* note 51, at 24-25.

93. Geneva I, *supra* note 27, art. 43 (reciprocity requirement to provide names of

occur, and that both sides of a conflict typically commit human rights abuses to varying degrees,[94] but given that advisory opinions and Bush Administration statements were issued so early after invasion and captured detainees were quickly being removed from Afghanistan, one might even view that the Bush Administration provided the initial predominant signal to combatants in Afghanistan that the U.S. was not obligated to treat detainees with full protections.[95] This is a costly signal for American troops because the Geneva Conventions are the most reliable framework that would protect Americans if they were captured in a foreign country,[96] and compelling arguments can be made that the reputational effect for not providing humane treatment is grave.

C. International in Scope

Legal advisors concurred that the bulk of the Geneva Convention did not apply to protect al-Qaeda and the Taliban in Afghanistan because Common Article 2 applies to "armed conflict

individuals detained); *id.*, art. 132 (obligation to exchange prisoners to the other side when hostilities end). Perhaps somewhat baffling with such consternation over reciprocity, is that the legal advisors initially contended (and the Bush Administration agreed) that the Geneva Conventions were inapplicable to al-Qaeda and the Taliban, which insinuates that the foe must also not be bound, but Gonzales opined that customary laws of war could still be utilized to bring war crimes charges against al-Qaeda and the Taliban for combat in Afghanistan. Bybee, *supra* note 51, at 2-3, 25 ("Taliban troops . . . torture any American prisoners . . . [t]he U.S. military thus could prosecute Taliban militiamen for war crimes for engaging in such conduct.").

94. MICHAEL IGNATIEFF, THE LESSER EVIL 115-19 (2004).

95. M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 758 (2008) (contending that when the Bush Administration violated International Humanitarian Law, it "provided an added incentive for non-state actors to take the position that IHL does not apply to them.").

96. Memorandum from Colin Powell, Secretary of State, to Alberto Gonzalez, Counsel to the President 1 (Jan. 26, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf (last visited Nov. 13, 2013) (stating the Geneva Conventions should apply to those captured in Afghanistan and failure to do so would "reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general"); Joby Warrick, *Administration says Particulars may Trump Geneva Protections,* WASH. POST (Apr. 27, 2008), *available at* http://articles.washingtonpost.com/2008-04-27/politics/36898081_1_interrogation-benczkowski-letters (last visited Nov. 13, 2012). Senator Graham, who opposed the administration's detainee policies, remarked that the Geneva Convention "rules we set up speak more about us than it does the enemy." Kate Zernike, *G.O.P. Senator Resisting Bush over Detainees,* N.Y. TIMES (July 18, 2006), *available at* http://www.nytimes.com/2006/07/18/washington/18graham.html?pagewanted=all&_r=0 (last visited Nov. 13, 2013).

'between two or more of the High Contracting Parties'" and Article 3 did not apply.[97] Common Article 2 refers to conflict with two or more opposing states engaged in international armed conflict;[98] and Common Article 3 applies to non-international armed conflict,[99] which by process of elimination, applies to any type of conflict not involving two rival states, such as combat between government forces and insurgents or non-governmental forces. Common Article 3 is consistent with ensuring that all persons involved in conflict have human rights and are protected.[100]

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97. Bybee, *supra* note 51, at 9 ("[A] non-governmental organization cannot be parties to any of the international agreements here governing the laws of war. . . al-Qaeda is not a High Contracting Party. As a result, the U.S. military's treatment of al-Qaeda members is not governed by the bulk of the Geneva Conventions, specifically those provisions concerning POWs."); *see also id.* at 9-10 (al-Qaeda is a "non-governmental terrorist organization" and al-Qaeda and the Taliban were criminal organizations, which meant there were no available protections under the Third Geneva Convention.). Gonzales, Haynes, and Yoo concurred. Tim Golden, *After Terror, a Secret Rewriting of Military Law,* N.Y. TIMES (Oct. 24, 2004), *available at* http://www.nytimes.com/2004/10/24/international/worldspecial2/24gitmo.html?pagewanted=all&position= (last visited Nov. 13, 2013) (Gonzales called the opinion "definitive."). Haynes and Yoo contended that "neither the Third nor Fourth Geneva Conventions protected al-Qaeda and Taliban detainees captured in Afghanistan," and Bybee contended that "neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention of al-Qaeda prisoners." Bybee, *supra* note 51, at 37; Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House,* 105 COLUM. L. REV. 1681, 1691 (2005) (noting that Yoo contended that the Geneva Conventions "apply to some captives or detainees but not to others, and that they do not apply to al-Qaeda and Taliban detainees in the war on terror."). On April 4, 2003, Air Force General Counsel Mary Walker concurred that the Taliban was not afforded protection under the Geneva Convention because they are "unlawful combatants" and that it does not apply to al-Qaeda because al-Qaeda is not a contracting party. Paust, *supra* note 5, at 841-42.

98. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, [hereinafter "Geneva II"]. An "armed conflict," whether of an international or non-international character is "a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995).

99. Article Three applies in "cases of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." Geneva I, *supra* note 27, art. 3; Geneva II, *supra* note 98, art. 3; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter "Geneva III"].

100. *See* Shannon M. Roesler, *The Ethics of Global Justice Lawyering,* 13 YALE H.R. & DEV. L.J. 185, 208 (2010) (noting that an egalitarian understanding of the law mandates that all human beings be regarded with equal worth); *see* O'Connell, *Responses*, *supra* note 5, at 5132 (noting that "all persons caught up in armed conflict have the protections of the Geneva Conventions – all persons"); *see also* Jordan Paust, *Post-9/11 Overreaction and*

Citing legal memoranda, Bush announced that he had "the authority under the Constitution to suspend Geneva as between the United States and Afghanistan," but would not presently do so; that he accepted legal advice contending that "Article 3 of Geneva does not apply to either al-Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character;'" and that he would still apply provisions of Geneva "to our present conflict with the Taliban."[101]

There is substantial precedent to support the position that battling terrorism is an international armed conflict requiring Geneva protections,[102] but it might have even been logical to announce that American operations in Afghanistan did not involve armed conflict of

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Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions, 79 NOTRE DAME L. REV. 1335, 1351 (2004) (stating that Article 3 of all four Geneva Conventions guarantee minimum protections, including the right to be free from torture, humiliation, and cruel and unusual treatment, and to be treated humanely, and Article 3 applies to all detainees, including POWs and unprivileged belligerents).

101. Memorandum from President George W. Bush, to Vice President Dick Cheney, et al. (Feb. 7, 2002), *available at* http://www.aclu.org/files/assets/CIA.pdf (last visited Nov. 13, 2013); *Fact Sheet: Status of Detainees at Guantanamo*, WHITE HOUSE, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/02/20020207-13.html (last visited Nov. 13, 2013) ("Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the [Geneva] Convention, and the President has determined that the Taliban are covered by the Convention.").

102. Comm'n of Inquiry on Lebanon, Rep. Pursuant to Human Rights Council Resolution S-2/1, ¶ 55, U.N. Doc. A/HRC/3/2, (Nov. 23, 2006) (finding the fighting between Israel and Hezbollah an international armed conflict, substantially because Hezbollah was called a "militia belonging to a Party to the conflict."); HCJ 769/02 Public Comm. Against Torture in Israel v. Gov't of Israel, at 43 [2006], *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.a34.pdf (holding that military operations against terrorism involved an "armed conflict of an international character," requiring application of the Geneva Conventions); *contra* Hamdan v. Rumsfeld, 548 U.S. 557, 628-31 (2006) (calling conflict with al-Qaeda a non-international armed conflict); *see also* Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case*, 89 INT'L REV. RED CROSS 373, 377-78 (2007), *available* at http://www.icrc.org/eng/assets/files/other/irrc_866_milanovic.pdf (last visited Nov. 13, 2013). Also, if there is a sufficiently substantial connection between a state and a non-governmental group, then the fighting should be called an international conflict. Sylvain Vite, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT'L REV. RED. CROSS 69, 71 (2009), *available at* http://www.icrc.org/eng/assets/files/other/irrc-873-vite.pdf (last visited Nov. 13, 2013); Prosecutor v. Tadic, Case No. IT-94-1-A Judgment on Appeal, ¶ 92-93, (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (holding that there is an international armed conflict when a non-state group is in conflict with another state when the non-state group "belongs to" another state).

an international character, perhaps due to the "failed state" allegation, as long as one finds that operations involve conflict not of an international character,[103] which implicitly still means that basal Geneva Convention rights apply. Ultimately, with Bush offering the indecisive comment of having authority to "suspend the Geneva Convention"[104] and that minimal standards of Article 3 did not apply, an impression is seemingly implanted that nothing is truly binding and that any protection from that origin of zilch appears gratuitous. Ironically enough, Bush did not eagerly apply Geneva provisions,[105] but instead stated several years later that Article 3 applied.[106]

The other problem stems from the use of heuristics—the targeted foe evolved and there was selective use of the phrase "war on terrorism" to empower the president on the one hand and reduce international law restrictions on the other. Congress passed the *Authorization for Use of Military Force* (AUMF) in September 2001 to permit the U.S. military to capture Osama bin Laden and those associated with 9/11, which was then expanded to suspected al-Qaeda members in Afghanistan, to the Taliban, and to segments of the Afghani population that opposed the occupation after the U.S. installed a president and established military bases.[107] The United Nations called the attack on Afghanistan a "war" between two states, and Bush said the attack on Afghanistan was part of a "war on terror" apparently harbored those connected to 9/11.[108] Thus, for purposes of unleashing unbridled

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103. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 64-65, ¶¶ 114-16 (June 27) (holding that the Contras' battle against the legitimate government of Nicaragua was a non-international armed conflict, but the U.S. involvement in training, equipping, and financing the Contras did not result in effective control over the Contras); David Glazier, *Playing By the Rules,* 51 WM. & MARY L. REV. 957, 994 (2009) (discussing the battle with al-Qaeda and expressing that "[i]f the choice is between the rules governing 'international' and 'noninternational' conflict, then the former is clearly the better alternative.").

104. WHITE HOUSE, *supra* note 101 (Bush remarking: "Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the [Geneva] Convention, and the President has determined that the Taliban are covered by the Convention.").

105. William H. Taft, *The Geneva Conventions and the Rules of War in the Post-9/11 and Iraq World,* 21 AM. U. INT'L L. REV. 149, 154-55 (2005) (noting that Bush did not implement the provisions).

106. Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 20, 2007) ("Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency.")

107. Bejesky, *Geopolitics, supra* note 83, at 273.

108. *Bush Gives Update on War Against Terrorism*, CNN (Oct. 11, 2001), *available at* http://articles.cnn.com/2001-10-11/us/gen.bush.transcript_1_terror-islamic-nations-war?_s=PM:US ("[W]ar against all those who seek to export terror and a war against those

moral and legal authority or power and deploying sophisticated weaponry and aircraft and the U.S. military under the Commander-in-Chief authority to combat a formidable army, it is a war,[109] which suggests there is an international armed conflict and Article Two should have applied inside Afghanistan.

The inconsistency arises when al-Qaeda as the enemy is emphasized to call it a "global" war, but under international law, a state cannot be at war with belligerents, insurgents, or non-state actors, such as Osama bin Laden. Only Congress can declare war and it technically never authorized any broadly construed "war on terror,"[110] but Bush interpreted the AUMF to assume expansive Commander-in-Chief authority for war against "every terrorist group of global reach."[111] However, because war is a conflict involving at least two opposing states,[112] perhaps commentators are correct that "the war on terror" was

governments that support or shelter them."); Ragavan & Mireles, *supra* note 79, at 629-30; Johannes van Aggelen, *The Bush Administration's War on Terror: The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of Victims*, 42 CASE W. RES. J. INT'L L. 21, 30 (2009) ("Neither of the Security Council resolutions nor NATO's September 12, 2001 statement attempted to establish a link between terrorist acts and a particular state.") NATO members deployed troops. Kenneth Anderson, *United Nations Collective Security and the United States Security Guarantee in an Age of Rising Multipolarity: The Security Council as the Talking Shop of the Nations*, 10 CHI. J. INT'L L. 55, 68 (2009) ("[NATO] went along to support an ally in a general sense, [but] not because they believed this mission was actually core to the NATO mutual security pact.").

109. Stephen P. Marks, *Branding the "War on Terrorism": Is There a "New Paradigm" of International Law?* 14 MICH. ST. J. INT'L L. 71, 88-89 (2005).

110. Robert Bejesky, *Cognitive Foreign Policy: Linking al-Qaeda and Iraq*, 56 HOW. L.J. 1, 8-11 (2012) [hereinafter "Bejesky, CFP"]; Paust, *supra* note 26, at 346; *see contra* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2056-57 (2005) (disagreeing with those contending that "powers being granted to the President are limited or truncated in some fashion because Congress has not declared war" and that "the powers granted to the President in the AUMF are limited or truncated in some fashion because conflict with terrorists is not a 'real war.'").

111. Marks, *supra* note 109, at 75; Jeffrey F. Addicott, *Efficacy of the Obama Policies to Combat Al-Qa'eda, the Taliban, and the Associated Forces – The First Year*, 30 PACE L. REV. 340, 344-45 (2010) (stating that the "War on Terror" is "not accurate in what it purported to describe" and does not list an enemy); Thomas P. Crocker, *Overcoming Necessity*, 61 SMU L. REV. 221, 230 (2008) ("By invoking a so-called 'war on terrorism,' government officials seek the availability of exceptional powers to act.").

112. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT: DISCOURSE ON THE ORIGIN OF INEQUALITY, DISCOURSE ON POLITICAL ECONOMY 21-22 (Donald A. Cress trans., Hackett Publ'g Co. Inc. 1983) (1762) ("War is not therefore a relationship between one man and another, but relationship between one state and another. In war private individuals are enemies only incidentally: not as men or even as citizens, but as soldiers."); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 5 (4th ed. 2005) ("In all definitions it is clearly affirmed that war is a contest between states.").

only a metaphor[113] that called for improved police work.[114] Whatever the invasion of Afghanistan should have been called, and whether it was international or non-international conflict, international law does not permit denying Geneva Convention protections or grant a right to engage in interrogation tactics that may be torture.[115] Nonetheless, the bifurcation of the enemy and select use of rhetoric may also have led to esoteric assumptions about U.S. military operations in foreign lands and another legal loophole that rejected occupation and human rights law, which ordinarily guarantee generally-applicable rights even when the Geneva Conventions are inapplicable.

D. Extraterritorial Jurisdiction

The International Covenant on Civil and Political Rights (ICCPR) affirms: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[116] The Bush Administration reduced the ICCPR's jurisdictional applicability by omitting the "subject to its jurisdiction" portion of the provision and contended that U.S. human rights obligations were only available in the "territory of the United States."[117] Alternatively, Germany, the U.K., Australia, and Belgium all executed documents with the UN that recognized that they accepted jurisdiction over actions of their forces deployed to Afghanistan and Iraq;[118] U.S. military doctrine requires human rights treaties to be followed in foreign stability operations;[119]

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113. Brooks, *supra* note 6, at 716-17; George Anastaplo, *September 11th, A Citizen's Responses (Continued)*, 4 LOY. INT'L L. REV. 135, 157 (noting that 9/11 was "a vicious assault by a gang of international criminals"); Scott Wilson & Al Kamen, *"Global War on Terror" is Given New Name*, WASH. POST (Mar. 25, 2009), *available at* http://articles.washingtonpost.com/2009-03-25/politics/36918330_1_congressional-testimony-obama-administration-memo (last visited Nov. 13, 2013).

114. Anastaplo, *supra* note 113, at 154.

115. CAT, *supra* note 68.

116. International Covenant on Civil and Political Rights art. 2(1), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter "ICCPR"].

117. U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Comm.: United States of America, ¶ 130, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005).

118. Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 256 n.124 (2010).

119. U.S. DEP'T OF ARMY, FIELD MANUAL 3.07: STABILITY OPERATIONS 1-7 (Oct. 6, 2008), *available at* http://usacac.army.mil/cac2/repository/FM307/FM3-07.pdf (last visited Nov. 13, 2013); U.S. DEP'T OF DEF., JOINT PUBLICATION 1, JOINT WARFARE OF THE ARMED FORCES OF THE UNITED STATES, at II-2 (Jan. 10, 1995), *available at* http://webapp1.dlib.indiana.edu/cgi-

and the Bush Administration's position was inconsistent with existing precedent of the International Court of Justice (ICJ),[120] the Inter-American Committee on Human Rights,[121] UN Human Rights Committee,[122] and the UN General Assembly,[123] which have affirmed that human rights treaties apply beyond a state's territory.

European Court of Human Rights (ECHR) precedent is not binding on the U.S., but interpretations provide insight and persuasive

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bin/virtcdlib/index.cgi/4240529/FID6/pdfdocs/jel/new_pubs/jp1.pdf (last visited Nov. 13, 2013) ("[Military officials and troops] respect human rights. We observe the Geneva Conventions not only as a matter of legality but from conscience.").

120. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 109 (July 9) (holding that the jurisdiction of states "may sometimes be exercised outside the national territory," particularly when there is a "constant practice" of exercising control over that territory); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶ 39 (June 21) ("[T]he fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law"). The Wall advisory opinion states that the Convention on Social, Economic and Cultural Rights, the ICCPR, and the International Covenant on Social, Economic and Cultural Rights, all apply extra-territorially when a state exercises effective control over a foreign territory. Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers,* 51 HARV. INT'L L.J. 113, 130 (2010); Cleveland, *supra* note 118, at 259-60 (noting that the ICJ has held that either territorial control or "effective control" implicates international legal obligations).

121. Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), Inter-Am. Comm'n H.R. (Mar. 12, 2002), *reprinted in* 41 I.L.M. 532, 533-34 (2002). (determining that detainees held at Guantanamo Bay were held under the "authority and control" of the U.S. military, making human rights treaties applicable); Alejandre v. Cuba, Case 11.589, Inter-Am. Com'n H.R., Report No. 86/99, OEA/Ser.L./V/II.106, doc. 3 rev. P 25 (1999).

122. U.N. Human Rights Comm., General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th Sess., May 26, 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at ¶¶ 2, 9-10 (March 29, 2004), *available at* http://www.unhcr.org/refworld/pdfid/478b26ae2.pdf (last visited Nov. 13, 2013) (ICCPR jurisdiction applies, based on reciprocal obligations, to states for "all persons who may be within their territory" and "to all persons subject to their jurisdiction" when the party has "effective control" over the territory); Saldias de Lopez v. Uruguay, Communication No. 52/1979, at 88, ¶ 12.3, U.N. Doc. CCPR/C/OP/1 (1984) (holding that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant [ICCPR] as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."); ICCPR, *supra* note 116, art. 2(1) (stating that the agreement applies "to all individuals within its territory and subject to its jurisdiction").

123. Patrick Walsh, *Fighting for Human Rights: The Applicability of Human Rights Treaties to United States' Military Operations,* 28 PENN ST. INT'L L. REV. 45, 53-54 (2009); Heidi Krieger, *A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights In the ICRC Customary Law Study,* 11 J. OF CONFLICT & SEC. L. 268 (2006).

precedent to the jurisdictional applicability of human rights via "effective control."[124] Article 1 of the ECHR employs language guaranteeing that all persons shall have secure rights and freedoms "within [the] jurisdiction" of the parties.[125] Consequently, the ECHR grants protection "to everyone within their jurisdiction,"[126] which includes extending obligations on a member state when there is effective control outside national territory, including for what follows after lawful or unlawful military action.[127]

The ECHR addressed case specific facts involving the occupation of Iraq and extended ECHR obligations to member states due to effective control.[128] With respect to the U.S., the Security Council authorized occupation,[129] which inherently affirms effective control, including after a new Iraqi government was installed, because "territory is considered occupied when it is actually placed under the authority of the hostile army."[130] Scholars may disagree over the point at which "war" in Afghanistan turned to occupation.

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124. Cleveland, *supra* note 118, at 261-66 (emphasizing that effective jurisdiction is consistent with other ECJ cases and that "effective control" is not limited to a state's sovereign territory).

125. Convention for the Protection Of Human Rights and Fundamental Freedoms, art. 1, Sept. 3 1953, 213 U.N.T.S. 221.

126. *Id.*

127. Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 335, 354-55 (holding that extraterritorial jurisdiction is particularly appropriate when acts of state "produced effects or were performed outside their own territory, where as a consequence of military action (lawful or unlawful) the state exercised effective control of an area outside its national territory, whether it was exercised directly, through the respondent state's armed forces, or through a subordinate local administration"); Loizidou v. Turkey, 310 Eur. Ct. H.R. 7, 21-22, 24-25 (ser. A) (1995) (holding that that Turkey was in effective control over Cyprus because it possessed authority to implement and enforce policies with a military presence of 30,000 troops, and was liable for upholding human rights in Northern Cyprus).

128. Al-Skeini v. Sec'y of State for Def., [2007] UKHL 26, [2007] 1 A.C. (H.L.) [153] (case involving British soldiers apparently killing six Iraqi citizens in Iraq (one was reportedly in a British detention facility)); Dan E. Stigall, *Counterinsurgency and Trends in the Law of International Armed Conflict*, 30 PA. J. INT'L L. 1367, 1373-75 (2009) (describing how the *Al-Skeini* case history depicts some unwillingness within British institutions to accept jurisdiction over British acts in Iraq); Abbasi v. Sec'y of State for Foreign and Commonwealth Affairs [2002] EWCA (Civ) 1598, [64], [66], *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2002/1598.html (last visited Nov. 21, 2013) (holding that U.S. detentions of noncitizens, who are "subject to indefinite detention in territory over which the U.S. has exclusive control with no opportunity to challenge the legitimacy of his detention before any court of tribunal," were arbitrary and "in apparent contravention of fundamental principles").

129. S.C. RES. 1483, U.N. Doc. S/RES/1483 (May 22, 2003)(recognizing obligations of the legal status of occupation).

130. Convention (IV) Respecting the Laws and Customs of War on Land, art. 42, Oct.

Despite all the precedent relating to jurisdictional applicability of the ICCPR, it may still be reasonable to interpret from the negotiating history and objections that the ICCPR was not always intended to apply beyond a state's sovereign territory for military operations, but this is because international humanitarian law is required to be followed during combat.[131] The problem is rather obvious because the last part addressed how the Bush Administration used fuzzy reasoning with Article 2 and Article 3 of the Geneva Convention to deny full applicability of international humanitarian law.[132] Another method of denying international law restrictions is to focus on the characteristics of the enemy, which could also deny POW status and advance a policy of removing detainees from Afghanistan and transporting them across the Atlantic Ocean to Guantánamo; a location with an "ambiguous legal status"[133] and that may have been partially relevant to the removal of detainees from Iraq[134] and to abductions and Extraordinary Rendition of suspected terrorists in other parts of the world.[135]

18, 1907, 36 Stat. 2277, 2306, 1 Bevans 631.

131. Walsh, *supra* note 123, at 51-52. U.S. DEP'T OF STATE, LIST OF ISSUES TO BE CONSIDERED DURING THE EXAMINATION OF THE SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA: RESPONSES OF THE UNITED STATES OF AMERICA, at 32 (Apr. 28, 2006), *available at* http://www.state.gov/documents/organization/68662.pdf (last visited Nov. 18, 2013) (John Bellinger, State Department legal advisor, remarking that "neither the text of the Convention [Against Torture], its negotiating history, nor the U.S. record of ratification supports a view that Article 3 of the CAT applies to persons outside the territory of the United States"). The CAT requires parties to undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1. CAT, *supra* note 68, at art. 2(1).

132. *See* Human Rights Council, U.N. Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, ¶¶ 99, 101 U.N. Doc. A/HRC/13/42 (Feb. 19, 2010), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/134/99/PDF/G1013499.pdf?OpenElement (last visited Nov. 21, 2013) (stating that the Bush Administration decided that human rights law would not apply in Afghanistan or in detention centers at Guantanamo Bay and other places around the world).

133. Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 306 (2006); Rasul v. Bush, 124 S. Ct. 2686, 2698-99 (2004) (holding that overseas detainees could attain relief in U.S. courts for habeas corpus violations, and attain civil damages for international law violations). It is surprising that the Bush Administration utilized this ambiguous jurisdictional status because when the U.S. criminalized torture in 1994 for acts perpetrated by U.S. citizens outside the U.S., it was understood that the statute did not apply because Guantánamo Bay was "within the definition of the special maritime and territorial jurisdiction of the United States." Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations 7-8 (Apr. 4, 2003), available *at* http://www.washingtonpost.com/wp-srv/nation/documents/040403.pdf. (last visited Mar. 21, 2014).

134. Memorandum from Jack Goldsmith to William H. Taft, IV, et al. (Mar. 19, 2004),

E. Classifying Combatants

1. Legal Advice

Based on advice from appointed lawyers, the Bush Administration announced that Taliban and al-Qaeda members were not entitled to POW status under the Geneva Conventions because of their combatant characteristics, but that they should be treated in a way that is consistent with the Geneva.[136] Any combatant can be detained to prevent them "from returning to the field of battle and taking up arms once again,"[137] but whether detainees are classified as POWs, civilian internees, or "other detainees," can set justifications for long-term detention, standards of treatment, and the right to prosecute.[138] There is

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available at http://www.washingtonpost.com/wp-srv/nation/documents/doj_memo031904.pdf (last visited Nov. 18, 2013) (stating that "protected persons," who may or may not be illegal aliens, could be removed from Iraq "pursuant to local immigration law" for a brief but not indefinite period, so long as adjudicative proceedings have not been initiated against them"). Alternatively, if a person is innocent, this could be a form of kidnapping, and if an individual is a combatant and one acknowledges that detainees are "protected" under the Geneva Conventions, they cannot be interrogated. Bejesky, *Abu Ghraib Convictions, supra* note 19, at 5-16 (noting the legal ambiguities that developed over treaty applicability in Iraq).

135. Dana Priest & Dan Eggen, *Terror Suspect Alleges Torture*, THE WASH. POST (Jan. 6, 2005), *available at* http://www.washingtonpost.com/wp-dyn/articles/A51726-2005Jan5.html (last visited Nov. 21, 2013) (Gonzales affirmed the legal authorization for the U.S. to abduct terror suspects throughout the world without regard to foreign sovereignty). This can also be viewed as inconsistent with international law. Robert Bejesky, Sensibly Construing the "More Likely Than Not" Threshold for Extraordinary Rendition 6-7, 10-12 (Apr. 2013) (unpublished manuscript) [hereinafter Bejesky, *Sensibly Construing*].

136. Memorandum from Donald Rumsfeld, Secretary of Defense, to the Chairman of the Joint Chiefs of Staff (Jan. 19, 2002), *available at* http://www.defense.gov/news/Jun2004/d20040622doc1.pdf (last visited Nov. 19, 2013) (stating that al-Qaeda and the Taliban "are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949," but that soldiers should "treat them humanely, and to the extent appropriate and consistent with military necessity, [and] in a manner consistent with the Geneva Conventions of 1949"); Bush, *supra* note 101, at ¶¶ 2-3 ("[The U.S. military] shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva, [but] the Taliban [and al-Qaeda] detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva.").

137. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

138. *See* Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, Torture*, 81 IND. L.J. 1255, 1265 (2005) (noting that these classifications are also consistent with military doctrine); Int'l Comm. Red Cross, Commentary, *Geneva Convention Relative to the Treatment of Prisoners of War*, at art. 46 (1960) (affording protection to civilians and emphasizing that "protected persons" include

disagreement over whether the correct designations under international law should be civilians and privileged combatants,[139] meaning that anyone other than a combatant designee is by default a civilian.[140] Instead, the Bush Administration invented a new category called "unlawful enemy combatant" to avoid Geneva Convention protections that prohibit interrogations[141] and criminal prosecutions of captured combatants.[142]

OLC opinions even contended that torture should be narrowly construed and that prohibitions on interrogation did not apply to "enemy combatants."[143] Unlawful detentions, prosecutions, or abuse during interrogations mandates liability under the Geneva Convention.[144]

"enemy nationals within the national territory of each of the Parties to the conflict and . . . the whole population of occupied territories").

139. Paul B. Stephan, *Symmetry and Selectivity: What Happens in International Law When the World Changes,* 10 CHI. J. INT'L L. 91, 104 (2009); Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War:" The Law and Politics of Labels,* 36 CORNELL INT'L L.J. 59, 68-70 (2003) (noting that only legitimate combatants are entitled to POW status).

140. Geneva Protocol Additional, *supra* note 27, art. 50(1); Int'l Comm. Red Cross, *Commentary on the Additional Protocols of 1977 to the Geneva Convention of 1949,* 611 ¶ 1917 (1987); CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, GENEVA, 12 AUGUST 1949, COMMENTARY—ART. 4. PART I: GENERAL PROVISIONS, *available at* http://www.icrc.org/ihl/COM/380-600007?OpenDocument (last visited Mar. 21, 2014) ("Every person in enemy hands must have some status under international law: he is either a prisoner of war . . . covered by the Third Convention, a civilian covered by the Fourth Convention, or . . . a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.").

141. IN THE NAME OF DEMOCRACY, *supra* note 17, at 87, 123; JEFFREY T. RICHELSON, THE U.S. INTELLIGENCE COMMUNITY 307 (2012) (stating that "cheating" is the reason for Geneva rules that prohibit interrogations because POWs were a prime source of intelligence about adversaries in wars preceding the Geneva Conventions); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11,* 1 J. NAT'L SECURITY L. & POL'Y 409, 432-33 (2005) (noting that the OLC did not cite precedent for failing to apply any of the Geneva Convention categories).

142. Geneva I, *supra* note 27, art. 118 (POWs must be repatriated to their respective countries after hostilities end); Tug Yin, *Ending the War on Terrorism One Terrorist at a Time: A Non Criminal Detention Model for Holding and Releasing Guantanamo Bay Detainees,* 29 HARV. J.L. & PUB. POL'Y 149, 171 (2005). Soldiers are generally not held liable for following orders, but there can be prosecutions for crimes against peace, war crimes, and crimes against humanity. Int'l Comm. of the Red Cross, *Commentary of the Third Geneva Convention,* 419-22 (1994).

143. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding,* 121 HARV. L. REV. 689, 707 (2008).

144. Geneva I, *supra* note 27, art. 131 (no state "shall be allowed to absolve itself or any other . . .of any liability incurred by itself or by another" for serious breaches of the

Legal opinions written by Yoo, Delahunty and Gonzales focused much attention on the possibility of prosecution under the War Crimes Act, but "[t]heir refutation of its applicability rests solely on the argument that the Third Geneva Convention does not protect members of the Taliban or al-Qaeda."[145]

2. *Distinguishing Combatants*

There were two approaches for denying POW status for actions in Afghanistan based on the characteristics of the enemy. The first approach included applying Geneva Convention designation elements and the second approach involved pointedly determining that those deemed to be members of al-Qaeda and the Taliban were not protected.

First, advisory opinions assume that the Taliban and al-Qaeda were "unlawful enemy combatants" because they hid among civilians,[146] which can deny POW status under Article 4(A) of the Third Geneva Convention because combatants (1) are not commanded by leaders, (2) do not wear recognizable combat insignia, (3) do not openly carry arms, and (4) do not obey laws of war.[147] The test is intended to

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Geneva Convention).

145. Wallach, *supra* note 56, at 619; Gonzales, *supra* note 70, at 1-2 (noting that if the Geneva Conventions do not apply to the Taliban, there was also a reduced likelihood of criminal prosecution of U.S. soldiers and officials under the War Crimes Act (18 U.S.C. 2441)); Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment,* 23 ST. JOHN'S J.L. COMM. 503, 576-77 (2008).

146. 151 CONG. REC. S8811 (daily ed. July 25, 2005) (statement of Sen. Graham) ("They do not wear uniforms. They are terrorists. They hide among civilians. They cheat."); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 28-29 (2004) (stating that combatants who hide among civilians can lose the privileged status, and a civilian can become a combatant and vice versa).

147. Geneva I, *supra* note 27, art. 4(A)(1); *see* Hague Conventions on Land Warfare of 1899, ch. I, art. 1, July 29, 1899, 32 Stat. 1803; Hague Conventions on Land Warfare of 1907, ch. I, art. 1, Oct. 18, 1907, 36 Stat. 2277; Bush, *supra* note 101, at 2; Bybee, *supra* note 51, at 9-10 (stating that al-Qaeda members "have attacked purely civilians targets of no military value; they refused to wear uniform or insignia or carry arms openly, but instead hijacked civilian airliners, took hostages, and killed them; and they themselves do not object the laws of war"). The problem with this position is that it discusses broad acts of al-Qaeda outside of Afghanistan and assumes culpability based on a perceived nexus that should have ultimately been dependent on determinations in military commissions at Guantánamo Bay. As of February 2013, "there have been six convictions of Guantánamo detainees by military commissions, four of which were procured by plea agreements." Jennifer K. Elsea, Cong. Research Serv., R40932, Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court 10 (2013), *available at* http://www.fas.org/sgp/crs/natsec/R40932.pdf (last visited Nov. 24, 2013).

prevent rewarding combatants for hiding among civilians, which can place the civilians in harms way and provide an unfair military advantage if the opponent is conscientious in not placing civilians in danger.[148]

On the one hand, the Taliban must have had some degree of structure and unity in command because it was engaged in fighting with the Northern Alliance for several years, but members would generally not meet the four elements.[149] However, there are alternative interpretations of the Geneva Convention requirements that make denying POW status controversial. Article 44 of the Protocol Additional (adopted in 1977) provides that anyone "who falls in the power of an adverse party shall be a prisoner of war."[150] The U.S. is not a party to Protocol I, but 173 countries are members to make Protocol I an additional source to the Geneva Conventions,[151] which might make Protocol I's POW principle customary international law.[152]

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148. Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT'L L. 1025, 1026 (2004); Derek Jinks, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?: Protective Parity and the Laws of War*, 79 NOTRE DAME L. REV. 1493, 1495 (2004) (noting that "the question is how best to encourage fighters to distinguish themselves from the civilian population").

149. United States v. Lindh, 212 F.Supp. 2d 541, 557-58 (E.D. Va. 2002); David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT'L L. 61, 69 (2005). Some commentators did contend that the Taliban was the armed forces of Afghanistan, but legal advisers called the Taliban a "loose confederation of militia groups." Graham, *supra* at 68. The Taliban lacked an "organized command structure," and "wore the same clothes they wore to perform other daily functions." Memorandum from Assistant Attorney General Jay S. Bybee to White House Counsel Alberto R. Gonzales (Feb. 7, 2002), *available at* http://www.fas.org/irp/agency/doj/olc/taliban.pdf (last visited Nov. 11, 2013); 151 CONG. REC. S8811 (daily ed. July 25, 2005) (statement of Sen. Graham) ("We find ourselves in a war with a group of people who are not part of a state or a nation. They do not wear uniforms. They are terrorists. They hide among civilians. They cheat."); Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Remarks at the Chatham House on the Status and Treatment of Taliban and al-Qaeda Detainees (Feb. 20, 2002), *available at* http://2001-2009.state.gov/s/wci/us_releases/rm/2002/8491.htm (last visited Nov. 11, 2013) (identifying the elements for the test in the Geneva Conventions and agreeing that the Taliban do not meet the test to be granted POW status, but noting that they do "have the right to be treated humanely"); *See contra* Glazier, *supra* note 103, at 1013 (stating that some al-Qaeda units might have qualified as POWs because they did wear the same camouflage uniforms and openly carried weapons).

150. Int'l Comm. of the Red Cross, *supra* note 85.

151. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, membership, *available at* http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last visited Mar. 21, 2014).

152. GREGORY E. MAGGS, TERRORISM AND THE LAW: CASES AND MATERIALS, app. c, at 585-87 (2005).

During the negotiations over Protocol I, countries discussed terms to address liberation movements and to eliminate colonial powers from their countries and developing countries prevailed in eliminating the insignia requirement[153] so that hostilities could be conducted from within civilian populations and belligerents would still have POW status.[154] Protocol I adds that "armed forces of a Party" comprise "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates."[155] If the Taliban could be granted POW status and there is a sufficient relationship between the Taliban and al-Qaeda,[156] then both groups could have arguably received POW status.

Article 44(3) of the Protocol Additional to the Geneva Convention states that a combatant is not required to wear a uniform when "owing to the nature of the hostilities an armed combatant cannot so distinguish himself."[157] The invasion of Afghanistan occurred due to the acts of 19 hijackers, reportedly because of a plan devised by Osama bin Laden, who was apparently in Afghanistan. The Taliban did not direct those who were involved in 9/11[158] and perhaps those wielding weapons against invading forces acted in self-defense when

153. Geneva Protocol Additional, *supra* note 27, art. 44(3); *see also* Geneva I, *supra* note 27, art. 4(A)(1),(2) (POW status is applicable to "members of the armed forces of a Party" and "organized resistance movements").

154. Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT'L L. 683, 724-26 (2009).

155. Geneva Protocol Additional, *supra* note 27, art. 43(1); INTL. COMM. OF THE RED CROSS, *supra* note 140, ¶ 1663, at 508 (non-state entities "may in certain circumstances become Parties to the conflict").

156. John Yoo, *Fixing Failed States*, 99 CALIF. L. REV. 95, 108 (2011) (stating that it "appears now that either the Taliban could not control al-Qaeda, or that al-Qaeda simply dictated to the Taliban"); Stephen R. Shalom, *Far From Infinite Justice: Just War Theory and Operation Enduring Freedom*, 26 ARIZ. J. INT'L & COMP. L. 623, at 644 (emphasizing that CIA Director George Tenet considered al-Qaeda and the Taliban inseparable). Not all agree that there was this tight relationship. Rachael Lorna Johnstone, *Unlikely Bedfellows: Feminist Theory and the War on Terror*, 9 CHI.-KENT J. INT'L & COMP. L. 1 (2009) (reporting that "[l]inks between the Taliban and al-Qaeda go beyond the mere territorial, but nonetheless are a far cry from the threshold of complete dependence or effective control applied in the *Nicaragua* Judgment," which assessed the relationship between the Contras and the Reagan Administration's covert action team); Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 840 (2005) (noting that the Taliban did not seem to have any greater connection to al-Qaeda than providing logistical support).

157. Geneva Protocol Additional, *supra* note 27, art. 44(3).

158. Reinold, *supra* note 74, at 245 (noting that "the Afghan Taliban. . .neither directed nor controlled the perpetrators of 9/11").

confronted.[159] There may also be some hypocrisy in not granting POW status[160] and Afghanistan's poverty may have made procuring uniforms cost prohibitive.[161]

The second general approach for denying POW protections was to assume that if individuals could be labeled members of the Taliban and or al-Qaeda, they would be designated an "enemy combatant."[162] "Membership" is the determining variable for an "enemy combatant" designation, rather than the act perpetrated that preceded capture. Many authorities disagreed with the use of the "unlawful enemy combatant" label to deny Geneva Convention protections in Afghanistan,[163]

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159. Shalom, *supra* note 156, at 672, 674-75 (mingling with civilians does not absolve the U.S. of responsibility to avoid harming non-combatants, but early NGO estimates placed Afghani civilian casualties at several thousand).

160. Geneva Protocol Additional, *supra* note 27, art. 44(4) (stating that even if a combatant does not meet POW requirements or carry arms openly, the individual will "nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war"); Scott M. Sullivan, *Private Force / Public Goods,* 42 CONN. L. REV. 853, 878 (2010) (noting that some American government officials disclosed that private military contractors for some types of operations were advantageous because they do not wear uniforms). Given that CIA operations are often covert, CIA agents and assets also do not wear uniforms and may commingle with civilian populations.

161. WORLD BANK, INT'L DEV. ASS'N, OPERATIONAL POL'Y & COUNTRY SERV. & RES. MOBILIZATION DEP'T, OPERATIONAL APPROACHES AND FINANCING IN FRAGILE STATES 2 (June 2007) (depicting Afghanistan as the eighth poorest country in the world and the poorest outside of Africa).

162. *Guantanamo Detainee Process,* DEP'T OF DEF., at 2 (Oct. 2, 2007), *available at* http://www.defense.gov/news/Sep2005/d20050908process.pdf (last visited Sept. 24, 2013) (stating that for purposes of detention at Guantánamo, an "enemy combatant" is "an individual who was part of or supporting Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."); Memorandum from William J. Haynes II, Gen. Counsel of the Dep't of Def., to Members of the ASIL-CFR Roundtable (Dec. 12, 2002), *available at* http://www.cfr.org/international-law/enemy-combatants/p5312 (last visited Sept. 24, 2013) (defining an "enemy combatant" as "an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict. In the current conflict with al Qaida and the Taliban, the term includes a member, agent, or associate of al-Qaida or the Taliban."); *see also* Memorandum from LTC Diane Beaver, Staff Judge Advocate, to Commander, Joint Task Force 170, at Legal Brief on Proposed Counter-Resistance Strategies, para. 2 (Oct. 11, 2002), reproduced in THE TORTURE PAPER: THE ROAD TO ABU GHRAIB 229 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) ("Since the detainees are not [Enemy Prisoners of War] EPWs, the Geneva Conventions limitations that ordinarily would govern captured enemy personnel interrogations are not binding on U.S. personnel conducting detainee interrogations at GTMO."); Ensign Scott L. Glabe, *Conflict Classification and Detainee Treatment in the War Against al Qaeda,* 2010 ARMY L. 112, 113-15 (noting that there was difficulty in classifying operations against al-Qaeda under the Geneva Convention).

163. Paust, *supra* note 5, at 829 (pointing out that the Bush White House's use of the

extenuate precedent, confuse the categories,[164] and to use Geneva Convention definitions not to classify the enemy, but to use characteristics of the enemy to construct a new category.

"Enemy combatant" was not a commonly-used term prior to 9/11, and there is no reason to believe it was legitimate in this case.[165] In *Ex parte Quirin* (1942), the Supreme Court called six German saboteurs caught on U.S. shores during World War II unlawful enemy combatants.[166] The Court pointed out that they were not qualified to be POWs because they, "during time of war, pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts . . ."[167] If the intent with using the term was to assume that those individuals who entered U.S. territory during a world war with an intention to commit terrorism should be extrapolated to anyone inside a foreign country that the U.S. invaded, the factual comparison is spurious.

After much debate over the classification of those detained in Afghanistan, in January 2005, the Bush Administration finally declassified the legal memo that stated that there was an intention to treat members of the Taliban and al-Qaeda in a manner consistent with the Geneva Conventions.[168] It is unclear why compliance with international law should be a classified national secret and it is unclear whether this intention was in fact fulfilled in the previous years. The

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term "unlawful combatant" "demonstrate[d] remarkable ignorance of the nature and reach of treaties and customary international law . . . [because] any member of al-Qaeda who is a national of a state that has ratified the relevant treaties is protected by them."); Hamdi v. Rumsfeld, 542 U.S. 549 (2004) (Souter, J., concurring) (disagreeing with classifying the Taliban as unlawful enemy combatants). The Canadian military commented on treatment of detainees in Afghanistan: "All the individuals . . .captured or detained will be afforded humane treatment, according to the standards that are applicable to POWs, and that's according to international law." Hendin, *supra* note 78, at 61.

164. David Wippman, *Comment on Richard Arneson's Just Warfare Theory and Noncombatant Immunity*, 39 CORNELL INT'L L.J. 699, 702 (2006) (noting that the proper term should have been "unprivileged belligerent").

165. Peter Jan Honigsberg, *Inside Guantanamo*, 10 NEV. L.J. 82, 94 (2010).

166. *Ex parte* Quirin, 317 U.S. 1, 30-31 (1942) (noting that they were individuals associated with a country at war with the U.S. and who would engage in acts that would support the enemy).

167. *Id.* at 31, 35 (holding that an unlawful enemy combatant can be a "spy who secretly and without uniform passes the military lines of a belligerent in a time of war, seeking to gather military information and communicate it to the enemy . . .").

168. Scharf, *International Law in Crisis*, *supra* note 17, at 85; Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1, 14 (2010) (stating that a new U.S. Army Field Manual was adopted in 2006 and eliminated classifications between Prisoners of War and enemy combatants and provided that the Geneva Conventions apply to all detainees).

definitional maneuvers in Afghanistan were astonishingly parallel to what transpired in Iraq.

The Bush Administration acknowledged that the Geneva Conventions clearly applied in Iraq,[169] but for some reason Iraqi detainees were subjected to the same incarceration and interrogation policies and many were also called "unlawful combatants."[170] Security Council Resolution 1483 pertained to the occupation of Iraq and cited the Geneva Conventions of 1949 and the Hague Regulations of 1907 as applicable during the occupation.[171] The Supreme Court regards the Hague Conventions, which have been ratified by over 180 countries, as the paramount authority for assessing proper conduct for the law of war,[172] and Geneva Convention protections should also apply as a matter of customary international law.[173] The Bush Administration simply rejected the Conventions and Security Council Resolution restrictions in the case of Iraqi detainees. Rumsfeld directed intensive interrogation procedures to obtain "actionable intelligence" from Iraqi

169. *See, e.g.*, Dep't of Defense News Transcript, *Secretary Rumsfeld Media Availability En route to Baghdad* (May 13, 2004), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3010 (last visited Nov. 13, 2013) (Rumsfeld stating that "from the beginning" it has been the U.S. government's position "with respect to Iraq that the Geneva Conventions apply" and "anyone who is running around saying that Geneva Convention did not apply in Iraq is either terribly uninformed or mischievous."). In congressional hearings, Senator Levin stated that Rumsfeld publicly announced about Iraq on several occasions "that the Geneva Conventions apply not precisely, that prisoners are treated 'consistent with, but not pursuant to' [the Geneva Conventions]." *Review of Department of Defense Detention and Interrogation Operations, Hearing on S. 108-868 Before the Comm. on Armed Serv.*, 108th Cong. (2004), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-108shrg96600/html/CHRG-108shrg96600.htm (last visited Nov. 13, 2013) [hereinafter "Comm. on Armed Serv."].

170. Comm. on Armed Serv., *supra* note 169 (Colonel Warren stating that some detainees at Abu Ghraib were being called "unlawful combatants" and that interrogation procedures "are not, in and of themselves, in isolation, violations of the Geneva Conventions," specifically for "security detainees" under the Fourth Convention). Senator Levin itemized interrogation methods approved by Rumsfeld for "unlawful combatants" in December 2002, and methods included "nudity, exploiting detainees' fears . . . and stress positions." *Id.* Additional interrogation methods were authorized on April 16, 2003. *Id.* General Miller provided interrogation orders when visiting Iraq; "Policy No. 1—Battlefield Interrogation Team and Facility (BIT/F) Policy" dated 15 July 2003 was produced for Iraq, and queried General Fay who admitted that these authorizations "contribute[d] to the use at Abu Ghraib of aggressive interrogation techniques . . ." *Id.*

171. S.C. Res. 1483, ¶ 5, U.N. Doc. S/RES/1483 (May 22, 2003).

172. *See Hamdan*, 548 U.S. at 603-04; *Hamdi*, 542 U.S. at 520; Kadic v. Karadzic, 70 F.3d 232, 242-43 (2d Cir. 1995); United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991).

173. Glabe, *supra* note 162, at 116. Germany did not ratify the 1907 Hague Convention, but violations were applied as customary international law. *International Military Tribunal at Nuremberg, Judgment and Sentences*, Oct. 1, 1946, reprinted in 41 AM. J. INT'L L. 172, 248-49 (1947).

prisoners[174] and originally justified issuing the interrogation directives as necessary methods to fight the "war on terror"[175] even though Hussein's regime did not have ties to al-Qaeda.[176]

F. Using Interrogators and Classifying Torture

1. International Law Prohibits Interrogation

With legal advice postulating that international law did not restrict the Bush Administration's directives under the Commander-in-Chief authority, that the Geneva Conventions did not apply because Afghanistan was a failed state, that the conflict was international but the Conventions were not binding and Article 3 was inapplicable, and that those categorized as "unlawful enemy combatants" could be denied POW protection, it certainly does appear that appointed legal advisers strove to meet an ultimate goal of detaining and interrogating prisoners without legal ramification. These contentions molded the groundwork for what was explicated more directly by White House Counsel Alberto Gonzales. The existence of "novel factual circumstances" does not

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174. IN THE NAME OF DEMOCRACY, *supra* note 17, at 121; Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge*, WASH. POST, May 21, 2004, at A01 (recalling the abuse at Abu Ghraib, stating that interrogations were being used to obtain intelligence to "thwart the insurgency in Iraq" and "find Saddam Hussein or locate weapons of mass destruction," and that military intelligence officers were using "MPs to help 'set the conditions' for interrogation"); R. Jeffrey Smith, *Knowledge of Abusive Tactics May Go Higher*, WASH. POST, May 16, 2004, at A01 (stating that there was "heightened pressures in Washington for more robust intelligence-gathering, because of proliferating attacks on U.S. forces and the dwindling intelligence on Saddam Hussein's suspected weapons of mass destruction").

175. IN THE NAME OF DEMOCRACY, *supra* note 17, at 94, 122, 126-27; JAMES R. SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DEPARTMENT OF DEFENSE DETENTION OPERATIONS 63-64 (2004), *available at* http://www.defense.gov/news/aug2004/d20040824finalreport.pdf (last visited Nov. 13, 2013) (stating that interrogation was being used to gather intelligence and that the "failure to adapt rapidly to the new requirements of the Global War on Terror resulted in inadequate resourcing, inexperienced and untrained personnel, and a backlog of detainees destined for interrogation."); HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB 1 (2005), *available at* http://www.hrw.org/sites/default/files/reports/usa0604.pdf (last visited Nov. 13, 2013) (stating that "the Bush administration . . . required that the United States circumvent international law . . . " and administration lawyers counseled that "the new war against terrorism rendered 'obsolete' long-standing legal restrictions on the treatment and interrogation of detainees.").

176. *See generally* Bejesky, CFP, *supra* note 110; Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 858-59, 877 (2011) [hereinafter "Bejesky, *Intelligence Information*"].

mean that government officials can dismiss existing law,[177] but Gonzales opined that the war on terrorism required a "new paradigm" that rendered "obsolete Geneva's strict limitations on questioning of enemy prisoners" because of the need to "quickly obtain information from captured terrorists and their sponsors."[178] As a categorical prohibition without exceptions[179] and with similar restrictions existing in U.S. military law for 150 years,[180] Article 17 of the 1949 Geneva Convention provides:

> Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. . .No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.[181]

The Geneva Convention mandates that prisoners of war be humanely treated at all times and requires states to prohibit actions that cause death, seriously endanger the health of prisoners, or subject detainees to acts of violence, reprisals, intimidation, or "any other form

177. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

178. Gonzales, *supra* note 70, at 2; HUMAN RIGHTS WATCH, *supra* note 175, at 1.

179. Bassiouni, *supra* note 16, at 395.

180. DEPARTMENT OF THE ARMY FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION, at 1-8 (1992), *available at* http://www.fas.org/irp/doddir/army/fm34-52.pdf#search=%22FM%2034-52%20Field%20Manual%22 (last visited Nov. 19, 2013) (stating that "[p]hysical or mental torture and coercion revolve around eliminating the source's free will . . . Torture is defined as the infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure," and "US policy expressly prohibits acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation."); U.S. WAR DEP'T, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, SECTION I, ART. 16 (1863), *available at* http://www.icrc.org/ihl.nsf/0/286696dfc21d967ec12563cd00514a91?OpenDocument (last visited Nov. 19, 2013) (noting that the 1863 Instructions for the Government of Armies of the United States (Lieber Code) stated that "[m]ilitary necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions"); *see also* David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1435 (2005); BLACK'S LAW DICTIONARY 1528 (8th ed. 2004) (defining torture as "the infliction of intense pain to the body or mind to punish, or to extract a confession . . . or to obtain sadistic pleasure").

181. Geneva I, *supra* note 27, at art. 17; Aaron E. Garfield, *Note: Bridging a Gap in Human Rights Law: Prisoner of War Abuse as "War Tort,"* 37 GEO. J. INT'L L. 725, 748-49 (2006).

of coercion" to attain information,[182] but these conditions were systematically violated in Iraq, Afghanistan, and Guantánamo Bay.[183] Geneva Convention provisions require prisoners to be given adequate food and water to maintain good health, sufficient clothing and footwear, sanitary facilities, and medical attention,[184] but the Bush Administration overtly violated convention provisions by issuing directives that upset detainees' psychological and physical conditions, stripped them naked, and tasked health care professionals to facilitate interrogations.[185]

2. *Distinguishing Between Torture and Cruel and Inhuman Treatment*

As for the degree of abuse, trends and policy intentions indicate that there should be no sharp distinction between torture and cruel and unusual punishment,[186] but legal advisors issued memos that sustained the use of harsh interrogations by obfuscating distinctions between torture and cruel, inhuman, or degrading punishment.[187] These prohibitions on interrogation are applicable during a period of armed

182. Geneva I, *supra* note 27, arts. 13, 17.

183. Bejesky, *Abu Ghraib Convictions, supra* note 19, at 17-31, 60-64; Bejesky, *Epiphany Approach, supra* note 4, at 6-11, 20-25.

184. Geneva I, *supra* note 27, arts. 26-30.

185. Bejesky, *Abu Ghraib Convictions, supra* note 19, at 35-36.

186. Koh, *supra* note 69, at 642 ("Torture and cruel, inhuman, and degrading treatment are both illegal and totally abhorrent to our values and constitutional traditions. And no constitutional authority licenses the President to authorize the torture and cruel treatment of prisoners, even when he acts as Commander-in-Chief."); ABA Torture Resolution 10-B, at 1 (adopted Aug. 9, 2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/torture/torturepolicy2004_10B.authcheckdam.pdf (last visited Nov. 19, 2013) (condemning "any use of torture or other cruel, inhuman or degrading treatment or punishment upon persons within the custody or under the physical control of the United States government . . . and any endorsement or authorization of such measures by government lawyers."). International law can be interpreted to absolutely prohibit interrogation and all forms of abuse. Geneva I, *supra* note 27, at art. 17 (stating that "[n]o physical or mental torture, nor any other form of coercion" can be employed); Bejesky, *Pruning, supra* note 4, at 829-36.

187. *See* John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in TORTURE: A COLLECTION 154 (Sanford Levinson, ed., 2004); Waldron, *supra* note 97, at 1727 (the administration was obfuscating "cruel, inhuman and degrading methods" from "torture for the purpose of paying lip service to prohibitions"); *US Experts Unconvinced by Bush Assurance on Torture*, REUTERS (June 25, 2004), *available at* http://www.commondreams.org/headlines04/0625-07.htm (last visited Nov. 19, 2013) (Republican representative Frank Wolf wrote a letter to the Justice Department noting: "I am deeply concerned that this memorandum provides legal justification for the US government to commit cruel, inhumane and degrading acts, including torture.").

combat, occupation,[188] and as general restrictions that prohibit any substantial level abuse by government agents in other locations.[189]

With several bodies of law applicable in different contexts and locations to prohibit interrogation that would be torture or cruel, inhuman, or degrading treatment, another of the Bush Administration's approaches was to discount the applicability of generally restrictive sources by referencing exceptions in one source. For example, specifically to imprison and interrogate detainees at Guantánamo Bay, the Administration contended that Articles 1-27 of the International Covenant on Civil and Political Rights (ICCPR) did not bind U.S. actions because the ICCPR was not self-executing as domestic law, could not be enforced in American courts, and that the President could dismiss restrictions based on exigency.[190]

The ICCPR distinguishes between torture and lesser forms of harm and absolutely prohibits torture, but "cruel, inhuman or degrading treatment or punishment" could be permitted if there is a sufficient

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188. Geneva I, *supra* note 27, art. 3 (grave breaches of the laws of war include "murder of all kinds, mutilation, cruel treatment and torture; . . . outrages upon personal dignity, in particular, humiliating and degrading treatment; [and] the passing of sentences and the carrying out of executions without previous judgment."); Paust, *supra* note 5, at 835 (noting that during an occupation, the Geneva Convention and human rights law prohibit torture, "'violence,' threat of violence, 'cruel' treatment, 'physical and moral coercion . . .to obtain information,' 'physical suffering,' 'inhuman' treatment, 'degrading' treatment, 'humiliating' treatment, and 'intimidation' during interrogation").

189. CAT, *supra* note 68, art. 1 (prohibiting "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for reasons of inflicting severe physical or mental pain or punishment, intimidating, inflicting punishment, or extracting information); Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 5, U.N. Doc. A/810 (1948) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 6, G.A. Res. 43/173, Annex, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (Dec. 9, 1988) (providing that "no person under any form of detention or imprisonment shall be subject to torture or to cruel, inhuman or degrading treatment or punishment"); European Convention, *supra* note 125, art. 3 (defining torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him . . . , or intimidating or coercing him"); Michael John Garcia, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens* 1, CRS REPORT FOR CONGRESS, Mar. 11, 2004, *available at* http://fpc.state.gov/documents/organization/31351.pdf (last visited Nov. 19, 2013) (noting that "torture is defined as an *extreme* form of cruel and unusual punishment committed under the color of law" and that the U.S. enacted statutes to enforce Article 3).

190. AMNESTY INTERNATIONAL, DECADE OF DAMAGE TO HUMAN RIGHTS 45 n.10 (2011), *available at* http://www.amnesty.ca/sites/default/files/2011-12-16amr511032011enguantanamodecadeofdamage.pdf (last visited Nov. 19, 2013).

exigency.[191] The ICCPR is not automatically suspended during a period of armed combat, such that combat would be deemed an exigency, [192] and Article 9 only permits temporary derogations "to the extent strictly required by the exigencies of the situation" and only when member states officially request exemptions.[193] Moreover, the ICCPR Committee defined torture broadly, such as by noting that sleep deprivation,[194] forcing captives into stress positions, hooding, and threatening detainees were forms of torture.[195]

The Administration was indeed correct when it reminded that at the time of congressional ratification, the ICCPR was not intended to be self-executing.[196] However, the Senate made a reservation to the ICCPR based on prohibiting torture as standards equivalent to cruel,

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191. Comm. on Int'l Human Rights, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 42 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 235, 240 (1987) (explaining that "most of the obligations imposed by the Convention apply only to acts of torture, as defined in Article 1"); AMNESTY INTERNATIONAL, *supra* note 190, at 45 n.10 (stating that the advisory memo "entirely ignored the fact that under the ICCPR, even 'in time of public emergency which threatens the life of the nation', there can be no derogation from the prohibition of cruel, inhuman or degrading treatment or punishment (Articles 4 and 7)").

192. van Aggelen, *supra* note 108, at 56.

193. ICCPR, *supra* note 116, at art. 9; Human Rights Comm., *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 72nd Sess., Aug. 31, 2001, U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 2 (Aug. 31, 2001), *available at* http://www.refworld.org/docid/453883fd1f.html (last visited Nov. 19, 2013) (affirming that "[m]easures derogating from the provisions of the Covenant must be of an exceptional and temporary nature").

194. *See* Office of the High Comm'r for Human Rights [OHCHR], Comm. Against Torture, Annual Rep., Sept. 10, 1997, U.N. Doc. A/52/44; GAOR, 52nd Sess., Supp. No. 44, ¶257 (Sept. 10, 1997).

195. Human Rights Comm., 31st Sess., Oct. 26-Nov. 13, 1987, U.N. Doc. A/43/40, ¶¶ 2.2, 4, 10 (Oct. 27, 1987), *available at* http://www.worldcourts.com/hrc/eng/decisions/1987.10.27_Magri_de_Cariboni_v_Uruguay.htm (last visited Oct. 1, 2013) (being kept incommunicado for 42 days, "blindfolded with towelling material," deprived of sleep, beaten, and threatened with torture, was torture); Human Rights Comm., 60th Sess., July 29, 1997, U.N. Doc. CCPR/C/60/D/612/1995, ¶8.5 (July 29, 1997), *available at* http://www.bayefsky.com/html/114_colombia053.php (last visited Oct. 1, 2013) (stating that "being blindfolded and dunked in a canal" and being threatened with deadly force were torture).

196. U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. 8070 (1992) (specifying that "the United States declares that the provisions of Articles 1 through 27 of the [ICCPR] are not self-executing"); Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. 102-23, 31 I.L.M. 645, 652, 657 (1992) (stating that "[t]he Administration proposed a declaration stating that Articles 1 through 27 of the [ICCPR] are not self executing" and that "[t]he intent is to clarify that the [ICCPR] will not create a private cause of action in U.S. courts").

unusual, and inhumane treatment as specified in the Fifth, Eight, and/or Fourteenth Amendments to the Constitution,[197] which means that U.S. jurisprudence and law enforcement practices in the U.S. are applicable to defining torture and that "the Convention bans conduct that is already unconstitutional."[198] The White House and Secretary of Defense directed the use of psychological interrogation tactics that American officials could not engage in inside the U.S. without violating the Eighth Amendment and those same standards would be prohibited outside the United States when the ICCPR or CAT are applicable to American government actions.[199]

3. *Endorsing Specific Methods*

With respect to the interrogation tactics that the Bush Administration approved, in October 2002, Joint Task Force 170 furnished the Joint Chiefs of Staff and SOUTHCOM with proposals that were substantially similar to interrogation methodology that the CIA

197. 136 CONG. REC. 25, 36, 192 (1990) (the U.S. is bound to prevent "'cruel, inhuman or degrading treatment or punishment' only insofar as the term . . .means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States"); U.S. DEP'T. OF DEF., WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS 6 (Apr. 4, 2003), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf (last visited Nov. 9, 2013) (stating that U.S. obligations "under the Torture Convention apply to the interrogation of unlawful combatant detainees," but only to the extent that "cruel, inhuman, and degrading treatment and punishment" was restricted under the U.S. Constitution; ICCPR, *supra* note 116, art. 7 ("cruel, inhuman or degrading treatment or punishment" restriction as equated to cruel and unusual treatment in the Bill of Rights); Garcia, *supra* note 189, at 2, 4 (stating that police brutality would not be torture under the CAT, but distinguishing from the lesser forms of "cruel and unusual punishment" and affirming that both standards are prohibited); *Id.* at 6 (stating that there the Senate restricted "mental torture" to mean "severe physical pain and suffering"); LOUIS HENKIN, INTERNATIONAL LAW CASES AND MATERIALS 626 (3d ed. 1993) ("The reasons why the United States has maintained its distance from the international human rights agreements are not obvious. . . [T]here is resistance to accepting international standards, and international scrutiny, on matters that have been for the United States to decide.").

198. EVIL, LAW AND THE STATE: PERSPECTIVES ON STATE POWER AND VIOLENCE 9 (John T. Parry ed., 2006).

199. Garcia, *supra* note 189, at 13 (CAT and/or § 2340A restricts torture outside the U.S. borders). Congress ensured that this was clear with the McCain Amendment which affirms that the President must "take action to ensure" that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, unusual, and inhumane treatment and punishment prohibited by the U.S. Constitution." 42 U.S.C. §§ 2000dd(d), 2000dd-0(3) (2008).

researched and incorporated into its *Kubark* Interrogation Manual in 1963.[200] The Task Force proposed three categories of techniques with progressing intensity. Category I authorized interrogators to stimulate an uncomfortable environment by yelling and employing deception to create stress.[201] Category II permitted interrogators to use stress positions, produce falsified documents, quarantine captives in solitary confinement for up to thirty days, restrict breathing, induce sensory deprivation, and invoke phobias.[202] Category III authorized interrogators to threaten to kill members of a captive's family, expose inmates to harshly cold temperatures and water, engage in daylong interrogations, and induce perceptions of drowning or suffocation.[203] In December 2002, Defense Secretary Rumsfeld approved Category I and II, and some methods in Category III.[204]

After some officials contended that detainees frequently resisted approved interrogation methods, in early March 2003, a Defense Working Group proposed more approaches and Rumsfeld authorized another dozen interrogation techniques, including implementing "environmental manipulation," altering sleep rhythms from night to day, leaving detainees naked in dark isolation for up to thirty days, applying harsh heat and cold, withholding food, hooding for several days straight, and forcing detainees into "stress positions" that would "subject detainees to rising levels of pain."[205] Directives progressed down the chain of command and interrogators commonly used the procedures on detainees at all American detention facilities.[206]

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200. Wallach, *supra* note 56, at 581.

201. *See generally Memorandum from General Counsel of the Department of Defense William J. Haynes II for Secretary of Defense* (Nov. 27, 2002), *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/additional_detainee_documents/07-F-2406%20doc%201.pdf (last visited Nov. 9, 2013); *Memorandum from Joint Task Force 170 for Commander, U.S. Southern Command* (Oct. 11, 2002), *available at* http://www.defense.gov/news/Jun2004/d20040622doc3.pdf (last visited Nov. 9, 2013) [hereinafter *Task Force 170*].

202. *Task Force 170*, *supra* note 201, at 1-2.

203. *Id.* at 2-3.

204. Wallach, *supra* note 56, at 583, 593-94; Paust, *supra* note 5, at 840. In November 2002, the Bush Administration approved the use of sensory deprivation, stress positions, phobias and dogs, psychological trickery, and threat scenarios against the detainee and/or his family. Haynes, *supra* note 201.

205. U.S. DEP'T OF DEF., *supra* note 197, at 2, 63-65, 70.

206. LTG Anthony R. Jones, *AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade*, FINDLAW.COM 10, 15-16, 25-26 (August 23, 2004), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf (last visited Nov. 19, 2013) (noting that on September 14, 2003, Lt. Gen. Ricardo Sanchez, authorized the use of twenty-nine interrogation methods in Iraq, including isolation, stress

There was emphatic criticism of these methods, which led to disagreements with international authorities. The Bush Administration offered retorts with a failure to recognize the degree of abuse. For example, expressing concerns over the isolation of prisoners, the United Nations Human Rights Council stated that the "weight of accumulated evidence to date points to the serious and adverse health effects of solitary confinement" and that it was a potential breach of the ICCPR.[207] The Bush Administration denied that "prolonged isolation and indefinite detention . . . per se constitutes cruel, inhuman, or degrading treatment or punishment."[208] Yet with the ICCPR's usual applicability to domestic criminal law standards, there is a general distinction between placing an already-convicted inmate in solitary confinement perhaps for a week as a punishment for misbehaving in a penal facility, and capturing a suspected insurgent or terrorist, blindfolding him, taking him to an unknown location, and subjecting him to other forms of sensory deprivation and isolation for weeks or months without being certain about the detainee's guilt.

The ECHR deemed methods such as "wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink," inhuman treatment that caused "at least intense physical and mental suffering."[209] The methods were explicitly prohibited under the ECHR, but they were not deemed torture.[210] Legal advisor Jay Bybee issued a memo that used the ECHR's case to develop definitions and approved of methods such as sleep deprivation, white noise, stress positions, denying food and water, and hooding.[211] However, the

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positions, threats with dogs, and sleep and sensory deprivation, only to revoke the authorization several weeks later); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309, 340 (2006) (stating that an approach implemented at Guantánamo Bay and Abu Ghraib was to use attack dogs to intimidate inmates); Pearlstein, *supra* note 138, at 1263-65 (Rumsfeld approved of using attack dogs and other means of generating fears and individual phobias in November 2002); Bejesky, *Abu Ghraib Convictions*, *supra* note 19, at 17-31, 60-64 (discussing abuse at Abu Ghraib); Bejesky, *Epiphany Approach*, *supra* note 4, at 6-11, 20-25 (discussing abuse at Gitmo).

207. U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 77-85, U.N. Doc. A/63/175 (July 28, 2008).

208. U.S. DEP'T OF STATE, *supra* note 131, at 107.

209. Paust, *supra* note 26, at 408-09.

210. Waldron, *supra* note 97, at 1706; *See also* International Covenant on Economic, Social and Cultural Rights, art. 11, Dec. 19, 1966, 993 U.N.T.S. 3.

211. Waldron, *supra* note 97, at 1705-06; Jackson Maogoto & Benedict Sheehy, *Torturing the Rule of Law: USA and the Post 9-11 Legal World*, 21 ST. JOHN'S J.L. COMM. 689, 721 (2007); Seth F. Kreimer, *"Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience*, 1 J. NAT'L SECURITY L. & POL'Y 187, 192 (2005) (noting

ECHR case involved British interrogators holding Irish detainees for a few days and subjecting them to psychological interrogation methods,[212] while the Bush Administration's orders routinely subjected hundreds of detainees to more intense interrogation techniques for many months. Nonetheless, shades in the degree of abuse may not have been consequential if the most criticized position of all had been taken seriously.

4. Nullifying the Relevance of Authorized Interrogation Standards with the Bybee Memo

Perhaps the most condemned memo,[213] approved by Bybee but reportedly written by John Yoo in August 2002,[214] imparted a legal defense for government actors carrying out interrogation directives. The Bybee memo stated that for an interrogator to be held criminally responsible for abuse, the interrogator must intend that the victim "experience intense pain and suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant bodily function will likely result."[215] Alternatively, federal

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that another advisory position, provided by Judge Advocate LTC Beaver, acknowledged that the U.S. was restricted from using methods that would be torture or cruel, inhuman and degrading treatment, but maintained that approved interrogation techniques did not violate those restrictions; methods such as sleep deprivation, threatening with dogs, inducing "misperceptions of asphyxiation," and "mind noninjurious contact" did not violate international or domestic law); Charles H. Brower II, *The Lives of Animals, the Lives of Prisoners, and the Revelations of Abu Ghraib*, 37 VAND. J. TRANSNAT'L L. 1353, 1382 (2004) (interrogators "have used a 110-volt power supply to shock detainees" and "performed 'numerous' simulated asphyxiations to obtain information").

212. Bejesky, *Utilitarian Rational Choice*, *supra* note 3, at 405-11.

213. Koh, *supra* note 69, at 647 ("[I]n my professional opinion, the Bybee Opinion is perhaps the most clearly erroneous legal opinion I have ever read."); Waldron, *supra* note 97, at 1704, 1708 (stating that "[t]he quality of Bybee's legal work here is a disgrace . . . . [T]hese are obvious errors, and the Department of Justice – as the executive department charged with special responsibility for the integrity of the legal system.").

214. Rachael Ward Saltzman, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 439, 440 (2010) (stating that it was later reported that Yoo wrote this memo and Bybee approved it); Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST (June 25, 2007), *available at* http://blog.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/ (last visited Nov. 19, 2013) (explaining that Yoo kept getting "summoned" to the White House to tell CIA officers "what the legal limits of interrogation are" and that administration officials "attributed authorship [of the Bybee memo] to Yoo").

215. Bybee, *supra* note 54, at 1, 3 (stating that "[w]e conclude by examining possible defenses that would negate any claim that certain interrogations methods violate the statute" and enumerating the high-threshold elements to convict).

jurisdiction was established over torture crimes and Section 18 U.S.C. § 2340A absolutely prohibits physical and psychological torture outside the U.S.[216] The Torture Statute defines torture as "[a]n act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering."[217]

The Bybee memo's position that such a malicious *mens rea* is required for a high-level abuse is particularly surprising when federal courts have interpreted that specific intent for torture can also exist when there is an intentional act that leads to "prolonged mental pain or suffering" that is a foreseeable consequence of the deliberate act.[218] Moreover, the Torture Statute is a generally-applicable law that does not mention interrogation, but interrogation itself involves a government-sanctioned level of dominance by the interrogator over the captive and the relationship is specifically anticipated to employ specific acts to inflict harm and make the subject obliging.

With the Bybee memo's excessively high standard for culpability, a government's logical retort to criticism could be that chain of command directives *could not* have authorized illegal orders because authorized psychological interrogation tactics were limited and interrogators were not convicted of crimes.[219] After all, the legal advice

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216. 18 U.S.C. § 2340A, 2340(1) (2012). There are emerging trends in transnational plaintiff litigation. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Anne-Marie Slaughter & David Bosco, *Plaintiffs Diplomacy*, 2002 FOR. AFFAIRS 102 (2000).

217. 18 U.S.C. § 2340 (2012) ("[S]evere mental pain or suffering" defined as "prolonged mental harm caused by or resulting from . . . the intentional infliction or threatened infliction of severe physical pain or suffering; the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; the threat of imminent death; or the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application or mind-altering substances . . .").

218. Habtemicael v. Ashcroft, 370 F.3d 774, 782 (8th Cir. 2004); Zubeda v. Ashcroft, 333 F.3d 463, 473 (3d Cir. 2003); see Garcia, supra note 189, at 2 ("[A]n act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of the Convention.").

219. Daniel Levin, *Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*, U.S. DEP'T OF JUSTICE (Dec. 30, 2004), *available at* http://www.justice.gov/olc/18usc23402340a2.htm (last visited Nov. 19, 2013) (Memo withdrawing the legal advice on liability and noting that discussion on liability was unnecessary because "[c]onsideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture."); John T. Parry, *"Just for Fun": Understanding Torture and Understanding Abu Ghraib*, 1 J. NAT'L SECURITY L. & POL'Y 253, 267 (2005) ("If the Torture Convention is the controlling document, then a state that wishes to justify its violence need only assert that, whatever it may have done, it has not tortured. At this point the discussion gets bogged down in definitions."); *Senate Judiciary Committee Grills*

states that to be illegal, torture must "inflict pain that is difficult to endure," such as pain similar to "death or organ failure," as distinguished from cruel and inhuman acts.[220] Most significant to the approved interrogation methods is that "[m]ental torture" must cause "significant psychological harm of significant duration, e.g., lasting for months or even years,"[221] which would surely be arduous for a detainee-plaintiff or prosecutor to prove.

With a substantial gap between definitions prohibiting torture under U.S. and international law and the punishment standards contained in the Bybee memo, interrogators may have believed that their own acts would not be criminally culpable irrespective of the Administration's authorized techniques.[222] The high threshold criterion might also have been further promoted because the Bybee memo reiterated that even if there were violations of the U.S. Code, the Commander in Chief could still use "flexible" means of interrogation to attain information that would prevent terrorist attacks, pursuant to "necessity" and "self-defense" justifications.[223]

Approved interrogation methods and the President's direction for interrogation to remain within U.S. law do not explain how so many captives kept emerging with indications that they were severely beaten or how as many as two hundred detainees died, with at least 34 confirmed homicides while in U.S. custody between August 2002 and 2006.[224] In Afghanistan and Iraq, U.S. military doctors signed many

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Ashcroft on Justice Dept. Memo, PBS (June 8, 2004), *available at* http://www.pbs.org/newshour/bb/government_programs/jan-june04/torture_6-8.html (last visited Nov. 19, 2013) (In responding to the scandal following the Abu Ghraib atrocities, Rumsfeld remarked: "Let me completely reject the notion that anything that this President has done or the Justice Department has done has directly resulted in the kind of atrocity which were cited. . .There is no Presidential order immunizing torture.").

220. Bybee, *supra* note 54, at 1.

221. *Id.* at 7.

222. For example, the Bush Administration's interrogation standards did not approve of organ failure and death as pressure tactics to gain information, but the same agency of government – the Justice Department – is the same agency that is empowered to decide whether to criminally prosecute. Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, NY TIMES (Oct. 4, 2007), *available at* http://www.nytimes.com/2007/10/04/washington/04interrogate.html?pagewanted=all&_r=0 (last visited Nov. 19, 2013).

223. Bybee, *supra* note 54, at 31, 39-45.

224. *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan*, HUM. RTS. FIRST (Feb. 1, 2006), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/06221-etn-hrf-dic-rep-web.pdf (last visited Nov. 19, 2013); Bassiouni, *supra* note 16, at 390, 398-99, 406 (placing the death toll caused by interrogation practices at 200 detainees through 2006); Stephen N. Xenakis, *More on: "Doctors Must Be Healers"*, 37 SETON HALL L. REV. 703, 706 (2007) (at

detainee death certificates with causes that were tantamount to torture,[225] but interrogators were not being prosecuted[226] even though torture and acts of cruel and unusual punishment require punishment under international law.[227] Is it possible that legal advice regarding the *mens rea* of interrogators undermined the reasonable application of approved interrogation standards and that the legal advice was incompatible with the definition of a criminally punishable act under international and domestic law?

Given the definition in U.S. federal law, many scholars and government and military lawyers expressed that the memo mangled the definitions of torture and culpability for torture,[228] provided a "breathtakingly expansive view of presidential powers," was inconsistent with *jus cogens* norms,[229] and endorsed criminal conduct.[230]

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least 98 detainees died in U.S. custody, and Physicians for Human Rights tallied 105 deaths in Iraq and Afghanistan between 2002 and 2005); James W. Smith III, *A Few Good Scapegoats: The Abu Ghrabi Courts-Martial and the Failure of the Military Justice System,* 27 WHITTIER L. REV. 671, 675 (2006) (noting that the British also engaged in torture of detainees that resulted in deaths); *Report: 108 Die in U.S. Custody*, CBS NEWS (Mar. 16, 2005), *available at* http://www.cbsnews.com/stories/2005/03/16/terror/main680658.shtml (last visited Nov. 19, 2013) (noting that based on information supplied by the Army, Navy and other government agencies, at least 108 detainees died in U.S. custody).

225. Bassiouni, *supra* note 16, at 402-03, 406.

226. Khan, *supra* note 20, at 8 (stating that despite this evidence of deaths during interrogation, "not one single CIA personnel has been prosecuted"). By comparison, in the rare case of prosecution during the Vietnam War, the military court held that "whether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam or the most intelligent, he must be presumed to know that he could not kill the people involved here." U.S. v. Calley, 22 U.S.C.M.A. 534, 544 (C.M.A. 1973).

227. Bejesky, *Pruning*, *supra* note 4, at 829-36.

228. Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations,* 55 UCLA L. REV. 1407, 1418 (2008).

229. David A. Wallace, *Torture v. The Basic Principles of the U.S. Military*, J. INT'L CRIM. JUST. (May 2008), *available at* http://jicj.oxfordjournals.org/content/6/2/309.full.pdf (last visited Nov. 19, 2013); Association of the Bar of the City of New York Committee on Federal Courts, *The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Security in the Context of the War on Terror,* RECORD (2004), *available at* http://www.nycbar.org/pdf/1C_WL06!.pdf (last visited Nov. 19, 2013) (noting the "almost unlimited expansion of executive power" specifically because "the domestic war on terror" was treated as the same as "'total war' circumstances of World War II and the Civil War"); IN THE NAME OF DEMOCRACY, *supra* note 17, at 105 (former Nixon Counsel John Dean stating that the Bybee "Torture Memo" is "damning evidence suggesting a common plan [or conspiracy] on the part of the Administration to violate the laws of war"); Jordan J. Paust, *Civil Liability of Bush, Cheney, et al. for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT'L L. 359, 361 (2009) ("[M]emoranda . . . facilitated the common, unifying plan devised by an inner circle to use torture."). If Dean is correct, the memo could implicate top officials as conspirators in deaths and abuse that resulted after the order's issuance date. *Id.*; United States v. Laster, 42

Explaining precisely what transpired, Professor Mary Ellen O'Connell explains that the authors of the memo ignored "the negotiating history of the treaty" and "went to a completely unrelated document, a health care statute, found a provision that they liked, and from this statute they constructed a definition of torture that limited torture to actions inflicting the pain of 'organ failure or death.'"[231]

Even John Yoo conceded that the memorandum does not represent "majority views among international law academics,"[232] but a former White House lawyer believed the memo's perspective was more strained than a minority opinion and estimated that "if you line up 1,000 law professors, only six or seven would sign up to [the torture memo's viewpoint]."[233] In a June 2004 press conference, Gonzales contended that there were "unnecessary, over-broad discussions in some of these memos that address abstract legal theories, or discussions subject to misinterpretation, but [those opinions were] not relied upon by decision-makers are under review, and may be replaced, if appropriate, with more concrete guidance."[234] If this is true and the torture memo was a

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M.J. 538, 540 (A.F. Ct. Crim. App. 1995) (noting that under military law, circumstantial evidence can provide the basis to infer that there was an agreement to commit a crime between two parties).

230. Wallace, *supra* note 229, at 313 (calling the string of memos "overly legalistic and patently erroneous attempts to redefine torture"); Peter Brooks, *The Plain Meaning of Torture?*, SLATE (Feb. 9, 2005), *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2005/02/the_plain_meaning_of_torture.html (last visited Nov. 19, 2013) (calling the opinion "the work of some bizarre literary deconstructionist"); Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS (July 15, 2004), *available at* http://www.nybooks.com/articles/17230 (last visited Nov. 19, 2013) (stating that the memo is equivalent to "the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison").

231. O'Connell, *Responses*, *supra* note 5, at 5136.

232. R. Jeffrey Smith, *Slim Legal Grounds for Torture Memorandums*, WASH. POST, Aug. 5, 2004, at A4 (quoting John Yoo).

233. John Hagan, Gabrielle Ferrales & Guillermina Jasso, *How Law Rules: Torture, Terror, and the Normative Judgments of Iraqi Judges*, 42 LAW & SOC'Y REV. 605, 610 (2008); M. Cathleen Kaveny, *Donald A. Giannella Memorial Lecture: Prophecy and Casuistry: Abortion, Torture and Moral Discourse*, 51 VILL. L. REV. 499, 530 (2006) (noting that a percentage of Catholics repudiated Bush for using specious reasons to wage war against Iraq and that revelations of torture and memos justifying torture called into question Bush's commitment to human dignity).

234. *Press Briefing by White House Counsel Alberto Gonzales, et al.*, WHITE HOUSE (Sept. 25, 2004), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040622-14.html (last visited Nov. 19, 2013); Edward Alden, *Top Lawyers Call Legal OK for Torture 'Preposterous'*, FIN. TIMES (Sept. 25, 2004), *available at* http://archive.truthout.org/article/top-lawyers-call-legal-ok-torture-preposterous (last visited Nov. 19, 2013) (stating that Yoo referred to the opinion as "an abstract analysis of the meaning of a treaty and a statute.").

response to a policymaker request, it makes one wonder how many of the other advisory memos were intended to be planks of initial cogitation.

Perhaps it was partially the glut of warnings of abuse[235] and appalling victim accounts that puzzled Senators when Gonzales testified before the Senate in January 2005 and when he explained emphatically that the Bybee memo had been withdrawn and that he and Bush had both repudiated torture.[236] Senator Kennedy retorted by remarking that "for a two-year period when it was in effect, you didn't object to it."[237] In fact, it took until June 2005 for the U.S. government to even admit that prisoners had been subjected to abuse amounting to torture in Guantánamo Bay, Iraq and Afghanistan.[238] .By this point, the Bush Administration had already renamed the interrogation approaches and tweaked the standards.

5. *Modifying the Bybee Memo and Using "Enhanced Interrogation"*

In December 2004, Assistant Attorney General Daniel Levin, wrote a memo that withdrew the language of the Bybee memo, written over two years earlier, that required pain equivalent to "organ failure, impairment of bodily functions, or even death."[239] The new memo stated that to meet the definition of punishable torture, physical harm must be severe in "intensity and duration or persistence" and more than "mild and transitory pain," and that "mental harm must be of some lasting duration," but the harm need not last for "months or years."[240]

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235. Bejesky, *Abu Ghraib Convictions*, *supra* note 19, at 19-22 (explaining that the Bush Administration had been warned about illegalities in American prison facilities long before the memo was reportedly rejected).

236. *Senate Judiciary Committee Confirmation Hearing*, N.Y. TIMES (Sept. 25, 2005), *available at* http://www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html?_r=0&pagewanted=all&position= (last visited Nov. 19, 2013) (Gonzales stating, after being questioned over whether he agreed with the interpretation of the standard for torture in the Bybee memo, "I do not [agree with that interpretation]. That does not represent the position of the executive branch.").

237. *Id.*

238. *US Acknowledges Torture at Guantánamo; in Iraq, Afghanistan – UN*, AFX NEWS LIMITED (Sept. 25, 2005), *available at* http://web.archive.org/web/20060207165836/http://www.forbes.com/work/feeds/afx/2005/06/24/afx2110388.html (last visited Oct. 2, 2013) (UN Committee member stating: "They are no longer trying to duck this and have respected their obligation to inform the UN.").

239. Levin, *supra* note 219.

240. *Id.* (calling the torture memo "abhorrent both to American law and values and to international norms" and that there may be questions of whether an interrogator "specifically intended" to engage in an act of torture "in light of the President's directive

Citing a Supreme Court case to address interrogator culpability, the revised OLC memo stated that if an interrogator "acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary of violate sections 2340-2340A."[241]

Professor Jack Goldsmith replaced Bybee as head of the OLC in 2003 and rescinded many of the opinions[242] and called Yoo's work from 2001 to 2003 "deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President."[243] Goldsmith was "anointed as a hero by the media" for repealing the memos,[244] but Goldsmith had also been known to represent an ideological position that preferred to treat international law as discretionary norms,[245] and his 2004 OLC memo added a footnote stating that "all the interrogation methods that earlier opinions had found legal were still legal."[246] The footnote arguably nullified the relevance of the new memo and John Yoo apparently believed that Goldsmith's withdrawal of the opinion was merely "'for appearances' sake to divert public criticism in the immediate aftermath of the Abu Ghraib controversy. 'In the real world of interrogation policy nothing had changed.'"[247]

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that the United States not engage in torture").

241. *Id.*

242. Saltzman, *supra* note 214, at 446.

243. Dan Eggen & Peter Baker, *New Book Details Cheney Lawyer's Efforts to Expand Executive Power*, WASH. POST (Sept. 5, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/04/AR2007090402292.html (last visited Nov. 19, 2012); JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 146-50 (W.W. Norton & Company 2007); Yamamoto, *supra* note 66, at 318-19 (citing lists of other legal authorities).

244. Scharf, *supra* note 17, at 349.

245. Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393, 421 (2006) (critiquing Posner and Goldsmith's realist ideological book and stating that "[t]he book cannot be viewed as separate from the authors' broader normative project – a project that seeks to minimize U.S. participation in U.S. institutions and to limit the application of the international law," and noting Goldsmith's realist ideological affinity with other advisors).

246. Scharf, *supra* note 17, at 349 (citing YOO, *supra* note 38, at 183); GOLDSMITH, *supra* note 243, at 155-56; Power, *supra* note 15, at 97-98 (stating that Goldsmith was entirely supportive of the Bush Administration, but partially cleaned the mess left by antecedent memos).

247. Scharf, *supra* note 17, at 349 (citing YOO, *supra* note 38, at 183).

It does appear that nothing had changed. In February 2005, shortly after Alberto Gonzales became Attorney General and about one month after Levin's memo was produced, Gonzales endorsed methods that were reportedly "the harshest interrogation techniques ever used by the Central Intelligence Agency."[248] Other than waterboarding, the new methods that authorized degrees of physical touching could probably already be presumed to be occurring and many methods were the same as or substantially similar to the techniques approved in 2002, but they were now labeled "Enhanced Interrogation Techniques."[249] Only the label was changed on methods that were already called torture.[250] For example, JAG attorneys, the international community, and U.S. courts have called waterboarding torture,[251] but CIA Director Porter Goss

248. Shane, Johnston & Risen, *supra* note 222; R. Jeffrey Smith & Dan Eggen, *Gonzales Helped Set the Course for Detainees*, WASH. POST (Jan. 5, 2005), *available at* http://www.washingtonpost.com/wp-dyn/articles/A48446-2005Jan4.html (last visited Nov. 19, 2013) (noting that Gonzales had intricate involvement because he chaired meetings with top government officials that detailed "how much pain and suffering a US intelligence officer could inflict on a prisoner without violating" U.S. criminal law and that approved methods included "'waterboarding,' a tactic intended to make detainees feel as if they are drowning" and the "threat of live burial").

249. These "Enhanced Interrogation Techniques" included grabbing and slapping prisoners, shaking them to get their attention, imposing long-time standing, placing detainees in "cold cells," and using "waterboarding." Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS (Nov. 18, 2005), *available at* http://abcnews.go.com/Blotter/Investigation/story?id=1322866 (last visited Nov. 19, 2013); *See supra* Parts III(F)(3)(4).

250. Resnick, *supra* note 10, at 614 (explaining that "[t]he labels 'enhanced interrogation,' 'harsh' techniques, and 'coercion' have been offered up in lieu of the words torture, and the cruel, inhuman, and degrading treatment" to define detainment conditions); Bassiouni, *supra* note 16, at 393 (calling the memos "permissible interrogation techniques" was just "a euphemism for torture"); Manfred Nowak, Moritz Birk & Tiphanie Crittin, *The Obama Administration and Obligations Under the Convention Against Torture*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 33, 34 (2011) (noting that the memos were ostensibly endeavoring to further justify the system of extraordinary rendition flights and secret CIA detention facilities).

251. Scott Horton, *The JAGs Set the Record Straight*, HARPER'S (Nov. 4, 2007), *available at* http://harpers.org/archive/2007/11/hbc-90001588 (last visited Nov. 19, 2013) (noting that JAG attorneys "unanimously and unambiguously agreed that [waterboarding is] inhumane and illegal and would constitute a violation of international law, to include Common Article 3 of the 1949 Geneva Conventions."); Martin Hodgson, *US Censored for Waterboarding*, THE GUARDIAN (Feb. 6, 2008), *available at* http://www.guardian.co.uk/world/2008/feb/07/humanrights.usa (last visited Nov. 19, 2013) (UN Special Rapporteur on Torture, Manfred Nowak remarking, "I'm not willing any more to discuss these questions with the U.S. government, when they say [waterboarding] is allowed. It's not allowed."). After World War II, the U.S. prosecuted Japanese officials for using waterboarding and U.S. courts have customarily classified waterboarding as a form of torture. Power, *supra* note 15, at 85; Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 472-99 (2007); Jordan J.

explained that waterboarding is "an area of what I call professional interrogation techniques."[252] Against the order of Congress, the CIA destroyed the interrogation tapes of detainees who were subject to waterboarding.[253]

Even after all of the criticism and challenges to the standards, methods approved, and culpability level for interrogation, the President continued to pronounce discretion under the Commander in Chief power[254] and contended that the CIA had authority to choose interrogation methods.[255] In summer 2007, the Justice Department issued "letters," instead of "advisory memos," and noted that the Bush Administration was retaining flexibility in permitting the CIA's "harsher interrogation techniques."[256] Instead of addressing torture and

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Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1553 (2009) (water-boarding "manifestly and unavoidably constitute[s] torture").

252. Douglas Jehl, *Questions Left by C.I.A. Chief on Torture Use*, N.Y. TIMES (Mar. 18, 2005), *available at* http://www.nytimes.com/2009/04/20/world/20detain.html (last visited Nov. 19, 2013) (noting that the CIA subjected Khalid Shaikh Mohammed and Abu Zubaydah to waterboarding for a combined total of 266 sessions); Dan Eggen, *Justice Official Defends Rough CIA Interrogations: Severe, Lasting Pain is Torture, He Says*, WASH. POST, Feb. 17, 2008, at A3 (reporting that OLC advisor Steven G. Bradbury explained to a House subcommittee that "if it doesn't involve severe physical pain, and it doesn't last very long, it may not constitute severe physical suffering" and noting that waterboarding is not torture). Republican candidate Rudy Giuliani stated that whether waterboarding is legal "depends on how it's done. It depends on the circumstances. It depends on who does it." Michael Cooper, *In His Words: Giuliani on Torture*, N.Y. TIMES (Oct. 25, 2007), *available at* http://thecaucus.blogs.nytimes.com/2007/10/25/in-his-own-words-giuliani-on-torture/ (last visited Nov. 19, 2013).

253. Scott Shane, *Prosecutor to Review Official Handling of C.I.A. Tapes*, N.Y. TIMES (Feb. 10, 2008), *available at* http://www.nytimes.com/2008/02/10/us/10tapes.html?_r=0 (last visited Nov. 19, 2013).

254. Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE (Jan. 4, 2006), *available at* http://www.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_new_torture_ban/?page=full (last visited Nov. 19, 2013) (reporting that after Congress passed the Detainee Treatment Act (DTA) to prohibit torture of detainees, Bush included a "signing statement," asserting that he had the prerogative to bypass the law as commander in chief). The signing statement should have no legal effect because Congress defines the expanse of the Commander in Chief authority. Bejesky, *War Powers*, *supra* note 32, at 28-33, 89-93.

255. Exec. Order No. 13440 (July 20, 2007), *available at* http://www.fas.org/irp/offdocs/eo/eo-13440.htm (last visited Nov. 19, 2013) (reaffirming that the Geneva Convention did not apply to "al-Qaeda, the Taliban, and associated forces" and that the CIA was authorized to engage in "certain detention and interrogations" that are not torture or cruel and inhumane treatment, with the "conditions of confinement and interrogation practices" determined by the CIA).

256. Mark Mazzetti, *Letters Give C.I.A. Tactics a Legal Rationale*, N.Y. TIMES (Apr. 27, 2008), *available at* http://www.nytimes.com/2008/04/27/washington/27intel.html (last visited Nov. 19, 2013).

cruel and inhumane treatment, the "letter" distracted attention onto a new and lesser category of offense by noting that there would be no violation of the Geneva Convention's prohibitions of "outrages upon personal dignity" as long as interrogation procedures did not intend to humiliate, there was a need to defend the U.S., or if the act of humiliation was not "so deplorable that the reasonable observer would recognize it as something that should be universally condemned."[257]

In a peculiar interpretation of what transpired, Goldsmith wrote in his book that the Bush Administration experienced a failed attempt at presidential expansionism, was "strangled by law," and did not sufficiently rely on "soft power" persuasion to attain consent for its policies.[258] The Bush Administration did not appear to be "strangled by law" to implement interrogation initiatives because as new human rights abuses were reported, new standards were devised, time passed, and more loopholes opened based on discretionary circumstances and actions hidden in national security secrecy.

With respect to laws that prohibit wars of aggression and the use of rhetoric to persuade, Bush readily issued unsubstantiated terror threat announcements to the American public to drive fear rhetoric[259] and top Bush Administration officials made at least 935 patently false statements and hundreds of other misleading statements on 532 different occasions about weapons of mass destruction and ties to al-Qaeda to persuade Americans that Iraq was a security threat and needed to be invaded.[260] Nobel Laureate Joseph Stiglitz and Harvard Professor Linda Bilmes estimated that the war in Iraq cost the American public upwards of $3 trillion when including indirect expenditures, and Bush departed from office with the lowest recorded American Presidential approval ratings in history at 22%, which was due to the Iraq war and poor economic conditions.[261] Not being restrained by law and implementing persuasive tactics without consequence were substantially due to misuse of the secrecy prerogatives of the national security apparatus.

257. *Id.*

258. GOLDSMITH, *supra* note 243, at 69, 205-16.

259. Bejesky, *Rational Choice Reflection*, *supra* note 3, at 37-48; Bejesky, CFP, *supra* note 110, at 20-24.

260. Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343, 348-49 (2012).

261. Robert Bejesky, *Political Penumbras of Taxes and War Powers for the 2012 Election*, 14 LOY. J. PUB. INT. L. 1, 1-3 (2012).

IV. A POLITICIZED ROLE WITH SECRECY

A. The Secrecy Pipeline

As public revelations of human rights abuses and public excoriation periodically emerged, generally from whistleblower accounts or investigations, the Bush Administration delayed thorough investigations by unilaterally choosing to hide legal advice under national security by designating legal advice, orders for interrogation, and execution of directives as pieces of encompassing covert operation;[262] diluted responsibility by timely declassifying memos to defend that previously issued interrogation directives were legal; and then modified standards and definitions so they could continue virtually the same operations. The Geneva Conventions and criminal law prohibitions against torture and interrogation were unilaterally dismissed with classified legal advice[263] and successions of wrongs passed without accountability being imposed and with the Bush Administration only experiencing minimal and temporary political fallout.

It is true that the lawyers in the Attorney General's Office can have multiple roles because they must enforce the law and defend the U.S. government when there is a case or controversy, but the zealous

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262. ANTHONY ARNOVE, IRAQ: THE LOGIC OF WITHDRAWAL, 24 (News Press, 1st ed. 2006) (stating that the Justice Department memos and Presidential orders authorized obscene powers to intelligence and military agents to detain and interrogation and that memos were eventually declassified); Pearlstein, *supra* note 138, at 1273 (stating that "Congress was largely absent from engagement in U.S. policies of detention and interrogation from 2001 through much of 2005."); *Transcript: Reps. Harman, Hoekstra on 'FNS'*, FOX NEWS (Dec. 16, 2007), *available at* http://www.foxnews.com/story/2007/12/16/transcript-reps-harman-hockstra-on-fns/ (last visited Nov. 19, 2013) (Congresswoman Jane Harman noting: "We have a system of checks and balances and it's broken. We're in Constitutional crisis because of the arrogant view of some in this administration that they can decide what the policy is, write the legal opinions to justify that policy and be accountable to no one."). The use of Extraordinary Rendition provides a good example. Kreimer, *supra* note 31, at 1189-90; Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 JOHN MARSHALL L. REV. 215, 231 (1992) ("abducting a person from a foreign country is a gross violation of international law and . . . the territorial integrity of another state"); Lila Rajiva, *The CIA's Rendition Flights to Secret Prisons: The Torture-Go-Round*, COUNTERPUNCH (Dec. 5, 2005), *available at* http://www.counterpunch.org/rajiva12052005.html (last visited Nov. 19, 2013) (stating that there was significant evidence supporting a "long line of renditions without cause/due process of any kind" and that the Bush Administration was falsely representing that nothing illegal was occurring).

263. John J. Gibbons, *Commentary on the Terror on Trial Symposium*, 28 REV. LITIG. 297, 300-01 (2008).

advocate is not the proper role for legal advisors who provide consultation for policy development. Recall that the White House specifically requested advisors to provide ways to "exercise the full panoply of powers granted the president by Congress and the Constitution" and stated that he did not care if that meant "pushing the boundaries of the law."[264] Advisors did push the boundaries of the law and commentators have called the legal advice despicable, professionally unethical,[265] in violation of non-derogative international law,[266] and even criminal.[267] Condemnations followed after policies were executed due to the use of the national security apparatus.

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264. Thomas, *supra* note 11; Neil M. Peretz, *The Limits of Outsourcing: Ethnical Responsibilities of Federal Government Attorneys Advising Executive Branch Officials*, 6 CONN. PUB. INT. L. J. 23, 23-24 (2006) (stating that there is the possibility that legal advisors could issue opinions to curry favor with bosses).

265. Waldron, *supra* note 97, at 1687 (emphasizing that it is unfortunate that "views and proposals like these should be voiced by scholars who have devoted their lives to the law, to the study of the rule of law, and to the education of future generations of lawyers is a matter of dishonor for our profession"); Saltzman, *supra* note 214, at 440-41 (reporting that after the change in Administration, the Justice Department's Office of Professional Responsibility and other authorities recommended that the authors of the memos should be referred to proper disciplinary authorities); Power, *supra* note 15, at 41 ("Law drove policy decisions throughout the war, and not always in good or morally justifiable ways.").

266. Bejesky, *Utilitarian Rational Choice*, *supra* note 3, at 386-92 (discussing how advisory memos were inconsistent with prohibitions on torture); Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 COLO. L. REV. 1, 24 (2006) ("The acts endorsed by the torture memoranda violate a jus cogens norm of international law by advocating and excusing acts of torture."); Waldron, *supra* note 97, at 1681 (noting that the torture memoranda subvert the rule of law); Paust, *supra* note 5, at 861-62 ("As various memoranda, authorizations and actions noted above demonstrate, there were plans to deny protections under the Geneva Conventions . . .The plans to deny protections . . . violate the [Geneva] Conventions, and violations of the Conventions are war crimes.").

267. Koh, *supra* note 69, at 654 ("if a client asks a lawyer how to break the law and escape liability, a good lawyer should not say, 'here's how.' The lawyer's ethical duty is to say no."); Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 349, 357, 362-63 (2007) ("lawyers are potentially complicit in war crimes when they 'materially contribute' to the commission of crimes like torture," including via the International Criminal Court or under the Convention Against Torture); Scott Higham, *Law Experts Condemn U.S. Memos on Torture*, WASH. POST (Aug. 5, 2004), *available at* http://www.washingtonpost.com/wp-dyn/articles/A41189-2004Aug4.html (last visited Nov. 19, 2013) (quoting John J. Gibbons, former Chief Judge of the Third Circuit Court of Appeals) ("The position taken by the government lawyers [within the Bush Administration] in these legal memoranda amount to counseling a client as to how to get away with violating a law.").

B. Using Secrecy to Hide Illegal Orders

One of the first of the later condemned directives was issued shortly after 9/11 by Secretary of Defense Rumsfeld, who launched a "special-access program" to assassinate or capture and interrogate "high value targets."[268] International law prohibits assassinations and an executive order has long banned American government officials from ordering assassinations, but Bush explained that he was not waiving the executive order, but instead killing "enemy combatants."[269] The Bush Administration tasked the CIA with abducting suspected terrorists and conducting hundreds of covert flights across the world to deliver prisoners to secret detention centers and other countries with Extraordinary Rendition.[270] Secret prisons prima facie violate the Geneva Conventions and International Committee of the Red Cross inspection requirements,[271] but Bush did not officially acknowledge the secret detention centers until September 2006.[272] International law forbids abductions and rendering individuals to countries when it is

268. Seymour M. Hersh, *The Gray Zone: How a Secret Pentagon Program Came to Abu Ghraib,* THE NEW YORKER (May 24, 2004), *available at* http://www.newyorker.com/archive/2004/05/24/040524fa_fact?currentPage=all (last visited Nov. 19, 2013); Seymour M. Hersh, *Rumsfeld's Dirty War on Terror,* GUARDIAN HOUSE (Sept. 13, 2004), *available at* http://www.informationclearinghouse.info/article6898.htm (last visited Nov. 19, 2013) (describing abductions and noting that they had been occurring from 2001 to 2004). Secrecy was manifest because the only individuals privy to the operations were a few top Bush Administration officials and about two hundred Navy SEALs and Army Delta Force who were to execute operations in elite squads. *Noted in* MCCOY, *supra* note 49, at 116-17; Adeno Addis, *The "War on Terror" as an Autoimmunity Crisis,* 87 B.U. L. REV. 323, 339 (2007); GREG GRANDIN, EMPIRE'S WORKSHOP 88 (Metro. Books, 2006) (stating that there were reports of the U.S. aiding paramilitary groups "accused of assassinations and torture" and that a former high-level intelligence agent explained that locals were being recruited in the same way that the Reagan Administration founded and financed "right-wing execution squads in El Salvador").

269. James Risen & David Johnston, *Threats and Responses: Hunt for al Qaeda; Bush has Widened Authority of C.I.A. to Kill Terrorists,* N.Y. TIMES (Dec. 15, 2002), *available at* http://www.nytimes.com/2002/12/15/world/threats-responses-hunt-for-al-qaeda-bush-has-widened-authority-cia-kill.html (last visited Nov. 19, 2013); Brian Whitaker & Oliver Burkeman, *Killing Probes the Frontiers of Robotics and Legality,* GUARDIAN (Nov. 6, 2002), *available at* http://www.guardian.co.uk/world/2002/nov/06/usa.alqaida (last visited Nov. 19, 2013) (reporting that Anna Lindh, the Swedish foreign minister, called such assassinations "a summary execution that violates human rights").

270. MCCOY, *supra* note 49, at 116-17; Bejesky, *Sensibly Construing, supra* note 135, at 1-3, 6-10.

271. Geneva Protocol Additional, *supra* note 27, art. 75; Symposium, *Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America,* 57 AM. U. L. REV. 1203, 1203 (2008); Louis Fisher, *Extraordinary Rendition: The Price of Secrecy,* 57 AM. U. L. REV. 1405, 1450 (2008).

272. Khan, *supra* note 20, at 6-7.

expected that the detainee will be tortured, and Congress must approve of rendition programs.[273] Orders to engage in abusive interrogations began secretly and from the beginning, it seemed that the assumption was that lawmakers and the public had no right to know.[274]

CIA Director Tenet reportedly went to the White House to attain approval to permit minute details of interrogation to protect agents from criminal prosecution[275] and Bush purportedly exempted the CIA from military rules on interrogation after 9/11 under the rationale that "certain terrorists might have information that might save American lives" and even noted that criminal law restrictions could be avoided in specific circumstances.[276] The problem with the requests and assumed legitimacy of exemptions is that the President does not have the authority to grant another government agency the right to violate criminal law or human rights law, particularly if methods approved rise to the level of torture or a *jus cogens* violation, or the right to exempt an agency from international laws that are binding inside a war zone,[277] which is also unrelated to protecting American civilians from terrorist attacks.

After operations were executed, secrecy undermined criminal justice processes in the two high-profile and rare prosecutions. In 2006, CIA contract employee David A. Passaro was convicted of assault for the death of Afghan detainee Abdul Wali in June 2003.[278] At the beginning of the trial, Passaro sought to introduce classified memos and emails and to subpoena CIA officials to prove that CIA superiors directed and approved of abusive practices, but the judge denied his

273. Bejesky, *Sensibly Construing*, *supra* note 135, at 10-12.

274. ARNOVE, *supra* note 262, at 26 (testifying before a joint House and Senate intelligence committee hearing, Cofer Black, the head of the CIA's Counterterrorism Center, claimed that "operational flexibility" was needed in dealing with suspected terrorists and stated: "This is a very highly classified area, but I have to say that all you need to know: There was a before 9/11, and there was an after 9/11. . . After 9/11 the gloves come off."); *CIA Interrogation Techniques: What Did Congress Know*, CNN, (Dec. 13, 2007), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0712/13/ltm.02.html (last visited on Nov. 19, 2013) (stating that sometime in 2002, four Congresspersons on the SSCI were the first to be informed that the CIA would be engaging in an operation involving harsh interrogation methods to attain information from captives).

275. Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT'L L. REV. 1, 45 (2008).

276. Senate Judiciary Committee, *supra* note 236.

277. Bejesky, *Pruning*, *supra* note 4, at 829-36; *See supra* Part II.

278. Gregory P. Bailey, Note, *United States v. Passaro: Exercising Extraterritorial Jurisdiction Over Non-Defense Department Government Contractors Committing Crimes Overseas Under the Special Maritime and Territorial Jurisdiction of the United States*, 58 CATH. U. L. REV. 1143, 1157-59 (2009).

request in a closed hearing on the basis of protecting state secrets.[279] Passaro claimed that the Bush Administration was classifying everything, and that the judge did not know any better than to deny requests to documents that the Bush Administration classified, which included decisive evidence.[280] Likewise, Corporal Charles Graner was convicted for his role in the Abu Ghraib atrocities, and Graner appealed on the basis that there was an order for a "suspension" of war crime laws for the American military,[281] which does not seem illogical with today's knowledge of the loophole legal opinions that were issued by advisors.[282]

The state secrets doctrine has questionable legitimacy,[283] particularly when government directives were implemented and there are questions of fact over whether those orders led to detainee deaths and severe abuse, but pertinent government documents are classified and treated as "secret" information. The state secrets privilege is a common law evidentiary privilege that allows the government to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security,"[284] but it should not routinely prevail over a criminal defendant's assertion to obtain classified materials unless the classified document's evidentiary value to the accused is "clearly negligible."[285] Nonetheless, both Passaro and Granier defended

279. Ryan P. Logan, Note, *The Detainee Treatment Act of 2005: Embodying U.S. Values to Eliminate Detainee Abuse by Civilian Contractors and Bounty Hunters in Afghanistan and Iraq*, 39 VAND. J. TRANSNAT'L L. 1605, 1635 (2006); *Judge Denies Ex-CIA Contractor Access to Classified Documents*, WRAL.COM (Aug. 3, 2006), *available at* http://www.wral.com/news/local/story/1091970/ (last visited Nov. 19, 2013).

280. Logan, *supra* note 279, at 1633-34.

281. Dan Eggen & Josh White, *Administration Asserted a Terror Exception on Search and Seizure*, WASH. POST (Apr. 4, 2008), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/04/03/AR2008040304136.html (last visited Nov. 19, 2013).

282. Scott Horton, *A Nuremberg Lesson*, L.A. TIMES (Jan. 20, 2005), *available at* http://articles.latimes.com/2005/jan/20/opinion/oe-horton20 (last visited Nov. 19, 2013) (Gonzales stating that "the Geneva Convention was 'obsolete' when it came to the war on terror."). Abu Ghraib was in Iraq, but the directives that were issued for Iraq also did not effectively respect the Geneva Conventions. Bejesky, *Abu Ghraib Convictions*, *supra* note 19, at 22-31.

283. LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE (2006); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1933 (2007) (contending that the state secret's doctrine weakens congressional and judicial oversight of the executive).

284. Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C. Cir. 1983); *see* Reynolds v. United States, 345 U.S. 1 (1953); *see The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive*, 91 YALE L.J. 570 (1982).

285. United States v. Schneiderman, 106 F. Supp. 731, 736 (S.D. Cal. 1952) (citing Scher v. United States, 305 U.S. 251, 254 (1938)).

by contending that they were acting on orders of superiors and both claims were rejected, with Passaro's claim being rejected specifically because the memos he wanted to introduce as evidence were classified and protected from disclosure under "national security."[286] By April 2008, 22 out of 24 civil cases of alleged abuse by civilian employees and contractors were dropped by the Justice Department, and they may have been dropped substantially due to the defenses advanced by legal advisors.[287] It appears that advisory memos were classified to protect the administration and diffuse attention from scandal.

C. Using Secrecy to Hide Legal Advice

Over two years after the invasion of Afghanistan, classified legal advisory memos periodically emerged.[288] The Justice Department Office of Professional Responsibility later investigated and provided a rather astounding explanation, which was that there were very few recipients of the legal memoranda because of "the limited number of security clearances granted to review the materials," that "[t]his denial of clearances to individuals who routinely handle highly classified materials has never been explained satisfactorily," and that the denial "represented a departure from OLC's traditional practices of widely circulating drafts of important opinions for comment."[289] Professor Jack Goldsmith, the new head of the OLC after Bybee, acknowledged the secrecy and "limited readership" and stated that other departments, such as the State Department, were expected to object to the opinions.[290]

For example, when pressed about specific legal device, Gonzales explained that he renounced advice imparted in one of the memos and would review other opinions issued by the OLC (or "John Yoo"), but also mentioned that the document in question was not scheduled to be declassified until 2012.[291] Another memo written by

286. United States v. Passaro, 577 F.3d 207, 220 (4th Cir. 2009) (noting that the trial court "admitted some of the evidence in full, admitted some in redacted form, and excluded some as irrelevant, cumulative, or corroborative," which was not an abuse of discretion).

287. Eggen & White, *supra* note 281, at A04.

288. Michael Isikoff, *Double Standards?*, NEWSWEEK (May 21, 2004), *available at* http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=103x52175 (last visited Nov. 19, 2013).

289. DEP'T OF JUSTICE, *supra* note 24, at 260.

290. GOLDSMITH, *supra* note 243, at 167; Neil Kinkopf, *Is it Better to be Loved or Feared? Some Thoughts on Lessons Learned From the Presidency of George W. Bush*, 4 DUKE J. CONST. LAW & PUB. POL'Y 45, 46 (2009) (stating that "Administration officials deliberated only among themselves: not publicly and not with Congress").

291. Allen & Schmidt, *supra* note 57, at A01.

Yoo and dated March 14, 2003 was eighty-one pages and not declassified until March 31, 2008.[292] In July 2011, Human Rights Watch noted that top officials should be investigated and prosecuted if evidence warrants it, but pointed out that a main impediment to gathering evidence is that much information, internal memoranda, directives, and advisory memos remained classified.[293]

With respect to the details of the authorized interrogation methods, Gonzales contended in written responses for his confirmation hearings for Attorney General that he could not reveal "exceptional" Top Secret interrogation standards or practices because disclosure "would fairly rapidly provide al-Qaeda with a road map concerning the interrogation that captured terrorists can expect to face and would enable al-Qaeda to improve its counter-interrogation training to match it."[294] This was not a very compelling explanation because the general methods of interrogation had been known for decades and were denounced by the international community.[295]

Despite the fact that Bush and other top officials kept issuing orders for interrogation consistent with the legal advice,[296] classifying memoranda, and facing criticism by claiming that interrogators were ordered to remain within U.S. law, Gonzales oddly explained: "I don't believe the President had access to any legal opinions from the

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292. *See* van Aggelen, *supra* note 108 (referencing Memorandum from John Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel of the Dep't of Def. (Mar. 14, 2003).

293. HUMAN RIGHTS WATCH, *supra* note 12, at 2; Mark Mazzetti & Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. TIMES (Apr. 16, 2009), *available at* http://www.nytimes.com/2009/04/17/us/politics/17detain.html?_r=0 (last visited Nov. 19, 2013) (announcing the release of four new "detailed memos describing brutal interrogation techniques"). Recent investigations assessed the professional and ethical conduct of the lawyers as licensed attorneys, but Yoo's attorneys responded that the State Bar of Pennsylvania, his state of licensure, has a four-year statute of limitations for the advice in question, which had already expired. Miguel A. Estrada of Gibson, Dunn & Crutcher LLP, Response to the U.S. Department of Justice Office of Professional Responsibility Final Report, at 4 (July 29, 2009), *available at* http://graphics8.nytimes.com/packages/pdf/politics/20100220JUSTICE/20100220JUSTICE-YooResponse.pdf (last visited Nov. 19, 2013).

294. Eric Lichtblau, *Gonzales Says '02 Policy on Detainees Doesn't Bind CIA*, N.Y. TIMES (Jan. 19, 2005), *available at* http://www.nytimes.com/2005/01/19/politics/19gonzales.html (last visited Nov. 19, 2013).

295. Bejesky, *Utilitarian Rational Choice*, *supra* note 3, at 405-11 (explaining that the details of the CIA's *Kubark* interrogation manual (1963) could have been downloaded from the Internet, the methods were in findings and holdings of the ECHR case involving British abuse of Irish detainees in Northern Ireland, and waterboarding had been known of and condemned as war crimes since World War II.); *see supra* Part III(F)(3)(5).

296. Bejesky, *Abu Ghraib Convictions*, *supra* note 19, at 22-30.

Department of Justice."[297] How could Bush and appointees possibly issue orders and publicly claim that those tasked with carrying out directives were not violating law if he was not privy to the content of the memos?[298] The directives that were issued were considered illegal and unconstitutional to an overwhelming percentage of Americans, the legal profession, and the rest of the world,[299] but the White House hid behind the advice of four attorneys who kept issuing opinions to each other, and top Bush Administration officials kept classifying the memos. These top officials hid behind select legal memos in the same manner that they hid behind "intelligence information" to make their claims to invade Iraq.[300] The secrecy also caused chagrin for the U.S. military.

D. Using Secrecy that Compromised Military Responsibilities

The legal advice from Bush Administration lawyers placed the military in a precarious situation because military officials were also implementing directives and managing detention facilities, but military officials and attorneys were either substantially unaware of the legal advice that sanctioned levels of abuse or their objections were ignored.[301] The Schlesinger Report, which studied interrogation and

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297. Adam Liptak, *Author of '02 Memo on Torture: Gentle Soul for a Harsh Topic*, N.Y. TIMES (June 24, 2004), *available at* http://www.nytimes.com/2004/06/24/world/reach-war-legal-advice-author-02-memo-torture-gentle-soul-for-harsh-topic.html?pagewanted=all&src=pm (last visited Nov. 19, 2013).

298. Steven R. Weisman & Joel Brinkley, *Rice Sees Iraq Training Progress But Offers No Schedule for Exit: Senate Democrats Confront Nominee at Hearing*, N.Y. TIMES (Jan. 19, 2005), *available at* http://query.nytimes.com/gst/fullpage.html?res=9F05EEDB1338F93AA25752C0A9639C8B63 (last visited Nov. 19, 2013) (noting that Secretary of State Condoleezza Rice explained that "the determination of whether interrogation techniques are consistent with our international obligations and American law are made by the Justice Department").

299. Bejesky, *Pruning*, *supra* note 4, at 823-29; *see supra* Part IV(A).

300. *See generally* Robert Bejesky, *The SSCI Investigation of the Iraq War: Part II: Politicization of Intelligence*, 40 S.U. L. REV. 243 (2013); Bejesky, *Intelligence Information*, *supra* note 176, at 875-82.

301. Graham, *supra* note 149, at 77 (stating that "there was no extensive legal debate, even within the Pentagon, concerning these interrogation methods," and that "[m]any, if not most, attorneys within the building were completely unaware that these methods had been approved"); Victor Hansen, *A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617, 638 (2009) (a small circle of advisors shut JAGs out of the process). Rear Admiral Don Guter, a former Navy JAG officer, explained that "[i]f we—we being the uniformed lawyers—that is, the lawyers who are in the U.S. military—had been listened to and what we said put into practice, then these abuses would not have occurred." Senator Harry Reid, Minority Leader, U.S. Senate, *Statement on Nomination of Alberto Gonzales* (Feb. 3, 2005), *available at* http://democrats.senate.gov/2005/02/03/reid-statement-on-

detention abuse, states that the Secretary of Defense should have used "the legal resources of the Services' Judge Advocates and General Counsels" and obtained "a wider range of legal opinions and a more robust debate regarding detainee policy and operations."[302]

Had the Bush Administration not hid legal advice as classified national security secrets, military attorneys may have had more of a reasonable opportunity to voice objections. However, a competing position is that JAG attorneys and the military generally did not need to be consulted and were not empowered to challenge the standards.[303] Professors Yoo and Sulmasy wrote an article that challenged the contention that JAG attorneys should have provided legal counsel on detention and interrogation methods because doing so would have violated constitutional restrictions that ensure that there is civilian control over the military, enter JAG attorneys into domains in which they do not normally provide advice, and involve military lawyers in legal consultation when the "war on terror" was different from previous wars.[304]

Yoo and Sulmasy's contention that JAG attorneys might cause a separation of powers dilemma by "resisting civilian policy choices" is theoretically reasonable,[305] but JAG attorneys are also mandated by their professional obligations to impart advice on combat and related

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nomination-of-alberto-gonzales/ (last visited Nov. 13, 2013). There was some high-level military consideration because Navy General Counsel Alberto Mora expressed his concerns three times to Haynes during December 2002 and January 2003 and believed that interrogation techniques at Guantanamo Bay may be torture. SENATE ARMED SERVICES COMMITTEE, *supra* note 13, at xxi; SANDS, *supra* note 63, at 139-40 (noting that there were warnings). However, Haynes was one of the four prime legal advisers who issued opinions that were condemned by scholars.

302. SCHLESINGER, *supra* note 175, at 36.

303. In March 2003, a Department of Defense Working Group issued recommendations for interrogation and opined what level of abuse would constitute torture under international law. U.S. DEP'T OF DEF., *supra* note 197. The military was instructed to accept the legal standards set by the Attorney General's Office of Legal Counsel. *Detention Policies and Military Justice: Hearing Before the S. Subcomm. on Personnel of the S. Comm. of Armed Services*, 109th Cong. 15 (2005); U.S. DEP'T OF DEF., *supra* note 197, at 24 (noting that "in wartime, it is for the President alone to decide what methods to use to best prevail against the enemy"). Orders consistent with OLC advice were applied in Afghanistan and Iraq. FAY, *supra* note 206, at 24-25; MAJ. GEN. GEOFFREY MILLER, ASSESSMENT OF DOD COUNTERTERRORISM INTERROGATION AND DETENTION OPERATIONS IN IRAQ 2 (2003).

304. Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1818-23, 1842-43 (2007); Hansen, *supra* note 301, at 639 (disagreeing with Sulmasy and Yoo and noting that the authors exhibit a lack of understanding over the U.S. Constitutional structure).

305. Sulmasy & Yoo, *supra* note 304, at 1834.

concerns to commanders on a regular basis[306] and avert military personnel from violating criminal laws.[307] Foremost consternation arose over whether to extend Geneva Convention Prisoner of War protections to detainees, such as for alleged members of the Taliban and al-Qaeda;[308] and whether crimes under the Uniform Code of Military Justice were committed, such as murder, manslaughter, maltreatment, battery, and assault.[309]

In the capacity of legal advisor, there is no need to be overly-restrictive[310] and oppose the government's preference, assuming the legal advisor offers reasonable advice.[311] Perhaps there is a threshold

306. Laura Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. INT'L L. & POL. 355 (2010) (article devoted to discussions with JAG attorneys and depicting that they are consulted daily on numerous legal issues relating to combat and operations); Sulmasy & Yoo, *supra* note 304, at 1835-36 (stating that there are elevated concerns for legal doctrine during combat).

307. U.S. DEP'T OF ARMY, REGULATION 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, R. 1.13(c) (1992), *available at* http://www.army.mil/usapa/epubs/pdf/r27_26.pdf (last visited Nov. 13, 2013) ("If a lawyer for the Army knows that an officer . . . is engaged in action, intends to act or refuses to act in a matter related to the representation that is either a violation of a legal obligation to the Army or a violation of law which reasonably might be imputed to the Army the lawyer shall proceed as is reasonably necessary in the best interest of the Army."); Kramer & Schmitt, *supra* note 228, at 1426.

308. Jennifer Elsea, *Treatment of "Battlefield Detainees" in the War on Terrorism*, CRS REPORT FOR CONGRESS, at summary (Jan. 13, 2005), *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL31367011320O5.pdf (last visited Mar. 21, 2014) (stating that foreigners and human rights organizations have been especially critical of the denial of POW status to all combatants and that "[t]he publication of executive branch memoranda document[ed] the internal debate about the status of prisoners").

309. 10 U.S.C. §§ 893, 918, 919, 928 (2010).

310. John Yoo, *A Crucial Look at Torture Law*, L.A. TIMES (July 6, 2004), *available at* http://articles.latimes.com/2004/jul/06/opinion/oe-yoo6 (last visited Nov. 13, 2013) ("A lawyer must not read the law to be more restrictive than it is just to satisfy his own moral goals, to prevent diplomatic backlash or to advance the cause of international human rights law."). With respect to reciprocal obligations among states, such as to fulfill human rights standards that are binding on all governments, the Vienna Convention on the Law of Treaties provides that a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, art. 31(1). It does not say "treaties should be interpreted in light of every possible loophole, excuse, exception, and rationalization that can be conjured to avoid the object and purpose of the treaty." The Convention further states that the ordinary meaning of a treaty should be followed unless the meaning is "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable." *Id.* art. 32. It does not say that "a government should adopt manifestly absurd and unreasonable interpretations of human rights treaties to make the ordinary meaning of the treaty ambiguous or obscure." *Id.*

311. Barron & Lederman, *supra* note 31, at 985-87, 998, 1006-07, 1015-17, 1031, 1037-38, 1042, 1044-45, 1055, 1059-60, 1067-68, 1075, 1078, 1083, 1091 (noting that the

up to which advice should be assumed to be objective, but when opinions exceed this threshold of reasonableness with loopholes and technicalities that dismiss more orthodox interpretations of the law so to promote preferences of the government client, it seems highly probable that the advice could contort the view of the best interest of the ultimate client—the American public.

V. CONCLUSIONS ON PATH DEPENDENCE

This article maintains that human rights abuses might have been virtually inevitable as a path dependent outcome based on the Bush Administration's assumption of ubiquitous peril, open invitation to justify its policy preferences when it requested legal memos, and control over the national security apparatus. Several appointed legal advisers, who were prone to appease,[312] produced advice with loopholes[313] that contended the President has an all-puissant Commander in Chief authority that permits ignoring binding treaties and customary international law, that necessity and self-defense formed exigency to nullify laws that would otherwise restrict interrogations, that Afghanistan was a "failed state" without a lawful government, that distinctively classifying combatants and torture meant that detainees could be interrogated, and that the Taliban was more like a "militant, terrorist group" than a formal military. Effectively, the Bush Administration "construct[ed] a judicially-endorsed practice of permissible torture"[314] and hid the advice that contended how directives would be legal. Ironically enough, the approach of hiding information

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in the past, the Attorney General's office did impart diversity in opinions and did not always aggrandized executive war power).

312. Legal memos were written by OLC lawyers with "clear Republican credentials and affiliations," and those who reviewed the memoranda were "all Republican-appointed or at least Republican-affiliated officials." David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 606 (2009); DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 198 (2007) (calling the memos advocacy briefs rather than objective opinions).

313. David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VA. J. INT'L L. 295, 355 (2007) (opining that legal advisors intentionally produced "forward-leaning" memos to "see how far the CIA and the military could go without breaking the law, and how far the law could be stretched to move the line farther forward still"); Vanessa Blum, *Culture of Yes: Signing Off on a Strategy*, LEGAL TIMES, June 14, 2004, at 1 ("Guided by a determination to prevent another terrorist attack on U.S. soil, strong loyalty to the president, and in some cases an ideological disdain for international law, government attorneys sought ways to justify White House policies in the war on terror, much as a corporate lawyer might exploit loopholes in the tax code.").

314. David Luban, *Liberalism, Torture, and the 'Ticking Bomb,' in* THE TORTURE DEBATE IN AMERICA 71 (Karen J. Greenberg, ed. 2006).

in the national security apparatus, promoting a public agenda, and then using the national security apparatus as a scapegoat, was frightfully similar to the Bush Administration's false claims that led to the war in Iraq.[315]

The Bush Administration endowed American agents with a legal right to engage in the widespread use of interrogation methods that resulted in torture, kidnapping, unlawful detentions, and even deaths;[316] knew of the abuse;[317] promoted legal advisors[318] when they could have

315. Bejesky, *Intelligence Information, supra* note 176, at 875-82. In one specific piece of key information, the CIA Deputy Director of Intelligence requested analysts to write a "murky" paper to "lean far forward and do a speculative piece" and if you were to "stretch to the maximum the evidence you had, what could you come up with?" SELECT COMM. ON INTELLIGENCE, U.S. SENATE, REPORT ON THE U.S. INTELLIGENCE COMMUNITY'S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, S. REP. NO. 108-301, at 306-07 (2004) (committee staff interview with CIA Deputy Director of Intelligence). The paper's scope note affirmed that it was "purposely aggressive in seeking to draw connections" and written for White House "senior policymaker interest in a comprehensive assessment of Iraqi links to al-Qa'ida." *Id.* at 305-07. Congressman Peter Hoekstra places blame on the intelligence hierarchy: "I think you've got a systemic problem here. I think the [intelligence] community is incompetent. It is arrogant . . . [I]t's become political." *Transcript: Reps. Harman, Hoekstra on 'FNS'*, FOX NEWS (Dec. 16, 2007), *available at* http://www.foxnews.com/story/0,2933,317011,00.html (last visited Nov. 15, 2013). The Bush Administration regarded the information, much of it rumors, as serious in making threat claims to the American public. Robert Bejesky, *The SSCI Investigation of the Iraq War: Part I: A Split Decision*, 40 S.U. L. REV. 1, 37-38 (2012); Bejesky, *Intelligence Information, supra* note 176, at 859-63; Bejesky, CFP, *supra* note 110, at 22-29. The war may have cost American taxpayers upwards of $3 trillion. *See generally*, JOSEPH E. STIGLITZ & LINDA J. BILMES, THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT (W. W. Norton & Company ed., 2008).

316. ARNOVE, *supra* note 262, at 18-24; MCCOY, *supra* note 49, at 116; Bejesky, *Pruning, supra* note 4, at 823-36 (citing scholars contending that it is rather probable that the Bush Administration committed crimes).

317. Leila Nadya Sadat, *International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces*, ASIL INSIGHTS (May 2004), *available at* http://www.tjsl.edu/slomansonb/AbuGhraib.pdf (last visited Nov. 15, 2013) (noting that abuses were generally known by top officials who could have prevented the abuses).

318. MCCOY, *supra* note 49, at 160 ("[The] Bush administration's torture advocates strut across television screens and down the corridors of power," operate above the law, and the chief architects and policy-makers of the memos that protect the torturers from criminal prosecution have almost all been promoted by Bush.); Diane Marie Amann, *Application of the Constitution to Guantanamo Bay: Abu Ghraib*, 153 U. PA. L. REV. 2085, 2086 (2005) ("A few soldiers were prosecuted for detainee abuse, but generals implicated in government reports were not, and high-ranking civilians won promotion."). Bush appointed, and the Republican-controlled Congress confirmed Gonzales as attorney general after asking a few questions about interrogation memos. Senate Judiciary Committee, *supra* note 236. Bybee was also rewarded for "torturing the law" by being appointed a federal judge. Alvarez, *supra* note 47, at 197 n. 83.

been conspirators in war crimes;[319] and even responded to detainee attempts to attain legal redress as "lawfare" and international "judicial processes" that are "strategies of the weak" that undermine "[o]ur strength as a nation state."[320] Meanwhile, Yoo and Bybee acknowledged that interrogators would be relying on their advice,[321] but it is highly unlikely that a prosecutor would indict when there is a Justice Department opinion that authorizes the practices,[322] which can politicize the justice system.[323]

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319. IN THE NAME OF DEMOCRACY, *supra* note 17, at 133-35 (citing Marjorie Cohn, *The Gonzales Indictment,* MARJORIE COHN (Jan. 10, 2005), *available at* http://www.marjoriecohn.com/2005/01/gonzales-indictment.html (last visited Nov. 15, 2013)); David M. Brahms et al., *An Open Letter to the Senate Judiciary Committee*, GLOBAL SECURITY, *available at* http://www.globalsecurity.org/military/library/report/2005/senate-judiciary-committee-letter_03jan2005.htm (last visited Nov. 15, 2013) (a group of military officials expressing their concern about Gonzales's nomination because of his influence on supporting human rights violating interrogation and detention methods); van Aggelen, *supra* note 108, at 22.

320. U.S. DEP'T OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 6 (2005), *available at* http://www.defenselink.mil/news/Apr2005/d20050408strategy.pdf (last visited Nov. 15, 2013). The term "lawfare" was offered as a means of describing reliance on legal means to confront national security issues instead of by military force, and that the U.S. has traditionally relied on defensive lawfare. Orde F. Kittrie, *Lawfare and U.S. National Security,* 43 CASE W. RES. J. INT'L L. 393, 394, 399, 401 (2010); DAVID KENNEDY, OF WAR AND LAW 116 (2006) ("Law now offers an institutional and doctrinal space for transforming the boundaries of war into strategic assets, as well as a vernacular for legitimating and denouncing what happens in war."). The fear is that an enemy could use the U.S.'s strong legal system against us. Fred K. Ford, *Keeping Boumediene off the Battlefield: Examining Potential Implications of the* Boumediene v. Bush *Decision to the Conduct of the United States Military Operations,* 30 PACE L. REV. 396, 401 (2010). Abused detainees could allegedly wage "lawfare" against the United States. Michael J. Frank, *U.S. Military Courts and the War in Iraq,* 39 VAND. J. TRANSNAT'L L. 645, 651 (2006) (noting that "[u]nfortunately, the United States has not fully taken advantage of and enjoyed the fruits that can be reaped from the prosecution of war criminals, particularly with respect to terrorists operating in the Iraqi theatre of operations" which "is due in part to the effects of the lawfare being waged against the United States with respect to the prisoners at Guantanamo Bay, Cuba").

321. THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172 (Karen J. Greenberg & Joshua L. Dratel ed., 2005) (referencing Memorandum from Jay S. Bybee, Assistant Attorney Gen, to Alberto R. Gonzales, Counsel to President (Aug. 1, 2002)).

322. Clarke, *supra* note 275, at 46; William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking,* 57 AM. U. L. REV. 1453, 1455-56 (2008) (noting that it was "extraordinary" that Gonzales claimed "that the government has the legal authority to prosecute journalists for publishing classified information," such as those related to torture and other scandals).

323. In another example, in late 2006, individuals at the Department of Justice forced out several prosecutors in an effort to "manipulate prosecutorial decisions in an effort to entrench their political allies;" but "[t]he White House, of course, denied any involvement." Eric Lane, Frederick A.O. Schwarz, Jr. & Emily Berman, *Too Big a Canon in the*

In April 2008, after legal memos were successively issued for six years, the Justice Department finally decided to commence an investigation into whether its officials were improperly advising Bush and top White House officials on issues related to international law, wartime authority, and laws governing torture.[324] One month later, fifty-six members of Congress sent a letter to Attorney General Michael Mukasey, Bush's new appointee, to choose a special counsel to investigate whether top Bush Administration officials committed crimes by authorizing harsh interrogation techniques.[325] It is difficult to cogitate what is left to investigate after years of assiduous work by the ACLU, numerous human rights groups, courageous dissenting officials, a dozen military investigations, and the Bush Administration's own admissions.[326] Even former President Jimmy Carter expressed whether he believed that the Bush Administration issued policies that tortured prisoners in violation of international treaties, and he stated: "I don't think it. I know it."[327] With reference to the Bush Administration's contention that the "Geneva Convention do not apply to those people in Abu Ghraib prison and Guantanamo," Carter further explicated that the assertion seems to assume that "we can torture prisoners and deprive them of an accusation of a crime to which they are accused . . . [Y]ou can make your own definition of human rights and say we don't violate them, and you can make your own definition of torture and say we don't violate them."[328]

President's Arsenal: Another Look at United States v. Nixon, 17 GEO. MASON L. REV. 737, 770 (2010). Congressional investigations revealed that White House officials did play an active role in the firings, and there was "politicization of the American criminal justice system." *Id.* at 770-71.

324. Lara Jakes Jordan, *Justice Department Investigating 2003 Torture Memo*, ASSOCIATED PRESS (Apr. 17, 2008), *available at* http://www.chron.com/news/nation-world/article/Justice-Department-investigating-2003-torture-memo-1647622.php (last visited Nov. 15, 2013).

325. JOHN CONYERS, JR., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 368 n.531 (2009) (citing Letter from Jan Schakowsky, Rep., U.S. House of Rep., et al., to Michael Mukasey, United States' Attorney General (June 6, 2008).

326. Bejesky, *Abu Ghraib Convictions*, *supra* note 19, at 19-22, 64-75.

327. *Carter Says US Tortures Prisoners*, CNN (Oct. 10, 2007), *available at* http://www.cnn.com/2007/POLITICS/10/10/carter.torture/ (last visited Nov. 15, 2013).

328. *Id.*

FAILURE OF THE INTERNATIONAL MONETARY FUND & WORLD BANK TO ACHIEVE INTEGRAL DEVELOPMENT: A CRITICAL HISTORICAL ASSESSMENT OF BRETTON WOODS INSTITUTIONS POLICIES, STRUCTURES & GOVERNANCE

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CONTENTS

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I. INTRODUCTION

Scholars worldwide have clearly demonstrated the inability of the Bretton Woods Institutions (the "BWIs") to promote authentic sustainable development.[1] Some have criticized the BWIs for their

1. The Bretton Woods Institutions encompass the World Bank and the International Monetary Fund. In July 1944, delegates from forty-four allied nations gathered at the Mount Washington Hotel in Bretton Woods, New Hampshire. DEPARTMENT OF STATE, PROCEEDINGS AND DOCUMENTS OF UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE Vol. I at 5 (1948). They gathered to create institutions that would regulate the international monetary system and reconstruct the international relations. *Id.* at 5-7. The meeting resulted in the creation of the International Bank for Reconstruction and Development ("IBRD"), and the International Monetary Fund ("IMF"). *See* LEE E. PRESTON & DUANE WINDSOR, THE RULES OF THE GAME IN THE GLOBAL ECONOMY: POLICY REGIMES FOR INTERNATIONAL BUSINESS 132–33 (2d. ed. 1997) (explaining that the IMF was established to carry out exchange, reserve, and short–term loan functions normally associated with "bank," while the IBRD is essentially a "Fund" for providing long–term loans). The purpose of these institutions was to stabilize the global economy and fund reconstruction of countries recovering from World War II. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS, 12 (2003). *See* DEPT. OF PUBLIC INFO., EVERYONE'S UNITED NATIONS 364–65 (9th ed. 1979) (explaining that the IBRD was established to assist in the reconstruction and development of members' territories by facilitating the investment of capital for productive purposes; to promote private foreign investment and to supplement it by providing loans for productive purposes; and to promote growth of international trade and maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive sources of the Bank's members). The IMF was established with the purposes of facilitating international monetary cooperation; promoting exchange rate stability; assisting in the establishment of multilateral payment systems; eliminating foreign exchange restrictions; providing loans to nations experiencing balance of payments issues; all for the purpose of creating conditions for strong economic growth. *Id.* at 55. The IMF created an orderly basis for international currency exchange, and established both stabilization and adjustment mechanisms. *See* LEE E. PRESTON & DUANE WINDSOR, THE RULES OF THE GAME IN THE GLOBAL ECONOMY: POLICY REGIMES FOR INTERNATIONAL BUSINESS (2d. ed. 1997); *see also* EDWARD S. MASON & ROBERT E. ASHER, THE WORLD BANK SINCE BRETTON WOODS 21, 22 (1973). The IBRD provided loans to support reconstruction in war-damaged countries, and later promoted economic growth and development in nations with low per–capita income. *See* LEE E. PRESTON & DUANE WINDSOR, THE RULES OF THE GAME IN THE GLOBAL ECONOMY: POLICY REGIMES FOR INTERNATIONAL BUSINESS (2d. ed. 1997); *see also* EDWARD S. MASON & ROBERT E. ASHER, THE WORLD BANK SINCE BRETTON WOODS 21, 22 (1973). The World Bank actually refers to two banks: the International Bank for Reconstruction and Development and the

inability to rehabilitate, evolve, and reform their respective policies.[2] Some scholars argue that the core of this problem is the voting structures of the BWIs.[3] Additional critiques address the lack of transparency and limited participation by developing countries in formulation of BWIs' policies; both deficiencies have resulted in fewer developing countries benefiting from these policies.[4]

International Development Association. *See* WORLD BANK, *available at* http://www.worldbank.org/en/about (last visited Dec. 3, 2013). The World Bank Group refers to the two banks and three other agencies: the International Finance Corporation, the Multilateral Investment Guarantee Agency, and the International Centre for Settlement of Investment Disputes. *See id.*

2. *See What Are the Main Concerns and Criticisms about the World Bank and IMF?*, BRETTON WOODS PROJECT, *available at* http://www.brettonwoodsproject.org/item.shtml?x=320869 (last visited Dec. 3, 2013) ("Criticism of the World Bank and the IMF encompasses a whole range of issues but they generally centre around concern about the approaches adopted by the World Bank and the IMF in formulating their policies, and the way they are governed. This includes the social and economic impact these policies have on the population of countries who avail themselves of financial assistance from these two institutions, and accountability for these impacts.").

3. ARIEL BUIRA, CHALLENGES TO THE WORLD BANK AND IMF: DEVELOPING COUNTRY PERSPECTIVES 1 (2003); *see also* JOHN E. CHEN, THE ROLE OF INTERNATIONAL INSTITUTIONS IN GLOBALIZATION: THE CHALLENGES OF REFORM 81 (2003); M. PANIC, GLOBALIZATION AND NATIONAL ECONOMIC WELFARE 228 (2003); WILLIAM K. TABB, ECONOMIC GOVERNANCE IN THE AGE OF GLOBALIZATION 184, 373 (2004); V. SPIKE PETERSON, A CRITICAL REWRITING OF GLOBAL POLITICAL ECONOMY: INTEGRATED, REPRODUCTIVE AND VIRTUAL ECONOMIES 3, 8 (2003); JEFFREY D. SACHS, THE ANTI–GLOBALIZATION MOVEMENT, THE GLOBALIZATION AND DEVELOPMENT READER: PERSPECTIVE ON DEVELOPMENT AND SOCIAL CHANGE 356 (2007); JOSEPH STIGLITZ, GLOBALISM'S DISCONTENTS, THE GLOBALIZATION AND DEVELOPMENT READER: PERSPECTIVE ON DEVELOPMENT AND SOCIAL CHANGE 295 (2007); Messner et al., *Governance Reform of the Bretton Woods Institutions and the U.N. Development System* 6 (Friedrich Ebert Stiftung: Dialogue on Globalization, Occasion Paper No. 18, 2005). The IMF and the World Bank have a weighted system of voting. *Articles of Agreement of the International Monetary Fund*, INTERNATIONAL MONETARY FUND, *available at* http://www.imf.org/external/pubs/ft/aa/aa12.htm#5 (last visited Dec. 3, 2013) [hereinafter Articles of IMF] (explaining subsection a); WORLD BANK, *Voting Powers*, *available at,* http://go.worldbank.org/VKVDQDUC10 (last visited Dec. 3, 2013) [hereinafter Voting Powers] (explaining that the IMF's voting bylaws state that each member is guaranteed 250 votes, plus one additional vote for each part of its quota equal to 100,000 special drawing rights. Within the World Bank, a new member country is allotted 250 votes plus one additional vote for each share it holds in the World Bank's capital stock); *see also ICSID Basic Documents*, ICSID, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=RulesMain (last visited Dec. 3, 2013) (discussing how the ICSID allocates its voting within its Administrative Council; all decisions are taken by a majority of the votes cast, and each member must vote in person).

4. *See* Ngaire Woods, *Governance in International Organizations: The Case for Reform in the Bretton Woods Institutions*, INT'L AND FIN. MONETARY ISSUES (2008), *available at* http://www.globaleconomicgovernance.org/wp-

Acknowledging these critiques, this article will argue that current BWI policies must be fundamentally redesigned, since many are archaic and others are counter-productive to integral sustainable development in the current global economy. Further, the article will argue that the dominant nations in the BWI have forced their political agendas on the rest of the world while hiding behind the veil of these multilateral funding institutions.[5]

In making these arguments, the article will begin with a review of the origin, purpose, and structures of the BWIs and offer a brief critique of their voting structures. Next, this article will analyze and critique the neoliberal revival of the classical laissez-faire liberal ideology now on a global scale, and show how it has played out in the Asian financial crisis, the current world financial crisis, and the on-going debt crisis. Two case studies will then be provided and discussed: one on Argentina; and a second on Sub-Saharan Africa. The paper will then analyze other institutions' alternative solutions to the ongoing problems with the BWI, specifically the Monterey Consensus, developed by the United Nations Financing for Development process, the "Heavily Indebted Poor Countries," created by the World Bank, and the G-20[6], a policy-advising group of 20 countries claiming to represent the most "systemically significant" world's economies. Finally, a conclusion will summarize this article's critique of the BWIs and suggest alternative lines of strategy.

Part II first reviews the events and global instability that led to the Bretton Woods Conference creating the early BWIs, and then explains

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content/uploads/Governance%20and%20Decision-Making.pdf (last visited Dec. 3, 2013) ("While pressure for good governance has been magnified by the policy role of the [IMF and World Bank, also known as the] Bretton Woods twins, neither institution has adequately reformed [the] core aspects of accountability and participation."); *see also* Madeline Baer, *Water Privatization and Civil Society in Bolivia, Addressing the Democratic Deficit of International Organizations*, Annual Meeting of International Studies Association (2006), *available at* http://citation.allacademic.com//meta/p_mla_apa_research_citation/1/0/0/4/0/pages100408/p100408-1.php (last visited Dec. 3, 2013) (providing another critique which charges that recent BWIs' globalization policies favoring privatization—allowing private lenders to come in and charge higher rates—are further aggravating the problem for developing countries).

5. *See, e.g.*, Nico Kirsch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 382 (2005). "Most predominant states have been active forces behind the development of international law, and they have made extensive use of the international legal order to stabilize and improve their position." *Id.*

6. *See About the G20,* G20.ORG, *available at* http://www.g20.org/about_G20 (last visited Dec. 4, 2013); *see infra* Part IV.C.

the Bretton Woods Conference itself and the global response to the creation of the BWIs.[7] Part II then concludes with a critical analysis of the IMF and World Bank voting structures.[8]

Part III begins by showing how neoliberal agendas influence the policies of the BWIs through vote and governance.[9] A historical analysis of the rise of the contemporary neoliberal ideology is then provided.[10] At the heart of this has been the University of Chicago School of Economics, led by the late Professor Milton Friedman, and the Austrian School of Economics. Both were highly influential in developing a new and problematic model of so-called global 'development' for the BWIs. Part III then examines loan conditionality; the mechanism by which the BWIs pressure other countries into accepting neoliberal ideas.[11] Part III concludes by providing a critical analysis of the neoliberal ideology in its application to the Asian Financial Crisis,[12] along with case studies showing its impact on Argentina and Sub-Saharan Africa.[13]

Part IV analyzes alternative solutions, which have been put forth by various global endeavors. It begins with an examination of the Monterrey Consensus, the product of an international conference held in Monterrey, Mexico.[14] Part IV then examines The Heavily Indebted Poor Countries, a program created by the World Bank and the IMF, which currently classifies forty developing countries with high levels of poverty and debt which are eligible for special assistance.[15] Finally, the G-20 is a group of twenty countries that hold periodic meetings to review and promote discussions pertaining to the promotion of international financial stability and the governance of the world economy.[16]

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7. *See infra* Parts II.A-C.

8. *See infra* Parts II.D-E.

9. *See infra* Part III.A.

10. *See infra* Part III.B.

11. *See infra* Part III.C.

12. *See infra* Part III.D.3.

13. *See infra* Part III.D.1-2.

14. *See* Inaamul Haque & Ruxandra Burdescu, *Monterrey Consensus on Financing for Development: Response Sought from Economic Law*, 27 B.C. INT'L & COMP. L. REV. 219 (2004); *see infra* Part IV.A. (stating the conference in Monterrey, Mexico comprised of over fifty Heads of State, two hundred Ministers of Finance, and the Heads of the United Nations, IMF, World Bank, and World Trade Organization).

15. *See* Eric A. Friedman, *Debt Relief in 1999: Only One Step on a Long Journey*, 3 YALE HUM. RTS. & DEV. L.J. 191, 191–94 (2000); *infra* Part IV.B.

16. *See What is the G20,* G20.ORG, *available at* http://www.g20.org/about_g20/g20_members (last visited Dec. 3, 2013) (providing that the

Finally, Part V concludes that the BWIs, due to their lending policies and governing structures, have restrained true global development. The BWIs have served as impediments to authentic development and these institutions are in need of fundamental reform including overhauls to their policies, voting systems, and governance structures. Part V proposes alternative strategies for authentic sustainable development through other multilateral global institutions.

II. THE BRETTON WOODS INSTITUTIONS

A. Worldwide Economic Instability After World War I

A world trading system was practically nonexistent during the Great Depression because there were no major multilateral trading agreements or international agencies at the time to regulate or promote trade relations between countries.[17] Developed countries pursued nationalistic policies of closing their borders to imports in an effort to protect their domestic productions and shift unemployment to the nations from which they formerly imported.[18] At the mercy of their "European Masters,"[19] developing countries suffered from these isolationist policies, as they were cut off from their trading partners and no longer had external purchasers for their nationally produced goods.[20]

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group consists of both developed and developing countries, heads of state and government, finance ministers and central bank governors); *see infra* Part IV.C.

17. KENT ALBERT JONES, WHO'S AFRAID OF THE WTO? 68 (2004) (discussing how the world trading system after World War I collapsed during the Great Depression partly because most countries established bilateral trade agreements, thus precluding any sort of broad multilateral trade agreement).

18. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 15, 107 (2003) (explaining that these policies became known as "beggar-thy-neighbor" policies). Beggar-thy-neighbor policies are a government's protectionist course of action taken to discourage imports by raising tariffs and instituting nontariff barriers, usually to reduce domestic unemployment and increase domestic output. *Id.* This term is sometimes applied to competitive currency devaluation. *Id.* at 107.

19. *Id.* at 11–13 (asserting that contrary to its original policies, the IMF lends funds only if countries "engage in policies like cutting deficits, raising taxes, or raising interest rates that lead to a contraction of the economy.").

20. CHARLES P. KINDLEBERGER, THE WORLD IN DEPRESSION: 1929–1939, 26–28 (1973) (discussing how beggar-thy-neighbor tactics put countries in a worse-off position since they led to retaliation among countries). National economic interests trumped international cooperation. *Id.* In addition to the British government's micromanagement of the agricultural industry, the 1932 Import Duties Act imposed an ad valorem tariff on almost all goods, with only minimal exceptions. *Id.* Further, the Ottawa Agreements Act granted a duty exemption for all British Commonwealth Countries; this led to the economic discrimination against Great Britain's neighboring countries. *Id.* at 85–86 (explaining further that the duty exemption granted reciprocity on duty-free imports and exports to all

B. The Bretton Woods Conference

In July 1944, delegates from forty-four allied nations[21] gathered at the Mount Washington Hotel in Bretton Woods, New Hampshire, with the objective of creating institutions that, through a unified system of purpose, policies, and rules, would regulate the international monetary system while simultaneously reconstructing the international relations which had begun to foster before World War II.[22] Although all of the

British Commonwealth Countries). Germany responded to the international financial crisis by establishing its own beggar-thy-neighbor policies in the form of exchange controls in 1931, and by 1933, several state import boards were granted the power to regulate trade through import quotas and tariffs. *Id.*; B. N. GHOSH, GLOBAL FINANCIAL CRISIS AND REFORMS: CASES AND CAVEATS 379 (2001) (explaining how Germany and France increased border protection and domestic market regulations). Parallel to the United Kingdom and Germany, most developed countries introduced exchange-control systems. DEREK HOWARD ALDCROFT, EUROPE'S THIRD WORLD: THE EUROPEAN PERIPHERY IN THE INTERWAR YEARS 61 (2006) (listing countries that established exchange controls during the 1930's as: Bulgaria 1931, Estonia 1931, Greece 1931, Hungary 1931, Latvia 1931, Lithuania 1935, Poland 1936, Romania 1932, Spain 1931, Turkey 1930, and Yugoslavia 1931). Those that did not introduce exchange systems became members of trade blocs similar to that of the British Commonwealth; these blocs were characterized by preferential trading agreements that benefited bloc members and discriminated against nonmembers. EUROPE IN THE INTERNATIONAL ECONOMY 1500 TO 2000 156 (Derek Howard Aldcroft & Anthony Sutcliffe eds., 1999) (explaining how exchange control systems were also an issue in the development of South American and African countries). Thirteen of the fourteen countries using these systems in the IMF were Latin American countries. *See id.*; ELIZABETH HENNESSEY, A DOMESTIC HISTORY OF ENGLAND: 1930-1960 85 (1992) (explaining how African countries fared differently under the exchange control systems depending upon their relationship with the British Commonwealth).

21. The Department of State, Proceedings and Documents of United Nations Monetary and Financial Conference Vol. I at 5 (1948) [hereinafter Bretton Woods Conference Vol. I]. The forty-four nations were comprised of: Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Commonwealth, Poland, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States of America, Uruguay, Venezuela, and Yugoslavia. *Id.*

22. *See id.* at 5-7; DEPT. OF PUBLIC INFO, EVERYONE'S UNITED NATIONS 365 (9th ed. 1979). The draft documents presented to delegates at the Bretton Woods conference were presented in four different versions: the U.S. version, the U.K. version, new material, and material taken from the Monetary Fund proposal. EDWARD S. MASON & ROBERT E. ASHER, THE WORLD BANK SINCE BRETTON WOODS 21 (1973). Least developed members, including European countries damaged during World War II, held a greater interest in development of the IBRD than the IMF. *Id.* Therefore, when the first week of the conference primarily focused on development of the IMF, delegates feared the IBRD would not be established. *Id.* Stable monetary conditions are the cornerstone to successful lending and a precondition to the membership in the BWIs. *Id.*; JACQUES J. POLAK, THE WORLD BANK AND THE IMF: A CHANGING RELATIONSHIP 1 (1994). An attempt to reconcile openness and trade expansion with economic and employment stabilization, the agreement was "an unprecedented

forty-four nations were present, the Bretton Woods agreement was largely negotiated between Britain and the United States of America.[23] The meeting resulted in the creation of the International Bank for Reconstruction and Development ("IBRD"), and the International Monetary Fund ("IMF").[24]

Despite the peaceful northern New Hampshire setting for the Bretton Woods conference, the meeting set the stage for future conflict not only between the United States and Great Britain, but also between historical differing economic policies. At the conference, Great Britain's Lord John Maynard Keynes ("Keynes") sought to retain the imperial preferential system and bilateral trading, while the United States' Harry Dexter White ("White") preferred an open, non-discriminatory multilateral trading system.[25] Fundamentally, Great

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experiment in international economic constitution building." G. JOHN IKENBERRY, THE POLITICAL ORIGINS OF BRETTON WOODS, A PERSPECTIVE ON THE BRETTON WOODS SYSTEM 155 (1993).

23. The United States of America and Britain were the two major Western powers from World War II. *See* IKENBERRY, *supra* note 22; *see also* ERIC HELLEINER, STATES AND THE REEMERGENCE OF GLOBAL FINANCE: FROM BRETTON WOODS TO THE 1990S 33 (1996) ("The Bretton Woods negotiations are often portrayed as a battle of wills between Keynes and White."); M.J. Stephey, *A Brief History of Bretton Woods System,* TIME (Oct. 21, 2008), *available at* http://www.time.com/time/business/article/0,8599,1852254,00.html (last visited Dec. 1, 2013).

24. LEE E. PRESTON & DUANE WINDSOR, THE RULES OF THE GAME IN THE GLOBAL ECONOMY: POLICY REGIMES FOR INTERNATIONAL BUSINESS 132–33 (2d. ed. 1997) (explaining that the names of these two institutions are somewhat confusing, since the IMF was established to carry out exchange, reserve, and short–term loan functions normally associated with "bank," while the IBRD is essentially a "Fund" for providing long–term loans). The IBRD was established on December 27, 1945 with the intent to:

> "[A]ssist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes; to promote private foreign investment and, when private investment is not readily available on reasonable terms, to supplement it by providing loans for productive purposes out of its own capital funds; and to promote the balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive sources of the Bank's members."

DEPT. OF PUBLIC INFO., EVERYONE'S UNITED NATIONS 364-65 (9th ed. 1979). Membership to the IBRD is open to all members of the IMF. *Id.* at 364. The IMF was established with the purposes of facilitating international monetary cooperation; promoting exchange rate stability; assisting in the establishment of multilateral payment systems; eliminating foreign exchange restrictions; providing loans to nations experiencing balance of payments issues; all for the purpose of creating conditions for strong economic growth. *Id.* at 55.

25. IKENBERRY, *supra* note 22, at 156. Britain's position was to secure employment and economic stabilization within its borders for its citizens. *See id.* at 157. Formal negotiations on international trade took place in Havana, Cuba three years later under the formulation of the International Trade Organization. TYRONE FERGUSON, THIRD WORLD

Britain recognized a need for some post–war regulation on the international scene; it recognized that the potential exploitation by the war's victors of the defeated Axis Powers, as a means of financing the reconstruction of war-torn European nations, could lead to another global disaster.[26] The United States' influence and power ultimately won out, for the BWIs were mostly modeled after White's proposals.[27]

C. After the Bretton Woods Conference

Throughout the 1960s, the BWIs faced three great obstacles: decolonization, threats of decreasing international liquidity, and a weakening gold standard.[28] In partial response, the World Bank created the International Development Association ("IDA")[29] in 1960, which

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AND DECISION MAKING IN THE INTERNATIONAL MONETARY FUND 25 (1988). The multilateral organization taking the place of the ITO was the General Agreement on Tariffs and Trade ("GATT") in 1947. *See id.* Analysts consider the Bretton Woods system's "triadic structure" to include the GATT, IMF, and IBRD, encompassing trade, monetary, and financial relations. *Id.* The GATT was intended to reverse protectionist and discriminatory trade practices such as the imperialistic approach. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A5, 55 U.N.T.S. 187, art. XV [hereinafter GATT].

26. *See* JOHN D. CIORCIARI, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement*, 33 CORNELL INT'L L. J 361-69 (2000) (describing the negotiations leading up to the creation of the BWIs that took place prior to the end of WWII); *World War II*, U.S. HISTORY, *available at* http://www.u-s-history.com/pages/h1661.html (last visited Dec. 1, 2013) (explaining that the Allies were determined not to repeat the mistakes of World War I); Paul Wachtel, *Understanding the Old and New Bretton Woods* 6 (New York University, Stern School of Business Working Paper No. 2451, 2007), *available at* http://w4.stern.nyu.edu/emplibrary/Florence_paper_jan4.pdf (last visited Dec. 1, 2013). Keynes proposed an international bank and a radical institutional system for management of currencies, including creation of a common world–unit of currency. *Id.* He envisioned that these institutions would manage international trade through regulation, and prove strong incentives for countries to avoid substantial trade deficits while fostering economic growth. *Id.* Meanwhile, White's proposal called for less regulation. *Id.* White proposed limited government interference and gave more emphasis to market based solutions. *Id.*

27. Sabine Dammasch, *The System of Bretton Woods: A Lesson from History*, 5, *available at* http://www.hiddenmysteries.org/money/policy/b-woods.pdf (last visited Dec. 1, 2013).

28. *See* Jong Il You, *The Bretton Woods Institutions: Evolution, Reform and Change*, *in* GOVERNING GLOBALIZATION: ISSUES AND INSTITUTIONS 209, 210-12 (2000) (explaining that SDR's were created in 1969 to respond to the shortage of international liquidity); *Historical Gold Prices – 1833 to Present*, NATIONAL MINING ASSOCIATION, *available at* http://www.nma.org/pdf/gold/his_gold_prices.pdf (last visited Dec. 1, 2013) (listing the price of gold from 1833 to present day).

29. International Development Association, *Articles of Agreement and Report of the Executive Directors of the International Bank for Reconstruction and Development on the Articles of Agreement*, Sept. 24, 1960, at 21 [hereinafter *IDA Articles of Agreement*].

was praised as "the most significant moment in institutional expansion of the BWIs toward a poverty–focused approach."[30] When Robert McNamara arrived as World Bank President in 1968, the Bank's fundraising efforts grew.[31] Envisioning a larger, more active, and more efficient bank, McNamara established lending targets which, due to acceleration of the Bank's growth, justified reorganization in 1973.[32]

The IDA,[33] led by the United States, assisted the world's most impoverished countries, which were ineligible for bank loans, by offering concessional or soft loans.[34] Shifting its attention to newly

30. Balakrishnan Rajagopal, *From Resistance to Renewal: Third World Social Movements and International Institutions*, 41 HARV. INT'L L.J. 529, 552 (2000) (explaining how the IDA led to the further establishment of additional development institutions because its framework, lending primarily to Third World countries, helped the World Bank become a true international institution).

31. *Id.* at 140, 180; JOCHEN KRASKE, ET AL., BANKERS WITH A MISSION: THE PRESIDENTS OF THE WORLD BANK, 1946–1991 at 175 (1996); PHILIPPE LE PRESTRE, THE WORLD BANK AND THE ENVIRONMENTAL CHALLENGE 59 (1989). McNamara's stated reorganization goal was to:

> "[r]eplace the . . . procedure in which unrelated project loans, considered in isolation from another, filter up through the levels with a five year program based on systems analysis and overall development strategy, taking account of relative priorities among countries and within sectors of each country."

Id.; see also Enrique R. Carrasco & M. Ayhan Kose, *Symposium: Social Justice and Development: Critical Issues Facing the Bretton Woods System: Income Distribution and the Bretton Woods Institutions: Promoting an Enabling Environment for Social Development* , 6 TRANSNAT'L L. & CONTEMP. PROBS. 1, 18 (1996). Lending to alleviate poverty in developing countries expanded considerably after Robert McNamara took over the Bank's helm in the late 1960's; structural adjustment lending followed in the late 1970's. Carrasco & Kose, *supra*; *see also* KRASKE, *supra*, at 140 (discussing how during McNamara's presidency, the World Bank staff tripled, growing from 1,600 to 5,700 people).

32. SEBASTIAN MALLABY, THE WORLD'S BANKER 26–27 (2004) (discussing the divergence of the World Bank from a conservative lender to an ambitious bank set on offering loans to countries even if they could not afford to pay them back). The creation of the IDA reflected a shifting mind–set of the World Bank's largest shareholders as they saw the tide of independence sweeping Africa, combined with the height of the Cold War, as an opportunity to aid others in the hopes that those governments aided through the IDA would not become communist. *Id.*

33. *See IDA Articles of Agreement*, *supra* note 29 (discussing how the United States and a group of the Bank's member countries set up an agency that would lend to the poorest countries with the most favorable terms possible).

34. *See* DEVESH KAPUR, JOHN P. LEWIS & BERNARD WEBB, THE WORLD BANK: ITS FIRST HALF CENTURY VOL. 2 PERSPECTIVES 204, 207 (1997) (explaining how the United States encouraged the World Bank during the establishment of IDA to extend lending to low–income countries, become involved in development problems such as agricultural productivity, and take the lead in matters relating to industrial and trade liberation in India); *see e.g.*, OECD, *Concessional Loans*, *available at* http://stats.oecd.org/glossary/detail.asp?ID=5901 (last visited Dec. 1, 2013) (defining

industrializing countries in Africa, Asia, and Latin America, the World Bank expanded its reach into new sectors.[35] The IDA's funding was derived from the contributions of wealthier nations, IBRD income, and borrowers' credit repayments.[36] Due to the fact that funds were initially insufficient to meet the IDA's commitments—because of the unlikelihood of substantial replenishment due to the balance of payment deficit experienced by wealthier states—there emerged a certain skepticism about progress, which contributed to delays associated with recuperating the funds.[37]

As time passed, however, a significant and problematic shift emerged in the IDA's operational philosophy. It moved away from the World Bank's original theory of market-based lending, and instead adopted a new theory favoring loans to the poorest countries.[38]

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concessional loans as "loans that are extended on terms substantially more generous than market loans; the concessionality is achieved either through interest rates below those available on the market or by grace periods, or a combination of these. Concessional loans typically have long grace periods.").

35. *See* Martin A. Weiss, *CRS Report for Congress: The World Bank's International Development Association (IDA)* 2, 6 (Apr. 1, 2008), *available at* http://fpc.state.gov/documents/organization/104719.pdf (last visited Dec. 1, 2013) (explaining how concerns of the World Bank loans being unaffordable to low–income countries prompted the establishment of the IDA); *see also* International Development Association; *What is IDA?*, THE WORLD BANK, *available at* http://www.worldbank.org/ida/ida-15-mid-term-review.html (last visited Dec.1, 2013). "The IDA–15 replenishment raised funds for poor countries for the three–year period between July 2008 and June 2011. These are critical years for countries trying to achieve the U.N. Millennium Development Goals since it takes time for projects to be completed and yield measurable results." *Id.* Forty–five donor countries made pledges toward this replenishment. *Id.*

36. *See generally* KRASKE, *supra* note 31, at 142–43 (explaining that IDA commitments dropped in 1968 from $400 million per year to $107 million). This became a problem of mobilizing resources within the IDA. *Id.*

37. *See generally id.* This became a problem of mobilizing resources within the IDA. *Id.* at 140; *see id.* at 180; EDITH KUIPER & DRUCILLA K. BARKER, FEMINIST ECONOMICS AND THE WORLD BANK: HISTORY, THEORY AND POLICY 17 (2006) ("A critical junction in the Bank's history was the appointment as its president of Robert McNamara. . . . During his tenure . . . the Bank shifted from an emphasis on infrastructure to agriculture and rural development, in an attempt to address people's basic needs, particularly the rural poor.").

38. These loans were then furnished at cheaper rates, under the guise of giving "World Bank credits as a useful tool for propping up sympathetic governments." *See* Carrasco & Kose, *supra* note 31, at 3.

> Income inequality came under scrutiny during preparatory meetings for the World Summit for Social Development (Social Summit). Observers noted that although living standards in developing countries have improved over the past two decades, disparities within countries–the subject of this article–are likely to rise, with the largest gaps occurring in South Asia, Latin America, and the Caribbean.

Id.; *see also* DIGUMARTI BHASKARA RAO, WORLD SUMMIT FOR SOCIAL DEVELOPMENT 198

Originally, the cornerstone of the Bretton Woods system had been the United States' policy of buying and selling gold according to an official price set at the behest of foreign monetary authorities.[39] The Bretton Woods Articles of Agreement, Article IV, defined the unit of the international monetary system as either the U.S. dollar or gold of a specified weight and fineness.[40] However, the vulnerability of the gold standard began to show in the 1960s. Later, in August of 1971, President Richard Nixon officially suspended the automatic conversion of dollars into other currencies.[41] Although solutions to fixing the gold standard for the international monetary system were proposed, ultimately the Bretton Woods gold-standard system collapsed. This led to the development of Special Drawing Rights ("SDRs")[42] in 1969.[43]

(1998) (quoting former secretary general Boutros--Ghali); LE PRESTRE, *supra* note 31, for a discussion on the BWIs involvement in the development debate of the 1960's and 1970's.

39. MICHAEL D. BORDO & BARRY EICHENGREEN, *Bretton Woods and the Great Inflation* 28 (Soc. Sci. Res. Network, Working Paper No. w14532, 2008) (explaining how first, there was an asymmetric adjustment between deficit and surplus countries, which led to a deflationary bias); *see* FRITZ MACHLUP, REMAKING THE INTERNATIONAL MONETARY SYSTEM: THE RIO AGREEMENT AND BEYOND 7–8 (1968) (explaining how the United Kingdom and United States conflicted over the gold standard because the United States and White wanted it, but the United Kingdom and Keynes saw the system as imposing intolerable restraints on member countries). Gold supplies were inadequate to finance the growth of world output, and to serve as gold cover to back national currencies. BORDO & EICHENGREEN, *supra*. Shifts of currency holdings between London and New York risked a confidence crisis in the weak sector, while a shift between the key currencies and gold occurred when foreign holders of key currency balances staged runs on banks where reserve centers' could not convert their outstanding liabilities into gold. *Id.*

40. BAHRAM GHAZI, THE IMF, THE WORLD BANK GROUP AND THE QUESTION OF HUMAN RIGHTS 3 (2005) (explaining how other IMF members also had to keep the value of their currency within one percent of the par value). If a change of margin was needed, IMF members had to undergo thorough discussions with other members and obtain their consent before implementing the measure. *Id.*

41. *See id*; *see also* THE ECONOMIST, *A Brief History of Funny Money*, Jan. 6, 1990, at 21 (providing a brief account of why the Bretton Woods system ended and a larger debate as to which exchange–rate system has worked best in the world economy).

42. *Special Drawing Rights (SDRs)*, INTERNATIONAL MONETARY FUND, *available at* http://www.imf.org/external/np/exr/facts/sdr.HTM (last visited Oct. 19, 2013) [hereinafter SDRs] (discussing the makeup of the SDR). The SDR is a potential claim on the freely usable currencies of IMF members where holders of SDRs can obtain currencies in exchange for their SDRs through the arrangement of voluntary exchanges between IMF members, or through an IMF designation of members with strong external positions to purchase SDRs from members with weak external positions. *Id.*; *Held in Reserve: A Brief Guide to the IMF's "Currency"*, THE ECONOMIST (Apr. 8, 2009), *available at* http://www.economist.com/node/13447239 (last visited Oct. 19, 2013) (discussing the redefinition of the SDR as a basket of currencies consisting of the value of a fixed amount of the Japanese yen, U.S. dollar, pound sterling, and Euro).

43. *Held in Reserve*, *supra* note 42 (discussing how various sources of liquidity became unreliable and inadequate toward financing the growth of output and trade). In the

Essentially, SDRs are "[i]nternational reserve asset(s) [which] supplement existing reserve assets."[44]

SDRs have been criticized as funny money, as nothing more than a fancy term for allocated credits doled out by the IMF to member countries that have no value, but can be exchanged for subsidized loans to non-reserve currency countries.[45] Because SDRs are allocated in proportion to countries' existing IMF quotas, when the G20[46] countries authorized the IMF to issue $250 billion in new SDRs in 2009, up to approximately $170 billion could still land in the reserves of wealthy

late 1950's the world's monetary gold stock became insufficient. *Id.* The supply of U.S. dollars was dependent on the U.S. balance of payments, which hedged on the "vagaries of government policy and the confidence problem." *Id.* The probability of all dollar holders being able to convert their dollars into gold at the fixed price declined" and "outstanding dollar liabilities held by the rest of the world monetary authorities increased relative to the U.S. monetary gold stock." *Id.*; Joseph Gold, *The "Sanctions" of the International Monetary Fund*, 66 AM. J. OF INT'L L. 737 (1972) (discussing the special drawing rights amendment to the IMF Articles, with a focus on sanctions); William Bernhard, J. Lawrence Broz & William Roberts Clark, *The Political Economy of Monetary Institutions*, 56 INT'L ORG. 693, 700 (2002) (discussing the gold overhand and lax U.S. macroeconomic policies).

44. *See* Editorial, *The G–20's Funny Money*, WALL ST. J., Apr. 1, 2009, at A22 (Originally, to participate in this system, a country needed official reserves, government or central bank holdings of gold, and widely accepted foreign currencies that could be used to purchase the domestic currency in foreign exchange markets. After the Bretton Woods system collapsed, the major currencies shifted to a floating exchange-rate).

45. *Held in Reserve*, *supra* note 42 (discussing the April 2, 2009 authorization of $250 billion in fresh SDRs). Another example is China; its SDR reserves, already nearly $2 trillion, will go up $9.3 billion. *Id.*; *see* SDRs, *supra* note 42 (discussing how the IMF allocates SDRs). Under the Articles of Agreement, the IMF may allocate SDRs to members in proportion to their respective IMF quotas using two kinds of allocations: general and special. SDRs, *supra* note 42. General allocations are based on a long–term global need to supplement existing reserve assets, and have only been made three times, where special allocations occur in the form of a one–time allocation of SDRs enabling all members of the IMF to participate in the SDR system on an equitable basis. *Id.* This corrects the inequity for countries that joined the IMF after 1981, as they had never received an SDR allocation. *Id.* The three general allocations were distributed in 1970 through 1972, 1979 through 1981, and on August 28, 2009; the special allocation was implemented on September 9, 2009. *See id.*

46. *See Held in Reserve*, *supra* note 42 (explaining that the United States needs Congressional approval to part with its share). The last proposed SDR allocation in 1997 failed because only 75% of the votes accepted the proposal, and the IMF requirement is 85% of votes in order for the allocation to be ratified. *Id.* The United States, with nearly seventeen percent of the votes in the IMF, never approved. *Id.*; *see also G–20 Funny Money*, *supra* note 44 (explaining how SDRs cost U.S. taxpayers $330 million per year). Had the 1997 resolution been approved, U.S. exposure would have been about $12 billion with a $750 million annual cost to taxpayers. *Id.* Although IMF financing does not show up on the annual United States expenditure, the SDR credits make countries in turmoil, such as Syria, Zimbabwe, Sudan, Venezuela, and Burma, eligible for substantial amounts of money. *Id.*

countries such as the United States, Japan, and Britain.[47] Although the IMF hopes the reserve-rich countries will lend their shares to those countries in greater need, this is not a guarantee required by the current system.[48]

D. The Voting Structures

1. International Monetary Fund

The voting structure of the IMF was a debated topic at the outset by the principal founding nations.[49] Despite the desire of many countries to institute purely economic criteria in determining how votes would be distributed, the votes were allocated based on the relative economic importance of member-states to the international economy.[50] In order to appease smaller economic nations, the weighted voting system was bifurcated to include the allocation of a certain number of "basic" votes, which would be guaranteed to each member, thus giving smaller countries a "sense of participation," and tempering the overriding control that would be exercised by larger countries.[51] Also, while majority-voting for decision-making was to be a requisite in the IMF's Articles, the United States successfully advocated that certain decisions should require higher majorities for approval.[52] Despite the

47. *Held in Reserve*, *supra* note 42; *see also G–20 Funny Money*, *supra* note 44.

48. *See Voting Powers*, THE WORLD BANK (Jan. 10, 2010), *available at* http://go.worldbank.org/VKVDQDUC10 (last visited Oct. 19, 2013) [hereinafter Voting Powers] (providing links to voting statuses of the IBRD, IFC, IDA, and MIGA listed by country and executive director).

49. *See* J. KEITH HORSEFIELD, THE INTERNATIONAL MONETARY FUND 1945–1965: TWENTY YEARS OF INTERNATIONAL MONETARY COOPERATION 59 (1969) ("It would be an advantage if the proposed Union could be brought into existence by the United States and the United Kingdom as joint founder–States . . . [t]he management and the effective voting powers might adhere permanently in the founder States."). Michael Tanzer, *Globalizing the Economy: the Influence of the International Monetary Fund and the World Bank*, MONTHLY REV., Sept. 1, 1995 at 1 (discussing how the United States was ensured to be the dominant voice, having thirty–six percent of the subscribed capital).

50. FERGUSON, *supra* note 25, at 60–61.

51. Tanzer, *supra* note 49; *see* FERGUSON, *supra* note 25, at 60–61 (explaining that although this requirement effectively gave the United States a unilateral veto power, it was added to the Fund's Articles albeit in a more limited version in which the high, special majorities would be reserved for a few important decisions).

52. Articles of Agreement of International Monetary Fund. Art. V, s. 5–7, *available at* http://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf (last visited Oct. 19, 2013). Repurchase of currency and dealings of special drawing rights are some examples of instances which require super majority approval. *See id.* The voting structure provides that, when a vote is needed to waive any conditions on loan eligibility or even to declare a member country ineligible for IMF funds, the member's votes shall be increased by each 400,000 special

attempt to evenly allocate a certain percentage of votes to smaller countries, subsequent IMF practice, and the increase in the number of smaller economies as members of the IMF, has led to a reduction in the proportionality of basic votes as compared with total voting power.[53]

To fully analyze the voting requirements and their effects on the many nations, an analysis of the IMF's overall governance structure and implementation is required.[54] The IMF is governed by a Board of Governors that meets once each year and consists of one governor and one alternate governor for each member country.[55] The day-to-day business of the IMF is handled by a twenty-four member Executive Board of Directors.[56] There are cases, such as in Africa, where dozens of countries are represented by just one director.[57]

The IMF has two ministerial committees: the International Monetary and Financial Committee ("IMFC"),[58] and the Development

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drawing rights of net sales and reduced for each 400,000 special drawing rights of net purchases. *Id.* at Art. XII, s. 5.

53. Hector Torres, *Reforming the International Monetary Fund–Why its Legitimacy is at Stake*, 10 J. INT'L ECON. L. 443, 446 (2007) (explaining Torres' experience within the Fund and that the imbalance in voting power leads to the dilution of a true consensus voting forum, thereby falsifying by effect the Fund's frequent statements that its decisions are mostly taken by consensus); *see e.g.*, *IMF Members' Quotas and Voting Power, and IMF Board of Governors*, INT'L MONETARY FUND (July 11, 2011), http://www.imf.org/external/np/sec/memdir/members.aspx. *See* FERGUSON, *supra* note 25 (emphasizing that votes are distributed according to quotas and quotas are meant to reflect wealth. G7 countries alone have 41.72% of votes and 28 countries hold over 61% of the voting power at both the Fund and the World Bank).

54. Alexander Mountford, *Independent Evaluation Office Background Paper of the International Monetary Fund, The Formal GovernanceStructure of the Monetary Fund* (March 2001), *available at* http://www.imf.org/external/about/govstruct.htm (last visited Oct. 10, 2013).

55. *Id. See* Factsheet: A Guide To Committees, Groups, and Clubs, INT'L MONETARY FUND, http://www.imf.org/external/np/exr/facts/groups.htm#IC (last visited Oct. 23, 2013) [hereinafter IMF Factsheet] (providing a general discussion of the IMFC and explaining that larger economies, mirroring the weighted-voting philosophy, are represented by individual directors while smaller economies—developing countries—are grouped together and represented by a single director). During meetings, the governors vote on various amendments to the structure and operation of the IMF. Each governor, usually the minister of finance or the head of the central bank within his or her country, is appointed by his or her respective member country. *Id.*

56. *See IMF Executive Directors and Voting Power*, INT'L MONETARY FUND, *available at* http://www.imf.org/external/np/sec/memdir/eds.htm (last visited Oct. 10, 2013).

57. IMF Factsheet, *supra* note 55.

58. *See id.* (discussing the Development Committee); *See also* William N. Gianaris, *Weighted Voting in the International Monetary Fund and the World Bank*, 14 FORDHAM INT'L L.J. 910, 914 (1990) (The IMFC discusses matters of concern affecting the global economy.).

Committee (jointly with the Bank).[59] The ministerial composition of these two committees is basically identical to the composition of the respective Executive Boards.

2. World Bank

The planning involved in creating the World Bank was significantly less rigorous than that of the planning required for the creation of the IMF.[60] White's initial plan for a postwar stabilization fund and international bank included voting in proportion to stock holding,[61] however, his ultimate plan proposed voting power by the number of shares held by each government.[62] Ultimately, subscriptions to the capital of the Bank determined voting power, and thus, the World Bank's use of the weighted voting system is almost identical to that of the IMF.[63] Despite a revision of the voting structure in 2010, the six largest economies of the 187 member countries still maintain 38.61% of the total vote, with the United States having 15.85% alone.[64]

Similar to the governing structure of the IMF, the World Bank's

59. *See IMF Executive Directors and Voting Power*, INT'L MONETARY FUND, *available at* http://www.imf.org/external/np/sec/memdir/eds.htm (last visited Oct. 10, 2013). The Development Committee advises the Boards of Governors of the IMF and the World Bank on issues related to economic development in emerging and developing countries. *Governance Structure*, INT'L MONETARY FUND, *available at* http://www.imf.org/external/about/govstruct.htm (last visited Oct. 10, 2013);. The Boards of Governors appoints or elects the Executive Board. *IMF Executive Directors and Voting Powers*, *supra*. The Executive Board takes care of the daily business of the IMF. *Id.*

60. MASON & ASHER, *supra* note 1, at 14–16 (explaining how the Inter–American Bank combined the functions of an ordinary commercial bank, intergovernmental bank, and international stabilization fund).

61. *Id.* at 16–17 (explaining that no government could hold more than twenty–five percent of the total voting power).

62. *Id.* at 11.

63. Gianaris, *supra* note 58, at 917–18, 927–28 (discussing further that although membership in the World Bank is contingent upon membership in the IMF, the reverse is not true).

> Like the IMF, each member has 250 basic votes plus one additional vote for each share of capital equivalent to U.S. $100,000 subscribed . . . While most states wanted a large quota in the IMF, giving them enhanced drawing rights, the less developed countries preferred a lower quota in the World Bank because the amount they could borrow was independent of their capital contribution. To resolve the controversy, the United States agreed to accept a larger quota in the World Bank than in the IMF.

Id.

64. *Members*, INT'L MONETARY FUND, http://www.imf.org/external/np/sec/memdir/members.aspx (last visited Oct. 24, 2013). The United States currently has 16.75% of the voting power. *Id.*

powers are vested in its Board of Governors.[65] Another analogous feature is that the Board of Executive Directors for the World Bank has all of the day-to-day powers. The Articles of Agreement sets forth the structure and powers of the Board of Governors and the Board of Executive Directors; of the twenty-four Executive Directors, the five largest shareholders, France, Germany, Japan, the United Kingdom, and the United States.[66] Interestingly enough, each of the eleven Presidents of the World Bank, also known as the Chairman of the Board of Executive Directors, have been the appointed Executive Director of the United States.[67]

E. Critique of the Voting Structures

Both IMF member countries and critics of the IMF have attacked the IMF's voting structure, characterizing it as outdated.[68] In response to such criticisms, the IMF issued proposals to change the voting structure, such as a one-time boost in voting power to under-represented countries and an increase in the developing nations' voting share coupled with a respective decrease in the voting share of some of the industrial nations, especially those in Europe.[69] Yet, these proposed

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65. *Board of Governors, IMF, Articles of Agreement, art. XII, Section 2. See also* THE WORLD BANK, *available at* http://go.worldbank.org/L46NF9XJ40 (last visited Oct. 24, 2013). (The World Bank's Board of Governors consist of one governor and one alternate governor appointed by each member country.).

66. *About the World Bank*, THE WORLD BANK, http://web.worldbank.org/WBSITE/EXTERNAL/EXTSITETOOLS/0,,contentMDK:20147466~menuPK:344189~pagePK:98400~piPK:98424~theSitePK:95474,00.html (last visited Oct. 24, 2013). (Each appoints an individual Executive Director while the remaining nineteen Executive Directors represent the other 182 member countries.).

67. *Id.*

68. Jonathan Gregson, *The World Bank: Trying Times*, GLOBAL FIN., Oct. 2007, at 24 (discussing how emerging countries want a greater say within the World Bank's voting structure). India and Brazil are examples of emerging economies which have criticized the IMF's voting structures as being outdated and who believe that as a result of their respective increased contributing to the global economy, they should henceforth be provided with voting powers which correlate. *Id.*

69. Anthony Faiola, *Nations Cast Plan for Expanded IMF: Role to Deepen in Global Economy*, WASH. POST, Oct. 7, 2009, at A18 (explaining the preliminary plan that, by January 2011, would give more voting power to emerging financial powers like Brazil and China). Emerging economies would have more long-term say over the IMF's policies if voting rights were redistributed, "giving a 50–50 split to the developing and developed worlds." *Id.*; IMF Board of Governors Approves Quota and Related Governance Reforms (Sept. 18, 2006), *available at* http://www.imf.org/external/np/sec/pr/2006/pr06205.htm (last visited Oct. 10, 2013) (explaining how on September 18, 2006, the IMF's Board of Governors adopted a resolution that aimed to align the IMF's quota shares with members' positions within the world economy). Mexico, China, Korea, and Turkey, which were characterized as underrepresented countries, gained an increase in quota shares. *Id. But see*

changes were not without their own sets of criticism.[70]

The "basic vote" of the IMF was originally a compromise to give developing countries a specified amount of votes on top the allocated "quota-based" votes.[71] Since 1944, the IMF's quota has increased by a factor of thirty-seven while its membership has quadrupled.[72] Originally, basic votes accounted 11.3 percent of all votes but that has been reduced to merely 2.1 percent. This drastic decline in the power of the basic vote "has substantially shifted the balance of power in favor of large-quota countries. . . . Consequently, the voice of small countries in discussions has been substantially weakened and their participation in decision–making made negligible."[73] The result of the weighted voting structure is that developed countries have 60.4 percent of the IMF's voting power, while only accounting for twenty percent of the IMF's membership and fifteen percent of the world's population.[74]

Realizing a need for some sort of voting reform, the IMF is in the process of instituting amendments to the overall voting structure after the Board of Governors approved such reform on December 15, 2010.[75]

Intergovernmental Group of Twenty–Four on International Monetary Affairs and Development Communiqué (Oct. 10, 2008), *available at* http://www.imf.org/external/np/cm/2008/101008.htm (last visited Oct. 10, 2013) (explaining that an agreement was not reached on an increase in the voting power of developing and transition countries). It was stressed that broader objectives were necessary to achieve a realignment of voting shares because the current proposal at the time was a piece–meal approach. *Id.*

70. Christopher Swann, *Critics Assail IMF Plan on Developing Nations' Voting Share*, WASH. POST, Mar. 29, 2008, at D03 (discussing a 2008 plan that intended to give more voting authority to developing countries). The voting share of developing countries was to rise to forty–two percent from about 40.5% while the voting share of advanced economies would have fallen from 59.5% to 58%. *Id.* Former IMF officials, such as former chief economist at the U.S. agency for International Development Colin Bradford and former executive vice president with the Inter–American Development Bank Nancy Birdsall signed a letter authored by former assistant Treasury secretary Edwin M. Truman expressing their displeasure with the proposed reforms because they fell short in "addressing the challenges facing the IMF and its evolution toward a truly global institution. *Id.*

71. FINANCE, DEVELOPMENT, AND THE IMF 290 (James M. Boughton & Domenico Lombardi eds., 2009) (stating that the compromise was to allocate 250 "basic votes" to each member country).

72. DAVID WOODWARD, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, G-24 DISCUSSION PAPER SERIES, IMF VOTING REFORM: NEED, OPPORTUNITY AND OPTIONS 1 (2007).

73. BUIRA, *supra* note 3, at 15.

74. WOODWARD, *supra* note 72, at 2.

75. *See IMF Quota and Governance Publications*, IMF, *available at* http://www.imf.org/external/np/fin/quotas/pubs/index.htm (last visited Oct. 21, 2013). Even more drastic then the 2008 reforms, the Board of Governors, on December 15, 2010, passed a package of far-reaching reforms, completing the "14th General Review of Quotas." *Id.*

In 2008, reforms passed increasing basic votes to 5.502 percent of total votes, which results in 741 basic votes for each 187 member countries of the IMF.[76] Additionally, the reform enabled Executive Directors representing seven or more members to each appoint a second Alternate Executive Director following the 2012 regular elections of Executive Director.[77] Unfortunately, despite the much needed reform, developed countries still maintain a large percentage of the IMF's voting power; the seven G7 countries alone maintain 43.12 percent of all the votes while the top ten quota-based countries, including the G7 countries, have 52.13 percent of all the votes.[78]

The World Bank has experienced the same sort of criticisms, notwithstanding these criticisms developed and large emerging economies are asserting pressure on the World Bank desiring more influence on the institution.[79] Recently, the World Bank sought to pursue a reform program where developing countries would get at least forty-seven percent of the voting shares in the institution, although fifty

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The 14th General Review of Quotas will: (1)double quotas from approximately SDR 238.4 billion to approximately SDR 476.8 billion, (about US$767 billion at current exchange rates); (2) shift more than 6 percent of quota shares from over-represented to under-represented member countries; (3) shift more than 6 percent of quota shares to dynamic emerging market and developing countries (EMDCs); (4) significantly realign quota shares. China will become the 3rd largest member country in the IMF, and there will be four EMDCs (Brazil, China, India, and Russia) among the 10 largest shareholders in the Fund, and preserve the quota and voting share of the poorest member countries. This group of countries is defined as those eligible for the low-income Poverty Reduction and Growth Trust (PRGT) and whose per capita income fell below US$1,135 in 2008 (the threshold set by the International Development Association) or twice that amount for small countries. *Id.*

76. *Factsheet: IMF Quotas*, IMF (Sept. 13, 2011), *available at* http://www.imf.org/external/np/exr/facts/quotas.htm (last visited Oct. 21 2013).

77. Press Release, Int'l Monetary Fund, IMF Executive Board Recommends Reforms to Overhaul Quota and Voice (Mar. 28, 2008), *available at* http://www.imf.org/external/np/sec/pr/2008/pr0864.htm (last visited Oct. 21, 2013)(stating that the Executive Directors of African countries will receive additional Alternate Directors).

78. *See IMF Members' Quotas and Voting Power, and IMF Board of Governors*, INT'L MONETARY FUND, *available at* http://www.imf.org/external/np/sec/memdir/members.aspx (last vistited Oct. 21, 2013) (stating that Canada, France, Germany, United States, Italy, Japan, United Kingdom, China, Russia, and Saudia Arabia have a combined 1,312,437 votes out of the 2,517,646 total votes); *Group of Seven*, INFOPLEASE, *available at* http://www.infoplease.com/ce6/history/A0821954.html (last visited Oct. 21, 2013) (listing the G7 countries as Canada, France, Germany, United States, Italy, Japan, United Kingdom).

79. Press Release, The World Bank, The World Bank, World Bank Reforming to Meet New Challenges, Zoellick Says (Oct. 6, 2009), *available at* http://go.worldbank.org/5JYWTSK5U0 (last visited Oct. 21, 2013).

percent has been argued to be the optimal percentage.[80]

That being pursued, the voting structure still results in unfair situations. For example, the World Bank granted a loan on the condition that a country's water and sanitation services are privatized.[81] The country then sells its water and sanitation industries to a private consortium, which is financed by the IFC, a branch of the World Bank.[82] When the people of the country start complaining about sharp price increases due to privatization, the country is forced to turn to the ICSID, a branch of the World Bank, to dispute the situation.[83] So the weighted voting structure allows larger countries to impose their policies through the World Bank, which in this scenario results in the World Bank Group controlling the (1) conditions for which a country may take a loan, (2) the financing for the privatization of certain services, and (3) the dispute settlement.[84] This scenario happened at El Alto (Bolivia) in 2004–05.[85]

Although reforms to promote good governance were stressed as early as 1996,[86] the IMF's governance did not begin a major reform

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80. *Id.* (discussing a speech made by World Bank Group President Robert B. Zoellick at the beginning of the 2009 Annual Meetings of the World Bank and IMF in Istanbul, Turkey). The World Bank's shareholders supported giving developing countries at least a 47 percent share of the voting shares, yet Zoellick called for developing countries to have a 50% share. *Id.*; *see* Robert B. Zoellick, President, The World Bank Group, Remarks at Board of Governors of World Bank Group Annual Meeting: The World Bank Group Beyond the Crisis (Oct. 6, 2009) (discussing the World Bank's pursuit of an ambitious program of reform).

81. ERIC TOUSSAINT, THE WORLD BANK A CRITICAL PRIMER 3 (Sylvain Dropsy ed., Elizabeth Anne trans., Pluto Press, 2008).

82. *Id.*

83. *Id.* at 3–4.

84. *See id.*

85. *Id.*; *see* Maude Barlow, *Securing the Right to Water in Bolivia*, BLUE PLANET PROJECT (Mar. 23, 2010) *available at* http://www.blueplanetproject.net/?s=Securing+the+Right+to+Water+in+Bolivia&searchsubmit= (last visited on Oct. 21, 2013). "[C]itizens in El Alto, Bolivia [struggled] to regain control of their local water supply from multinational corporate giant, Suez. . . . As a condition for a World Bank loan, the public water system in El Alto was privatized in 1997. Eight years later, despite promises of expanded water services, the private company Aguas del Illimani (Suez is the major shareholder) had failed to deliver water to 200,000 people in El Alto and had no plans to do so in the future. . . . In January 2005, after a general strike and public protests demanding the immediate withdrawal of Suez from Bolivia and for the government to investigate the company's actions, the Bolivian government decided to cancel its contract with Aguas del Illimani. . . . Despite this initial victory, the Bolivian government, under pressure from the Inter-American Development Bank, the World Bank and German Corporation GTZ, announced its intention to create a supposed 'New Model' of Public–Private Partnership where Suez would continue to hold 35% of the shares." *Id.*

86. *See* INT'L BANK FOR RECONSTRUCTION AND DEV., THE WORLD BANK

process until 2006.[87] A 2009 Committee on IMF's Governance Reform report described the drawbacks to the current governance framework as: legitimacy and effectiveness; political voice; the executive board itself; overlaps and gaps; and mandates.[88] To rectify the drawbacks, the Committee recommended enhancement of clear leadership, enablement of effective executive decision-making, and an increase in membership accountability.[89] Emerging economies are not in favor of the reforms sought by the IMF.[90]

PARTICIPATION SOURCEBOOK (1996), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1996/02/01/000009265_3961214175537/Rendered/PDF/multi_page.pdf (last visited Oct. 21, 2013) (showing reform ideas proposed in 1996, which suggested that increased participation by developing countries was necessary).

87. *Governance Structure,* INT'L MONETRARY FUND, *available at* http://www.imf.org/external/about/govstruct.htm (last visited Oct. 21, 2013) (explaining the governance reform ideals between 2006 and 2008). A committee was appointed to assess the adequacy of the IMF's current framework. *Id.* The committee on IMF Governance Reform was appointed by Managing Director Dominique Strauss–Kahn on September 4, 2008. *Id.*; *see* INT'L MONETARY FUND, COMMITTEE ON IMF GOVERNANCE REFORM FINAL REPORT (Mar. 24, 2009), *available at* http://www.imf.org/external/np/omd/2009/govref/032409.pdf (last visited Oct. 21, 2013) [hereinafter COMMITTEE ON IMF] (explaining the findings of the committee); Press Release, Int'l Monetary Fund, IMF Managing Director Dominique Strauss–Kahn Welcomes Experts' Report on Fund Decision Making (Mar. 25, 2009), *available at* http://www.imf.org/external/np/sec/pr/2009/pr0988.htm (last visited October 31, 2013) (discussing the makeup of the eight–person committee).

88. COMMITTEE ON IMF, *supra* note 87, at 7–10. Changes are reforms that are implemented and take years to go into effect, and many nations are not following through with their respective portions of the bargain. *Id.* at 7. "High–level political representation on a decision–making body that provides strategic and policy direction, and discusses macroeconomic and financial policy coordination, is needed." *Id.* at 9. The Executive Board, while in actuality is a body of high professional and technical capacity, is treated by its members as a position on international civil servitude, rather than a capacity of political representation, therefore the members are often removed from the actual policy–making. *Id.* at 9. Regarding the overlaps and gaps, in order for a governing body to be efficient there needs to be clarity in the roles and responsibilities delineated to each area of the governmental framework. *Id.* at 9. "Components of institutional decision–making—namely, the legislative function, the executive function, and a means of measuring performance and holding the executive accountable—are insufficiently delineated and assigned. The IMFC lacks the mandate to take strategic decisions; the Board is too stretched in day–to–day operational decisions to be able to set broad strategic directions; and there are few explicit systems for measuring management and board performance and holding them accountable." COMMITTEE ON IMF, *supra* note 87, at 9.

89. *Id.* at 10.

90. Lesley Wroughton, *Emerging nations stand firm on IMF vote reform*, REUTERS NEWS, Aug. 5, 2009 (explaining that emerging economies want voting shares realigned before governance reforms are tackled). Emerging powers want voting shares to reflect their shares within the global economies before the governance is reformed because the emerging economies fear that a decision–making ministerial council backed by the current

The World Bank's governance, in its role as the premier multilateral banking institution, has been inherently critiqued, as it is the sole global institution of the sort.[91] As a result of weathering the heavy criticism, the World Bank has evolved vastly since its inception and has become a pioneer in terms of accountability.[92] The World Bank's governance structure is in a constant state of review and reformation.[93] As such, the World Bank instituted an independent review by experienced individuals, which the World Bank hopes will aid in strengthening its aims of becoming more accountable, agile, effective, inclusive, innovative, and financially sound.[94]

That independent review, headed by former Mexican President Ernesto Zedillo, emphasized the lack of accountability at the top–at the

IMF's powers would delay basic reforms emerging countries want. *Id.*

91. Ngaire Woods, The Challenge of Good Governance for the IMF and the World Bank Themselves, World Development (May 2000) 17–18 (discussing the critiques as the greater influence in research direction and results by large shareholders, and the World Bank's Anglo–Saxon approach to economics including the homogeneity in the World Bank's staffing). An example of influence is that in the 1980's, the Reagan administration, Germans, and British played a role in squelching research on debt issues. *Id.* The Anglo–Saxon approach consisted of the staffing of the agency being dominated by English speaking United States' citizens. *Id.* Fluency in English advanced employees within the organization. *Id.*

92. *Id.* at 6. In 1993, the World Bank became the first multilateral organization to create an independent inspection panel for public accountability. By 1998, that panel had received thirteen requests for inspection. *Id.*

93. Press Release, The World Bank, Outside Review Supports World Bank Group Reform (Oct. 21, 2009) (on file with author), *available at* http://go.worldbank.org/2I98FYWNJ0 (last visited Oct. 21, 2013) (explaining that the reforms that are already underway deal with financial capacity, the strengthening of management accountability, the leadership selection process, expanding voice, and the restructure of the World Bank's governing bodies). Financial measures such as the injection of paid–in capital were developed to reform financial capacity. *Id.* The World Bank is doing an institutional review of independent evaluation entities to strengthen management accountability. *Id.* The leadership selection process was reformed so selection of the World Bank Group President is now merit–based, transparent, and open. *Id.* The World Bank's voice has been expanded through a new chair for Sub–Saharan Africa, an increase in developing countries' shares in IBRD, and a raise in developing and transition countries' voting power. *Id.* The World Bank Group's governing bodies were restructured to improve Board operations and client services. *Id.*

94. *See* Press Release, The World Bank, *supra* note 93 (explaining that World Bank Group President Robert B. Zoellick created the High Level Commission on Modernization of World Bank Group Governance in October 2008 which did an external review of the World Bank Group's governance). Headed by former Mexican President Ernesto Zedillo, the Commission made five recommendations: 1) restructure the World Bank Group's governing bodies; 2) strengthen the World Bank Group's resource base; 3) strengthen management accountability; 4) reform the leadership selection process; and 5) enhance voice and participation. *Id.*

level of the Executive Board and Senior Management.[95] The accountability problem is exasperated by the Executive Board having three counterproductive functions: political representation, management, and oversight.[96] The report calls for more division of labor and responsibilities via a restructure of the current governance structure.[97] It is suggested that the Board of Directors be elevated to a "World Bank Board" with more responsibilities including making major policy decisions, conducting general oversight of the institution, and approving the World Bank Group's overall strategy and direction.[98] Furthermore, all responsibility for the approval of all World Bank Group financing operations should be transferred to Management.[99] The separation of management responsibilities will provide a checks and balances system where management will be accountable through effective performance evaluation by the World Bank Board.[100]

III. THE IMPOSITION OF NEOLIBERALISM ON A GLOBAL SCALE

The purpose of this section is to provide an overview of the economic principles which have controlled the actions of the BWIs and World Trade Organizations and how these principles have led to the failure of these institutions. Subsection A suggests that specific economic policies have played a fundamental role in the outcome of implementing the ideals underlying the BWIs.[101] Subsection "B" presents the evolution of neoliberalism and how it has had dramatic negative effects on the global economy throughout the last two centuries.[102] Subsection "C" analyzes the IMF and the World Bank's use of loan conditions, their chosen tool for imposing neoliberalism.[103]

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95. ZEDILLO COMM'N, REPOWERING THE WORLD BANK FOR THE 21ST CENTURY, REPORT OF THE HIGH-LEVEL COMMISSION ON MODERNIZATION OF WORLD BANK GROUP GOVERNANCE 30 (2009) [hereinafter ZEDILLO COMM'N REPORT], *available at* http://siteresources.worldbank.org/NEWS/Resources/WBGovernanceCOMMISSIONREPORT.pdf. (last visited Oct. 11, 2013).

96. *Id.*; *Governing Structure of the World Bank*, THE WORLD BANK, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20094705~menuPK:220464~pagePK:220503~piPK:220476~theSitePK:228717,00.html (last visited Oct. 11, 2013).

97. *See* ZEDILLO COMM'N REPORT, *supra* note 95, at 30, 39.

98. *Id.* at 39.

99. *Id.* at 40.

100. *See id.* at 43.

101. *See infra* Part III.A.

102. *See infra* Part III.B.

103. *See infra* Part III.C.

Subsection "D" presents case studies on Argentina and Africa and how the neoliberalist approach of the IMF and World Bank has impacted those countries.[104]

A. Influence through Vote and Governance

The British economist Keynes was a key participant at the Bretton Woods.[105] Through the looking glass of the Great Depression, the IMF and the World Bank's policies were based primarily on Keynes' prescriptions to resolve global economic problems.[106] However, by the mid 1980's, the controlling economic policy of these institutions shifted to the neoclassical approach.[107] "The Keynesian orientation of the IMF, which emphasized market failures and the role for government in job creation, was replaced by the free market mantra of the 1980's, as part of a new "Washington Consensus"— a consensus between the IMF, the World Bank, and the U.S. Treasury about the "right" policies for developing countries—that signaled a radically different approach to economic development and stabilization."[108] Rapid trade liberalization corresponding to the free market ideology would ultimately lead to the colonization of developing countries to the IMF.[109]

The IMF brought in the World Bank initially planning to provide billions of dollars in emergency support to Europe after the fall of the Berlin Wall.[110] In the 1980's the Bank lost sight of this humanitarian foundation and began lending structural adjustment loans burdened with IMF imposed conditions to developing countries.[111] The BWIs collectively represented the aggregate desire of the capitalist market to expand globally beyond the boundaries of the developed industrial world with minimum state restrictions.[112] Within the IMF, capitalistic

104. *See infra* Part III.D.

105. *See* STIGLITZ, *supra* note 1, at 11.

106. *See id.*

107. *See* ARIEL BUIRA, THE IMF AND THE WORLD BANK AT SIXTY, 8 (2005) ("The growing breach between world economic and financial realities and the governance structure of the BWIs argues for reform to enhance the legitimacy and restore the effectiveness of these institutions").

108. *See* STIGLITZ, *supra* note 1, at 16.

109. *See id.*

110. *See id.* at 14.

111. *See* CARL JAYARAJAH & WILLIAM H. BRANSON, OPERATIONS EVALUATION DEP'T, STRUCTURAL & SECTORAL ADJUSTMENT: WORLD BANK EXPERIENCE, 1980–92 (1995) (explaining an extensive study performed by the Operations Evaluation Department in 1995 regarding the World Bank's experience with adjustment lending in the 1980's, including conditionality).

112. *See* BUIRA, *supra* note 3, at 8; Under Bretton Woods, structural balance of

nations like the United States and England forcibly imposed neoliberal ideologies on underdeveloped countries by swinging heavily weighted voting power in favor of free markets.[113] President Reagan brought this neoliberal ideal to the annual meeting of the World Bank in 1983 when he stated:

> The societies that achieved the most spectacular, broad based economic progress in the shortest period of time have not been the biggest in size, nor the richest in resources and certainly not the most rigidly controlled. What has united them all was their belief in the magic of the marketplace. Millions of individuals making their own decisions in the marketplace will always allocate resources better than any centralized government planning process.[114]

The IMF was the perfect mechanism for the United States to realistically pursue an implementation of the free market concept on a global scale.[115] Starting in the mid 1970's, the IMF and the World Bank hired graduates from the Chicago School to implement capitalistic free market irrespective of humanitarian rights.[116] Underdeveloped countries which had sought refuge in the IMF and World Bank were blindly subjected to the neoliberal ideas of the Chicago School and became heavily indebted to the institutions.[117]

The IMF issued structural adjustment programs to bail out countries in financial crisis, which also helped to advance privatization

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payments disequilibria were to be corrected by exchange rate movements. *Id.* The IMF through its surveillance function is supposed to assess a country's economic health by reviewing its monetary, fiscal, exchange rate, trade and other financial policies. *Id.* However, under Milton Friedman's floating exchange rate approach, developed countries would essentially absolve themselves from any form of IMF oversight. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM, 65–71 (2nd ed. 1982); John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76. U. COLO. L. REV. 57, 60–65 (2005) (stating there is a complete lack of transparency and review of leading international financial bodies promotes lack of discretion, illegality, and fraud within the global economic community).

113. *See* STIGLITZ, *supra* note 1, at 14–15. The IMF and the World Bank were both driven by the collective will of the G–7, the governments of the most important advanced industrial countries. *Id.* These countries are the United States, Japan, Germany, Canada, Italy, and France. *Id.* In year 2011 the G–8 was formed to include Russia. *Id.*

114. *See* RICHARD PEET, UNHOLY TRINITY: THE IMF, WORLD BANK, AND WTO 13 (2003) (recognizing that Friedman and the Austrian School of Economics had profound implications on global fiscal policy).

115. *See generally* NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 388–403 (2007).

116. *Id.* at 161-63 (describing the policy makers of the IMF and their relation to the Chicago School).

117. *See generally id.* at 388–403 (building a connection between lifting regulations on interest rates and the colonization of Third World countries).

and free trade.[118] Countries which adhered to the adjustment programs took on massive floating interest rate loans.[119] Since interest rates were not regulated under the IMF and World Bank,[120] eventually the cost of borrowing money increased at a faster pace than countries could repay debt. This morally bankrupt lending practice was the driving force behind the colonization of the financially bankrupt counties to the IMF and World Bank.[121]

B. Evolution and Critique of Neoliberalism

Prior to an examination on the impact of neoliberalism on the policies of the IMF and World Bank, it is worth discussing the evolution of political economics. During a time when government regulations were desired Keynesian economics became the most popular.[122] From the Great Depression until the end of World War II, Keynesian economics had its primary influences on economic policies.[123] Keynes presumed that in order to correct market imperfections, state intervention had to be implemented.[124] One of the most important

118. *Id.* at 155–56, 200–03, 216. The IMF was originally concerned with exchange rates and balance of payment loans. *Id.* The IMF short term loans were at first used mainly by the same circle of industrial economies that had dominated the institution's founding. KLEIN, *supra* note 115, at 155-56, 200-03, 216 (2007). The IMF shifted in the mid 1970's to a more intervention–type stance where loans were granted under conditions of greater austerity to Third World countries. Loan conditionality was based on how countries achieve economic growth. This conception was formulated by right wing politicians and bureaucrats operating mainly through the U.S. Treasury in the series of Republican administrations. The result of neoliberal conditionality, together with policy moves, such as capital account liberalization, has proven to be disastrous for working people in developing countries. *Id.*

119. *See generally* KLEIN, *supra* note 115 at 156 (discussing the issues pertaining to government debt inheritance).

120. *See* BUIRA, *supra* note 3, at 72 (stating that Ronald Reagan and Margaret Thatcher had a policy to promote free market reform and opened the developing world to foreign trade and investment).

121. *See* STIGLITZ, *supra* note 1, at 41 (stating that the Fund's approach to developing countries has had the feel of a colonial ruler); *See generally* KLEIN, *supra* note 115 (explaining that industrialized countries pillage Third World countries in the modern day just as governments colonized the New World in the pre–industrialization era).

122. *See* PAUL KRUGMAN, THE RETURN OF DEPRESSION ON ECONOMICS AND THE CRISIS OF 2008 100 (2009) (explaining how during the 1930s the United States fell into the Great Depression and John Maynard Keynes attempted to explain the causes of the slump to the general public).

123. *See id.* at 102 (expounding on the notion that Keynes was in favor of macroeconomic intervention and this was viewed as acceptable by conservatives throughout WWII).

124. *See id.* (making an assumption that Kenyes did not want to return to a free market ideal even after the economy responded positively to government intervention).

lessons which Keynes helped teach was that markets are not self-correcting and government intervention is required to ensure recovery and a return to full employment.[125]

Keynesian economics lost popularity in the mid 1970's due to stagflation and associated ideological assaults launched by the Chicago School.[126] Unlike Keynes' idealization of government regulations, economists from the Chicago School such as Milton Friedman perceived most government expenditures as excessive. Hence, government intervention was viewed as inefficient and not likely to achieve projected goals.[127]

With the help of Friedman, the Chicago School derived a three-part formula for creating the perfect free market economy.[128] The formula included government deregulation, privatization of government enterprises, and cutbacks on government spending.[129] Under this

125. *See* JOSEPH E. STIGLITZ, THE STIGLITZ REPORT 20 (2010) (explaining how the United States economy would not have recovered after Great Depression without government intervention).

126. *See* BEN FINE, ECONOMICS IMPERIALISM AND INTELLECTUAL PROGRESS, HISTORY OF ECONOMICS REVIEW 15 (2000). The cornerstone of Milton Friedman's economic theory was that individuals make economic choices based upon self interests alone, and therefore, rational expectations of individuals in the market cannot be predicted through quantitative data. *See id.* Optimal levels of economic health were measured and predicted by formulating the rational expectations of individuals. *Id.* Friedman's rational expectations theory did not simulate a systematic macroeconomic policy requiring the gathering of data to calculate economic agents. *Id.*

127. *See* STIGLITZ, *supra* note 1, at 60 (discussing the economic policies behind the global financial crisis of 2008 and mentioning how doctrines that supported deregulation were predicated on the assumption that sophisticated market participants were rational and had rational expectations and unfettered markets would result in optimal economic efficiency).

128. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 65–71 (2d ed. 1982). Friedman promoted a floating exchange rate system because it is self-correcting and fully automatic. Friedman believed the instability of exchange rates is a symptom of instability in the underlying economic structure. Elimination of this symptom by administrative freezing of exchange rates, a method of direct controls, only aggravates the underlying problem. One way to correct this problem is for the U.S. to announce that it will not proclaim official exchange rates between the dollar and other currencies, and in addition, it will not engage in any speculative or other activities influencing exchange rates. *Id.* Exchange rates would then be determined in free markets. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 65–71 (2d ed. 1982). These measures would conflict with the U.S. obligation to the IMF, to specify an official parity for the dollar. However, the IMF found it possible to reconcile Canada's failure to specify a parity with its Articles and gave its approval to a floating rate for Canada. The IMF should do the same for the U.S. Also, other nations will be able to peg their currency to the U.S. by drawing on reserves, coordinating their internal policies with U.S. policy, and by tightening or loosening direct controls on trade. *Id.*

129. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 65–71 (2d ed. 1982). (speaking on the pitfalls of social welfare programs and government regulations; for

doctrine, only self regulation was appropriate.[130] To increase overall wealth, the government would have to not only sell all state capital assets to private corporations, but also required dramatic cut backs on entitlements, minimal taxes, and a deregulation of trade.[131]

In the late twentieth century, the Chicago School began to have a profound influence on South American Governments such as Chile.[132] At this time, Chile was under the power of a socialist group led by Salvador Allende ("Allende").[133] Allende came into power as a result of an election in which he promised to promote a democratic society.[134] Conversantly, Allende proceeded to convert Chile into a fully fledged communist state.[135] In turn, Allende's communist policies provoked the military to overthrow him and set up a military regime led by General

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example, minimum wage laws effectively increase the unemployment rate because employers cannot afford to pay workers at the required rates). *But see* Frontline: The Warning (PBS DVD release Jan. 5, 2010) (showing that Summers, the Obama's administration financial advisor, is unopposed to government regulation).

130. *See* STIGLITZ, *supra* note 1, at 60 (discussing the doctrines which support free markets).

131. *See generally* Kroger, *supra* note 112, at 57, 60 (exemplifying the consequences of complete government deregulation; Enron was built upon deregulation).

132. *See e.g.*, NOAM CHOMSKY, PROFIT OVER PEOPLE: NEOLIBERALISM & GLOBAL ORDER 9 (2003); *see also* BUIRA, *supra* note 3, at 145 (During the 1990's, policymakers in Chile sought to improve investor confidence and promote stable, sustainable economic and export growth. Chile confronted issues resulting from the neoliberal hyperinflation with Capital Management Techniques "CMTs". The CMT Chile set in place in the 1990's was designed to insulate the economy from volatile international capital flows).

133. *See e.g.*, *id.* Friedman had no qualms over the military overthrow of Chile's democratically elected Allende government in 1973, because Allende was interfering with business control of Chilean society. *Id.* After fifteen years of often brutal and savage dictatorship—all in the name of the democratic free market—formal democracy was restored in 1989 with a constitution that made it vastly more difficult, if not impossible, for the citizenry to challenge the business–military domination of Chilean society. *Id; see also* KLEIN, *supra* note 115, at 97(explaining how Segio de Castro was a prominent Chilean U.S. trained economist). *See generally* KLEIN, *supra* note 115, at 18, 82. (defining the trinity of free markets as privatization, deregulation, and cuts of social spending).

134. *See* BUIRA, *supra* note 3, at 145 (explaining how Chile uses CMT's to protect their economic infrastructures which were derailed during the 1970's and 1980's when the Chicago School had profound influences on their financial stability). "The policy regime sought to balance the challenges and opportunities of financial integration, lengthen the maturity structure and stabilize capital inflows, mitigate the effect of large volumes of inflow on the currency and exports, and protect the economy from the instability associated with speculative excess and the sudden withdrawal of external finance." *Id.*

135. *See id.* at 146 (Ariel Buira and the G–24 Research Program 2003) (explaining the Chilean model, whereby, financial integration in Chile was regulated through a number of complementary, dynamic measures; the authorities revalued the exchange rate mechanism that was initially adopted in the early 1980's).

Pinochet.[136]

Pinochet and his military tried to increase the overall wealth the Chilean economy.[137] However, inflation doubled in the first eight or nine months of their regime.[138] When rates of inflation continued to rise, Pinochet consulted with economists to stabilize the failed economy.[139] These economists were called "Chicago Boys" because they had studied at the University of Chicago and had received their Ph.D. degrees at the University of Chicago.[140] At the time, the "Chicago Boys" was the only group of economists in Chile not tainted by a connection with the Allende socialists.[141] They were untainted because the University of Chicago was one of the only institutions in the United States where the economics department had a strong group of free market economists.[142]

The Chicago Boys assured Pinochet that if he withdrew government involvement from all private sectors at once that the natural laws of economics would push the domestic economic variables, such as inflation and unemployment, back to equilibrium.[143] Pinochet followed the Chicago School's recommendations; he privatized a majority of state-owned companies including several banks, permitted speculative financing of projects, opened boarders to foreign imports exposing Chilean manufacturers to competition, and cut all government

136. *See id.* (explaining how regulations in Chile were central to the success of the Chilean model; foreign loans faced a tax of 1.2% per year; foreign direct investment and private investment faced a one year residence requirement).

137. *See id.* at 147 (showing how CMT's greatly reduced the likelihood that the currency would appreciate and made it difficult for investors to leave, which would ultimately jeopardize the Chilean currency).

138. *See id.* (showing that despite restraints on trade, investors committed funds to the Chilean infrastructure because the regime offered attractive opportunities for development within their growing market).

139. *See* BUIRA, *supra* note 3, at 151(Ariel Buira and the G24 Research Program 2003) (explaining how the CMTs employed in Chile in the 1990s not only reduced the risk of financial crisis but was a major preventative defense against IMF involvement within their policymaking).

140. *See* KLEIN, *supra* note 115, at 71, 77–81 (describing the Chicago Boys influence on the Chilean government in the 1970's and 1980's).

141. *See* BUIRA, *supra* note 3, at 150. "The general soundness of the Chilean banking system in the 1990s and macroeconomic policy, the maintenance of price stability and the high level of official reserves were important sources of investor confidence." *Id.* "International support for the neoliberal aspects of Chile's economic reforms provided the government with the political space to experiment with CMTs." *Id.*

142. *See* KLEIN, *supra* note 115 at 75 (explaining how the Chicago School influenced the theory taught within the Chilean economic schools).

143. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 15 (2d. ed. 1982) (explaining how neoliberalism is the cure to economic inefficiencies).

funding by ten percent.[144] In 1974, Pinochet's adaptations backfired and inflation escalated above 700 percent.[145] Both Castro and scholars of the Chicago School insisted that the inflation was attributable to Pinochet's incorrect implementation of free market ideals.[146] Noam Chomsky articled the concerns of Henry Kissinger regarding the likelihood of a widespread negative implication of Pinochet's regime.[147] Chomsky described the implications of the Chilean economic practices as a true threat to social change worldwide.[148]

Within a year, Friedman convinced Pinochet to fire his economic advisor and hire Sergio de Castro as the finance minister.[149] Castro invited friends from the Chicago School to join him to work with him in the Chilean government and appointed one of the Chicago School economists to the central bank.[150] In 1975, over 500 companies were privatized, government spending was cut by twenty seven percent, domestic manufacturers were absolved, and the Chilean economy fell into a major recession.[151] Friedman's concept of shocking the economy into equilibrium by lifting all government restraints on trade had failed to cure Chile's domestic economic market problems.[152]

Certain governments, such as Mexico, have begun to view Chile as a model of a failed free market and realize the necessity to strengthen their financial systems through regulations.[153] However, supporters of

144. *See* KLEIN, *supra* note 115, at 75–100 (stating that Pinochet was an admired Chilean leader, and defining the trinity of free markets as privatization, deregulation, and cuts of social spending).

145. *Inflation Chile 1974*, INFLATION.EU, *available at* http://www.inflation.eu/inflation-rates/chile/historic-inflation/cpi-inflation-chile-1974.aspx (last visited Oct. 29, 2013).

146. *See id.* at 75–80 (explaining how the Chicago Boys influenced Chilean economic policy).

147. *See* CHOMSKY, *supra* note 132, at 21–22. Noam Chomsky is the leading intellectual figure in the world today in the battle for democracy and against neoliberalism. *Id.* at 11. In the 1960's, Chomsky was a prominent U.S. critic of the Vietnam war, and, more broadly, he became perhaps the most trenchant analyst of the ways U.S. foreign policy undermines democracy, quashes human rights, and promotes the interests of the wealthy few. *Id.* In the 1970's, Chomsky, along with his co-author Edward S. Herman, began their research on how the U.S news media serves elite interests and undermines the capacity of the citizenry to actually rule their lives in a democratic fashion. *Id.* at 11.

148. *See id.* (describing the issues of Chile in light of neoliberal influence).

149. *See* KLEIN, *supra* note 115, at 75.

150. *See id.* at 254–55 (explaining how the Chicago Boys sought to liberate central banks in Africa).

151. *See id.* at 100

152. *See id.* at 75–100 (denoting how the Chicago Boy theory of economic policy did not have positive long lasting effects on the Chilean economy).

153. *See* KRUGMAN, *supra* note 122, at 31–34. ("If a national economy goes sour and default looms, the IMF is the preferred creditor. It gets paid back first – even if others, such

free markets, such as the Washington Consensus, continue to argue against any artificial barriers to trade.[154] The free market supporters continue to believe that growth can be achieved through sound budgets, low inflation, deregulation of markets, and free trade.[155]

Further magnifying the failure of Chile's economic policies was the success of countries that have moved away from the policies set forth by the "Washington Consensus." Brazil and Bolivia are two examples of two South American economies that have challenged the neoliberal model and moved to a more nationalistic approach.[156]

Bolivia, like many other South American countries, was in the midst of a debt crisis at the start of the 1980s.[157] Fueled by increased public borrowing during the petrodollar boom of the 1970's and the corruption of the military governments, Bolivia's GDP declined every year between 1981–1986.[158] Pushed to the brink of insolvency resulting from the falling price of tin elections were held a year early.[159] The election of Victor Paz Estenssoro marked the beginning of

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as foreign creditors, do not. They might get nothing. So a rational private sector financial institution is going to insist on a risk premium–a higher interest rate to cover the higher likelihood of not getting paid back."); *See also* STIGLITZ, *supra* note 1, at 206.

154. *See* KRUGMAN, *supra* note 122, at 31–34. Stiglitz, commenting on his experience at the World Bank and their failed policy decision making:

> At the World Bank, during the time I was there, there was an increasing conviction that participation mattered, that policies and programs could to be imposed on countries but to be successful had to be "owned" by them, that consensus building was essential, that policies and development strategies had to be adapted to the situation in the country, that there should be a shift from "conditionality" to "selectivity", rewarding countries that had proved track records for using funds well with more funds, trusting them to continue to make good use of their funds, and providing them with strong incentives.

Id.; *see also* STIGLITZ, *supra* note 1, at 49.

155. *See* KRUGMAN, *supra* note 122, at 31–34.

156. Nathaneal Hamilton, The Brazilian Economy in Transition: Explaining President Lula's Response to Neoliberal Reform (May 23, 2011) (unpublished M.A. dissertation, San Diego State University), *available at* http://sdsu-dspace.calstate.edu/bitstream/handle/10211.10/1351/Hamilton_Nathanael.pdf?sequence=1 (last visited Oct. 29, 2013).

157. Lydia Chavez, *Man in the News; Bolivian in an Encore: Victor Paz Estenssoro*, THE N.Y. TIMES (Aug. 7, 1985), *available at* http://www.nytimes.com/1985/08/07/world/man-in-the-news-bolivian-in-an-encore-victor-paz-estenssoro.html (last visited Oct. 22, 2013).

158. Benjamin Kohl, *Challenges to Neoliberal Homogenies in Bolivia*, ANTIPODE 304, 310 (2006), *available at* http://www.temple.edu/gus/kohl/documents/ChallengesNLHegAntipode..pdf (last visited Oct. 21, 2013).

159. *Id.*

neoliberalism in Bolivia.[160]

Paz Estenssoro, through Presidential Decree 21060, initiated the New Economic Policy (NEP), which called for the closing of state mines, privatized state-owned enterprises, and increased foreign direct investment, all leading to the end of protectionist policies that had been in place.[161] While the plan initially succeeded in slowing inflation within the first couple of weeks, over time it failed to address Bolivia's fundamental economic problems.[162] In 1993, under the leadership of Gonzalo Sánchez de Lozada, Bolivia instituted what is known as "El Plan de Todos."[163] The Law of Capitalization implemented the partial privatization of five major industries in Bolivia: oil and gas, telecommunications, airlines, power generations, and railroads.[164] Bolivia, a 50% shareholder in the multinational corporations that took control of these industries, planned on using the stock revenue to bail out the failing national pension system; however, factors such as lost revenues resulting from the Law of Capitalization as well as economic forecasts not being met led to a major reduction of government programs.[165] A populist backlash against neoliberal policies soon followed, culminating in the Cochabamba Protests of 2000 and the Bolivian gas conflict of 2003.[166] The current administration has attempted to further implement state control over the national economy, as evidenced by the nationalization of the hydrocarbon sector.[167]

The result seems to be a success for Bolivia. In 2010, the country's exports totaled $7.1 billion while imports totaled $5.3 billion, resulting in a healthy trade surplus of $1.6 billion.[168] Bolivia is part of several international trade partnerships, including the Andean Community (the "CAN") and the Bolivarian Alliance for the Americas (the "ALBA").[169] The country currently enjoys a BB- rating from the rating agency, Standards and Poor.[170] Though the country still is

160. Chavez, *supra* note 157.

161. Kohl, *supra* note 158.

162. *Id.* at 310-11.

163. Benjamin Kohl, *Restructuring Citizenship in Bolivia: El Plan de Todos*, 27.2 INT'L J. URB. & REG'L RES. 337, 340 (2003).

164. *Id.* "El Plan de Todos" was not a complete transfer over of the public sector to private industry; rather, it was a sale of 50% of the state industries to multinational corporations. The remaining shares were transferred back to the . *Id.*

165. *Id.*

166. Press Release, U.S. State Dep't, Background notes: Bolivia (Aug, 3, 2011).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Sovereign's Ratings List*, STANDARD AND POOR'S RATINGS SERVS., *available at*

heavily dependent on foreign assistance to help finance development projects,[171] Bolivia has rebounded nicely following the reign of neoliberalism in the country.

Brazil presents another successful example of a country flourishing after moving away from neoliberal policies. Neoliberal reform was brought to Brazil after the election of Fernando Collor de Mello in 1990.[172] The Collor de Mello administration implemented a number of policies to help deal with the high inflation rates of the 1990's, including market deregulation, reduction of import tariffs, and an investor–friendly tax system that helped pave the way to opening up Brazil to the global market.[173] A second round of neoliberal policies were followed up by the administration of Itamar Franco with the "Plano Real".[174] These measures involved a mix of privatizing several state-owned entities, including a global public offering of shares of the oil and gas giant Petrobas, and the raising of interest rates.[175] The plan drew a huge influx of foreign investors to Brazil.[176] Although the "Plano Real" seemed to first be a success, it was not able to bring about mass prosperity.[177]

Former President Luiz Ignazio "Lula" Da Silva had to juggle between not upsetting his left-leaning Workers Party base and representing the interests of the conservative neoliberals.[178] Lula issued a statement during the 2002 campaign stating that his government would respect the IMF programme agreed upon by the Cardoso administration and has maintained interest rates at levels set out by the "Plano Real."[179] In stark contrast to these neoliberal measures, Lula introduced "Bolsa Familia", a government program aimed to help

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http://www.standardandpoors.com/ratings/sovereigns/ratings-list/en/us/?subSectorCode=39&sectorId=1221186707758&subSectorId=1221187348494 (last visited Oct. 22, 2013).

171. U.S. State Dep't, *supra* note 166.

172. James Brooke, *Man in the News; The Choice of Brazilians; Fernando Collor*, THE N.Y. TIMES (Dec. 20, 1989), *available at* http://www.nytimes.com/1989/12/20/world/man-in-the-news-the-choice-of-brazilians-fernando-collor.html (last visited Oct. 22, 2013).

173. Maria de Lourdes Rollemberg Mollo & Alfredo Saad–Filho, *Neoliberal Economic Policies in Brazil (1994–2005): Cardoso, Lula and the Need for a Democratic Alternative*, 11 NEW POL. ECON. 99 (2006).

174. *Id.*

175. Hamilton, *supra* note 156.

176. *Id.*

177. *Sovereign's Ratings List*, *supra* note 170.

178. Gerardo Renique, *Introduction: Latin America Today: The Revolt Against Neoliberalism*, 19 SOCIALISM AND DEMOCRACY 1,1–11,182 (2005).

179. Hamilton, *supra* note 156.

reduce poverty by providing a government subsidy to families whose children attend school.[180] The multidisciplinary approach used by Brazil may be the reason for its economic success.

Amid an economic downturn throughout the global markets, Brazil has managed to maintain strong economic activity.[181] The state-run energy company, Petrobras, is among the international industrial leaders in oil production.[182] A portion of government expenditures has been directed at a number of high-tech industries, including aerospace, information technology, and telecommunication.[183] Government's willingness to invest in innovation has led to success in private entrepreneurship, resulting in a growing middle class that now accounts for more than half of the 190 million people in Brazil.[184] With a nominal GDP of $2.09 trillion, the country enjoyed a GDP growth of 7.5% in 2010.[185] The country currently enjoys an A- rating from the rating agency, Standards and Poor.[186] Brazil is an emerging market rich with resources that is looking to benefit from added representation at the negotiating tables of the BWIs.[187]

C. Loan Conditionality

The economic policies of those in charge of running the IMF and World Bank have generally been imposed through conditions placed on loans and other benefits of membership with the IMF and World Bank. The IMF's embracement of loan conditionality was declared the "biggest divergence from the Bretton Woods objectives."[188] The

180. *How to get children out of jobs and into school: The limits of Brazil's much admired and emulated anti-poverty programme,* ECONOMIST (Jul. 29, 2010) *available at* http://www.economist.com/node/16690887 (last visited Oct. 25, 2013).

181. *See* Andrew Downie & Tim Padgett, *The One Country That Might Avoid Recession. . .*, TIME (Mar. 05, 2009), *available at* http://www.time.com/time/magazine/article/0,9171,1883301-1,00.html (last visited Oct. 25, 2013).

182. *See* Lori Ioannou, *Brazil's Start-up Generation*, Time Online, Aug. 22, 2010, *available at* http://www.time.com/time/magazine/article/0,9171,2010076,00.html (last visited Oct. 25, 2013).

183. Press Release, U.S. State Dep't, Background notes: Brazil (Mar, 8, 2011).

184. *Id.*

185. *Id.*

186. *Sovereign's Ratings List*, *supra* note 170.

187. *See* Julia E. Sweig, *A New Global Player: Brazil's Far-Flung Agenda*, FOREIGN AFFAIRS (Nov/Dec 2010), *available at* http://www.foreignaffairs.com/articles/66868/julia-e-sweig/a-new-global-player (last visited Oct. 29, 2013).

188. Yilmaz Akyuz, The Rationale For Multilateral Lending; A Critical Assessment 20 (July 5, 2004) (unpublished manuscript), *available at* http://www.new-rules.org/storage/documents/ffd/akyuz04.pdf (last visited Oct. 25, 2013).

principle of conditionality was incorporated within the Articles of Agreement in 1969, empowering the IMF to condition access to financial assistance upon the borrowing country's assent to mandated reforms targeting primary causes of their balance of payments issues.[189] The majority of conditions imposed on poor countries wanting loans from the IMF and World Bank include privatization-related conditions.[190] For example, when Bangledesh received a large credit from the World Bank in 2005, of the fifty-three conditions added to the loan, eighteen required that Bangladesh, where over 50% of the population lives below the poverty line, privatize its banks, electricity, and telecommunications sectors.[191] Despite the fact these conditions have ultimately made matters worse within poorer countries, the average amount of conditions imposed on low income countries rose from forty-eight per loan to sixty-seven per loan between 2002 and 2005.[192]

The World Bank has also been known to impose conditions involving trade liberalization on poor countries.[193] Rwanda was

189. Article V, Section 3(a) of the Articles of Agreement provides:

> The Fund shall adopt policies on the use of its general resources, including policies on stand-by or similar arrangements, and may adopt special policies for special balance of payments problems, that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund.

IMF ARTICLES OF AGREEMENT, Amended July 28, 1969, *available at* http://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf (last visited Oct. 25, 2013). The nature of the conditions have predominantly centered on restricting government spending and foreign borrowing, regulating currency to limit inflation, and in strengthening banking supervision. *See id.*; John W. Head, *Law and Policy in International Finance Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks*, 17 KAN. J.L. & PUB. POL'Y 194, 214–18 (2007–2008) (discussing the legal aspects of IMF conditionality).

190. EURODAD, WORLD BANK AND IMF CONDITIONALITY: A DEVELOPMENT INJUSTICE 12 (2006), *available at* http://www.eurodad.org/uploadedfiles/whats_new/reports/eurodad_world_bank_and_imf_conditionality_report.pdf (last visited Oct. 29, 2013); *see also Privatization and the World Bank*, THE WHIRLED BANK GROUP, *available at* http://www.whirledbank.org/development/private.html (last visited Oct. 25, 2013) (questioning the effectiveness of privatization conditions imposed by the IMF and World Bank, and providing examples of privatization conditions in Argentina, India, and Mexico).

191. EURODAD, *supra* note 190, at 12; Shahzad Uddin & Trevor Hopper, *Accounting for Privatisation in Bangladesh: Testing World Bank Claims*, *available at* http://www.scribd.com/doc/21894315/Accounting-for-Privatisation-in-Bangladesh-Testing-World-Bank-Claims (last visited Nov. 13, 2013).

192. EURODAD, *supra* note 190, at 9.

193. *Id.* at 12; JUBILEE U.S.A., *Are IMF and World Bank Economic Policy Conditions Undermining the Impact of Debt Cancellation?* (2008), *available at*

conditioned to join the East African Trade Agreement, practically stripping its right to freely contract for its exports.[194] Bangladesh was required to remove any quantitative restrictions it had imposed on sugar imports.[195] Luckily, such trade conditions only constitute 3% of all World Bank conditions to low income countries.[196]

In essence, the purpose of the World Bank and IMF in giving loans to poorer countries is to assist those countries in raising their economy while helping to end the perpetuating cycle of poverty. However, the World Bank has been known to impose "Micro-Management" type conditions, which ultimately prevents much needed aid from reaching those actually in need of help.[197] Uganda, where 37.7% of the country lives in poverty, was required to "review and approve its school sports policy for tertiary schools," before it could access its World Bank financing in 2005.[198] As a condition to receiving their financing, The Republic of Mali, where 10% of children die as infants, was forced to move its government offices to a new location.[199]

The discord between loan conditionality and development objectives is rooted in the IMF and World Bank's governance structure permitting dominant shareholders to utilize conditionality as a means of furthering their own global economic and political agendas.[200] Actions by the IMF and World Bank give credence to the growing belief that the

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http://www.jubileeusa.org/fileadmin/user_upload/Resources/Policy_Archive/208briefnoteconditionality.pdf (last visited Oct. 25, 2013)("*Some of the most egregious policies force countries applying for debt relief to adhere to strict IMF fiscal and monetary targets, privatize key industries, liberalize their markets, and remove subsidies for sensitive commodities like gasoline and cooking oil.*").

194. EURODAD, *supra* note 190, at 15.

195. *Id.*; *Bangladesh: Trade Policy and Integration*, THE WORLD BANK, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/EXTSARREGTOPINTECOTRA/0,,contentMDK:20592516~menuPK:579454~pagePK:34004173~piPK:34003707~theSitePK:579448,00.html (last visited Oct. 23, 2013).

196. EURODAD, *supra* note 190, at 15.

197. *Id.* at 11; KENYA NATIONAL ASSEMBLY OFFICIAL REPORT 871 (May 3, 2006) ("The impression that has been created is that . . . econom[ies] [are] being managed by the IMF and the World Bank. The impression is that all these prices are as a result of micro-management by the IMF and the World Bank.").

198. EURODAD, *supra* note 190, at 11.

199. *Id.*

200. *See* STIGLITZ, *supra* note 1, at 19 (showing how sometimes conditionality was even counterproductive, either because the policies were not well suited to the country or because the way they were imposed engendered hostility to the reform process); *Contra* STIGLITZ, *supra* note 1, at 52 (stating that "sometimes money has gone to governments with good policies in place–but not necessarily because the IMF recommended these policies."). Stiglitz also continues the argument that loan conditionalities shifted the debate inside the country in ways that led to better policies. *Id.*

institutions "systematically act in the interest of creditors and of rich elites. . . in preference to that of workers, peasants, and other poor people."[201]

D. Case Studies

1. Argentina

Argentina provides a context for examining the economic and human impact of IMF lending over the course of nearly half a century. Prior to World War I, Argentina was viewed by the public and investors as a land of opportunity.[202] Argentina was a resource-rich nation and therefore attracted both European and American investors.[203] The Great Depression negatively affected Argentina due to its reliance on exporting capital.

Argentina initially appealed to the IMF for assistance in 1958 with the hope of receiving an infusion of capital to address its rampant inflation and a resulting balance of payment crisis.[204] The early successes associated with the loans were mitigated by an emerging discontent within the labor force stemming from a decrease in real wages, a rise in inflation, and a decline in the country's gross domestic product.[205]

Argentina's internal political problems led to a problematic relationship with the IMF until, in 1965, President Arturo Illia terminated Argentina's relationship with the IMF, rejecting all of the

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201. GILBERT RIST, THE HISTORY OF DEVELOPMENT: FROM WESTERN ORIGINS TO GLOBAL FAITH 140–41 (2d ed. 2006) (explaining that people in industrial countries began to complain that Third World demands were being ignored, causing the underdevelopment of the Global South). While transnational corporations were getting rich, countries of the South were being exploited for their resources. *Id.*

202. *See* KRUGMAN, *supra* note 122, at 38–40.

203. *See id.*

204. *See id.* at 51 Argentina's lower profile rescue came via the World Bank, which enabled a capital injection of $12 billion to support the nation's banks. *Id.* Subsequently, the Fund conditionally provided capital in the amount of 75 million and a further 254 million dollars, which was derived from public and private U.S. agencies. *Id.*

205. Margaret Conklin & Daphne Davidson, *The I.M.F. and Economic and Social Human Rights: A Case Study of Argentina, 1958-1985*, 8 HUM. RTS. Q. 231–32 (1986) (explaining that in 1959 real wages, decreased by twenty–six percent from the previous year, inflation rose to 111%, and GDP declined by eight percent). As the working class became increasingly dissatisfied, Argentina had a record number of employee strikes. *Id.* Even after the Fund negotiated similar stand–by arrangements for 1959 and 1960, the atmosphere within Argentina was not positive because the allocation of the funds were conditioned upon the attainment of strict deficit reduction goals that were reliant upon "large dismissals of employees, limitation on wage increases, and a reduction in public works." *Id.*

IMF's conditions and attempting to deal unilaterally with the $2.5 billion Argentina owed to international creditors.[206] By failing to comply with the IMF's policies, Illia eroded international confidence in the Argentinean economy. This was reflected in the severe decline of international loans to the country over the next three year period, and thus, Illia suffered the same fate as his Argentinean predecessors.[207]

In 1967, Colonel Juan Ongania ascended to power and agreed to implement an IMF stabilization program, which mandated the same fiscal deficit and inflation goals that had relegated Argentina to a constant state of political and economic turmoil since 1958.[208] However, in 1969 the IMF proclaimed a successful stabilization effort in Argentina based on an increase in its gross domestic product and reduction in the inflation rate.[209] These economic indicators seemingly validated the IMF's policies, but failed to resonate in the hearts of the Argentinean people who had been forced to adapt and survive on real wages that had fallen 11% in 1968.[210]

Starting in 1970, and continuing throughout the next three decades, the citizens of Argentina galvanized together against the IMF and fought for political changes as the IMF remained resolute in the conviction that the "shock therapy" approach was the right path for Argentina to attain progress and prosperity.[211] After a further decline in real wages in 1978, only ten percent of the population had the economic means to purchase the government's shopping basket of basic goods

206. *Argentina: Going It Alone*, TIME (Apr. 30, 1965), *available at* http://www.time.com/time/magazine/article/0,9171,898668,00.html (last visited Oct. 23, 2013) (explaining how Illia had attacked the IMF during his campaign for president, calling it an economic intruder and recommending that Argentina break relations with the Fund).

207. Conklin & Davidson, *supra* note 205, at 234. International loans to Argentina fell drastically, from 361 million in 1962, to 99 million in 1963 and 6 million in 1964. *See id.* The military overthrew Illia in June 1966. *Id.*

208. *Id.* at 235. Conditions in 1967 and 1968 including the devaluation of the peso, limits on fiscal deficit (increased utility charges for public services, restraints on government spending, and higher internal taxes), and wage controls (wage freezes until 1968). *Id.*

209. *See* KRUGMAN, *supra* note 122, at 41(comparing Mexico and Argentina's positive reaction to capital inflows when inflation dropped to nearly zero and GDP increased by 25% in three years).

210. Conklin & Daphne Davidson, *supra* note 205, at 236.

211. *See* Kim Reisman, *World Bank and the IMF: At the Forefront of World Transformation*, 60 FORDHAM L. REV. 349, 390 (1991-1992) (explaining that shock therapy is a means used by the IMF and World Bank to establish a market economy in countries by inflicting the attendant hardships for as short a time as possible in contrast to an evolutionary or gradual approach).

and services.[212] After struggling with massive inflation rates and a costly war that ended in 1982, Argentina appealed to the IMF for aid.[213] The startling figures taken in the 1980's illuminate a blatant disregard by the IMF to balance the human cost of economic stabilization with the benefits of attaining arbitrary economic indicator targets.[214] The problems of inflation and economic stagnation in the 1980s culminated in the hyperinflation that occurred in 1989.[215]

In 1991, Argentina instituted a Convertibility Plan designed to stabilize the economy through drastic measures, including fixing the peso to the U.S. dollar.[216] The Convertibility Plan and structural reforms led to stabilization, and the IMF believed that the six percent average GDP growth through 1997 was a sign of the success of these measures.[217] However, the appreciation of the currency placed exports and domestic producers at a disadvantage because payments became more difficult to make. Ultimately, the rise in prices led to a balance of payment issue. In 1995, the payment issue was coupled with government public relations problems with the IMF, and eventually resulted in the decline of the stock market.[218] Additionally, laws

212. Conklin & Davidson, *supra* note 205, at 245–52 (explaining that in the years of 1976 to 1978, public sector employees had their wages decreased by 53%, so that the government could comply with the Fund's fiscal deficit targets). The Fund's demand to reduce government expenditures translated to massive cuts and layoffs of public sector employees who were already "paid among the lowest in Argentina." *Id.* Although the deficit declined, the citizens were confronted with the reality that the cost of gas, telephone, water, rail fares, electricity, postal charges, and metro fare had increased an average of 405 percent. *Id.*

213. *Id.* at 239; *I.M.F. Loan to Argentina*, N.Y. TIMES, Jan. 25, 1983, at D2 (explaining that in early 1983, the IMF approved a $2 billion loan, including $1.5 billion SDR, to improve the collapsing economy).

214. Conklin & Davidson, *supra* note 205, at 245–52 (explaining that a study in 1985 estimated that one third of employed workers failed to earn sufficient wages so as to be able to feed a family of four); *see* Milt Freudenheim, Henry Giniger, & Richard Levine, *A Heartfelt Cry From Alfonsin On Debt Crisis*, N.Y. TIMES, Mar. 24, 1985, at 42 (explaining the plight of President Raul Alfonsin in 1985). Alfonsin's presidency followed eight years of military rule. *Id.* During his presidency, inflation began eating away at the standard of living to a point where Alfonsin had to balance the IMF's demands for austerity measures with the demands by Argentinean wage-earners for pay increases. *Id.*

215. INT'L MONETARY FUND INDEP. EVALUATION OFFICE, THE ROLE OF THE IMF IN ARGENTINA, 1991-2002 (July 2003), *available at* http://www.imf.org/external/np/ieo/2003/arg/070403.pdf [hereinafter The Role of the IMF].

216. *Id.* (defining the Convertibility Plan). It was centered around a currency board–like arrangement in which the peso was fixed at par with the dollar and autonomous money creation by the central bank was severely constrained. *Id.* "[I]t also included a broader agenda of market-oriented structural reforms to promote efficiency and productivity." *Id.*

217. *Id.*

218. Juan Carlos Linares, *After the Argentine Crisis: Can the IMF Prevent Corruption*

influenced by the IMF conditions, along with changes to the social security system, ultimately sparked massive "anti-IMF riots" in 1998.[219]

Later, in mid-2001, the lack of access to capital markets caused an increased capital flight that, in turn, resulted in Argentina's financial collapse later that year.[220] Once again, as had happened repeatedly before 1991, Argentina was unable to meet IMF conditions and the IMF suspended disbursements.[221] The Convertibility Plan was widely criticized for failing to account for Argentina's internal conditions because linking the currency with the U.S. dollar forced Argentina to "align its monetary policy with that of the United States, despite cyclical differences between the two countries."[222]

The IMF's negative involvement in Argentina culminated in January 2002, when the government of Argentina defaulted on $141 billion in public sector debt; this embodied "the largest sovereign default" of a state in history.[223] The catalyst behind Argentina's default and economic collapse has been "attributed to the country's excessive adherence to International Monetary Fund advice."[224] Argentina's 2009 statement that it does not need the IMF's financial help seems tenuous at best, as earlier that same year Argentina demanded IMF loans without conditions.[225] It has been stated that "the success story of the

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in its Lending? A Model Approach, 5 RICH. J. GLOBAL L. & BUS. 13, 19 (2005) (explaining how Argentina was forced to renegotiate its IMF loan, leading to the stock market decline).

219. *Id.* at 20 (describing the situation in Argentina around the time prior to the anti-IMF riots). The IMF's bailouts were seen as protecting the affluent at the expense of the poor. *Id.* The austerity programs installed to pay for the IMF loans were said to be absorbed by the poor instead of the wealthy. *Id.*

220. The Role of the IMF, *supra* note 215.

221. *Id.* (explaining how this led to the abandonment of the Convertibility Plan and, by the end of 2002, the economy had contracted by twenty percent since 1998).

222. The Role of the IMF, *supra* note 215; *see* Linares, *supra* note 218, at 23 (explaining other factors that contributed to the economic collapse, including decline in capital flows, institutional and political factors unique to Argentina, external shocks, failures in the banking system, and systemic corruption that was inherent in Argentina's politics and economy).

223. Linares, *surpa* note 218, at 18–19 (explaining the steps taken by the IMF and Argentina, starting in 1991 to its default in December 2001). Argentina's relationship with the IMF from 1990's through 2000 was marked by a series of renegotiations to loan agreements and requests for financial assistance. *Id.* Although Argentina never really complied with any of the IMF conditions, the IMF was unwilling to abandon its work there. *Id.* Meanwhile, Argentinean citizens and businesses found themselves marred in government tax increases and spending reductions. *Id.*

224. *See* Jo Marie Griesgraber & Oscar Ugarteche, *The IMF Today and Tomorrow: Some Civil Society Perspectives*, 12 GLOBAL GOVERNANCE 351 (2006).

225. Walter Brandimarte, *Argentina Demands IMF Lend Without Conditions*, REUTERS, Apr. 24, 2009, *available at*

Argentine stabilization program can be best told by international creditors as . . . they have been paid punctually and . . . could hardly be happier regarding the success of International Monetary Fund recommendations."[226]

2. Sub-Saharan Africa

The BWIs have been the cause of the most numerous set of policies Sub-Saharan African countries have ever faced.[227] Either directly, or as a consequence, the World Bank and IMF are responsible for policies which make significant changes in African economies.[228] Even with the implementation of these policies, Sub-Saharan Africa is still the poorest region of the world and the least likely to meet the Millennium Development Goals[229] by the established date.[230]

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http://www.reuters.com/article/idUSN2445415920090424; Sujata Rao & Carolyn Cohn, *Argentina Says Does Not Need Aid From IMF*, REUTERS (Sept. 5, 2009, 2:30 PM), http://www.reuters.com/article/idUSTRE58429020090905.

226. Conklin & Davidson, *supra* note 205, at 259–60 (explaining how the Fund consistently went against the poor and working class Argentineans). The Argentine government, faced with many hardships, had poor bargaining power against the Fund. *Id.*

227. AFRICAN DEVELOPMENT BANK, AFRICAN DEVELOPMENT REPORT 55 (2006) (listing the IMF and World Bank conditionality's in Sub–Saharan Africa as of 1999 as: Cameroon 92; Djibouti 134; Gambia 121; Ghana 80; Guinea 125; Madagascar 137; Mali 105; Mozambique 74; Rwanda 135; Senegal 165; Tanzania 150; Uganda 74; and Zambia 87).

228. REGIONAL SURVEYS OF THE WORLD: AFRICA SOUTH OF THE SAHARA 2004 20 (Katherine Murison ed., 33d ed. 2003) (explaining how the IMF and World Bank have pushed pressured Sub–Saharan African countries to large scale economic reforms). In 1998, thirty–five African countries began economic reform programs or borrowed from the IMF to support economic reform programs. *Id.* A 1981 World Bank study proposed four economic policy changes including: (1) the correction of overruled exchange rates; (2) the improvement of price incentives for exports and agriculture; (3) the protection of industry in a more uniform and less direct way; and (4) the reduction of direct governmental controls. *Id.*; *see* GÉRARD ROLAND, PRIVATIZATION: SUCCESSES AND FAILURES 44 (2008) (explaining that most of these policies concentrated on the goals of privatizing and stabilizing the economies). The hope was for economic growth and financial development results to follow. *Id.* Many of the newly private companies, instead of contributing to the growth of the economy, actually worsened the population's situation by laying workers off. *Id.* In Zambia for example, two large mines were sold to a bidder who agreed not to dismiss any of the workers. *Id.* However, after title was transferred, three thousand of the seven thousand workers were dismissed, and subsequently, the new owner went out of business causing the remaining four thousand workers to lose their jobs. *Id.*

229. *The Millenium Development Goals: Eight Goals for 215*, UNITED NATIONS DEV. PROGRAMME, http://www.un.org/millenniumgoals (last visited Oct. 12, 2013) (laying out the Millenium Development Goals, which include: ending poverty and hunger; universal education; gender equality; child health; maternal health; combating HIV, AIDS and other diseases; environmental sustainability; and global partnership).

230. SAUL BERNARD COHEN, GEOPOLITICS: THE GEOGRAPHY OF INTERNATIONAL

During the 1950s and 1960s, the World Bank concentrated on the development of physical infrastructure.[231] Through the 1970s, the Bank's lending shifted and concentrated more on social areas like education, water access, poverty reduction, and income distribution.[232] However, as the 1980s approached, most economic leaders were conservative and favored economic liberalization and keeping governments at the edge of the economic markets.[233] In 1963, the IMF started lending to Sub-Saharan Africa; however, the number of loans granted to the area was relatively small until the 1970s.[234] The World Bank, influenced by conservative economists, began taking this approach as well in the policies it pushed Sub-Saharan African countries to employ.[235] Lending during the 1980s became conditioned on economic policy reforms, and by the end of the decade, there was practically no difference between the World Bank and IMF conditionality terms.[236] Countries who received aid in Sub-Saharan Africa were at times undeserving, due to the political and economic turmoil present within.[237]

RELATIONS 31 (2009) (explaining that the average per capita income in Sub-Saharan Africa is $2,500, and 30% of the working poor earn less than one dollar per day); *see* JEFFREY SACHS, COMMON WEALTH: ECONOMICS FOR A CROWDED PLANET 31 (2008) for a discussion on the history of Sub-Saharan Africa's poverty and lack of development in comparison with the United States and United Kingdom; *see also* ROB BOWDEN, AFRICA SOUTH OF THE SAHARA 10 (2008) (stating that the World Bank has said that twenty-two of the twenty-five poorest countries in the world are in Sub-Saharan Africa, Burundi being the poorest of the world, with an average annual income per person of $640).

231. PHILIP W. JONES, EDUCATION, POVERTY AND THE WORLD BANK 11 (2006).

232. John Williamson, *The Impact of the Bretton Woods Institutions on the Prospects for development*, *in* SOUTH AFRICA AND THE WORLD ECONOMY IN THE 1990'S 178, 179 (Pauline H. Baker et al eds., 1993). From his first speech to the Board of Governors McNamara spoke of directing Bank lending toward improving the living conditions of individual poor people, and proposed expanding education lending to emphasize advanced technical training as well as fundamental literacy. *Id.*; *see* MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 107 (1996); RONALD G. RIDKER, THE WORLD BANK'S ROLE IN HUMAN RESOURCE DEVELOPMENT IN SUB-SAHARAN AFRICA: EDUCATION, TRAINING, AND TECHNICAL ASSISTANCE 42 (1994) (explaining that these were the goals of the World Bank's president at the time, Robert McNamara).

233. *See* Williamson, *supra* note 232.

234. Robert S. Browne, *The IMF in Africa: A Case of Inappropriate Technology*, *in* THE POLITICAL MORALITY OF THE INTERNATIONAL MONETARY FUND: ETHICS AND FOREIGN POLICY; VOLUME 3 (Robert J. Myers ed., 1987).

235. *See* Williamson, *supra* note 232.

236. IDA'S PARTNERSHIP FOR POVERTY REDUCTION: AN INDEPENDENT EVALUATION OF FISCAL YEARS 1994–2000 77 (2002); Howard Stein, *Structural Adjustment*, *in* THE ELGAR COMPANION TO DEVELOPMENT STUDIES 599 (David A. Clark ed., 2006).

237. KENDALL W. STILES, NEGOTIATING DEBT: THE IMF LENDING PROCESS 69, 75 (1991) (describing the IMF's loan to Zaire). Zaire's Chief of State, Mobuto Sese Seko,

Both the World Bank and the IMF still subject African countries to dozens of conditions in order to receive loans.[238] The conditions are mainly focused on lowering government expenses on social issues and diverting them towards market liberalization in order to cover forgone government revenues from lowering export barriers.[239] The results of these conditions are lower salaries, impoverishment for Africans, and cheaper raw materials for multinational companies.[240] Presently the

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began talks with the IMF in 1976, and a forty–seven million dollar one–year stand–by loan was approved. *Id.* The loan called for a forty–two percent devaluation to align Zaire with the SDR; a twenty percent ceiling on wage increases; a cut of government expenditures involving foreign exchange; a twenty–two percent limit on domestic credit expansion during 1976; and a renegotiation of external public debt. *Id.* Zaire became ineligible for further assistance in 1977 because it failed to meet conditions of the loan and repay debts. *Id.* at 72, 76. Zaire provided the IMF with disjointed, uncoordinated, and confused financial information that "tried the patience of the IMF to its limit." *Id.* It also became clear to Zaire's creditors that Zaire had not intent to implement the IMF reforms. *Id.* In 1978, at the urging of Zaire's creditors, the IMF sent officials to replace local Zairian financial leadership, and other stand–by arrangement of $155 million was given in 1979. *Id.* at 69, 76. Zaire's political aristocracy frustrated the efforts of the IMF team, and thus the loans were cancelled by 1983. *Id.* at 70, 74. The willingness of the IMF to keep returning to Zaire with loans was deemed "startling" in the context that Zaire's performance indicated its unwillingness to meet the terms of its loans. *Id.* at 79, 83.

238. *See* SALIWE M. KAWEWE, POLITICS AND ECONOMICS OF AFRICA, VOL. 5 43 (Olufemi Wusu ed., 2007) (stating that if governments fail to meet the measures imposed, any loans that may have been promised to them are withheld or canceled); THE POLITICS AND POLICIES OF SUB–SAHARAN AFRICA 73 (Robert A. Dibie ed., 2001) (stating that "the conditions attached to World Bank and IMF structural adjustment program . . . effectively transferred sovereignty from the African State to Washington") [hereinafter THE POLITICS AND POLICIES].

239. THE POLITICS AND POLICIES, *supra* note 238; *see* KAWEWE, *supra* note 238, at 44 (stating that the World Bank and IMF force governments to reduce spending on basic human needs and necessities like the elimination of subsidies for food prices, and reduction or social welfare and programs, including health and education); VINCENT B. KHAPOYA, THE AFRICAN EXPERIENCE: AN INTRODUCTION 182 (1998) (explaining how the IMF has required governments from Sub–Saharan Africa to reduce budget deficits by making cuts on expenditures on public programs).

240. *See* KAWEWE, *supra* note 238, at 44 (noting Zimbabwe as an example where the elimination of price controls on manufactured goods, retrenchment of works, devaluation of currency, and privatization of government industries resulted in a sharp shrinkage of income opportunities for the urban middle class and the working class). The elimination of price controls simultaneously marginalizing the poor further, especially women and children. *Id.*; RICHARD PEET, UNHOLY TRINITY: THE IMF WORLD BANK AND WTO 141 (2007) (stating that during the 1980's when most African countries came under World Bank and IMF tutelage, per–capita income decreased by twenty five percent in most of Sub–Saharan Africa). In addition, the removal of food and agricultural subsidies caused prices to rise and created increased food scarcity. *Id.* Since between one–fourth and one–third of the population of Sub–Saharan Africa is malnourished, the vulnerability of African populations to the spread of diseases and other health problems, has increased. *Id.* This, coupled with the closing of numerous hospitals and the understaffing of the ones remaining, has only added to the

global economic crisis affecting the industrialized nations is likely to affect donors' commitments, and thus, efforts to reach the MDGs by the 2015 deadline will be slowed down.[241] Sub-Saharan African countries have accumulated increasingly high debt allowances, whereby, interest outlay payments to financial institutions exceed income from loans which results in harmful net outflows of cash.[242]

The IMF and World Bank structural reforms have proven to be inefficient and detrimental to the people in Sub-Saharan Africa.[243] After adhering to the IMF's and World Bank's policies and mandated structural adjustments, residents of Sub-Saharan African countries have not experienced any long-term improvement in their living conditions.[244] However, since the voting power in the IMF of all Sub-Saharan African countries together is only about a fourth of that allocated to the United States alone, their voice is not likely to bring about any major reform.[245]

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problems rampant within Sub–Saharan Africa. *Id.*

241. UNITED NATIONS, WORLD ECONOMIC SITUATIONS AND PROSPECTS 2009 21 (2009) (explaining how the decrease in demand for exports, lower commodity prices, and decline in investments in the Sub–Saharan African region resulting from the crisis, will affect Sub–Saharan African countries' economic development).

242. THE ENCYCLOPEDIA OF AFRICAN HISTORY: VOLUME 1 338 (Kevin Shillington ed., 2004).

243. *See* REGIONAL SURVEYS OF THE WORLD: AFRICA SOUTH OF THE SAHARA 2004 119 (Katherine Murison ed., 33d ed. 2003) (explaining the case of Burkina Faso which highlights the inefficiencies of the policies) [hereinafter REGIONAL SURVEYS OF THE WORLD]. Since the 1970's there has been a history of fiscal deficit in Burkina Faso which has been mainly attributable to the economy's low taxable capacity. *Id.* In 1993 the IMF accorded an Enhanced Structural Adjustment Facility to Burkina Faso. *Id.* Under the terms of the accord the primary objective was to reduce the fiscal deficit, which was at 4.6% of GDP. *Id.* However, by 1994, instead of decreasing, the deficit had actually increased to 5.1% of GDP. *Id.* By 1999, the deficit was still four percent of GDP. *See* REGIONAL SURVEYS OF THE WORLD, *supra.*

244. Andrew Conteh, *Sub–Saharan Africa in the Post Cold War Era*, *in* THE POLITICS AND POLICIES OF SUB–SAHARAN AFRICA 73–76 (Robert A. Dibie ed., 2001).

245. International Monetary Fund, Annual Report 2009 47, *available at* http://www.imf.org/external/pubs/ft/ar/2009/eng/index.htm (last visited Oct. 21, 2013) (showing that the aggregated voting power for all Sub–Saharan countries is 4.36 percent, while the Unites States alone holds 16.77 percent); *see* Maurilo Portugal, *Improving IMF Governance and Increasing the Influence of Developing Countries*, in IMF DECISION–MAKING, IN REFORMING THE GOVERNANCE OF THE IMF AND THE WORLD BANK 75, 83 (Ariel Buira ed., 2006) (explainifor Sub–Saharan Africa's voting power); *see also* MARCUS POWER, RETHINKING DEVELOPMENT AND GEOGRAPHIES 84 (2003) (explaining that similarly, in the World Bank, the G8 states hold ten times the voting power of all Sub–Saharan countries together). The G8 states hold forty percent of the voting power in the World Bank, while Sub–Saharan Africa holds just over four percent. *Id.*

3. The Asian Crisis

The Asian financial crisis destroyed "the conventional wisdom that East Asia's economies would prosper indefinitely."[246] While few scholars predicted it,[247] the crisis showed the flaws of IMF loan conditionality and consequences of global financial liberalization.[248] The "[f]inancial liberalization from the 1980's had major ramifications in the region as savings supplemented the already high domestic savings rates in the region to further accelerate the rate of capital accumulation."[249]

Although there are at least four competing explanations that provide background for how the Asian financial crisis began,[250] it officially started in July 1997 in Thailand, after the Thai government began to float its currency, the Thai baht.[251] At that time, "the growth

246. Peter A. Coclanis & Tilak Doshi, *Globalization in Southeast Asia*, 570 ANNALS, July 2000, at 49, 56-57 (explaining that few would have predicted the crisis because leading up to 1995 because per capita growth in Singapore, Indonesia, Malaysia, and Thailand was much greater in comparison to that of South Asia and Latin America); JEFFREY D. SACHS & WING THYE WOO, UNDERSTANDING THE ASIAN FINANCIAL CRISIS, THE ASIAN FINANCIAL CRISIS: LESSONS FOR A RESILIENT ASIA 13 (Wing Thye Woo, Jeffrey D. Sachs, & Klaus Schwab, eds. YEAR) ("The World Bank and International Monetary Fund . . . are now divided on the causes of the crisis, and on what the policy advice should have been given."). *But see* Paul Krugman, *The Myth of Asia's Miracle*, 73 FOREIGN AFF. 62, 64 (1994) (explaining, before the Asian Crisis began, that the rapid Asian growth that occurred at the beginning of the 1990's was not a model that the West should follow, and that future growth would be limited).

247. JOMO K.S., GROWTH AFTER THE ASIAN CRISIS: WHAT REMAINS OF THE EAST ASIAN MODEL? 2 (March 2001), *available at* http://www.unctad.org/en/docs/pogdsmdpbg24d10.en.pdf.; *see also* STIGLITZ, *supra* note 1, at 6 (arguing how decisions concerning necessary reforms in global institutional arrangements must be made not by a self selected group such as the G-7, G-8, G-10, G-20, or G-24, but should be made by all the countries of the world).

248. STIGLITZ, *supra* note 1, at 13.

249. MANUEL F. MONTES, THE CURRENCY CRISIS IN SOUTHEAST ASIA 1 (2000) (listing four competing explanations of the Asian financial crisis). The four explanations are: the entry of low cost producers into the international export markets; macroeconomic weakness in all economies; undisciplined banking; or the shear differences between all of the different countries' economies. *Id.; see* Laurent L. Jacque, *The Asian Financial Crisis: Lessons from Thailand*, 23 FLETCHER F. WORLD AFF. 87 (1999) ("[T]he Asian crisis primarily originated in the private sector. It is a crisis of flawed resource allocation abetted by misguided government policies and unfortunately corrected by Western style policies often ill-adapted to the idiosyncrasies of Asian capitalism.").

250. SACHS & WOO, *supra* note 246, at 13 (explaining the confusion among experts as to how the financial crisis occurred even after analysts had been praising Asian economies up until the unexpected collapse in July 1997).

251. MORRIS GOLDSTEIN, THE ASIAN FINANCIAL CRISIS: CAUSES, CURES, AND SYSTEMIC IMPLICATIONS 7 (1998); *see* Helen Hughes, *Crony Capitalism and the East Asian Currency Financial 'Crises'*, POLICY (Spring 1999) *available at*

of bank and nonbank credit to the private sector exceeded. . .the already rapid growth of real GDP. . ., [and] exposure to the property sector accounted for roughly twenty-five to forty percent of total bank loans in Thailand, Indonesia, Malaysia, and Singapore, and more than that in Hong Kong."[252] With an overextension and concentration of credit, countries became vulnerable to shifts in cyclical and credit conditions.

By the end of 1997, Indonesia, Malaysia, South Korea, Thailand, and the Philippines' stock markets had lost more than sixty percent of their value.[253] "[T]he Indonesian rupiah was down more than 80 percent against the dollar, and the currencies of Thailand, Malaysia, and Philippines all fell by 30-50 percent; . . . [w]ithin months of the baht flotation, the stock markets of all four saw losses of sixty percent or more in dollar terms."[254] Most surprisingly affected by the crisis was South Korea, because at the onset it was the most rapidly growing country in the region and the eleventh biggest economy in the world, yet after the crisis hit, South Korea lost its credibility as it became known that its banks lacked "commercial orientation" and had made too many risky loans.[255]

At the center of some of the criticism before the crisis was the IMF, whose inappropriate advice "led to overly tight macroeconomic policies and badly designed and badly handled restructuring programs."[256] Besides persuading Thailand into devaluation, the IMF

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http://www.cis.org.au/POLICY/Spr99/polspr99-1.htm (last visited Oct. 21, 2013) (explaining that most East Asian banks did not adopt the proper accountability and transparency measures necessary to police loaning practices, thus a high proportion of those loans were non-performing).

252. *Id.* at 8–9 (explaining that falling property prices and rising shares of nonperforming bank loans were a consequence of the ASEAN–4 economies being vulnerable to the shifts in credit and cyclical conditions). In an effort to minimize borrowing costs, too much of those countries' borrowing consisted of short maturities and/or foreign currency; an ultimately risky strategy as it contributed to currency mismatches. *Id.*; *see Overview, the Association of Southeast Asian Nations*, ASEAN, *available at* http://www.asean.org/asean/about-asean/overview (last visited Oct. 21, 2013) (providing an overview of ASEAN).

253. Coclanis & Doshi, *supra* note 246, at 59 (describing these events as the "Asian flu" or "bahtulism"); *see* Jomo K.S., *supra* note 247, at 12 (discussing how the Republic of Korea's currency, the won, collapsed, and as a result, the Hong Kong dollar was directly attacked).

254. Coclanis & Doshi, *supra* note 246, at 59; *see* Jomo K.S., *supra* note 247, at 12.

255. John W. Head, *Global Implications of the Asian Financial Crisis: Banking, Economic Integration, and Crisis Management in the New Century*, 25 WM. MITCHELL L. REV. 939, 945–46 (1999) (explaining how South Korea's financial difficulties basically forced it to accept an IMF bailout package in December 1997). At the time, South Korea's twenty-one billion dollar IMF loan was the largest the IMF ever made. *Id.*

256. SACHS & WOO, *supra* note 246, at 14; *see* Hughes, *supra* note 251 (criticizing the

was alleged to have pressured Indonesia to devalue the rupiah, which also led to devaluation in the Philippines and South Korea, and the needless "debasing" of the Taiwan dollar.[257] The World Bank was not immune from criticism either, as just four years prior to the crisis it argued that Indonesia, Thailand, and Malaysia were the preferred models of economies for other developing countries to emulate.[258] Both the IMF and World Bank encouraged Asian countries to adopt a strategy known as "fast-track capitalism" which ended up putting countries in high-yield, yet high-risk sectors; this ultimately led to the crisis.[259]

After the crisis broke, the IMF attempted to come to the countries' rescue by instituting "programmes and conditionalities, as well as policies favored by the international. . .financial communities and others affected."[260] Its three-point strategy was aimed toward financing, macroeconomic policy, and structural reform within Indonesia, South Korea, and Thailand.[261] The IMF's programs "urged bank closures,

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IMF for funding countries that had balance of payment difficulties). This led to a moral hazard where private lenders and developing country borrowers relied upon the IMF for perpetual credit. *Id.* The author goes on to criticize the World Bank for giving loans to countries "that had no intention of following prudent economic policies." *Id.*

257. Editorial, *The IMF Crisis*, WALL ST. J., Apr. 15, 1998, at A22 (describing the IMF's mishandling of Asia's economy). "The IMF tripped this crisis by urging the Thais to devalue, then, promoted contagion by urging everyone else to do likewise." *Id.*

258. Jomo, *supra* note 247, at 1–2 (explaining The East Asian Miracle study conducted by the World Bank in 1993 that the World Bank sought to distance itself from). The study concluded, in contrast to the majority of case-studies such as those in Latin America and Africa, that structural adjustment programs were working in East Asia. *Id.*

259. Jomo, *supra* note 247, at 23–24; *see* John W. Head, *Lessons from the Asian Financial Crisis: The Role of the IMF and the United States*, 7 KAN. J.L. & PUB. POL'Y 70, 71–74 (1998) (detailing the IMF's bailout package broken down by country and dollar amounts); PETER G. ZHANG, IMF AND THE ASIAN FINANCIAL CRISIS 73–74, 78 (World Scientific Publ'g Co. Pte. Ltc.) (1998) (explaining, for example, how at the peak of the crisis, the IMF loaned South Korea fifty-eight billion dollars on December 4, 1997). The IMF's immediate response was to help Korea, Indonesia, and Thailand design programs of structural economic reforms to win investors' confidence. *Id.* The loans did not curb the financial crisis, because, for example, the South Korean won ended up falling to 1,745 wons for every U.S. dollar on January 23, 1998. *Id.*

260. *Recovery from the Asian Crisis and the Role of the IMF*, INT'L MONETARY FUND (June 2000), *available at* http://www.imf.org/external/np/exr/ib/2000/062300.htm#III (last visited Oct. 21, 2013) (listing the three components of the IMF's Asian crisis rescue plan). Although the IMF initially put in thirty-five billion dollars of support for Indonesia, Korea, and Thailand to be distributed equally, eventually, Indonesia got more money, in 1998 and 1999. *Id.* The macroeconomic policies affected were monetary and fiscal policies. *Id.* Money was tightened to stop the collapse of each country's exchange rate and, especially in Thailand, fiscal policy was tightened to diminish deficit increases. *Id.* Finally, structural reforms were taken to address corporate and financial sector weaknesses. *Id.*

261. Jomo, *supra* note 247, at 23–24.

government spending cuts and higher interest rates in the wake of the crisis."[262] In the end, the IMF's aid failed as the programs it instituted were contradictory in consequence and exacerbated the impact of the crisis in countless aspects.[263]

In a review of its handling of the Asian Crisis of 1997 to 1998, the IMF recognized that it needed to improve the infrastructure of the international financial system.[264] The IMF Managing Director, Dominique Strauss-Kahn, echoed this realization by stating "the Fund has advocated fiscal stimulus to restore global growth; . . . [t]here is now a broad consensus on this."[265] The lessons of the Asian Crisis have not manifested themselves within the framework of the policy advice that has been directed toward countries battling the current economic

262. *Id.*; *see* Editorial, *Dousing the IMF Fires*, WALL ST. J., Oct. 8, 1998, at A18. "Before you pour liquid on a raging fire. . .make sure it doesn't smell like gasoline . . . the IMF doesn't look like much of a fireman." *Id.* In March 1997, IMF Managing Director Michel Camdessus encouraged Thailand to devalue its currency, but as the Asian crisis proves, this was a huge mistake. *Id.* Then, the IMF gave eighteen billion to Thailand, forty–three billion to Indonesia, and fifty–seven billion to South Korea. *Id.* Those loans, coupled with loans to Russia and Brazil, totaled $171 billion from the beginning of the Asian Crisis through 1998 as the crisis continued. *Id.* In 1997, Camdessus predicted that the crisis would not be prolonged. Editorial, *supra* note 257. His prediction looked foolish for the IMF to have stood behind at the time. *Id.*; *but see Letters to the Editor: A Gross Distortion of IMF's Policies*, WALL ST. J., May 29, 1998, at A15 (discussing IMF External Relations Department Director Shailendra Anjaria's contention that the IMF did not force Thailand to devalue its currency).

263. *The IMF's Response to the Asian Crisis*, INT'L MONETARY FUND, *available at* http://www.imf.org/External/np/exr/facts/asia.htm (last visited Oct. 21, 2013) (explaining the six major areas where the IMF should be strengthened: (1) more effective surveillance over countries' economic practices and policies; (2) financial sector reform; (3) ensuring orderly and properly sequenced integration of international financial markets; (4) promoting regional surveillance; (5) promoting good governance and fighting corruption; and (6) more effective structures for orderly debt workouts).

264. Neil Watkins, *The London G–20 Summit: The Global New Deal We Need*, JUBILEE USA NETWORK at 3 (Mar. 3, 2009), *available at* http://www.jubileeusa.org/fileadmin/user_upload/Resources/G20/Briefing_note_G20_London_Summit.pdf (last visited on Oct. 22, 2013) (quoting Managing Director of the IMF, Dominique Strauss–Kahn).

265. *See id.* at 4 (discussing the recent history of the IMF in its loans to Serbia, El Salvador, Latvia, and Hungary). Serbia was told that anything less than a tight fiscal stance would jeopardize the credibility of the program in the eyes of foreign investors and the Serbian public. *Id.* A loan to El Salvador in January of 2009 advocated the attainment of economic growth through the administering of tax increases and diminishing gas and transport subsidies. *Id.* In funding a December 2008 loan to Latvia, the lending was contingent upon reduction in many government related expenditures as well as the incorporation of a value added tax. *Id.* The implementing of stringent fiscal deficit and inflation targets were also a critical component of the loan to Hungary in November 2008. Watkins, *supra* note 264, at 4. The IMFs polices toward developing countries differ from its policies toward developed countries. *Id.*

crisis.[266] The nature of the conditions attached to the loans symbolizes the unresponsiveness and systematic inability of the IMF to avoid the historic cyclical pattern of providing loans to those without the sufficient financial and economic systems set in place to provide for timely repayment, the cost of which has been nothing less than a country's sovereignty.[267]

IV. OTHER CHALLENGES TO THE BWIS

A. Challenge of the Monterrey Consensus

In 2002, the BWIs conjured a recipe of false hope through their participation in and subsequent lack of commitment to the Monterrey Consensus ("Consensus").[268] Prior to the Consensus, the World Bank was criticized because many of its low-interest loans went to corrupt governments who were not held responsible when no accounting could be given for the money.[269] The IMF was criticized for its expensive rescue operations, and for giving too little attention to improving financial structures in developing countries.[270]

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266. *See* PAUL BLUSTEIN, THE CHASTENING: INSIDE THE CRISIS THAT ROCKED THE GLOBAL FINANCIAL SYSTEM AND HUMBLED THE IMF 382 (Pub.Affairs) (2003) (suggesting that instead of attaching conditions, loans should only go to countries that pre–qualify by adhering to certain banking standards); *see also infra* Part IV.

267. *See* STIGLITZ, *supra* note 1, at 84 (proposing countercyclical lending to countries in distress in order to stabilize the suffering economies); *see id.* (stating how lending at higher rates in a cyclical manner will infringe upon the economic recovery of the nation). The policies pushed by the international financial institutions are now seen as having contributed to the lack in confidence in these institutions and the loan conditionalities they imposed. *See id.* at 110.

268. Editorial, *Forging the Monterrey Consensus*, N.Y. TIMES, Mar. 24, 2002, § 4 at 14 (explaining criticisms aimed at the World Bank and other international development bodies because the aid doled out by those institutions to countries made no great progress in those countries at eliminating poverty) [hereinafter *Forging the Monterrey Consensus*]; *see* Susanne Soederberg, *Recasting Neoliberal Dominance in the Global South? A Critique of the Monterrey Consensus*, ALTERNATIVES: GLOBAL, LOCAL, POL., Vol. 30, No. 3, 325 (July-Sept. 2005) (explaining how the World Bank found a seventy–three percent failure rate in Africa); *see also supra* (explaining the Monterrey Consensus conference). The Monterrey Consensus set a priority for combating corruption at all levels, reaffirmed at the Doha Conference. *See Draft Outcome Document on the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, Submitted by the President of the General Assembly in Accordance with General Assembly Resolution 62/187: Doha Outcome Document on Reviewing the Implementation of the Monterrey Consensus*, UNITED NATIONS (Jul. 28, 2008), *available at* http://www.un.org/esa/ffd/doha/draftoutcome/DraftOutcomeDoc_English.pdf (last visited Oct. 21, 2013)[hereinafter *General Assembly Resolution 62/187*].

269. *Forging the Monterrey Consensus*, *supra* note 268.

270. *See* General Assembly Resolution 55/2, Monterrey Consensus (Mar. 22, 2002),

The Consensus sought to establish a common ground for developed and developing countries to converge in an effort to stabilize and grow the global economy in pursuit of the MDG's development objectives.[271] The atmosphere leading into Monterrey was built upon several factors: the 1997 economic crisis in South East Asia;[272] international financial institutions ("IFIs") were not acting as neutral and independent public authorities; the Consensus' precursor, the Washington Consensus,[273] was "not solely political in nature, but had its roots in the changing nature of the world economy;"[274] and "growing

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reprinted in Financing for Development: Building on Monterrey, UNITED NATIONS 9 (2002), *available at* http://www.un.org/esa/ffd/documents/Building%20on%20Monterrey.pdf (last visited Oct. 21, 2013) [hereinafter *Building on Monterrey*]. As a result, the IMF attempted reorganization in its fight against poverty with lowering demands for loan approval. *Id.*; *see* M.L. NARASAIAH, MICROCREDIT AND RURAL POVERTY 103–04 (Discovery Publ'g House) (2006) (explaining that structural–adjustment programs were replaced by Poverty–Reduction Strategy Papers).

271. The Consensus contains six thematic "chapters" for action, including one devoted to external-debt-relief. *See Building on Monterrey*, *supra* note 270, at VII–X.

272. *See id.*; Akila Weerapana, *Lecture 23: The IMF and Its Critics, Spring 2003 & 2004*, WELLESLEY, *available at* http://www.wellesley.edu/Economics/weerapana/econ213/econ213pdf/lect213-23.pdf (last visited Oct. 21, 2013). Following the East Asia crisis, the IMF imposed conditions on the Indonesian government to get fiscal spending under control. *Id.* Rather than using financial aid to put an end to widespread corruption, the Indonesian government was forced to remove food and fuel subsidies, a blow to the poor in Jakarta. *Id.* The IMF was further criticized for allowing devaluation to occur, stating this was the catalyst to the crisis. *Id.* The IMF should be helping countries defend their currencies, rather than devaluing them. *Id.* The IMF required high interest rates in exchange for bailouts. Weerapana, *supra*; *see* Paul Blustein, *World Bank Turns Up Criticism of the IMF*, WASH. POST (Dec. 3, 1998), *available at* http://www.globalpolicy.org/component/content/article/209/43528.html (last visited on Oct. 21, 2013). Although the institutions usually work in tandem, the World Bank lending for long-term and the IMF short-term relief, this rift marked a growing separation between Europe and the United States of America. *See General Assembly Resolution 62/18*, *supra* note 268.

273. Soederberg, *supra* note 268 (explaining the Washington Consensus as the neo–liberalistic policy of the IFIs, such as the IMF and World Bank, that believed political and social problems should not be solved through state intervention and instead through market–based mechanisms).

274. *See* Soederberg, *supra* note 268 (discussing three caveats leading to the Monterrey consensus). The heavily skewed IMF voting power and United States dominance within the World Bank's standby capital were examples of how IFIs are not natural and independent authorities. *Id.* The roots of the Washington consensus being in the changing nature of the economy meant that policies were created as a reaction to the crisis of overproduction and thus there was a growing dependence of corporations, governments, and consumers on debt financing. *Id.* Finally, the policies of the Bush administration led to overproduction because performance-based grants were intrinsically tied to the efforts to maintain U.S. competitiveness and dominant position in the world economy. *Id.* Thus, tax cuts and government spending, coupled with a fear of public

protectionism, unilateralism, and fiscal overrun pursued by the Bush administration" created a crisis of overproduction, which was not simply a reaction to the events of September 11, 2001.[275]

Preparation for the Consensus spanned four years of "patient consensus-building work."[276] By the end of the fourth preparatory meeting for the Monterrey Conference, all participants endorsed the Monterrey Consensus.[277] The Zedillo report,[278] prepared by a panel of

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backlash by policymakers wary of criticizing the administration's budget, led to a rise in debt levels. *Id.*

275. *Calls Heard for Increased Aid to Reduce Poverty at Monterrey Conference on Development Financing*, UNITED NATIONS, Mar. 21, 2002, *available at* http://www.un.org/ffd/pressrel/21c.htm (last visited Oct. 30, 2013) (explaining how September 11 tore down the invisible wall dividing rich and poor worldwide) [hereinafter Calls Heard for Aid]. The Monterrey Conference should serve to rebuild confidence lost in the international economy and system as a result of 9/11/01 events. *See id.*; *Group of 77 Plays Key Role in Monterrey Consensus on FFD*, G77, *available at* http://www.g77.org/news/monterrey.htm (last visited Oct. 30, 2013) [hereinafter *Group of 77*]. "Greater confidence should lead to higher investments and stronger recovery as well as concrete measures in international trade and better prices for primary commodities." *Group of 77, supra*. Since then, re-development in the world's poorest societies as taken on a sense of urgency because "although not a direct cause of terrorism, 'poverty breeds frustration and resentment . . . particularly in those countries in which poverty is coupled with a lack of political rights and basic freedoms.'" Calls Heard for Aid, *supra* note 276; *see* Lan Cao, *Cultural Change*, 47 VA. J. INT'L L. 357, 363 (2007) (citing Colin Powell, *No Country Left Behind*, FOREIGN POL'Y Jan.-Feb. 2005, at 30); *see also* Soederberg, *supra* note 268 (discussing three caveats leading to the Monterrey consensus). The heavily skewed IMF voting power and United States dominance within the World Bank's standby capital were examples of how IFIs are not natural and independent authorities. Calls Heard for Aid, *supra*. The roots of the Washington consensus being in the changing nature of the economy meant that policies were created as a reaction to the crisis of overproduction and thus there was a growing dependence of corporations, governments, and consumers on debt financing. *Id.* Finally, the policies of the Bush administration led to overproduction because performance-based grants were intrinsically tied to the efforts to maintain U.S. competitiveness and dominant position in the world economy. *Id.* Thus, tax cuts and government spending, coupled with a fear of public backlash by policymakers wary of criticizing the administration's budget, led to a rise in debt levels. *Id.*

276. Building on Monterrey, *supra* note 270, at vii. The Paris Club has since become a highly-popular bilateral institution supplying multiple avenues of debt relief to many low-income developing countries. *See* Club de Paris, *available at* http://www.clubdeparis.org/en/ (last visited Oct. 30, 2013). Under most administrations, a common thread has been the identification and focus on enhancing long-term development goals. *See* JOHN R. ERIKSSON, TOWARD COUNTRY-LED DEVELOPMENT: A MULTI-PARTNER EVALUATION OF THE COMPREHENSIVE DEVELOPMENT FRAMEWORK 25 (2003). Nations were encouraged to lead a strong commitment and ownership of national strategies. *Id.*

277. *See* Ernesto Zedillo, Report of the High-Level Panel on Financing for Development, U.N., *available at* http://www.un.org/esa/ffd/a55-1000.pdf (last visited Oct. 30, 2013) [hereinafter "Zedillo Report"]. The MDGs can only be reached if developed countries increased aid by $50 dollars per year. *Id.*

278. Barbara Crossette, *No Headline*, N.Y. TIMES, July 1, 2001 at 6 (discussing the

the world's leading financial and development experts,[279] was reviewed by the preparatory committee and indicated that restructuring the international financial architecture was a crucial issue in attaining the MDGs.[280]

External-debt relief, in addition to other goals and challenges of financing for development, was not a novel idea to the heads of State and Government at the international conference[281] in Monterrey, Mexico.[282] External debt damaged countries by consuming resources that could be used for public services and poverty eradication.[283] Thus, the focal point of the development committee's meeting at Monterrey was ensuring commitment to lifting more people from poverty and allowing them to reap benefits associated with globalization and economic development.[284] The challenging plan set forth by the BWIs

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recommendations put forth in the Zedillo report as setting an objective of free trade to take place between industrial and developing countries, as it already had between industrial countries). *See* Zedillo Report, *available at* http://www.un.org/esa/ffd/a55-1000.pdf (last visited Oct. 30, 2013) (describing the key issues in the Zedillo Report, which include mobilizing domestic financial resources, foreign investment, trade, official development assistant (ODA), external debt and the international financial architecture); *see also* World Bank and IMF Roles Debated at Development Finance Summit, *available at* http://www.brettonwoodsproject.org/art-16170 (last visited Oct. 30, 2013) [hereinafter Roles Debated].

279. Roles Debated, *supra* note 278.

280. *See Development Finance Summit a Fiasco: Say Campaigners*, BRETTON WOODS PROJECT (Mar. 25, 2002), *available at* http://www.brettonwoodsproject.org/art-16172 (last visited Oct. 30, 2013) [hereinafter Development Finance Summit].

281. The summit marked the culmination of four years of "patient consensus-building work." *See* Soren Ambrose, *Social Movements and the Politics of Debt Cancellation*, ALLBUSINESS, *available at* http://www.allbusiness.com/accounting/debt/883639-1.html (last visited Oct. 26, 2013).

282. BUILDING ON MONTERREY, *supra* note 270, at vii (explaining that the heads of State and Government met March 18–22, 2002 in Monterrey, Mexico to discuss and finalize implementation of the Consensus).

283. BUILDING ON MONTERREY, *supra* note 270, at 25. "We must do our utmost to ensure that people at the local level understand this process, are engaged, and have the means to take advantage of its opportunities." *Id.* Criticism at the NGO Global forum stated "Monterrey . . . is an example of the negative impacts of globalization on people, particularly the high social costs of production of the large-scale enterprises." *Id.* at 307. Rather than focusing on privatization and neo-liberal tactics, which incur substantial micro-economic harms, the focus should be on developing world-wide economy based on human rights and environmental protections. *See id.*

284. *See* Trevor Manuel, Remarks at the International Conference on Financing for Development (Mar. 18, 2002), http://www.un.org/ffd/statements/cdcE.htm (last visited Oct. 12, 2013); *see also Inclusive Globalization*, United Nations Development Program on Poverty Reduction, *available at* http://www.undp.org/poverty/inclglob.htm (last visited Oct. 12, 2013) [hereinafter *Inclusive Globalization*]. Chairman Manuel noted that although the consensus for cooperation between developed and developing countries were strong, so was

involved commandeering globalization to advance the goal of poverty reduction.[285] Chairman Trevor Manuel stated that "[r]eform of international financial governance is critical to ensuring developing countries benefit from globalization through participation."[286] Challenges in achieving debt-relief changed institution objectives from "achieving a permanent exit from debt rescheduling . . . to removing the debt overhang within a reasonable time and providing a base from which to achieve debt sustainability."[287]

Since halving poverty was the cornerstone of the MDGs,[288] the primary focus in formulating the Consensus was to address the commonly occurring "shortfalls in resources required to achieve the internationally agreed development goals, including those contained in the United Nations Millennium Declaration (the "Declaration")."[289] At the conference, the "performance-driven aid"[290] initiative was heavily supported through the two-tiered lending structure of the Highly

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the risk of failing to implement the Consensus. *Id.* The BWIs envision globalization as the solution to poverty, and their neo–liberal practices as its antidote. *See* Joseph Yu, *Has Globalization eased global poverty?*, CHOIKE.ORG, Aug. 2005, http://www.choike.org/nuevo_eng/informes/3316.html. The BWIs claim ineffective integration of low–income countries rather than globalization has caused the onslaught of global poverty. *See id.* "Although globalization brought overall net benefits and was also contributing to poverty reduction, its growth effects were unequally distributed, and so far it had contributed little to greater gender equality. As a result, progress towards the Millennium Development Goals differed considerably across regions and countries." *Id.*; *see* United Nations Conference on Trade and Development, Accra, Ghana, Apr. 20–24, 2008, *Globalization, Development, and Poverty Reduction– Their Social and Gender Dimensions*, U.N. Doc. TD/L.405, *available at* http://unctad.org/en/Docs/tdl405_en.pdf.

285. Remarks at the International Conference on Financing for Development, *supra* note 284;*see also Inclusive Globalization*, *supra* note 284; *Poverty Reduction,* UNITED NATIONS DEVELOPMENT PROGRAMME, http://www.undp.org/poverty/incIglob.htm (last visited Oct. 27, 2013).

286. *Id. See* A. GESKE DIJKSTRA, THE IMPACT OF INTERNATIONAL DEBT RELIEF 107 (2007).

287. Calls Heard for Aid, *supra* note 275.

288. *Monterrey Consensus of the International Conference on Financing for Development*, UNITED NATIONS (2002), *available at* http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf (last visited Oct. 30, 2013) [hereinafter *International Conference on Financing and Development*].

289. Sophie Smith & Anna Triponel, *Development Goals and Indicators: Education as a Lynchpin for Development: Legal and Policy Considerations in the Formation of Education for All – Fast Track Catalytic Trust Fund*, 6 SUSTAINABLE DEV. L. & POL'Y 8, 8 (2005) ("international development aid should follow and support clear evidence of commitment to reform and improvement on the part of the recipient country").

290. *See Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative*, INT'L MONETARY FUND, *available at* http://www.imf.org/external/np/exr/facts/hipc.htm (last visited Oct. 26, 2013); *see also The Heavily Indebted Poor Countries Initiative*, THE WORLD BANK, *available at* http://go.worldbank.org/XLE8KKLEX0 (last visited Oct. 26, 2013).

Indebted Poor Countries Initiative (the "HIPC").[291] The Consensus also called for international financial institutions and bilateral agencies to "scale-up."[292] The main emphasis was "broadening and strengthening the role of developing countries in international economic decision-making and norm setting."[293]

Crucial to this objective was a financial structure and system that could be beneficial, purposeful, and feasible in facilitating the stated 21st century values.[294] The Consensus sought the formulation of a "new partnership between developed and developing countries,"[295] fueled by the fundamental values expressed in the Declaration.[296] It promoted the values of freedom, equality, solidarity, tolerance, respect for nature, and shared responsibility[297], as essential for survival in the 21st century international arena.

"Sustainable debt financing is an important element for mobilizing resources for public and private investment."[298] The Consensus promoted the idea of accountability, stating "[d]ebtor and creditor countries should be mutually responsibility for preventing and resolving un-sustainable debt situations."[299] The BWIs' critical role, in addition to facilitating lending venues, was to provide "technical assistance for external debt management and debt tracking."[300]

Several opinions regarding the facilitation of worldwide debt

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291. *Id.*

292. BUILDING ON MONTERREY, *supra* note 270, at 3.

293. *See* United Nations Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess., Supp. No. 49, at 4, U.N. Doc. A/55/49 (2000), *available at* http://www.un.org/millennium/declaration/ares552e.htm [hereinafter Millennium Declaration]. Development and poverty eradication "depends on good governance at the international level and on transparency in the financial, monetary and trading systems." *Id.* "We are committed to an open, equitable, rule–based, predictable and non–discriminatory multilateral trading and financial system." *Id.*

294. *International Conference on Financing and Development*, *supra* note 288.

295. Millennium Declaration, *supra* note 293. The declaration was a re–affirmation of the original charter of the United Nations. *See id.* In addition to the original principles of human dignity, equality, and equity, the Millennium Declaration sought to expand their perspective to ascertain the needs of a developing global economy. *See id.*

296. *See* Millennium Declaration, *supra* note 293. Responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally. *Id.* As the most universal and most representative organization in the world, the United Nations must play the central role. *Id.*

297. *See* BUILDING ON MONTERREY, *supra* note 270, at 4.

298. *Id.* at 9.

299. *Id.* at 219.

300. Calls Heard for Aid, *supra* note 275.

reduction were presented at the Consensus.[301] The developed nations and developing countries held differing views on how debt should be reduced. Norway's Prime Minister Kjell Magne Bondevik informed delegates that the Norwegian government planned to increase official development assistance from .92% to 1% of GDP by 2005, advance policy coherence, and forgive all debts to countries under the HIPC.[302] Most donor countries only provided 0.22% of GDP, with only five countries reaching the 0.70% target.[303] Former U.S. President George W. Bush proposed, "development resources should be distributed fifty percent for grants and fifty percent for loans."[304] The approach to cancellation of debts expressed by NGOs attending the conference was heavily ignored.[305]

Developing countries held strong views about how poverty reduction should have been accomplished.[306] Small island nations

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301. *See id.*

302. *See id.* By the rate at which it was improving at the time of the conference, the ODA would only reach 0.7% in 2032. *See id.* The European Union was only contributing 0.27%, pledging to increase its contribution to 0.33% at the EU Barcelona Summit. *See id.*; *see Small Steps Towards More Development Aid: Financing for Development Conference Finishes in Monterrey*, OUTREACH 2002 (Mar. 25, 2002), *available at* www.earthsummit2002.org/es/newsletter/Issue%2020.rtf.

303. *See* Calls Heard for Aid, *supra* note 275. Proposed increase in development assistance by the United States was projected to reach "a $5 Billion annual increase over current levels." *Id see* BUILDING ON MONTERREY, *supra* note 270, at 113; *see also* Stephen Marks, *U.S. Foreign Policy and Human Rights: The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137, 156–57 (2004) (discussing Bush's speech at Monterrey). Bush said that developed nations had duties to share wealth and encourage sources that produce wealth such as economic freedom, human rights, rule of law, and political liberty. *Id.*

304. *See* BUILDING ON MONTERREY, *supra* note 270, at 308. "[A] fair and transparent process of arbitration" should be used to cancel "external debt of countries of the south." *Id.* "All forms of conditionality should be eliminated, such as tied aid, and food aid, which undermines the productive capacity, and food security of countries." *Id.*

305. *See World Economic Outlook: Database – WEO Groups and Aggregates Information*, INT'L MONETARY FUND (Oct. 2009), *available at* http://www.imf.org/external/pubs/ft/weo/2009/02/weodata/groups.htm#oem (listing emerging and developing economies as well as advanced economies) (last visited Oct. 15, 2013).

306. Gaston Browne, Minister of Planning Implementation and Pub. Serv. Affairs of Ant. & Barb., Statement at the International Conference on Finance for Development, (Mar. 22, 2002), *available at* http://www.un.org/ffd/statements/aabE.htm (explaining how developing countries wanted to make sure the Consensus would catapult developed countries into action instead of being just another "talk shop") (last visited Oct. 15, 2013); *see* Eduardo Duhalde, President of the Arg., Statement at International Conference on Financing for Development (Mar. 21, 2002), *available at* http://www.un.org/ffd/statements/argentinaE.htm (stating: "the gap between many emerging economies and developed countries has not been reduced[,] and [o]n the contrary, it seems

pushed for the international community to expand the HIPC.[307] African developing countries stressed that since most of their economies were based on exporting, the deterioration of trade had a negative impact on the balance of payments and thus, economic growth.[308] Donald Kaberuka, Rwanda's Minister for Financing and Economic Planning, stressed that aid alone would not eliminate poverty and that there should be greater integration of poor countries into world-wide trade and investment.[309]

To achieve the development objectives, including the MDGs, the U.N. members and the representatives from the BWIs addressed six areas of financing for development that ultimately would become known as the Monterrey Consensus: (1) the mobilization of domestic financial resources for development;[310] (2) the mobilization of international resources for development through foreign direct

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deeper day by day") (last visited Oct. 15, 2013).

307. WORLD BANK, WORLD DEVELOPMENT INDICATORS 2007, 11, 13 (2007) (explaining that small island developing nations have special needs due to their particularly difficult geographic constraints, such as a small tax base, lack of natural resources, lack of access to ODA, substantially reduced foreign direct investment flows, and a lack of access to capital markets; several of these needs were addressed through the Programme of Action for the Sustainable Development of Small Island Developing States and the 22nd special session of the General Assembly).

308. Calls Heard for Aid, *supra* note 275 (discussing how creating sound environments, frameworks for investment, structural and government reforms, and transparency are all primary responsibilities of developing countries and aid should be secondary).

309. Altai Efendiev, Chairman of the Delegation of the Republic of Azerbaijan, Statement to the International Conference on Financing for Development at Monterrey, Mexico (Mar. 21, 2002), *available at* http://www.un.org/ffd/statements/azerbaijanE.htm.

> Handling and managing the expected massive inflows of resources in a most efficient way, transform potentially high growth into sustainable development is one of the major challenges. . .building up adequate institutional infrastructure, enhancing institutional capacities, introducing good-governance practices, pursuing radical structural and administrative reforms, implementing poverty reduction strategy, SME and non-oil sector development are . . .the areas where the international assistance and expertise is most needed.

Id.

310. *See* BUILDING ON MONTERREY, *supra* note 270, at 4. "In our common pursuit of growth, poverty eradication and sustainable development, a critical challenge is to ensure the necessary internal conditions for mobilizing domestic savings, both public and private, sustaining adequate levels of productive investment and increasing human capacity." *Id.* "An enabling domestic environment is vital for mobilizing domestic resources, increasing productivity, reducing capital flight, encouraging the private sector, and attracting and making effective use of international investment and assistance." *Id.* "We recognize the need to strengthen and develop the domestic financial sector, by encouraging the orderly development of capital markets . . . addressing development financing needs, including the insurance sector and debt and equity markets." *Id.*

investment and other private flows;[311] (3) international trade as an engine for development;[312] (4) increasing international financial and technical cooperation for development;[313] (5) external debt;[314] and (6) addressing systemic issues, including enhancement of the coherence and consistency of the international monetary, financial, and trading systems in support of development.[315] The ability of the BWIs to contribute in

311. *See* BUILDING ON MONTERREY, *supra* note 270, at 5. "We will support new public/private sector financing mechanisms, both debt and equity for developing countries and countries with economies in transition." *Id.* at 6. *See* Abdel H. Bouab, Comment, *Financing for Development, the Monterrey Consensus: Achievements and Prospects*, 26 MICH. J. INT'L L. 359, 361 (2004). "Both domestic and international conditions are necessary to facilitate direct investment flows to Least Developed Countries ('LDCs')." *Id.*; *see* U.S.A. Gov't Submission, Review of the Monterrey Consensus on Financing for Development Feb. 15, 2008 Review Session on Mobilizing International Resources for Development: Foreign Direct Investment and Other Private Flows, *available at* http://www.un.org/esa/ffd/doha/chapter2/USA_submission.pdf (last visited Oct. 12, 2013) (stating each country is primarily responsible for maintaining its own economic environment and international institution support should be considered secondary). Although the benefits of foreign direct investment include "increase in employment, technological spill-overs, higher public revenue, and a positive impact on growth . . . such benefits may be off-set by negative long-term balance-of-payments effects." *Id.*; *see* David Woodward, *Foreign Direct Investment for Development?*, G-24,1, http://www.g24.org/PolicyBriefs/pbno23.pdf (last visited Oct. 12, 2013). "A clear distinction needs to be made between maximizing FDI flows and maximizing their contribution to development" in order to make effective use of funds. *Id.* at 2.

312. *See* BUILDING ON MONTERREY, *supra* note 270, at 6. Trade is the single most important external source of development financing. *See id.* "We urge international financial institutions, including regional development banks, to continue to support projects that promote sub-regional and regional integration among developing countries and countries with economies in transition. . .we invite multilateral and bilateral financial and development institutions to expand and coordinate their efforts." *Id.* at 7; *see* Bouab, *supra* note 311, at 362.

313. *See* BUILDING ON MONTERREY, *supra* note 270, at 8. "We recognize that a substantial increase in ODA and other resources will be required if developing countries are to achieve the internationally agreed development goals and objectives, including those contained in the Millennium Declaration." *Id.* "There is a need for the multilateral . . . development institutions to intensify efforts to . . . enhance the absorptive capacity and financial management of the recipient countries . . . [and] enhance recipient countries' input into and ownership of the design, including procurement, of technical assistance programs." *Id.*; *see* Bouab, *supra* note 311, at 363.

314. *See* BUILDING ON MONTERREY, *supra* note 270, at 9. "External debt relief can play a key role in liberating resources that can then be directed towards activities consistent with attaining sustainable growth and development." *Id.*

315. *Id.* at 10; *see* Bouab, *supra* note 311, at 365; UNITED NATIONS ECON. AND SOC. COUNCIL, ECON. AND SOC. COMM'N FOR ASIA AND THE PAC., *Date, Venue and Theme Topic for the Sixty-First Session of the Commission*, *available at* http://www.unescap.org/60/E/E1327e.pdf (last visited Oct. 10, 2013). Commentators have suggested these six themes can actually be merged into four: (a) bringing about a substantial increase in the volume and effectiveness of foreign resource flows (private, bilateral, and

these areas, and particularly the sixth one which touches precisely on economic governance, was crucial to their viability.[316]

With public skepticism looming,[317] early criticisms regarding Monterrey were that it did not call for independent external evaluations of the performance of either the World Bank or the IMF,[318] and few initiatives were substantially generated to achieve the MDGs.[319] Furthermore, insufficient attention was given to reforming the international financial institutions regarding composition and decision-making process of the executive boards in dealing with debt relief.[320] In

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multilateral) in support of development, with a clear focus on poverty eradication; (b) setting up a fair, transparent, and ethical procedure and institutional framework for resolving external debt problems; (c) improving global economic governance to make it more participatory and accountable to a broader community of nations; and (d) creating an international trading environment that is more supportive of growth, in general, and the development of the poor, in particular. *Id.*; *see* Innamul Haque & Ruxandra Burdescue, *Monterrey Consensus on Financing for Development: Response Sought from International Economic Law*, 27 B.C. INT'L COMP. L. REV. 219, 243-44 (2004).

316. *See* Latin American and Caribbean Economic System (SELA), THE MONTERREY CONSENSUS SIX YEARS LATER AND FINANCING FOR DEVELOPMENT IN LATIN AMERICA AND THE CARIBBEAN 9 (June 20, 2008), *available at* http://www.sela.org/DB/ricsela/EDOCS/SRed/2008/06/T023600002872-0-Monterrey_Consensus_six_years_later_and_financing_for_development_in_LAC.pdf (last visited Oct. 21, 2013). "A real reform of the Bretton Woods Institutions is necessary . . . [t]he boards of directors of these institutions must be restructured so as to increase the number of seats for least developed countries." *Id.* at 23. Others have stated the UN, rather than the BWIs should take charge in restructuring worldwide finances. *Id.*; *see* Rbisso, *U.N. Only Legitimate Body to Reform Financial System*, IFIWATCH.NET (Nov. 22, 2008), *available at* http://www.ifiwatchnet.org/?q=en/node/26509 (last visited Oct. 21, 2013).

317. *See* Development Finance Summit, *supra* note 280 (explaining the skepticism as the product of the Monterrey Consensus being drafted in preparatory committees, and not being subject to any further negotiations). Thus, the predetermined nature of the Conference caused many civil society organizations to question their own, what was then, upcoming participation in the Conference. *Id.*

318. *Assessment of the FfD Outcome Paper and Proposed Next Steps*, BRETTON WOODS PROJECT (Mar. 25, 2002), *available at* http://www.brettonwoodsproject.org/art-16171 [hereinafter *Assessment of the FfD*]; *see* Independent Evaluations Office, *available at http://www.ieo-imf.org/ieo/pages/ieohome.aspx* (last visited Oct. 21, 2013) [hereinafter IEO] (discussing the IMF's Independent Evaluation Office ("IEO")). The IEO was established in 2001 "to conduct independent and objective evaluations of Fund policies and activities." *Id.* The IEO is fully independent of IMF management and operates at arm's length from the Executive Directors. *Id.* The IEO's mission is to "[e]nhance the learning culture within the Fund, [s]trengthen the Fund's external credibility, [p]romote greater understanding of the work of the fund, and [s]upport institutional governance and oversight." *Id.*

319. Development Finance Summit, *supra* note 280 (explaining that civil society groups organized Foro Global, ahead of the Conference, to challenge the Monterrey Consensus). The Consensus was chastised for failing to propose any new ways to mobilize finances toward achieving the MDGs. *Id.*

320. *Assessment of the FfD*, *supra* note 318.

response to criticisms, IMF Managing Director, Horst Köehler, proclaimed the underlying stigma of the new plan: "nothing will work without good governance."[321] Under the HIPC, the IMF would contribute rehabilitation and stimulus loans once the poor countries took certain measures in evaluating and formulating their domestic policies.[322] Priorities included: trade; a standard of 0.7% GNP for debt assistance; debt relief; and institutional capacity.[323]

With twenty-five years of failed structural adjustment programs for poverty reduction and the inability to assist major countries out of poverty crisis,[324] whether the IMF is truly in a position to command the correct administration of such funds towards developing counties is at issue. However, it is fair to recognize, given the traditional opposition

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321. Horst Köehler, Managing Dir., Int'l Monetary Fund, Introductory Remarks at the International Conference on Financing for Development (Mar. 18, 2002), *available at* http://www.un.org/ffd/statements/imfE.htm (last visited Oct. 21, 2013) (stating poor countries should be ready to confront responsibility to their people before the international community can step in to bail them out); *Horst Köhler: Biographical Information*, INT'L MONETARY FUND, *available at,* http://www.imf.org/external/np/omd/bios/hk.htm (last visited Oct. 21, 2013). Horst Köhler served as Germany's Deputy Minister of Finance from 1990 to 1993. *Horst Köhler: Biographical Information*, INT'L MONETARY FUND, *available at* http://www.imf.org/external/np/omd/bios/hk.htm (last visited Oct. 21, 2013). During that time, he led negotiations on behalf of the German government on the Maastricht treaty. *Id.* He was President of the German Savings Bank Association from 1993 to 1998, and in September 1998, he was appointed President of the European Bank for Reconstruction and Development. *Id.* From May 2000 to March 2004 Köhler served as the Managing Director of the International Monetary Fund. *Id.*

322. *Horst Köhler: Biographical Information*, INT'L MONETARY FUND, *available at* http://www.imf.org/external/np/omd/bios/hk.htm (last visited Oct. 21, 2013); *see* Rick Rowden, *A World of Debt: Why "Debt Relief" has Failed to Liberate Poor Countries*, AM. PROSPECT, July 1, 2001, at 29, *available at* http://www.thirdworldtraveler.com/Reforming_System/World_of_Debt.html (last visited Oct. 22, 2013) (criticizing the HIPC initiative). Although the HIPC framework invites NGOs and civic groups to consult with governments, there are not any clear guidelines as to how a legitimate NGO can be identified. *Id.* Governments in some countries had the ability to handpick who was allowed to participate in the poverty reduction process. *Id.* Legitimate NGOs have called this process a joke. *Id.*

323. Rowden, *supra* note 322. Even the IMF doubted its capacity to provide assistance to poor countries. *Id.* A draft resolution by the economic and financial committee, in a follow-up meeting to the Monterrey Consensus held in 2005, urged for time tables to stage increments for developed countries to achieve 0.7% GDP, reaching 0.5% by 2010. *See* Press Release, United Nations, Second Comm. Approves Draft Resolution Underlying Need to Improve Commitments of Monterrey Consensus, GA/EF/3141 (Dec. 20, 2005), *available at* http://www.unis.unvienna.org/unis/pressrels/2005/gaef3141.html (last visited Oct. 21, 2013).

324. *IMF Support for Low-Income Countries*, INT'L MONETARY FUND (Sept. 30, 2013), *available at,*
http://www.imf.org/external/np/exr/facts/poor.htm (last visited Oct. 21, 2013) [hereinafter IMF and Poor Countries].

of industrial countries to discuss international financial and monetary matters in a UN setting, the Monterrey Conference, and the resulting Consensus, constituted an unprecedented blueprint for action that would bring the Bretton Woods agencies, historically dominated just by Finance Ministries, into much closer touch with broader political decision makers.

B. The Challenge of the Heavily Indebted Poor Countries

In response to criticism of their development approach and structural-adjustment policies, the BWIs ended an eleven-year productivity drought with the formation of the HIPC.[325] With its establishment in 1996 and doubling in 1999, the HIPC provides comprehensive debt-relief[326] assistance to countries qualified to receive aid from the International Development Association (the "IDA").[327] To eliminate poverty, the mission was to promote local government spending on public services such as healthcare and education, and for relief to include multi-lateral creditors, such as the IMF and World Bank.[328] Unfortunately, commentators correctly predicted real debt relief provided by the HIPC would be substantially lower than

325. BARBARA P. THOMAS-SLAYTER, SOUTHERN EXPOSURE: INTERNATIONAL DEVELOPMENT AND THE GLOBAL SOUTH IN THE TWENTY-FIRST CENTURY (2003) (discussing how the HIPC doubled through the Enhanced HIPC Initiative). For the World Bank's description of the HIPC and links to the HIPC At-A-Glance Guide and Status of Implementation *see (HIPC) The Enhanced Heavily Indebted Poor Countries Initiative*, THE WORLD BANK, *available at* http://go.worldbank.org/85B908KVE0 (last visited Oct. 22, 2013).

326. LEONIE F. GUDER, THE ADMINISTRATION OF DEBT RELIEF BY INTERNATIONAL FINANCIAL INSTITUTIONS: A LEGAL RECONSTRUCTION OF THE HIPC INITIATIVE 2 (2009) (defining debt relief as "a restructuring of debt that contains an element of forgiveness or reduction, thus relieving the overall debt burden of a country"). Although providing relief, as opposed to extending loans, is a drastic turn from concessional lending structures of the past, the HIPC conditions ultimately reveal similar development goals. *Id.* at 28–29. In addition to the World Bank and IMF, there are eighteen lenders affiliated with the HIPC. *See id.* at 48. The debts relieved are "official debts" because they are owed by governments or state-owned enterprises. *Id.* Half of the debt relief will be provided by bilateral funding and the other cancelled by the BWIs. *Id.* at 49.

327. THOMAS-SLAYTER, *supra* note 325, at 175 (discussing that qualification includes an unsustainable debt burden, limited exports, low foreign currency reserves, and other limited resources). Of the qualified countries, eighty percent are in Africa. *Id.*; *see also* Part IV for regional case studies involving countries which qualify for the HIPC.

328. Sanjee Gupta et al., *Bulletin of the World Health Organization*, SCIELO PUBLIC HEALTH, *available at* http://www.scielosp.org/scielo.php?script=sci_arttext&pid=S0042-96862002000200011 (last visited Oct. 22, 2013) (discussing fiscal policy issues related to debt relief in twenty-three countries that reached their decision point under the HIPC framework).

anticipated.[329]

The BWIs began the HIPC initiative for the purpose of assisting poor countries that were sustaining potentially unmanageable amounts of debt.[330] The World Bank administers a trust fund, separate from its own resources, financed and administered by external donors, allowing for the leveraging of poverty-reduction programs by providing expanding development collaboration, including technical assistance, advisory services, debt relief, and co-financing.[331] In response to harsh criticism of the qualifying criteria for the original HIPC, the IMF initiated and advanced a version of the Initiative in 1999.[332]

In 2004, the World Bank stated: "the enhanced HIPC initiative provides an opportunity to strengthen the economic prospects and poverty reduction efforts of its beneficiary countries."[333] Nevertheless,

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329. Daniel Cohen, *The HIPC Initiative: True and False Promises* 5 (OECD Dev. Centre, Working Paper No. 166, 2000). Furthermore, the G-7 Leaders have expressed doubt stating:

> [N]ot all creditors have agreed to reduce their HIPC debts; the expected financing needs for the initiative have not been met, and as a result of weaker growth and export commodity prices, a number of countries could be at risk of not having sustainable debt loads at the Completion Point.

G-7 Leaders at Kananaskis Summit, *supra.* The leaders encouraged the BWIs to seek assistance from both regional and multilateral development institutions. *Id.* Furthermore, they requested the institutions seek additional assistance and availability from internal resources. *Id.* The leaders of the G-8 committed to contribute $1 billion to the initiative. *Id.*

330. *See Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative*, INT'L MONETARY FUND, *available at* http://www.imf.org/external/np/exr/facts/hipc.htm (last visited Oct. 22, 2013) [hereinafter Debt Relief Under HIPC]; *see also* Eugenia McGill, *Poverty and Social Analysis of Trade Agreements: A More Coherent Approach?*, 27 B.C. INT'L & COMP. L. REV. 371, 380 (2004) ("The initiative was the result of a civil-society campaign for meaningful external debt relief to free up scarce financial resources to address HIV/AIDS and other social development needs.").

331. John R. Crook, *United States Supports G-7 Decisions to Reduce Debt Burden of Poor Countries, Including Those Affected by December 2004 Tsunamis*, 99 AM. J. INT'L. L. 500, 501 (2005); Bonnie D. Jenkins, et. al., *International Institutions*, 37 INT'L LAW. 609 (2003). The United States has repeatedly encouraged other bilateral creditors to follow it on providing 100 percent loan forgiveness for MDB soft loans to the HIPCs. *Id.*

332. Robin Goldberg, *Financing Developments and the Desperate Need for Debt Relief*, 17 N.Y.L. SCH. J. HUM. RTS. 969, 969 (2001); Elizabeth Justice, *The African Union: Building A Dream to Facilitate Trade, Development, and Debt Relief*, 12 CURRENTS: INT'L TRADE L.J. 127, 130–31 (2003) (explaining that at its inception in 1996, only 5 countries qualified for the HIPC).

333. Bouab, *supra* note 311, at 365. "When default becomes inescapable, the debts that governments cannot pay are almost always owed in foreign currency . . . an inability to stay current on payments on external debt causes deep economic trauma." Barry Herman, *Doing the Right Thing: Dealing with Developing Country Sovereign Debt*, 32 N.C.J. INT'L L. & COM. REG. 773, 775 (2007). During the time building up to the Monterrey Consensus,

as of 2009, of the two trillion dollars owed by developing countries, about $250 billion is owed by nations that were given "low income" status.[334] Critics claim that although the program has good intentions, the program is inadequate because it does not force debtor nations to adequately reduce poverty or provide basic health care and education for their citizens.[335] Irrespective of these shortcomings, budget cuts are often incurred in these areas to meet stringent demands for receiving debt relief.[336]

Currently, thirty-eight states are recognized as HIPC qualified.[337] The initiative provides low-interest loans and debt relief to reduce external debt payments and achieve levels sustainable for countries to reach "completion point."[338] Factors for considering whether a country

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fifty–six countries had "arrearages in their foreign debt payments or rescheduled their debt–servicing obligations . . . accounting for one–fifth of world's population, over one billion people, but less than six percent of world's gross product." *Id.* at 776. Middle–income countries such as Argentina, the Dominican Republic, and Iraq have also restructured debts they could no longer service. *See id.* "While the IMF has usually assumed the role of international arbiter of how much relief, new financing, and policy reform a country needs to overcome its debt crisis, it has been widely accused of systematically underestimating the amount of relief needed." *Id.* at 779. There may be systematic bias for countries following IMF policy advice. *See id.*

334. David Ricksecker, *What is the HIPC Initiative?*, UNIV. OF IOWA CTR. FOR INT'L FIN. AND DEV. (Sept. 21, 2006), *available at* http://www.uiowa.edu/ifdebook/faq/faq_docs/HIPC.shtml (last visited Oct. 22, 2013) (describing how without major debt reduction, poor income countries are trapped and stuck making endless interest payments on debts). Since inception of the initiative, Guyana is the only country that has successfully been removed from the list of heavily indebted poor countries. *See* DIJKSTRA, *supra* note 286, at 107. The problem with achieving sustainability through the HIPC is evident in its qualification methods: almost ten countries have not even reached the decision point and eight more have not reached completion. *See id.*

335. *See* A. Mechele Dickerson, *Insolvency Principles and the Odious Debt Doctrine: The Missing Link in the Debate*, 70 LAW & CONTEMP. PROBS. 53, 59 (2007).

336. UNITED NATIONS, WORLD ECONOMIC SITUATIONS AND PROSPECTS 77 (2009), *available at* http://www.un.org/esa/policy/wess/wesp2009files/wesp2009.pdf (last visited Oct. 22, 2013). This would require the reduction in poverty to mirror the release of government-subsidized programs. *Id.*

337. INT'L MONETARY FUND, FACTSHEET–DEBT RELIEF UNDER THE HEAVILY INDEBTED POOR COUNTRIES (HIPC) INITIATIVE (Oct. 1, 2013), *available at* http://www.imf.org/external/np/exr/facts/hipc.htm (last visited Oct. 22, 2013). *See* Dickerson, *supra* note 335, at 59 (explaining that qualification requires eligible nations to have a current track record of satisfactory performance under a Poverty Reduction Strategy, an IMF program, or an interim PRS in place). An agreed plan must also be in place to clear any outstanding debts to foreign creditors. *Id.*

338. *See* INT'L MONETARY FUND, *supra* note 337 (describing the two-step process which countries must follow for HIPC Initiative assistance). The completion point is the second and final step where, upon completion, a country is allowed to receive its full debt relief committed at decision point. *Id.*

is heavily indebted include "a nation's total outstanding debt relative to exports and GDP, as opposed to rations of debt service expenses to government revenues."[339] Furthermore, qualification is conditional upon the governments' abilities to attain a range of economic management and performance targets as set and agreed upon with either the World Bank or the IMF.[340]

As the 'gatekeeper' for development assistance, the IMF requires HIPC countries to prepare and submit Poverty Reduction Strategy Papers (the "PRSPs") for approval, prior to receiving loans or debt relief.[341] However, this type of loan-bargaining structure often ends up one-sided, placing the IMF in a totalitarian position regarding budget cuts in the debtor countries,[342] and thereby limiting availability of

339. *See* Charles Seavey, *The Anomalous Lack of an International Bankruptcy Court*, 24 BERKLEY J. INT'L L. 499, 504 (2006). These standards "penalize countries with: (i) low government tax revenues relative to exports or GDP; and/or (ii) high debt service relative to total outstanding debt." *Id.* at 517.

340. *See* Ambrose, *supra* note 281, at 272 ("[Governments] with questionable creditworthiness will only be considered eligible for grants, loans, or credits once the IMF has signaled its approval of the government's economic program.").

341. *See Poverty Reduction Strategy Papers Fact Sheet*, INT'L MONETARY FUND (Oct. 4, 2013), http://www.imf.org/external/np/prsp/prsp.asp#H. PRSPs are prepared by member countries (of the BWIs) and updated every three years. *Id.* PRSPs include annual progress reports, a description of macro and micro-economic policies and programs for promotion of growth and reduction of poverty. *Id.* Countries also provide interim PRSPs through the process of finalizing the fully-developed PRSPs. *See id. See also* Lisa Philipps & Miranda Stewart, *Fiscal Transparency: Global Norms, Domestic Laws, and the Politics of Budgets*, 34 BROOK. J. INT'L L. 797, 817-21 (2009) (explaining several accountability mechanisms, including PRSPs, that country donors have used to help strengthen and manage public finances and fiscal policy in aid-recipient countries). The PRSPs are meant to increase focus on poverty reduction while providing stronger collaboration between the country and the financing institutions. *Id.* More than sixty-six countries completed PRSPs between 2000 and March 2009. *Id.*

342. *See* Dickerson, *supra* note 335, at 56. "Some members of the financial community . . . contend that IMF lending creates a moral-hazard problem . . . knowingly lending to repressive regimes who illegally divert the loan process or use the funds in ways that affirmatively harm the countries' citizens." *Id.* Contrary to the effects of its implementation, the PRSPs were supposed to grant governments greater influence in "tripartite" discussions for loan forgiveness and redevelopment. MARC DARROW, BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND, AND INTERNATIONAL HUMAN RIGHTS LAW 289 (2006). This allows for the IMF and World Bank policy makers to take advantage of the developing countries' weakness, diverting government attention regarding obligations from citizens to the institutions. *Id.*; *see* Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT'L L. REV. 527, 532-33 (2002); Ibrahim F. I. Shihata, *The World Bank and the IMF Relationship- Quo Vadis*, 35 INT'L LAW. 3549 (2001). However, it is been assessed most developing countries may not have the institutional capacity to conduct the necessary public consultations required for approval of a PRSP. *Id.*; *see* Rajesh Swaminathan, *Regulating*

resources for public services.[343] While urging priority in repayment of debts, the IMF urges low-income countries to adopt potentially cataclysmic policies.[344]

C. The Challenge of the G-20

The Group of Twenty, otherwise known as G-20, is of a group of finance ministers and central bank governors from countries across the world initially dedicated to discussing and coordinating policies related to the stabilization and regulation of global financial markets, but which has recently broadened its agenda to include more general global economic governance issues.[345] Established as a response to the financial crises of the late 1990s,[346] the G-20 consists of selected both advanced and so-called "systemically significant" emerging economies.[347] The G-20 functions as an informal forum, allowing for

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Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights, 37 COLUM. J. TRANSNAT'L L. 161, 214 (1998). There are several operational issues regarding the inter-relational aspects of these structural policies and individual human rights standards. *See id.*

343. *See* Goldberg, *supra* note 332, at 970 (furthering insight into why countries participating in the HIPC run into problems even with their participation in the program). HIPC debtor countries usually apportion their domestic investments toward infrastructure, such as providing electrical power, paving roads, and telephone connections instead of spending money toward health and education. *See id.* This form of neoliberal economic ideology has proven detrimental to certain countries. *See* Anup Shah, *Structural Adjustment – A Major Cause of Poverty*, GLOBAL ISSUES, (Oct. 29, 2008), *available at* http://www.globalissues.org/print/article/3 (last visited Oct. 23, 2013). Minimizing the role of the state, privatization, reduced protection of domestic industries, currency devaluation, increased interest rates, elimination of subsidies, reduction and removal of regulations to gain attraction from foreign investors are all parts if this ideology. *See id.* "Structural adjustments have . . . contributed to 'the greatest peacetime transfer of wealth from the periphery to the imperial center in history' . . . without much media attention." *Id.*

344. *See* KUNIBERT RAFFER, DEBT MANAGEMENT FOR DEVELOPMENT: PROTECTION OF THE POOR AND THE MILLENIUM DEVELOPMENT GOALS 101 (2010).

345. *See* Haque & Burdescue, *supra* note 315, at 241 (explaining how leaders came to the Conference with the objective of establishing a framework for cooperation and assistance with alleviating poverty). *See also What is the G20?*, G20, *available at* http://www.g20.org/docs/about/about_G20.html (last visited Oct. 23, 2013).

346. *See St. Petersburg Hosts the F20 Summit* G-20, http://www.g20.org/about_what_is_g20.aspx (last visited Oct. 13, 2013).

347. *Id.* The finance ministers and central bank governors hail from the European Union and the following nineteen countries: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, Republic of Korea, Turkey, United Kingdom, and the United States. Former Canadian Finance Minister (later, Prime Minister) is credited with proposing the G-20. *See* John Ibbitson & Tara Perkins, *How Canada Made the G20 Happen*, THE GLOBE AND MAIL, (June 18, 2010, 4:09 PM), http://www.theglobeandmail.com/news/world/how-canada-made-the-g20-happen/article4322767/?page=all.

discussion between the participating developed and developing countries as to the promotion of global economic stability and development.[348] The inaugural meeting of the G-20 took place in Berlin, Germany on December 15-16, 1999.[349] Since then, the G-20 has held annual meetings, engaging in a dialogue about key economic issues and implementing various initiatives and reforms.[350]

Creation of the G-20 was premised in part on remedying the limited participation of key emerging developing economies in global economic discussion and governance.[351] Other forums discussing world economic issues preceded the G-20, and these "showed the potential benefits of a regular international consultative forum embracing the emerging-market countries."[352] Building on these predecessors, the handpicked G-20 enabled a regular dialogue with a constant set of partners.[353] Reflecting the broad representation of the G-20, its member countries represent around ninety percent of global national product, eighty percent of world trade, and two-thirds of the world population.[354] However, critics of the Group of Twenty mention that it is essentially a self-appointed, elite group, and point to its corresponding lack of inclusiveness, accountability and, most importantly, political legitimacy.[355]

Because of the informal nature of the G-20, members can make comments, recommendations, and measures to be adopted.[356] There are

348. *See St. Petersburg Hosts the F20 Summit*, *supra* note 346.

349. *Id.*

350. *Id.* The meetings are annual, but they are preceded by workshops, reports, case studies to provide ministers and governors with analysis and insight. *Id.* The 2011 G-20 summit meeting took place on November 3-4, 2011, in Cannes, France. *Id.*

351. *See St. Petersburg Hosts the F20 Summit*, *supra* note 346.

352. *Id.* Before the G–20 was created, there was a G–22, G–7, and even a G–33. *Id.* These groups of leaders made proposals to deal with world economic issues. *Id.* The G–7 was established in 1976, comprised of major industrial economies including Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America. *Id.* The G–7 also allows for discussion of current economic issues, but the discussion is geared toward the interests of the seven countries. *Id.* The G–20, in contrast, reflects the diverse interests of the industrial and emerging-market economies. *St. Petersburg Hosts the F20 Summit*, *supra* note 346.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* Participation in the G–20 meetings is limited to the members. *St. Petersburg Hosts the F20 Summit*, *supra* note 346. The limit is linked to ensuring the "effectiveness and continuity of [the G–20's] activity. *Id.* Although the meetings are not open to the public, the public has access to discussions via a "communiqué" which the G–20 publishes after each meeting. *See G–20 Publications*, G–20, http://www.g20.org/pub_communiques.aspx (last visited Oct. 10, 2013) (providing record

no formal votes or resolutions.[357] Instead, "[e]very G-20 member has one "voice" with which it can take an active part in G-20 activity."[358] There is no permanent staff; the chair, selected from a different regional group of countries each year, rotates on an annual basis.[359] The chair is part of a three-member management "Troika" of chairs.[360]

Financial ministers and central bank governors are not the only attendees at G-20 meeting.[361] Also present at the meetings are important representatives of the BWIs, namely the Managing Director of the IMF, the President of the World Bank, and the chairs of the International Monetary and Financing Committee and Development Committee of the IMF and World Bank.[362] This participation attempts to ensure that "the G-20 process is well integrated with the activities of the BWIs."[363]

Reform of the BWIs has, indeed, been on the agenda of more than one G-20 meeting.[364] Acknowledging the "vital role the [BWIs] should play in promoting macroeconomic and financial stability, economic growth, and poverty reduction,"[365] the G-20 concentrated in great part on governance reforms.[366] Recognizing the evolution of the global

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of communiqués).

357. *Id.* There are no voting shares attached to the voting member, and voting power is not governed by the member's economic status. *Id.*

358. *Id.* "To this extent the influence a country can exert is shaped decisively by its commitment." *Id.*

359. The 2011 Chair is France. *The G20,* UNIV. OF TORONTO, *available at* http://www.g20.utoronto.ca/g20whatisit.html (last updated Sept. 28, 2011). Mexico will chair the G20 in 2012. *Id.* Starting in 2011, G–20 summits will be held annually. *Id.*

360. The 2011 Chair is France. *G20 Information Centre,* U. OF TORONTO, http://www.g20.utoronto.ca/ (last updated Sept. 10, 2013). Mexico will chair the G20 in 2012. *G–20 Information Centre: The G20*, http://www.g20.utoronto.ca/g20whatisit.html (last updated July 22, 2010). Starting in 2011, G–20 summits will be held annually. *Id.*

361. *Id.*

362. *Id.* These participate on an ex–officio basis. *Id.*

363. *Id.* The G–20 also collaborates with the Financial Stability Board and the Basel Committee on Banking Supervision. *The G20*, *supra* note 359.

364. G20 Statement on Reforming Bretton Woods Institutions, Meeting of Finance Ministers and Central Bank Governors in Xianghe (Oct. 16, 2005), *available at* http://www.g20.utoronto.ca/2005/2005bwi.html (last visited Oct. 26, 2013) [hereinafter *Statement on Reforming BWIs*].

365. *Id.*

366. *Id.* The G–20 also called for reinforcement of the cooperation between the BWIs, and discussed their separate responsibilities. *Id.* The G–20 emphasized that the IMF should focus on macroeconomic and financial stability, both nationally and internationally, on the surveillance of the global economy, and on strengthening crisis prevention. *Id.* As to the World Bank, the G–20 advised that it focus on development "sharpening its financial and technical assistance roles for both least–developed countries and emerging markets."

economy since the inception of the BWIs,[367] the G-20's statement emphasized the need to have the governance structure of the BWIs, with respect to both quotas and representation, reflect the changes in economic weight."[368]

The 2005 Statement also addressed management reforms.[369] The Statement suggested that the BWIs work to enhance their "institutional effectiveness." advising that selection of senior management should be premised on merit and allow for broad representation of all member countries.[370] The G-20 also drew attention to lending practices, advising the BWIs to "continue improving their lending frameworks," and to take measures to meet their members' financial needs.[371]

As has been indicated, the 2008 financial crisis gave the G-20 forum a new dimension and promoted the G-20 to call for continued BWI reform.[372] By 2004, Canadian Prime Minister Paul Martin wanted the G-20 to be not only a forum for finance ministers and central bank governors, but also one for the leaders of the governments.[373] Martin's goal came to fruition as a result of the 2008 financial crisis, when then-president George W. Bush decided to convene a meeting of world

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Statement on Reforming BWIs, *supra* note 364. *See also* Communiqué, Meeting of Finance Ministers and Central Bank Governors in Xianghe (Oct. 16, 2005), *available at* http://www.g20.utoronto.ca/2005/2005communique.html (last visited Oct. 26, 2013) (reiterating support for reformation of the BWIs and drawing attention to the importance of improving the governance, management, and operational strategies of the BWIs).

367. Specifically the growth in emerging markets and "deepened integration in industrialized countries." G–20, Statement on Reforming the Bretton Woods Institution (2005), *available at* www.g20.utoronto.ca/2005/2005bwi.pdf.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.* The 2006 G–20 meeting renewed discussion regarding the reform of the BWIs. Communiqué, Meeting of Finance Ministers and Central Bank Governors (Nov. 19, 2006), *available at* http://www.g20.utoronto.ca/2006/2006communique.html (last visited Oct. 26, 2013). At the meeting, members discussed the formula of a quota formula and how to implement it. *Id.* The members also agreed to further consider issues relating to IMF surveillance, the IMF's role in emerging market economies, and its role in low–income countries, as well as collaboration between the BWIs. *Id.* The members called for the modernization and strengthening of IMF surveillance to "meet the needs of globalization." *Id.* Suggesting a possible weakness in the area of surveillance, the G–20 addressed the strengthening of IMF surveillance as recently as 2011, noting G–20 agreement on the need to further strengthen the effectiveness and coherence of bilateral and multilateral IMF surveillance. *See* Final Communiqué, Meeting of G20 Finance Ministers and Central Bank Governors in Wash. D.C. (Apr. 15, 2011), *available at* http://www.g20.utoronto.ca/2011/2011-finance-110415-en.html (last visited Oct. 26, 2013).

372. *See* Ibbitson & Perkins, *supra* note 347; *What is the G20*, G20, *available at* http://www.g20.org/docs/about/about_G20.html (last visited Oct. 12, 2013).

373. Ibbitson & Perkins, *supra* note 347; *What is the G20*, *supra* note 372.

leaders to deal with the crisis.[374] The Bush administration gathered the world leaders by turning to the G-20 countries.[375] The result was the G-20 Summit, which convened on November 15, 2008 and featured a gathering of both finance ministers and political leaders.[376]

Notwithstanding its lack of inclusiveness (and legitimacy), the Washington, D.C. summit has been billed by some as the "Bretton Woods 2" meeting for its emphasis on reform of the BWIs.[377] After the Summit, the G-20 issued a declaration setting forth reforms to be implemented in response to the ongoing financial crisis.[378] The G-20 announced an action plan designed to respond to the crisis, noting five categories of reform and characterizing the measures to be taken in each category as either "immediate" or "medium term."[379] One of the categories of reform was the reform of international financial institutions.[380] Recognizing the plight of developing economies as to financing, the G-20 expressed approval of the IMF's new short-term liquidity facility and urged the "ongoing review of its instruments and facilities to ensure flexibility."[381] As to the World Bank, the G-20 encouraged full-capacity use of its development agenda, approving the introduction of new facilities by the World Bank in the area of infrastructure and trade finance.[382] The G-20 expressed its intent to act to "[e]nsure that the [BWIs] . . . have sufficient resources to continue

374. Ibbitson & Perkins, *supra* note 347; *What is the G20*, *supra* note 372.

375. Ibbitson & Perkins, *supra* note 347; *What is the G20*, *supra* note 372.

376. Ibbitson & Perkins, *supra* note 347; *What is the G20*, *supra* note 372. Since then, the leaders of the G-20 nations have held summits semi-annually or annually. *Id.* Summits were held in London and Pittsburg in 2009. *Id.* Summits were also held in Toronto and Seoul in 2010. *Id.*

377. *G20 Heads of State Meeting 15th November 2008: Summary and Analysis of Washington Meeting*, BRETTON WOODS PROJECT (Nov. 17 2008), *available at* http://www.brettonwoodsproject.org/2008/11/art-562975/ (last visited Oct. 22, 2013).

378. Declaration of the Summit on Financial Markets and the World Economy (Nov. 15, 2008), *available at* http://www.g20.utoronto.ca/2008/2008declaration1115.html (last visited Oct. 26, 2013).

379. *Id.*

380. *Id.* The IMF and World Bank were the focus of this category of reform. *Id.* The other categories of reform were: strengthening transparency and accountability; enhancing sound regulation; promoting integrity in financial markets; and reinforcing international cooperation. *Id.* The proposed reforms were separated into five categories: (1) strengthening transparency and accountability; (2) enhancing sound regulation; (3) promoting integrity in financial markets; (4) reinforcing international cooperation; (5) reforming international financial institutions. Declaration of the Summit on Financial Markets and the World Economy, *supra* note 378.

381. *Id.*

382. *Id.*

playing their role in overcoming the crisis."[383]

The November declaration emphasized the state of developing and emerging economies in urging BWI reform.[384] The G-20 tied BWI reform to these countries, noting its commitment to the BWIs' reform "so that they can more adequately reflect changing economic weights in the world economy . . . ."[385] It called for International Financial Institutions to review and adapt their lending instruments to meet their members' needs, and also called for the consideration of ways to "restore emerging and developing countries' access to credit and resume private capital flows which are critical for sustainable growth and development, including ongoing infrastructure investment."[386] The G-20 once again addressed the issue of surveillance, noting that the IMF should conduct "vigorous and even-handed surveillance reviews of all countries . . ."[387] Elaborating on another weakness in IMF operations, the G-20 stated the BWI's role in providing macro-financial policy advice would be strengthened if it gave greater attention to the financial sectors of all countries and better integrated the reviews with the joint IMF/World Bank financial sector assessment programs."[388]

IMF operations were once again a source of discussion during the April 2009 G-20 Summit, which took in place in London.[389] In a declaration issued after the Summit, G-20 leaders noted the continued need to reinforce international financial institutions, "particularly the IMF."[390] To that end, the G-20 pledged to make available $850 billion in resources through the global financial institutions "to support growth in emerging market and developing countries by helping to finance

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383. *Id.*

384. *See id.*

385. Declaration of the Summit on Financial Markets and the World Economy, *supra* note 378. The G20 also noted that the FSF should expand to a broad membership of emerging economies. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* The G-20 also addressed crisis response, emphasizing the need for the IMF to collaborate with the FSF and other bodies in an effort to "better identify vulnerabilities, anticipate potential stresses, and act swiftly to play a key role in crisis response." Declaration of the Summit on Financial Markets and the World Economy, *supra* note 378. Part of the action plan was for the IMF, in conjunction with the expanded FSF and other regulators and bodies, to develop recommendations to "mitigate pro-cyclicality, including the review of how valuation and leverage, bank capital, executive compensation, and provisioning practices may exacerbate cyclical trends." *Id.*

389. Communiqué, Global Plan for Recovery and Reform, Statement Issued by the G20 Leaders (Apr. 2, 2009), http://www.g20.utoronto.ca/2009/2009communique0402.html [hereinafter Global Plan for Recovery and Reform].

390. *Id.*

counter-cyclical spending, bank recapitalization, infrastructure, trade finance, balance of payments support, debt rollover, and social support."[391] The G-20 agreed to increase the resources available to the IMF through immediate financing of $250 billion from members, and announced its support for a substantial increase in lending of at least $100 billion by the multilateral development banks, specifically to low income countries.[392] Many of these same topics were revisited and reiterated at the November 2011 summit meeting in Cannes, France.

VI. CONCLUSION

Despite the promotion of neo-liberal policies by the BWIs, over the last decade or so developed countries have hypocritically instituted various government actions and regulations. For instance, on September 8, 2008, the United States government bailed out and took over the nation's largest mortgage buyer, The Federal National Mortgage Association ("Fannie Mae"), along with the Federal Home Loan Mortgage Corporation ("Freddie Mac"), after the two mortgage giants struggled with deep losses and investors had lost confidence in them.[393] Amid an economic recession, and shortly after the fall of

391. *Id.* Counter-cyclical spending is a fiscal policy characterized by an increase in government expenditures that is meant to jumpstart economic recovery. Martin Khor, *Reality Behind the Hype of G20 Summit*, THIRD WORLD NETWORK (Apr. 6, 2009), *available at* http://www.twnside.org.sg/title2/gtrends/gtrends246.htm (last visited Oct. 25, 2013). Programs that automatically expand fiscal policy during recessions, and contract it during booms, are one form of countercyclical fiscal policy. David N. Weil, *Fiscal Policy*, THE CONCISE ENCYCLOPEDIA OF ECON., *available at* http://www.econlib.org/library/Enc/FiscalPolicy.html (last visited Oct. 10, 2013). Additionally, bank recapitalization refers to the restructuring of a troubled bank with the assistance of a deposit insurance fund. *Business Definition for: Recapitalization*, ALL BUS., *available at* http://www.allbusiness.com/glossaries/recapitalization/4954442-1.html (last visited Nov. 7, 2013). Debt rollover refers to the rolling over of existing debt into new debt when the existing debt is about to mature. *Rollover Risk*, INVESTOPEDIA, *available at* http://www.investopedia.com/terms/r/rollover-risk.asp#axzz1Zls25wls (last visited Nov. 7, 2013). The IMF defines balance of payments as a:

> statistical statement that systematically summarizes, for a specific time period, the economic transactions of an economy with the rest of the world. Transactions, for the most part between residents and nonresidents, consist of those involving goods, services, and income; those involving financial claims on, and liabilities to, the rest of the world; and those (such as gifts) classified as transfers, which involve offsetting entries to balance—in an accounting sense—one-sided transactions.

INT'L MONETARY FUND, BALANCE OF PAYMENTS MANUAL 6, *available at* http://www.imf.org/external/np/sta/bop/bopman.pdf (last visited Nov. 7, 2103).

392. Global Plan for Recovery and Reform, *supra* note 389.

393. *See Federal National Mortgage Association Fannie Mae*, N.Y. TIMES, *available at* http://topics.nytimes.com/top/news/business/companies/fannie_mae/index.html?inline=nyt-

Lehman Brothers,[394] the American International Group (the "AIG") was suffering from a liquidity crisis when its credit ratings were downgraded in September 2008.[395] Fearing the catastrophic consequences of AIG filing for bankruptcy, on September 16, 2008, the Federal Reserve Board announced that it would authorize the Federal Reserve Bank of New York to lend up to $85 billion to AIG.[396]

In 2008, the United States automotive industry was facing financial downturn partially linked to a substantial increase in the prices of automotive fuels.[397] General Motors and Chrysler were given large government bailouts to support them through this crisis while Ford was given an open credit line.[398] However, due to poor management and

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org (last visited Oct. 25, 2013); *see Freddie Mac*, N.Y. TIMES, *available at* http://topics.nytimes.com/top/news/business/companies/freddie_mac/index.html?inline=nyt-org (last visited Oct. 25, 2013); *see also* Charles Duhigg, *As Crisis Grew, a Few Options Shrank to One*, N.Y. TIMES (Sept. 7, 2008), *available at* http://www.nytimes.com/2008/09/08/business/08takeover.html?_r=2&hp=&pagewanted=all&oref=slogin (last visited Oct. 25, 2013) ("The downfall of Fannie and Freddie stems from a series of miscalculations and deferred decisions, both by their executives and government officials, according to company insiders, regulators, auditors and outside analysts.").

394. *See* John Cassidy, *Anatomy of a Meltdown: Ben Bernanke and the Financial Crisis*, THE NEW YORKER (Dec. 1, 2008), *available at* http://www.newyorker.com/reporting/2008/12/01/081201fa_fact_cassidy?currentPage=all (last visited Oct. 25, 2013); Sam Mamudi, *Lehman Folds with Record $613 Billion Debt*, MARKET WATCH (Sept 15, 2008), *available at* http://www.marketwatch.com/story/lehman-folds-with-record-613-billion-debt?siteid=rss (last visited Oct. 25, 2013). Lehman Brothers, a Wall Street investment bank, filed for bankruptcy protection in 2008. *Id.* The bankruptcy was the largest in history, with a total of $613 billion in debt against $639 billion in assets, effectively ending the company's 158-year existence. *Id.*

395. *See* William Greider, *The AIG Bailout Scandal*, THE NATION (Aug. 6, 2010), *available at* http://www.thenation.com/article/153929/aig-bailout-scandal?page=full (last visited Oct. 25, 2013); *see also* Jim Puzzanghera, *AIG Bailout is 'Poisonous'; Taxpayers Risk 'Severe Losses,' Panel Says*, L.A. TIMES (June 11, 2010), *available at* http://articles.latimes.com/2010/jun/11/business/la-fi-aig-bailout-20100611 (last visited Oct. 25, 2013) (referring to the bailout as a $182-billion bailout, and noting lack of clarity as to whether taxpayers ever will be fully repaid).

396. Press Release, Bd. of Governors of the Fed. Reserve Sys. (Sept. 16, 2008), *available at* http://www.federalreserve.gov/newsevents/press/other/20080916a.htm (last visited Oct. 25, 2013); Pam Selvarajah, *The AIG Bailout and AIG's Prospects for Repaying Government Loans*, 29 REV. BANKING & FIN. L. 363, 364 (2010) (noting that the loan carried a twenty-four month term).

397. *See Gas Prices Put Detroit Big Three in Crisis Mode,* NBC NEWS (June 1, 2008), *available at* http://www.msnbc.msn.com/id/24896359/ns/business-autos/t/gas-prices-put-detroit-big-three-crisis-mode/#.TsBwSMPNltM (last visited Oct. 25, 2013).

398. *See* David Shepardson, *Rattner Applauds Auto Bailouts' 'Happy Ending'*, 1853 CHAIRMAN (Nov. 1, 2011), *available at* http://www.1853chairman.com/2011/11/01/rattner-applauds-auto-bailouts%E2%80%99-%E2%80%98happy-ending%E2%80%99/ (noting that the Treasury extended Chrysler a $12.5 billion bailout, $11.3 billion of which has been recovered, and extended General Motors a $49.5 billion bailout, of which $23.2 billion has

business practices, General Motors and Chrysler still filed for Chapter 11 Bankruptcy in 2009.[399] Having emerged from bankruptcy, the United States federal government now holds nearly 61% of the new company.[400]

The United States has not been the only developed country to institute the type of hypocritical policies described above. Currently facing an economic debt crisis, Europe has been urged to begin bailing out its banks.[401] The recommendation to do so came directly from the IMF's managing director, Christine Legarde.[402] In agreement with the bailout, the first major European bank bailout of 2011 occurred when the governments of both France and Belgium pledged to participate in a rescue plan for their banking giant Dexia.[403] The plan is to place Dexia's "toxic assets, including Greek and other peripheral euro zone government bonds" into a government-supported "bad-bank."[404] Bank of France Governor and G20 member, Christian Noyer, has stated "[w]e will loan Dexia as much as it needs."[405]

As developed countries begin to institute actions contradictory to neo-liberal policies, maybe the BWIs will begin to recognize the harm of forcing neo-liberal policies on developing countries; however, it should not be forgotten that, in the final analysis, the general policies of these institutions are set by member states's governments, not by the secretariat bureaucracy. Newly-elected Managing Director Christine

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been recovered). "At current trading prices, the Treasury would lose more than $13 billion on its GM bailout." *Id.*

399. *See Automotive Industry Crisis*, N.Y. TIMES, *available at* http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/auto_industry/index.html (last updated May 25, 2011).

400. *Id.* The Canadian government, a health care trust for the United Auto Workers Union, and bondholders own the balance. *Id.*

401. Heather Stewart, Jill Treanor & Dominic Rushe, *IMF Chief Tells Europe: You Must Bail Out the Banks Again*, THE GUARDIAN (Sept. 22, 2011), *available at* http://www.guardian.co.uk/world/2011/sep/22/imf-chief-europe-bail-out-banks (last visited Oct 25, 2013).

402. *Id.* (discussing Lagarde's call for action).

403. Philip Blenkinsop & Robert-Jan Bartunek, *Dexia Bailout Set as Wider Bank Rescue Mulled*, REUTERS (Oct. 9, 2011), *available at* http://www.reuters.com/article/2011/10/09/us-dexia-idUSTRE7962XE20111009 (last visited Oct. 25, 2013). Dexia used short-term funding to finance long-term lending, and had difficulty obtaining credit as the European debt crisis worsened. *Id.*

404. John O'Donnell & Ilona Wissenbach, *EU Preparing Bank Rescues Amid Greece Doubts*, REUTERS (Oct. 4, 2011), *available at* http://www.reuters.com/article/2011/10/04/us-eurozone-idUSTRE7921720111004 (last visited Oct. 25, 2013).

405. Alexandria Sage, *France's Noyer Says Will Ensure Dexia Liquidity*, REUTERS (Oct. 5, 2011), *available at* http://www.reuters.com/article/2011/10/05/france-dexia-noyer-idUSP6E7KC01N20111005 (last visited Oct. 25, 2013).

Lagarde has shown promise with her actions in trying to move towards a more balanced approach (to the degree that she can). After edging out the Bank of Mexico's governor Agustin Carstens,[406] the former Finance Minister of France took over the top post at the IMF in the midst of global economic turmoil. Ms. Lagarde won the support of a several economic powers including China, Russia, and the United States with the promise to bring "reform" to the IMF.[407]

The most prominent reform pledged by Ms. Lagarde was to increase the presence of emerging economies at the IMF. Several emerging markets leaders voiced concern over the election of yet another European to head the IMF, something that has not changed since its inception in 1944.[408] Ms. Lagarde was able to curtail complaints through assurance that the interests of emerging markets would be represented under her leadership.[409] To show her commitment, Ms. Lagarde created a fourth deputy managing director position and appointed Chinese economist Zhu Min to the position. Cornell University Professor Eswar S. Prassar hailed the move as a "grand bargain" in that Europeans were able to keep control of the top job at the IMF while emerging markets were able to gain more of a voice with the appointment.[410]

Even with a promising new managing director, massive changes to the BWIs are still unlikely. The policies of the BWIs flow from ideals, positions and interests of developed countries. The core structure of the BWIs gives the voice of developed countries more weight than developing countries because the BWIs are fundamentally a corporation

406. Press Release No. 11/259, Int'l Monetary Fund, IMF Executive Board Selects Christine Lagarde as Managing Director (June 28, 2011) (on file with author), *available at* http://www.imf.org/external/np/sec/pr/2011/pr11259.htm (last visited Oct. 25, 2013).

407. *See US Backs Christine Lagarde as Next Head of IMF*, THE TELEGRAPH (June 28, 2011), *available at* http://www.telegraph.co.uk/finance/dominique-strauss-kahn/8603421/US-backs-Christine-Lagarde-as-next-head-of-IMF.html (last visited Oct. 25, 2013).

408. *See* Liz Alderman, *France's Lagarde Selected as I.M.F. Managing Director*, N.Y. TIMES (June 28, 2011), *available at* http://www.nytimes.com/2011/06/29/business/global/29fund.html?pagewanted=all. (last visited Oct. 25, 2013).

409. *See* Liz Alderman & Keith Bradsher, *Emerging Nations Warm to Lagarde for I.M.F. Role*, N.Y. TIMES (June 7, 2011), *available at* http://www.nytimes.com/2011/06/08/business/global/08fund.html?pagewanted=all (last visited Nov. 7, 2013).

410. Binyamin Appelbaum, *I.M.F.'s New Chief Names American and Chinese Deputies*, N.Y. TIMES (July 12, 2013), *available at* http://www.nytimes.com/2011/07/13/business/us-and-chinese-officials-named-to-imf-posts.html (last visited Nov. 7, 2013).

with developed countries controlling its Board of Directors as majority shareholders. Naturally, the actions of the corporation are for the benefit of its shareholders. Without a major redevelopment to the core structure of the International Monetary Fund and the World Bank, developed countries will continue to favor neo-liberal policies as they open the economies of these developing countries to the benefit of developed countries, despite contradictory actions within their own countries.

CAKES WITHOUT SUGAR: REASONS BEHIND FOREIGN INVESTOR RELUCTANCE TO ENTER MESOPOTAMIA

Nidham G Al Abasey[†]

CONTENTS

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I. INTRODUCTION

Iraq was hopeful when it imagined preparing itself as an "investment cake" under the new Investment Law. Following investment environment reforms,[1] Iraq opened the doors of its economy to foreign investors.[2] However, as some foreign investors flowed in and commenced "eating" the cake, they were disappointed to find it sugar-free, not sweet and sugary as most would prefer.[3] What then would be

1. *See* SAMI SHUBBER, THE LAW OF INVESTMENT IN IRAQ 5-6 (2009).

2. Iraq has made significant progress in the reconstruction of its economy, and investors have shown considerable interest in the country, as evidenced by the influx of Chinese investors in the past few years. In fact, recent statistics show that the number of foreign investments doubled in 2010, as investors swarmed into the Middle Eastern country to cash in on investment opportunities arising from Iraq's stabilitiy. More positive results are being reported by western news agencies, as evidenced by Newsweek International's (London) following assertion: "Civil war or not, Iraq has an economy, and—mother of all surprises—it's doing remarkably well. Real estate is booming. Construction, retail and wholesale trade sectors are healthy, too, report by Global Insight in London. The U.S. Chamber of Commerce reports 34,000 registered companies in Iraq, up from 8,000 three years ago. Sales of second-hand cars, televisions and mobile phones have all risen sharply. Estimates vary, but one from Global Insight puts GDP growth at 17 percent last year and projects 13 percent for 2006. The World Bank has it lower: at 4 percent this year. But, given all the attention paid to deteriorating security, the startling fact is that, Iraq is growing at all." *See generally* WORLD BANK, MIDDLE EAST AND NORTH AFRICA REGION, REBUILDING IRAQ: ECONOMIC REFORM AND TRANSITION (2006).

3. Considering the investment needs in Iraq, investment opportunities are myriad across sectors in the Iraqi economy. In this respect, the Iraqi Government has availed investment opportunities across sectors including construction, industry, agriculture, tourism, housing, communications, and health care. Leading investment companies still have a tendency to invest in the energy sector, particularly as proven by the fact that Iraqi reserves of oil stand at 115 billion barrels. On the basis of these figures, Iraq ranks 2–3 worldwide with the largest proven amount of reserves. There are also indications that Iraq has 45–100 billion additional barrels in its western desert, which remain undiscovered. Furthermore, Iraq's discovered oil reserves amount to 10% of the world's total reserves.

the result?

Certainly, other investors would receive a "warning" notice that the Iraqi "cake" was not only free of sugar, but also salty. The following question would be raised here regarding the multi-white-powder cakes in a warehouse: which of them has sugar?

The thesis of this article is that ten years of Iraqi and international efforts[4] to encourage foreign investment have failed and that foreign investment in Iraq remains limited to the extent of foreign investment flows amounting to USD 1.617 billion, as of 2011.[5]

The path to investing in Iraq is still full of obstacles because reforms have not been addressed. For example, a number of old laws do not meet minimum international standards, yet they remain in force. Moreover, national infrastructure is not up to acceptable standards, and foreign investors must comply with administrative red tape. Despite other recently emerging challenges, as described by this article's analysis below,[6] some writers argue that there are sufficient existing justifications for foreign investors to come to Iraq and initiate a harvesting of dividends.[7]

Iraq has natural gas ("NG") reserves as well. Available information indicates 112 trillion cubic feet NG reserves in Iraq, thus placing Iraq at the tenth position worldwide in terms of largest NG reserves. Potentially, additional NG reserves amount to 275–300 trillion cubic feet along with large amounts of other metals including phosphate, sulphur, and iron. *See Top Ten Reason to Invest in Iraq*, REPUBLIC OF IRAQ NATIONAL INVESTMENT COMMISSION, *available at* http://investpromo.gov.iq/why-iraq/ (last visited Oct. 30, 2013).

4. *See* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, SUPPORTING INVESTMENT POLICY AND GOVERNANCE REFORMS IN IRAQ 8 (2010). The Iraqi Government is at the forefront in spearheading reconstruction efforts in Iraq, but support is being provided by other investment partners such as the U.S. through the U.S. Chamber of Commerce, which is also channeling funds toward improving reconstruction efforts in Iraq. *Id.*

5. UNCTAD, WORLD INVESTMENT REPORT UNITED NATIONS 171 (2012).

6. *See generally* Clarence M. Dass, *Adventure Capitalizing in Baghdad: An Entrepreneurial Approach to Reconstructing Iraq*, 4 ENTREPRENEURIAL BUS. L.J. 157 (2010); Ned Parker, *The Iraq We Left Behind: Welcome to the World's Next Failed State*, 91 FOREIGN AFF. 94 (2012); Antony Blinken, *Is Iraq on Track? Democracy and Disorder in Baghdad*, 91 FOREIGN AFF. 152 (2012); Christopher J. Coyne & Adam Pellillo, *Economic Reconstruction Amidst Conflict: Insights from Afghanistan and Iraq*, 22 DEF. & PEACE ECON. 627 (2011); CHRISTOPHER J. COYNE, *The Economic Reconstruction of Iraq* (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550867 (last visited Oct. 30, 2013).

7. David Grantham argues that the calculation of profits outweigh risks for foreign investment companies in Iraq. *See* David Brent Grantham, *Calculated Risk: The Advance of IOCs and NOCs Into the Iraqi Investment Theater*, 3 J. WORLD ENERGY L. & BUS. 315 (2010) [hereinafter Grantham, *Calculated Risk*]; *See generally* Judith Richards Hope & Edward N. Griffin, *The New Iraq: Revising Iraq's Commercial Law is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy*, 11

These opinions rely on a drastic change in the country's political, legal, and economic arenas, with new facts being formulated after the Anglo-American troops toppled the then-ruling Baathist Regime. Thereafter, the new Iraqi Government sought to rebuild the country's war-torn economy by opening its doors to investors. Iraq has moved from a central to an open-market economy. To enable this shift, a number of laws were enacted;[8] Investment Law No. 13 of 2006 is the most notable of these new laws. The law provides for guarantees together with prohibition of nationalization and confiscation, adoption of stable legislation, and provision of international arbitration as mechanisms of dispute settlement. A host of incentives and exemptions have been provided for by this law, the most important of which is the ten year tax free period for investments.[9]

The reconstruction efforts are one reason why international investors are storming into Iraq. It is estimated that Iraq's reconstruction efforts are going to cost about USD 100 billion.[10] International companies are coming into Iraq to acquire a share of the finances.

Another reason for such a notion is the amount of support Iraq is receiving from international organizations and governments. Since 2003, Iraq has been a recipient of aid both in technical and legislative know-how from the Organization for Economic Cooperation and Development (OECD). Political developments in the country are seen as remarkable progress in that MENA-OECD deemed it necessary to help hold competitive elections as part of the democratic transition.

CARDOZO J. INT'L & COMP. L. 875 (2004); Robert D. Tadlock, *Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine has Become an Obstacle to Occupied Populations*, 39 U.S.F. L. REV. 227 (2005). The title of David Grantham's previous article was *Caveat Investor: Assessing the Risks and Rewards of IOCs Entry into Iraq*, which won the Spring 2009 AIPN Student Writing Competition. *See* David Brent Grantham, *Caveat Investor: Assessing the Risks and Rewards of IOCs Entry Into Iraq*, 3 J. WORLD ENERGY L. & BUS. 304 (2010).

8. One of these was the "Foreign Investment Order." This legislation, which was part of the 100 orders issued by the former U.S. civilian administrator Paul Bremer when he was head of the Coalition Provisional Authority ("CPA") during the first year of occupation, has provided U.S. groups with a multitude of benefits: full repatriation of profits earned in Iraq by foreign companies, sale of all Iraqi companies to foreign groups including banks, privatization of the entire Iraqi public sector, total legal immunity for occupants and their subcontractors in Iraq, and "national treatment" of foreign investments. *See* Order No. 39 Foreign Investment, THE IRAQ COALITION (Dec. 20, 2003), *available at* http://www.iraqcoalition.org/regulations/20031220_CPAORD_39_Foreign_Investment_.pdf (last visited Nov. 5, 2013).

9. *See* SHUBBER, *supra* note 1, at 5.

10. James Glanz & T. Christian Miller, *Official History Spotlights Iraq Rebuilding Blunders*, N. Y. TIMES, Dec. 14, 2008, at A1.

However, Iraq's political and economic environments are still seen as challenges for its government, and will need to be dealt with in the years ahead. At the international conference concerning developments in Iraq, the representatives of the International Compact with Iraq (ICI) recognized the importance of reforms that are required to be supported by the MENA-OECD: noting that refors should center on governance and investment for development. Structural reforms such as promoting sector development, attracting foreign investment, and good governance were presented at this gathering. According to the representatives, all these aspects affect a country's business environment.[11]

The author argues that such a reform is a white point on a grey board, but is still insufficient for the revival of the investment environment. Unfortunately, the Iraqi investment environment has been shaken to the roots by political rifts at the borders, where the volcano of terrorism has erupted. The consequent corruption has taken its toll. Furthermore, the weak investment-related legal system can be ascribed to a lack of effective protection of intellectual property rights, the indefinite role of national investment authorities, and the extreme ineffectiveness (even lack) of an independent and efficient judiciary.

This article concludes that there are certain reforms that may alleviate these obstacles and establish a sustainable investment-friendly environment so that Iraq may move forward.

The rest of this article consists of five parts: the first part analyzes the endemic obstacles in the country; the second part tests the efficiency of the Iraqi legal system; the third part reveals that the country's investment frameworks are inhibitory; the fourth part demonstrates that legal determinants still exist in the investment environment; the fifth part presents a roadmap for the reform of the investment environment in Iraq.

II. ANALYSIS OF INHERENT LIMITATIONS

Even though Iraq is a country rich in investment opportunities, investors have expressed concerns over the feasibility of investing money in Iraq and obtaining negative returns. The causes of investors' fears include political conflicts, insecurity, corruption, and poor infrastructure.

11. *See* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 4, at 14, 34.

A. Political Conflict and Security Collapse

On December 19, 2011, Iraqis woke to receive the news that Vice President, Tareq al-Hashemi, had been arrested on charges of running a terrorist group.[12] This story caused further damage to the deteriorating political, legal, and security situation in the country, sending a bleak message to potential investors.[13] Upon analysis, it was determined that the worst part of the situation was that it reflected a negative political environment. If the charges against the Iraqi Vice-President, who was accused of harboring terrorists, were proven in the absence of any fierce political competition, this would be a clear indication that terrorists held a strong foothold in the Iraqi Government. However, if the charges were proven false, the case would reflect the exclusion mechanism adopted by politicians on one hand, and the lack of independence of investigative authorities and the judiciary represented by the court that sentenced Al-Hashemi to death on the other.[14] This led to massive political and legal issues. The asylum sought by Al-Hashemi in Kurdistan and his stay therein under the protection of the Kurdistan forces despite the arrest warrant against him was followed by the reluctance of the Kurdistan Police to enforce the Baghdad court arrest orders; the role of the Kurdistan Police in denying the Federal Police admittance into Iraqi Kurdistan to enforce the arrest warrant is also significant.[15] Such developments resulted in a big question over the administrative and legal powers of the Kurdistan region, leaving the Iraqi Constitution in a dilemma regarding the regulation and administrative organization of the state.[16] This scene is but a reflection

12. *See* INTERNATIONAL CRISIS GROUP, REPORT NO. 126, DÉJÀ VU ALL OVER AGAIN? IRAQ'S ESCALATING POLITICAL CRISIS (2012), *available at* http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/Iraq%20Syria%20Lebanon/Iraq/126-deja-vu-all-over-again-iraqs-escalating-political-crisis.pdf (last visited Nov. 5, 2013).

13. *See* Blinken, *supra* note 6 at 155

14. On September 9, 2012, the Iraqi Central Criminal Court sentenced Vice President Tareq al-Hashemi to death after he was convicted on charges of managing terrorist death squads. *See* The Judicial Authority, TRANSLITERATED ARABIC TITLE [JUDGMENT TO DEATH BY SUPREME JUDICIAL COUNCIL] (2012), *available at* http://www.iraqja.iq/view.1677/ (last visited Nov. 5, 2013); Michael A. Newton, *The Death Penalty and the Iraqi Transition: Observations on a Lost Opportunity* (Vanderbilt Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 12-45, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191144## (last visited Nov. 5, 2013).

15. *See Iraq VP Tariq al-Hashemi Sentenced to Death*, BBC NEWS (Sept. 9, 2012), *available at* http://www.bbc.co.uk/news/world-middle-east-19537301 (last visited Nov. 5, 2013).

16. Most of the political and administrative problems are due to the failing constitution

of a failed state, where the absence of law and infesting corruption and brutality are the rule. Political leaders use security forces and militias to suppress enemies and intimidate the public with an inclination to settle scores with opponents by means of timed bombs and silencer guns on streets.[17] There are large-scale accusations against the government and ruling parties of protecting and harboring criminals and corrupt individuals on one hand and liquidating supervisory and judicial bodies that hinder illegal activities on the other.[18] Clearly, the Iraqi Government has proven itself unable to provide basic services such as electricity, clean water, and appropriate healthcare to the public. Unemployment among youths amounts to 30%; thus, they are easy prey for terrorist groups.[19] Consequently, Iraq does not exhibit the stability sought by foreign companies which has a negative impact on its efforts to attract investors.[20]

The post-2003 political conflicts in Iraq resulted in a fragile security environment;[21] however, such fragility has existed in Iraq over the last four decades owing to wars fought by Iraq and its consequent political seclusion, as manifested by the investor repellent siege. However, the governments in existence during those times endeavored to enact pro-investment laws to attract investors into Iraq. This effort failed because of the then unstable political and security situations, and the presence of a pessimistic outlook.[22] This led to the failure of

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in terms of the sought-after crystal clear administrative federal or decentralized organization. The ambiguous constitutional provisions regarding the regulation of powers between the central and province governments on one hand, and the overlap of powers on the other, contributed to creating one of the most complex problems that resulted in the conflict between the Central Government, Kurdistan Region and the Region-free Governorates. *See* Haider Ala Hamoudi, *Notes in Defense of the Iraq Consitution*, 33 U. PA. J. INT'L L. 1277 (2012); Christina J. Sheetz & Matthew T. Simpson, *Symposium: Rethinking the Future: The Next Five Years in Iraq*, 24 AM. U. INT'L L. REV. 181 (2009).

17. *See* Parker, *supra* note 6.

18. *See* Blinken, *supra* note 6, at 152-53.

19. *See* Parker, *supra* note 6, at 94

20. *See* Dass, *supra* note 6, at 157, 161-62.

21. *See* James P. Pfiffner, *U.S. Blunders in Iraq: De-Baathification and Disbanding the Army*, 25 INTELLIGENCE & NAT'L SECURITY 76, 76-85 (2010). The dissolution of the Iraqi army and security departments by the former Civil Administrator of Iraq, Paul Bremer, and his substitution with militias of the ruling parties contributed to the insecurity. This led to large-scale corruption in granting military positions to persons who lacked basic police or military training. The political rampage has been further compounded by sacking thousands of civil servants who once were members of the banned Baath Party. For the same political reasons (i.e., membership of the Baath Party), some opponents were banned from having a say in the political process. *Id.*

22. *See* Dass, *supra* note 6, at 159-60.

attracting in-bound investments and out-bound departure of local capital.[23] By 2005, the political situation improved following the adoption of the new constitution and the completion of the first free elections, thus marking a better political situation and a future democratic outlook. Another positive point was the significantly improving security situation.[24]

Contrary to expectations, the political and security situation in Iraq only worsened, with serious setbacks taking place to initiate an unending series of daily terrorist acts since mid-2006. As for investors, deliberate assassinations, kidnappings, bombings, and threats against individuals and corporations alike have created an enormous obstacle to in-bound investments. Political instability and insecurity are the main reasons behind foreign companies and local capital leaving Iraq.[25]

In 2009, under a political truce, the number of terrorist attacks reduced owing to hunting down of armed militias under the "law enforcement" operation. Following the formation of the national partnership government, which involved parties from across the Iraqi political spectrum, the investment environment improved slightly, with numerous Turkish, Chinese, and Iranian companies engaging in business activities of various natures, particularly in the housing industry.[26]

Despite the aforementioned progress, the Iraqi investment environment remained incapable of attracting and retaining major foreign companies. At the time, foreign investors were uncertain about the long term stability of Iraq's investment climate.[27] Fleeing from investments in Iraq is justifiable; the political congestion between Baghdad and Irbil has generated problems that have reflected on the operations of oil companies.[28] Relations between investment-hosting and parent states have gained importance in Iraq's case, as the strained Baghdad–Ankara[29] political relations have had a toll on Turkish

23. *See generally* Stephen Biddle, Michael E. O'Hanlon & Kenneth M. Pollack, *How to Leave a Stable Iraq*, 87 FOREIGN AFF. 40, 52-53 (2008).

24. *See* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 4, at 14.

25. *See* Dass, *supra* note 6, at 161-62.

26. *See* WORLD BANK, MIDDLE EAST AND NORTH AFRICA REGION, *supra* note 2, at 27, 44.

27. *See* Grantham, *Calculated Risk*, *supra* note 7, at 315, 319-20.

28. *See* REX J. ZEDALIS, THE LEGAL DIMENSIONS OF OIL AND NATURAL GAS IN IRAQ: CURRENT REALITY AND FUTURE PROSPECTS 317, 319 (2009).

29. Baghdad–Ankara relations are experiencing tension because of a number of differences; recently, Turkey refused to extradite the fugitive Iraqi Vice-President Al-

companies' Iraq-based operations.[30] The security of Turkish investors is related to Iraq's inter-country political disputes.

Broadly speaking, the partial stability of given areas in an investment region does not lead to astonishing results. Although the southern and northern parts of Iraq enjoy reasonable security, the creation of a healthy and attractive environment requires more stability across Iraq.[31] Foreign direct investments are long-term by nature, and hence, investors are interested in the political and security situation across the whole of a country, rather than just parts of it.[32] Therefore, insecurity is a hindrance to foreign private investment as it results in higher security and protection costs for investments, and transport. A number of opinions stress that such investment companies sometimes use security or military companies to overcome the insecurity dilemma.[33] Moreover, some sectors such as the oil sector will be a target for foreign companies for two reasons: (1) the global strategic importance of this sector, which promotes the protection of such companies, and (2) the high returns that motivate a high-risk approach.[34]

Hashemi in addition to accusations brought by Al-Maliki's government against Erdogan of dealing with Kurdistan as an independent state last August, following the Turkish Foreign Minister Ahmet Davutoglu's visit to Kirkuk without notifying the Federal Government, which irked the latter. Earlier, Erdogan accused his Iraqi counterpart of power monopoly. In response, Al-Makili accused Turkey of causing chaos in the region by meddling in the internal affairs of neighboring countries, including Iraq and Syria. *See Iraq Warns Turkey over Kurdistan Pipeline Deal*, BBC NEWS (May 22, 2012), *available at* http://www.bbc.co.uk/news/world-middle-east-18163248 (last visited Nov. 6, 2013).

30. Hundreds of Iraqi demonstrators burnt the Turkish flag and threatened Turkish interests in Iraq on the backdrop of Turkey's interference with Iraqi affairs and violation of Iraqi sovereignty. *Turkey, Iraq Condemn "Shameful Behavior" Against Flag in Basra Protest*, TODAYS ZAMAN (May 20, 2012), *available at* http://www.todayszaman.com/news-280891-turkey-iraq-condemn-shameful-behavior-against-flag-in-basra-protest.html (last visited Nov. 6, 2013).

31. Dass, *supra* note 6, at 157.

32. SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW RECONCILING POLICY AND PRINCIPLE 16 (2008).

33. Alberto Abadie & Javier Gardeazabal, *Terrorism and the World Economy*, 52 EUR. ECON. REV. 1 (2008).

34. This can be seen in Colombia, where foreign companies were reluctant to enter the Colombian market. Opposition groups used to blow up the pipelines of foreign oil companies, but the latter managed to wipe out such opposition groups by offering huge financial support to the Colombian Government with a view to securing their interests. The same holds true for the companies that operated in Afghanistan before toppling, as they concluded many agreements with the Government since 1996. These foreign companies offered large amounts to the Taliban Government. When Unocal was told that Taliban is a regressive terrorist movement, UNOCAL spokesman Mike Thatcher said, "We're an oil and gas company. We go where the oil and gas is." This makes sense because large companies

Iraq is going through difficult times, mainly because of sectarian and racial divisions that have never been as deeply felt or expressed as they are now.[35] The country's foreseeable future holds no indication of the settlement of rampant disputes that have taken place between warring parties since the last parliamentary elections.[36]All political efforts did not lead to any solution; the appointment of the two ministers of defense and interior is far from settled,[37] the council of strategic policies has never come to light, and the dispute between Baghdad and Irbil about Kirkuk and other disputed regions remains intact.[38] Moreover, acting on the Oil and Gas Law is still of no interest to politicians. Meanwhile, the Federal Government and Government of Kurdistan are still at war regarding the endorsement of oil agreements with several oil companies created without the federal government's review or consent. The Constitution[39] remains as it is despite its ambiguities. No census has been executed. There are a large number of political blocs, especially those represented in the House of Representatives, on top of conflicts that affected the overall situation of the State.

In a serious evaluation of political and sectarian conflicts, grassroots uprising in Iraqi cities, particularly Ramadi and Salahuddin,

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use specialist security companies for protection. This applies to the Iraqi economy, where oil resources are outside city boundaries, thus making protection and capital retention easy. *See* Wayne Madsen, *Afghanistan, the Taliban and the Bush Oil Team,* GLOBAL RESEARCH (Jan. 23, 2002), *available at* http://globalresearch.ca/articles/MAD201A.html (last visited Nov. 6, 2013).

35. One of the reasons behind sectarian volatilization has been the Iraq-based U.S. Forces; the Sunnis, Shiites, and Kurds deal with the U.S. forces differently. The first fought U.S. Forces, while the second cooperated with them to establish the foundations of the nascent state, but for U.S. Forces exiting Iraq afterwards. However, the Sunnis felt insecure about U.S. Forces leaving the country. *See* Bart S. Fisher, *Symposium: Markets in Transition: Reconstruction and Development: Part One - Reconstruction: Prescriptions for Iraq, Predictions for Russia and Performance for China: Investing in Iraq: Legal and Political Aspects*, 18 TRANSNAT'L L. 71 (2005).

36. Strong suspicions exist between political blocs which stubbornly fight and exchange accusations of power monopolies or attempted dictatorships. *See* IMTIAZ HUSSAIN, AFGHINISTAN, IRAQ AND POST-CONFLICT GOVERNNANCE: DAMOCLIAN DEMOCRACY? 5 (David Sciulli ed., Brill Academic Publishers, 2010).

37. *See* INTERNATIONAL CRISIS GROUP, *supra* note 12; Parker, *supra* note 6.

38. SONER CAGAPTAY ET AL., THE FUTURE OF THE IRAQI KURDS 15 (Washington Institute for Near East Policy, Policy Focus 85, 2008), *available at* http://www.washingtoninstitute.org/uploads/Documents/pubs/PolicyFocus85v2.pdf (last visited Oct. 29, 2013).

39. An undertaking given to the Sunni movements in return for their political involvement. *See* Parker, *supra* note 6, at 108.

started with a wave of raids and arrests based on terrorism charges against the bodyguards of the Minister of Finance, Rafe al-Eissawi, a member of the Iraqya political bloc and an iconic Sunni figure.[40] However, the uprising gave way to larger-scale demands, most importantly the angry demand for the freedom of female detainees in Iraqi prisons. Protestors accuse security forces of arresting women to force their wanted husbands and sons to turn themselves in,[41] and call for releasing those detainees already proven innocent by court orders, but never set free as well as others who were arrested upon informant reports while being denied the right to legal investigation.[42]

Regarding protesters, it is important to mention that the way the state is addressing the dilemma of terrorism is clearly politicized and sectarian. This has caused protesters to call for abolishment of the Anti-Terrorism Law owing to the notion that it is designed to target Sunni Arabs. Moreover, protesters call for the Accountability and Justice Law, which has replaced the De-Baathification Law, to be rescinded and for a newly enacted amnesty law for all detainees to be put into force.[43]

Prime Minister Nuri al-Maliki's response to protesters has consisted of a mixture of warnings and approbation. He has expressed his willingness to set up a fact-finding committee to investigate the cases of detainees and penitentiaries while accusing some demonstrators of making up a sectarian crisis and being involved in a clamor that will end with a partitioned Iraq.[44]

Considering the latest developments in Iraq, the door is wide open for partitioning, with the ill omens of civil war looming ahead.

B. Spread of Corruption

Globally, the previously quoted indices indicate that corruption has reached serious proportions and threatens the development and investment programs just as it distorts the economic decision-making process and drains the economy.[45] This reduces the quality and volume

40. Duraid Adnan, *Arrest of a Sunni Minister's Bodyguards Prompts Protests in Iraq*, N.Y. TIMES, (Dec. 21, 2012) at A9.

41. Rami Ruhayem, *Protests Engulf West Iraq as Anbar Rises Against Maliki*, BBC NEWS (Jan. 2, 2013), *available at* http://www.bbc.co.uk/news/world-middle-east-20887739 (last visited Oct. 29, 2013).

42. *See* Parker, *supra note* 6, at 102-203.

43. Ruhayem, *supra* note 41.

44. *Id.*

45. David Ng, *The Impact of Corruption on Financial Markets*, 32,10 MANAGERIAL FIN. 822-36 (2006).

of foreign and local investments.[46]

Despite the fact that most countries in the world contain a certain degree of corruption, corruption has never prevented foreign investors from investing in these countries. However, the case is different with the 169th country of 175 listed that was awarded 18 points by Transparency International (TI) in 2012.[47] The worst part about this is the suspicions regarding the reconstruction efforts undertaken after 2003 among supporters and donors.[48] Corruption is a serious problem, especially in Iraq; Iraq is a country rich in natural resources where the rule of law has been weakened by consecutive wars and dictatorships. Therefore, Iraq is the victim of instability and punitive supervisory procedures. Furthermore, since the discovery of oil to the present date, Iraq has lost opportunities of economic recovery derived from large oil revenues. Corruption, as witnessed currently, is starting to nurture terrorism and deepen sectarian divisions. The failure of rehabilitating state institutions hinders the development of investment and business environments.[49]

Since 2004, there has been a constant series of corruption charges within the UN Oil-for-Food Program. [50] The scandal emerged after an Iraqi newspaper published a list of 270 persons that included UN officials, politicians, and company owners who made use of illegal oil transactions as part of the program. Thereafter, the U.S. Congress discovered that Saddam Hussein had accumulated a staggering amount of USD 17.3 billion from such transactions, of which USD 13.6 billion were with neighboring countries.[51]

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46. *Id.*

47. *Corruption Perceptions Index 2012*, TRANSPARENCY INT'L, *available at* http://transparency.org/cpi2012/%20results (last visited Oct. 29, 2013).

48. M. Cherif Bassiouni, *Postconflcit Justice in Iraq*, 33 HUM. RTS. 15 (2006).

49. *See* Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT'L L. 1 (2008); Ryan J. Liebl, *Rule of Law in Postwar Iraq: From Saddam Hussein to the American Soldiers Involved in the Abu Ghraib Prison Scandal, What Law Governs Whose Actions?*, 28 HAMLINE L. REV. 91 (2005).

50. The Oil-for-Food Program was designed in 1996 at a cost of USD 60 billion to enable Iraq to buy food, medicine, and other necessary supplies using oil revenues. Back then, oil volumes had an impenetrable ceiling against the UN-imposed blockade on Iraq after its invasion of Kuwait in 1990. The program came to an end because of the invasion of Iraq in 2003 and the toppling of Saddam Hussein. *See* Joy Gordon, *When Unilateralism is Invisible: A Different Perspective on the Oil-for-Food Scandal*, 13 GLOBAL GOVERNANCE 59 (2007).

51. Independent Inquiry Committee into the United Nations Oil-for-Food Programme, Report on the Management of the Oil-for-Food Programme, Volume II--Report on

The UN received backlash for being the entity responsible for the program.[52] This led the UN to set up a three-member independent committee, presided over by Folker, for investigating the charges. The investigations resulted in corruption charges against officials, companies,[53] and organizations.[54] The program damaged the reputation and credibility of the UN, and was described as the largest financial scandal in history.[55] Astonishingly, Iraqi brokers accused of suspicious dealings have emerged once again to contribute to the reconstruction stage in Iraq.[56]

With the arrival of U.S. Forces in Iraq, reconstruction finances started to flow into the war-torn country.[57] What happened to such finances? Washington provided a total of USD 60 billion to reconstruction efforts and USD 146 billion in the Iraqi currency.[58] However, Iraqi citizens have not benefited considerably from these funds. How then was the money spent? Recently, the Iraqi Ministry of Electricity failed to satisfying the needs of the electricity despite "the true price of Iraq's power crisis is not just the $40bn it costs the Iraqi economy annually, but also the growing frustration of the Iraqi populace that suffers with only four-five hours of electricity each day."[59] Portable

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Investigation (Sept. 7, 2005).

52. *Id.* at 3.

53. A key figure of the scandal was Benon Sevan, the former director of the program, who pleaded not guilty to all bribery or complicity charges leveled against him. Kojo, the son of UN Secretary General Kofi Annan, has been proven to have received payments from Cotecna, another suspicious person. *See id.* at 71-72.

54. Investigations included French company Total, as well as international companies from the Middle East and Russia, in addition to security companies. *See id.* at 29-30.

55. The wider scale of this scandal was all about the future of the UN, with the so-called Neo-conservatives in the United States adding fuel to the fire as an indication of the UN's incompetence. Senator Norm Coleman, head of the Congressional Investigation Committee, called for Annan's resignation. *See* Nile Gardiner, *The White House Should Call on Kofi Annan to Resign*, THE HERITAGE FOUNDATION (Dec. 15, 2004), *available at* http://www.heritage.org/research/reports/2004/12/the-white-house-should-call-on-kofi-annan-to-resign (last visited Nov. 7, 2013).

56. Gordon, *supra* note 50. The provisional Iraqi Government conducted routine investigations in 2005 but never came up with a decision. *Id.*

57. David Caron, *The Reconstruction of Iraq: Dealing with Debt*, 11 U.C. DAVIS J. INT'L L. & POL'Y 123, 126 (2005).

58. *See* STUART W. BOWEN, A FINAL REPORT FROM THE SPECIAL INSPECTOR GENERAL FOR IRAQI RECONSTRUCTION, vii, 9 (2013), *available at* http://www.sigir.mil/learningfromiraq/ (last visited Nov. 7, 2013).

59. *See* Shamsek Asad, Hussain Qaragholi & John Sachs, *Iraq's Power Crisis and the Need to Re-engage the Private Sector – Smartly*, THE MIDDLE EAST ECONOMIC SURVEY (Feb. 6, 2012), *available at* http://www.mees.com/en/articles/3923-iraq-s-power-crisis-and-

water supplies are cut off every other day. Conditions in the country are as poor as those in the "pre-Saddam" era and are worsening because of the terrorist attacks, which have claimed the lives of tens of thousands since 2003.[60]

Considering this situation, TI warned that reconstruction efforts may well turn into the largest corruption scandal in history[61] and stated that management of oil revenues must be more transparent and accountable[62] and a weak government, black market, and legacy of dictatorship form a dangerous corruption-breeding combination.[63]

George W. Bush faced strong pressure from opponents to unveil profiteering war-related activities in Iraq.[64] Henry Waxman, who presides over the Congressional Committee on Integrity and Government Reform, said, "[t]he money squandered or gulped by corruption as part of these contracts are infuriating and astonishing. We

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the-need-to-re-engage-the-private-sector-smartly (last visited Nov. 7, 2013).

60. ANTHONY H. CORDESMAN, ECONOMIC CHALLENGES IN POST-CONFLICT IRAQ, CENTER FOR INTERNATIONAL AND STRATEGIC STUDIES, (2010), *available at* http://csis.org/files/publication/100317_IraqEconomicFactors.pdf (last visited Nov. 7, 2013).

61. *See* JEFFREY COONJOHN, CORRUPTION IN POST-CONFLICT ENVIRONMENTS: AN IRAQI CASE STUDY, (Kurdistan Center for Democracy in the Middle East, 2012), *available at* http://www.kcdme.com/Corruption%20in%20Post-Conflict%20Environments%2002.02.2012.pdf (last visited Nov. 7, 2013).

62. TI recommended key steps to be adopted urgently before a "plague of corruption" amounts to inevitability and irreparability. International contractors operating in Iraq, according to the TI, must abide by the Anti- Corruption Law. Donors and allied forces are encouraged to adopt a stricter approach in dealing with the phenomena. TI indicated a highly corrupt post-war Iraq. *See id.*

63. Bribery has been rampant since the toppling of Saddam Hussein. Some contractors and government officials have conceded that corruption widely exists. The report lashed out at the U.S. policy of awarding investment contracts in Iraq, depicting the same as secretive and favoring certain large companies. TI agrees with some UN bodies, such as the UN global consultative body which reported that the U.S. awarded an oil investment contract to the Texas-based Halliburton run by Dick Cheney until Cheney was elected Vice President of the U.S. last December. A BBC team tracked down the missing billions in a house inhabited by Hazem Sha'alan, who was appointed minister of defense in the 2004 Iraqi Government in Acton, West London. Sha'alan and accomplices drained about USD 1.2 billion from the ministry by purchasing old military equipment from Poland while claiming it to be state-of-the-art and subsequently transferring the difference in money to personal accounts. Radi Ar-Radi, the judge who presided over the Public Commission on Integrity, said, "They failed to rebuild the ministry of defense, and hence the continuing violence and blood baths. Iraqis and foreigners are still slaughtered, and those corrupt officials are to be blamed for that. They are criminals." Sha'alan was sentenced to death, but fled the country to avoid this sentence. *See id.*

64. *See* Jane Corbin, *BBC Uncovers Lost Iraqi Billions*, BBC NEWS (June 10, 2008), available at http://news.bbc.co.uk/2/hi/middle_east/7444083.stm (last visited Nov. 7, 2013).

may discover that it has been the widest profiteering process in history."[65]

The Office of the Special Inspector General for Iraq Reconstruction (SIGIR) identified two reasons for the lack of tangible results from the reconstruction efforts in Iraq: (1) rampant corruption[66] and (2) economic mismanagement. However, the 2008 federal report revealed that the reconstruction policies adopted by Washington for Iraq failed owing to bureaucratic division inside the Pentagon and a lack of familiarity with the Iraqi society.[67]

Today, corruption is present in the Iraqi Government at all levels. Some ministries are obviously controlled by militias or organized crime bosses.[68] The Iraqi Government is incapable of enforcing the bare minimum of anti-corruption laws.[69] Furthermore, key Government officials boldly refuse to engage in or initiate any corruption case investigations. Consequently, the Commission of Integrity is not empowered to be a true investigative authority.[70]

Despite the powers of the commission associated with investigating corruption cases, it cannot fulfill its role because of fragile security and violent criminals who are controlling various ministries. It is impossible to investigate corruption cases without support from the police and government. However, in Iraq, such support does not currently exist.[71]

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65. *Id.*

66. An example cited by the report is USD 36 billion deal for military equipment, weapons, and communication gear for the Iraqi forces, but no one knows about the fate of this expenditure. The report also mentions that a U.S. company, DynCorp International, submitted USD 18 million in invoices for unjustifiable costs. Furthermore, large amounts have been mismanaged or squandered (e.g., a police training camp with a USD 43.8 million swimming pool which was never used). *See* Judith Richards Hope & Edward N. Griffin, *The New Iraq: Revising Iraq's Commercial Law is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy*, 11 CARDOZO J. INT'L & COMP. L. 875 (2004).

67. James Glanz & T. Christian Miller, *supra* note 10.

68. Parker, *supra* note 6.

69. *Id.*

70. Special Inspector General for Iraq Reconstruction, *Report to Congress*, SIGIR OBSERVATIONS (July 30, 2012), *available at* http://www.sigir.mil/files/quarterlyreports/July2012/Section1_-_July_2012.pdf#view=fit (last visited Nov. 7, 2013).

71. CRISIS GROUP MIDDLE EAST REPORT NO.113, FAILING OVERSIGHT: IRAQ'S UNCHECKED GOVERNMENT (2011), *available at* http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-iq/dv/d-iq20111005_06_/d-iq20111005_06_en.pdf (last visited Nov. 7, 2013).

Accordingly, the commission investigators cannot be relied upon to detect criminal activities of persons protected by the influential, even to the extent that they cannot be protected in the course of any such investigation. Any comment about the ability of Iraqi institutions established to combat corruption to enforce anti-corruption laws is pointless. Another acknowledgment to be made here is that anti-corruption and law enforcement efforts have not been well planned in the consideration of rampant corruption, which has come to take various forms and become a means of profitable trade through which security and military positions are acquired in exchange for money.[72] Many officials receive bribes for these purposes. Corruption has become a human disaster, even a matter of life or death in Iraq, and has found its way into child vaccines, portable water, and admittance of fatal radioactive goods and foods into Iraq.[73] The pressing question here is: where do huge amounts of corruption-generated money go? And what reasons are behind the increasing rates of corruption?

Most of such corruption-generated money is used to finance and strengthen the ruling parties to ensure their survival and purchase secret accounts outside Iraqi borders. The rest of this money is used to finance and nurture terrorism. Increasing corruption rates are due to illegal uses of oil revenues, which have been on the rise because of increasing oil prices.[74]

C. Diminished Infrastructure Capacity

In today's world, infrastructure receives outstanding importance, as it is the cornerstone of economic and social development. On one hand, infrastructure assumes the role of being the link between economic resources of a given country and production structures therein; on the other hand, it links production locations and markets, thus boosting

72. Arming contracts and all security-related activities are corrupting-breeding arenas owing to the inability of the independent supervisory bodies to audit them under the pretext of national security. *See* Solomon Moore, *Secret Iraqi Deal Shows Problems in Arms Orders*, N.Y. TIMES (April 13, 2008), *available at* http://www.nytimes.com/2008/04/13/world/middleeast/13arms.html?pagewanted=all&_r=0 (last visited Nov. 7, 2013).

73. *See* Anwar Al-Hamdani, STUDIO 9/AL-BAGHDADIYA TV (2012), *available at* http://www.albaghdadia.com/programs/politics-prog/studio9.html (last visited Nov. 7, 2013) (in Arabic).

74. Patrick Cockburn, *Iraq 10 Years on: How Baghdad Became a City of Corruption*, THE INDEPENDANT (Mar. 4, 2013), *available at* http://www.independent.co.uk/news/world/middle-east/iraq-10-years-on-how-baghdad-became-a-city-of-corruption-8520038.html (last visited Nov. 7, 2013).

economic activities and their horizons and variety in addition to improving commercial activities and promoting easier establishment of service and production ventures.

As far as investment is concerned, in developing an efficient infrastructure, there is an urgent and inevitable need for attracting direct foreign investments (DFIs) while enhancing the competitive edge of the country concerned. Accordingly, the deteriorated infrastructure in Iraq sends a negative message to foreign investors, thus limiting investor-flowing opportunities. This is the impact of the abovementioned situation on economic growth and development.

Undoubtedly, the Iraqi economy suffers from out-of-date infrastructure, which is largely due to the wars in which Iraq has been involved[75] Iraqi infrastructure has experienced little improvement since 2003, such as construction of building roads and airports. However, the infrastructure, e.g., transportation and electricity utilities, are still victimized by out-of-datedness and governmental negligence.[76] It is worthy to mention that the low[77] electricity production rate has affected the performances of other sectors, particularly the industrial sector.[78]

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75. The Iraq–Iran war wreaked havoc in terms of infrastructure, followed by the First and Second Gulf Wars, which wiped it out. Acts of rampage, destruction, and looting also contributed to the current situation. Similarly, the electricity dilemma in Iraq started with a lack of basic materials and spare parts necessary for maintenance. Technical support for a grid station was also lacking due to the economic blockade imposed after the 1991 Iraqi invasion of Kuwait. The dilemma persisted up to 2003, after which Iraq only encountered slow-motion schemes in the form of specific investment targets for the electricity sector. Poor planning and rampant administrative corruption across the departments in the Ministry of Electricity account for this persistent predicament. *See* William Nordhaus, *The Economic Consequeces of a War with Iraq*, YALE U. (Oct. 29, 2002), *available at* http://www.econ.yale.edu/~nordhaus/iraq.pdf (last visited Oct. 29, 2013); Asad, Qaragholi, & Sachs *supra* note 59.

76. Dahr Jamail, *A Country in Shambles*, AL JAZEERA (Jan. 9, 2012), *available at* http://www.aljazeera.com/indepth/features/2012/01/20121411519385348.html (last visited Nov. 7, 2013).

77. An annual growth rate of 2.8% during the 1990s has been achieved in terms of electricity production, marking a rate lower than the population growth rate. In return, electricity consumption has increased by an annual rough rate of 8%, marking a clear divide in the electricity production levels. Electricity station operation ratings have remained lower than needed; as a result, 25% of the institutional capacity in Iraq was hit despite an increase in electricity production over four years following 2003, with a total institutional capacity of 3550 megawatts in 2004, which increased to 5390 megawatts during 2005 only to regress to 4500 megawatts in 2006 owing to the increasing sabotage against electricity stations and towers. The Ministry of Electricity produced only 6850 megawatts in 2013, which means a daily operation capacity of 12 hours. *See* STATISTICS PRODUCTION ANALYSIS OF ELECTRIC POWER IN IRAQ, SUPERVISORY ANALYSIS 2014(2014) (in Arabic).

78. The low-capacity infrastructure in Iraq, especially in terms of electricity

Terrorist attacks pose a key danger to the shyly growing infrastructure, especially when it comes to electricity transmission towers and railways.[79] In fact, the lack of strategic thinking and appropriate execution of reformative schemes for institutions concerned with provision of the services needed for infrastructure rehabilitation and development has resulted in a ramshackle and deteriorated the national infrastructure.[80] Unfortunately, the excessively weak infrastructure has contributed to foreign investors' reluctance to invest in Iraq, as such infrastructure would increase operational and reach-out costs for local and international markets alike. Eventually, this situation discourages foreign investment in Iraq.

III. DETERMINANTS OF LEGAL FRAMEWORK

This section highlights the nature of legal limitations that have relatively precluded foreign investment flows and distorted the investment environment. It further analyzes existing legal limitations, which can be classified into three levels:

A. Inadequate Protection and Enforcement of Intellectual Property Rights

Laws regarding intellectual property rights in Iraq do not comply with the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in several respects. Copyright Law No. 3 of 1971 is not completely harmonious in its use of terms such as "author" and "original author" or in its references to the rights included in a copyright and for holders of such rights.[81] For example, the protection range set forth in the Copyright Law is narrow and only

production, will impact all other sectors, particularly the industrial sector, given the urgent and inevitable need for projects to create electrically powered units. Given the abysmal distribution capacity of this sector and the resulting longer blackout periods, individuals and institutions, especially those in the private sector, have sought to come up with alternatives from private generators to make up for the power shortage. Such generators are fuel powered. This leads to increasing electricity costs and consequently higher direct costs in the form of higher production costs for production projects. Therefore, one may say that less efficient infrastructure is a major hindrance to investment. *See Why Business is Still in the Dumps*, THE ECONOMIST (July 1, 2010), *available at* http://economist.com/node/16488938 (last visited Nov. 7, 2013).

79. Jamail, *supra* note 76.

80. Corbin, *supra* note 65.

81. *See* Bashar Malkawi, *Iraqi Patent Law: In Search of Compliance with TRIPS*, 37 INT'L REV. INTELL. PROP. & COMPETITION L. 591 (2007) [hereinafter Malkawi, *Iraqi Patent*].

provides for consolidated data without any reference to other articles,[82] while TRIPS provide for readable, selection-based, or content-order-based works.[83] Similarly, Malkawi noted that Copyright Law No. 3 of 1971 does not address whether the exclusive right to adapt a work includes the right to make a cinematographic adaptation of the work.[84]

Further, the protection term under the aforesaid Iraqi Copyright Law lags well behind TRIPS,[85] with the law providing for the first public issue as the commencement date for protection.[86]

The Trademark Law[87] violates the provisions of TRIPS in that it allows for the filing of appeals and application of decisions of the trademark registrar before the Minister of Industry and Minerals.[88] However, TRIPS provides for litigation before independent administrative and/or judicial entities.[89]

Moreover, despite the introduction of amendments to the Iraqi Trademark Law, it still lacks in the use of state-of-the-art technology in filing trademark registration applications, mainly because red tape procedures are time- and money-consuming as well as less effective.[90]

Regarding patents, pursuant to TRIPS, a patent must be a novel innovation and applicable industry-wide. However, compared to Article 27 of TRIPS, Iraqi Patent Law No. 65 of 1970 does not explicitly set forth patent-awarding requirements. Therefore, Iraqi legislators have made up for this shortcoming through Article 2 of Patent Law No. 65 of 1970, which was produced to fulfill the aforementioned requirements.[91]

In certain parts, Iraqi Patent Law No. 65 of 1970 goes further than

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82. Bashar Hikmet Malkawi, *Iraq's Accession to the WTO: Commitments and Implications*, 6 J. INT'L TRADE L. & POL'Y14, 19 (2007) [hereinafter Malkawi, *Iraq's Accession*].

83. *See* Agreement on Trade Related Aspects of Intellectual Property at Art. 10.2, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm (last visited Sept. 26, 2013) [hereinafter TRIPS].

84. *See* Malkawi, *Iraq's Accession*, *supra* note 82.

85. *See* TRIPS, *supra* note 83, at arts. 20.4, 6.

86. *See id.* at art. 12 ("[S]uch a term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.").

87. It is worth mentioning that compatibility exists between the Iraqi Law and TRIPs in terms of the visual sensitivity requirement for trademarks. *See* Malkawi, *Iraq's Accession*, *supra* note 82.

88. *Id.*

89. *See* TRIPS, *supra* note 83, at art. 24.3.

90. *See* Malkawi, *Iraqi Patent*, *supra* note 81.

91. *See* Malkawi, *Iraq's Accession*, *supra* note 82.

TRIPS in that it includes even biological patents for development of methods of diagnosis and treatment, surgeries, and protection of flora and fauna. Accordingly, Article 3 of the law should be amended to accommodate exclusions provided for under Article 27 of TRIPS.[92]

The provisions of the law regarding "fair compensation" are ambiguous; an innovator may claim fair compensation from the relevant employer in return for such an innovation as long as the same is covered by the employment contract period, unless such a contract provides for a specific compensation for an innovation. This provision may well leave the door wide open for several predictions on accepting compensation, setting a fair compensation mechanism in accordance with the significance and importance of the innovation in question, and the entity associated with setting the compensation value.[93]

Once again, Patent Law No. 65 fails to refer disputes to judicial entities. Article 33 of the law allows for appealing a registrar's decision to void a patent before the competent minister, while TRIPS provides for judicial referral to settle such disputes.[94] The protection period for an industrial prototype is seven years as per the Iraqi Patent Law No. 65, but 10 years as per TRIPS, in yet another violation of TRIPS.[95]

Furthermore, the Iraqi Government's ability to enforce protection of intellectual property rights and enforcement of relevant laws is extremely weak. In addition, Iraqi laws on intellectual property rights lack procedural measures for border-based customs management when it comes to purchasing illegal copies of commodities and shipping them across borders amounting to violations of property rights.[96] Moreover, such laws are not enforced in the first place. For example, it is possible to find hacked copies in public stores. The Iraqi laws on intellectual property rights do not authorize competent authorities to self-act for

92. *Id.*

93. *See* Elizabeth Mirza Al-Dajani, *Post Saddam Restructuring of Intellectual Property Rights in Iraq Through a Case Study of Current Intellectual Property Practices in Lebanon, Egypt, and Jordan*, 6 J. MARSHALL REV. INTELL. PROP. L. 250 (2006).

94. *See* TRIPS, *supra* note 83, at art. 32.

95. *See* Malkawi, *Iraq's Accession, supra* note 82, at 19.

96. It is hoped that the new intellectual property bill will comply with Articles 51–60 of TRIPS regarding the competent court judgment requirement to finalize customs clearance procedures of commodities suspected to be violating intellectual property rights. *See* 2013 INVESTMENT CLIMATE STATEMENT- IRAQ, U.S. DEP'T OF ST. (2013), *available at* http://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm (last visited Nov. 5, 2013). For this purpose, a national committee has been established by the Council of Ministers of relevant Iraqi ministries, syndicates, trade bodies, and the private sector to draft a new intellectual property rights bill covering all related intellectual property rights. *See id.*

confiscating materials that are proven to be violating property rights. Furthermore, registry organizations in ministries and government bodies concerned with the protection of intellectual property rights are still using primitive tools that do not meet international standards. Finally, the Iraqi laws on intellectual property rights are dispersed under several laws managed by several bodies. Hence, there is an urgent need to consolidate all intellectual property rights under one easily referred to law.[97]

B. Unclear Iraqi Laws for Ratification of International Arbitration Awards

Iraq is an active member of the Arab League of Nations, and in this respect,[98] the country is often governed by stipulations from the 1985 Riyadh Convention,[99] which provides a common framework through which member states enforce laws (including arbitration laws).[100]

According to Articles 251–276 of the country's civil laws, any arbitration proceedings taking place in the country are normally considered to be a domestic issue (even though it may involve a foreign party).[101] However, with recent changes in legislation, foreign nationals or parties can decide to choose foreign arbitration.[102]

Most states across the globe are common signatories to the New

97. *See* Malkawi, *Iraq's Accession*, *supra* note 82, at 19.

98. According to Article 3 of Iraq's 2005 Constitution, "Iraq is a country of multiple nationalities, religions, and sects. It is a founding and active member in the Arab League and is committed to its charter, and it is part of the Islamic world. Article 3, Doustour Jaumbouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, *available at* http://www.wipo.int/wipolex/en/details.jsp?id=10027 (last visited Nov. 4, 2013).

99. The Riyadh Arab Agreement for Judicial Cooperation was signed on June 4, 1983, in "Riyadh," by all the Council of Arab Ministers of Justice except Egypt and Islamic Republic of Comoros. *Riyadh Arab Agreement for Judicial Cooperation*, LEAGUE OF ARAB STATES (April 6, 1983), *available at* http://www.unhcr.org/refworld/docid/3ac6b38d8.html (last visited Nov. 4, 2013).

100. *Id.* at art. 37. "Without prejudice to the provisions of Articles 28 and 30 of this Agreement, adjudications of arbitrators shall be recognized and executed by any contracting party in the manner stipulated in this part subject to the legal norms of the requested party, and the competent judicial authority of the requested party may neither discuss the subject of such arbitration nor refuse to execute the judgment, except in the following cases: (a) If the law of the requested party does not permit the settlement of the subject of the dispute by arbitration, (b) If the adjudication of the arbitrators is made in execution of a condition or arbitration contract that is void or has not become final, (c) If the arbitrators are non-competent under the contract or condition of arbitration or under the law on the basis of which the adjudication was made." *Id.*

101. Saleh Majid, *Arbitration in Iraq*, 19 ARAB L.Q. 267 (2004).

102. SHUBBER, *supra* note 1, at 139-140.

York Convention on the Recognition and Enforcement of Arbitrary Awards, but Iraq failed to be a signatory to the agreement and is therefore excluded from the convention.[103]

Requirements for the recognition and enforcement of foreign arbitration decisions in Iraq are unclear because the Law on Enforcement of Foreign Judgments in Iraq (No. 30 of 1928) and the Civil Procedural Law (No. 83 of 1969) do not regulate such decisions. Accordingly, foreign arbitration decisions may not be enforceable in Iraq, since this principle cannot be deduced from the provisions neglecting the same. Furthermore, Law No. 30 of 1928 has provided explicitly for the scope of enforcement in that it requires a decision or judgment to be handed down by a court formed outside Iraq for it to be enforceable in Iraq.[104]

Iraqi commentators adopt two opinions regarding this negative attitude: the first allows for enforcement, while the second denies such enforcement. Advocates of the first opinion say that foreign arbitration judgments can be enforced in Iraq despite the lack of a legal provision to this end. The argument behind this is that the Arbitration Section of Iraqi Civil Procedure Law No. 83 of 1969 does not specify judgments within the scope thereof.[105] Therefore, such scope cannot be restricted without an explicit legal provision. Accordingly, it covers national and foreign arbitration judgments, i.e., an absolute provision remains so unless restricted by another. According to this opinion, irrespective of whether foreign arbitration judgments are covered by international conventions for enforcement of foreign arbitrator's judgments,[106] they shall be enforced. Moreover, the acceptance of such enforcement in the country has become a principle of private law that is common across the

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103. Abdel Sattar al-Beriqdar, spokesman for Iraq's High Judicial Council, told RFE that Iraq is keen to join the 1958 New York Convention on the Recognition and Enforcement of Arbitrary Awards. *See generally Iraq Drafting International Arbitration Law*, RADIO FREE EUR. RADIO LIBERTY (2011), *available at* http://www.rferl.org/content/iraq_arbitration/2320391.html (last visited Nov. 4, 2013). Despite the fact that Iraqi officials have indicated that they are going to sign the New York convention treaty, their failure to do so means that if a foreign national or company is to obtain an arbitration award against an Iraqi company (or individual), it will have to enforce the same through the courts. *See* PAULSSON ET AL., FRESHFIELDS GUIDE TO ARBITRATION CLAUSES IN INTERNATIONAL CONTRACTS (3d ed. 2011).

104. *See* Dr. Hamzeh Haddad, Enforcement of Foreign Judgments and Award in Jordan and Iraq, Lecture Before the IBA Conference of Bahrain (Mar. 8, 1989), *in* ARAB INSTITUTE OF ARBITRATION & ADR, *available at* http://www.aiadr.com/aiadr%20re/2.pdf (last visited Nov. 4, 2013).

105. *Id.*

106. Majid, *supra* note 101.

world, as any judgment so handed down in the country is required to be enforced. Hence, such enforcement is acceptable in Iraq as per Article 30 of the applicable Iraqi Civil Law, which provides the following: "Any matter not covered by the previous articles regarding conflict of laws shall be governed by the most common private international law principles." However, the second opinion rejects the above argument, as the advocates of the same are (rightly so) in favor of non-acceptance of foreign arbitration judgments in Iraq unless the same are regulated by international bilateral or multilateral agreements providing for enforcement of the arbitrators' judgments in the contracting country if Iraq is party thereto.[107]

In addition, enforcement of foreign arbitration judgments is one of the most common principles of the private international law worldwide, and hence, the potential enforcement thereof in Iraq pursuant to Article 30 of the Iraqi Civil Law may not be accepted in this respect because the aforesaid Article is restricted to a subject of the private international law or conflict of laws. It reads as follows: "Any matter not covered by the previous Articles regarding conflict of laws shall be governed by the most common private international law principles."[108] Considering the fact that enforcement of foreign arbitration judgments is not a case of conflict of laws, the said Article is not applicable thereto.[109]

Therefore, foreign arbitrator judgments including those handed down to settle foreign investment contracts are not applicable in Iraq unless provided for by international agreements. In any event, for the purposes of enforcement of arbitration decisions by the concerned executive authorities, the approval of such a decision by the competent court after payment of fees pursuant to Article 272 (F/1) of Iraqi Civil Procedure Law No. 83 of 1969 is a requirement of the Iraqi laws. The purpose of this procedure is to monitor the arbitrators' work through approval or revocation judgments handed down by the competent court on the ground that arbitrators are different from judges in terms of legal experience. Another reason is to ensure that the arbitrators' decisions are not illegal in either subject or form.[110]

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107. ABDUL HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 230 (3d ed. 2011).

108. Majid, *supra* note 101.

109. EL-AHDAB, *supra* note 107, at 230.

110. Haddad, *supra* note 104.

C. Institutional Capabilities of Iraqi Judiciary

Undoubtedly, the Iraqi judiciary has adopted a number of steps to win foreign investors interested in Iraq.[111] However, there are many

111. In the aftermath of 2003, a new position was introduced in the Iraqi judiciary. Additionally, some key reforms were introduced in the Iraqi judicial system; e.g., the Supreme Judicial Council (SJC) was restructured by Provisional Civil Coalition Authority (PCCA) Order No. 35, whereby the SJC was assigned supervision of the Iraqi judicial system independently from the Ministry of Justice. The said order was followed by the PCCA-enacted Law No. 12 on May 8, 2004, which was designed to boost an independent judiciary by providing for administrative and financial independence of the SJC from the Ministry of Justice. See Benjamin B. Brockman-Hawe, *The Iraqi High Court: A Retrospective and Prospective View*, 14 TILBURG L. REV. 422 (2008). An independent judiciary is enshrined and well-established in the Iraqi Constitution under Article 47, which provides for establishing three federal powers in the State of Iraq, the independence of which shall established by the Constitution: legislative, executive, and judicial powers. Each of these powers shall conduct their work under the "separation of powers" principle. See Bassiouni, *supra* note 48. Furthermore, the judicial power shall be independent, with duties and functions conducted by courts of various degrees and types. See Christina J. Sheetz & Matthew T. Simpson, *Symposium: Rethinking the Future: The Next Five Years in Iraq*, 24 AM. U. INT'L L. REV. 181 (2009).

Courts shall hand down their judgments pursuant to the applicable laws. In addition to this point, judges shall be independent and not subject by any power except that of the law in the course of conducting their duties. No power may interfere with judicial affairs or administration of justice. See Bassiouni, *supra* note 48.

Additionally, the Commercial Court has been created recently by virtue of the SJC Statement No. 136, issued on 01/11/2010, which is the first specialist court in Iraq to be assigned cases in which a party is a non-Iraqi. After the establishment of the economic open-door policy in Iraq, it has become inevitable to create commercial courts to assure investors of the presence of an impartial specialist court that allows for summary settlement of disputes. Furthermore, a foreign investor may not only plead before such a court in the course of legal proceedings marking disputes with private sector entities but also with entities from the Iraqi Government. The only difference between a commercial court and a court of first instance lies in the involvement of non-Iraqi litigants. However, in a commercial case with Iraqi litigants, a court of first instance shall be the competent court. *See* JUDICIARY, ESTABLISHMENT OF THE COMMERCIAL COURT (2010), *available at* http://www.iraqja.iq/view.680/ (last visited Oct. 29, 2013) (in Arabic); *see also* Jordan E. Toone, Foreign Direct Investment in Iraq: Reassessing the Legal Framework, BYU I.L. & MGMT. REV., (Sept. 25, 2012), *available at* http://ssrn.com/abstract=2152037 (last visited Oct. 29, 2013). The first judgment of the Commercial Court revoked the decision of the Ministry of Industry and Minerals (MoIM), which was the defendant (the trademark registering party) on the French Veolia Environment and condemned the defendant for registering a trademark in the plaintiff's name pursuant to the legally applicable ways. Veolia Environment, the plaintiff, filed an application with the relevant department of the defendant to register its trademark, Veolia Environment, in several types of commodities and goods following the defendant's refusal to register the same on no legal grounds because the trademark was a two-word phrase, while the other trademark was a one-word phrase in upper case letters and placed inside a square frame. The trademark to which the subject matter of the case is related is not framed and is written in lower case letters. Therefore, no similarity exists between both trademarks, and thus, the case was dismissible.

challenges ahead, which are obstacles to creating a national world-class judiciary.

The challenge encountered by the Iraqi judiciary is the unmet dire needs of judicial institutions in terms of resources, training, and facilities. Lack of experience in foreign investment disputes, international arbitration, training for judges, and court officers or employees are the major concerns.[112] Foreign investors' trust the Iraqi judicial system has been compromised by political interferences with judicial work,[113] mainly in the form of personal safety threats against judges, thus undermining the efficacy of judicial institutions.[114] Furthermore, outdated legislations and delayed legal reforms undermine the integrity of the judiciary and Iraq's abidance to international obligations under international law.[115] Clearly, this leads to delayed judgments. As a result of the enforcement of the De-Baathification Law, many judges have been relieved of office on the grounds of being members of the Baath Party.[116] As a result, only 750 judges remain to

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Moreover, the court reviewed the original copy of the trademark layout and decided to appoint three judicial exports to look into the matter. They confirmed non-similarity between both trademarks and the subsequent cheating and deceiving of the public into buying trademarked commodities bearing misleading trademarks that are not identical. There is a clear verbal difference in the pronunciations of the trademarks, and hence, the experts grounded the report, which is valid for a judgment pursuant to Article 140 (1) of Evidence Law. The Court handed down its judgment based on Articles 5 and 10 of the Trademark and Commercial Logos Law No. 21 of 1957. See Commercial Court, Judicial B No. 315 / commercial court / 118 (2011) (in Arabic).

112. Court administrations still feature many administrative technique problems on a large scale, all of which are obsolete. Such techniques include keeping case records, not integrating records, and primitive and weak exchanges of information. These methods are causing a lot of concern owing to the resulting potential disclosure of case details. *See* U.N.E.P., IRAQ INSTITUTIONAL CAPACITY ASSESSMENT REPORT 18, 25 (2006), *available at* http://www.unep.org/disastersandconflicts/portals/155/disastersandconflicts/docs/iraq/ICA_iraq_report.pdf (last visited Oct. 27, 2013); QED GROUP, LLC, IRAQ INSTITUTIONAL CAPACITY BUILDING (ICB) ASSESSMENT, USAID|IRAQ 2, 52 (May 2010), *available at* http://pdf.usaid.gov/pdf_docs/PNADW087.pdf (last visited Oct. 27, 2013).

113. A.B.A., JUDICIAL REFORM INDEX FOR IRAQ 35 (2006).

114. *Id.* at 29. Terrorist attacks against judges may well cast shadows on the country's judicial institutions because investigations and trials are usually followed by threats and violence against judges concerned, thus compromising their abilities to fairly and impartially look into cases. *See id.* Most judges lack knowledge of personal security details or sufficient training therein. *Id.* Other areas of lacking include provisions of a judicial safe house, safe workplace, and firearms license. *Id.* A total of 58 judges and 70 judicial officers were killed between 2003 and 2012. *See Martyrs of Judges*, Iraqja.iq (May 30, 2012), *available at* http://www.iraqja.iq/shheedq.php (last visited Nov. 5, 2013) (in Arabic).

115. A.B.A., *supra* note 112, at 19.

116. Jeffrey J. Coonjohn & Zuhair al-Maliki, *Chaos in the Courts Can Iraq's*

serve nation-wide judicial needs. Despite the fact that the appointment of judges is a top priority for the SJC, it has been slow and accompanied by a lack of experience among new judges in handling specific issues such as foreign investment disputes.[117]

IV. PILLARS OF THE INVESTMENT ENVIRONMENT SUFFER SUBSTANTIAL CRACKS

Although Iraq has taken significant steps to create an attractive and competitive investment environment together with the enactment of Investment Law No. 13 of 2006 and establishment of the National Investment Commission, which has given way to rising hopes of strong Iraq-bound foreign investment flows, the following limitations account partly for foreign investors' reluctance to flow into Iraq.

A. Imbalance in Investment Commissions

The facilitating procedures of foreign investors' dealings with government commissions in the investment hosting country would normally mark a positive economic and commercial activity encouraging attitude.[118] Therefore, the Iraqi Investment Law No. 13 of 2006 provides for establishing investment commissions[119] that shall be responsible for developing and planning national investment policies, facilitating investment law enforcement by enacting regulations and directives, and monitoring the execution of strategic investment projects.[120]

However, the Iraqi National Investment Commission (NIC) was born politically dependent. Political rifts and corruption cast shadows

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Embattled Chief Justice Fend-off Presidential Strategists, JJCOONJOHN.COM (Feb 26. 2013), *available at* http://jjcoonjohn.com/wp-content/uploads/2013/02/Chaos-in-the-Courts-.pdf (last visited Oct. 27, 2013); Pfiffner, *supra* note 21. The Chief Justice was removed from service on the grounds of being a member of the Baath Party. Coonjohn, *supra*; Pfiffner, *supra* note 21. Jeffrey Coonjohn, a Senior Policy Advisor working in the Middle East, North Africa, and Central Asia commented, "Valentine's Day was none too sweet for Iraq's Chief Justice Medhat al-Mahmoud this year. Coonjohn, *supra* note 115; Pfiffner, *supra* note 21. The 79-year-old jurist awoke to find himself ignominiously ousted from his post as a result of having once been Saddam Hussein's personal legal advisor." Coonjohn, *supra*; Pfiffner, *supra* note 21.

117. A.B.A., *supra* note 113, at 18.

118. SHUBBER, *supra* note 1, at 48.

119. *See* The Investment Law Oct. 2006 Article 4, TRADE, *available at* http://trade.gov/static/iraq_investmentlaw.pdf (last visited Oct. 27, 2013) [hereinafter *Investment Law*].

120. SHUBBER, *supra* note 1, at 49.

largely on the commission performance of the local NIC.[121] Political quotas played a key role in choosing NIC officers and employees, thus leading to incompetent individuals being entrusted with the responsibility of management of investment commissions.[122] Furthermore, the private sector, represented by high-profile businessmen or key investors, is not represented in the NIC board.[123] Much to Iraq's detriment, the non-professional administration of some investment commissions has led to politically-motivated decisions granting or denying investment licenses; [124] investment commissions have not been far from the government bodies causing corruption, of which the Commission of Integrity (CoI) has detected several cases of blackmailing foreign investors into bribing employees for completing or approving investments and disburse payments.

The NIC has not fulfilled its role, nor has it worked smoothly, as it failed to reconstruct a foreign investment friendly environment. Moreover, the NIC never had an investment advancement plan and even lacked a comprehensive vision to plan for foreign investment attraction.[125] All of this led to incorrect investment choices in terms of

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121. Consequences of political rifts in the Iraqi Government include lack of coordination concerning obtainment of approvals for key projects that end up rejected owing to the non-obtainment of necessary approvals because of political rifts in decision-making circles. *See* Hussein Tamimi, *Iraq Needs to Rehabilitate and Expand Infrastructure Investment through the Gate*, NENO'S PLACE (Jan. 17, 2013), *available at* http://nenosplace.forumotion.com/t973-iraq-needs-to-rehabilitate-and-expand-infratstructure-investment-through-the-gate (last visited Oct. 27, 2013).

122. *See Assessment of Current and Anticipated Economic Priorities in Iraq*, USAID-TIJARA at A-79 (2012), *available at* https://tijara-iraq.com/?pname=resources_tech&doctype=21&t_t=Technical_Reports (last visited Oct. 27, 2013) [hereinafter USAID]. In general, NIC employees show a very modest level of expertise and competence, especially in terms of mastering foreign languages, administrative systems, and e-control. *Iraq Investment Climate Statement Bureau of Economic, Energy, and Business Affairs*, IRAQPROJECT.COM, *available at* http://iraqproject.com/investment-in-iraq/ (last visited Oct. 27, 2013).

123. *See Investment Law*, *supra* note 119.

124. The most critical point here is that investment commissions have lost their institutional professionalism regarding the vision behind establishment and performance. They are the victims of political pressures that have affected their performance. For such reasons, investment commissions have lost their credibility and necessary political support to interact effectively with investors and national institutions (as put forward by the Council of Representatives). *See* Rahim al-Uqailee, *Corruption in Iraq Hampered Investment*, 117 JUDICIARY 12 (2012) (in Arabic).

125. The NIC does not have a clear-cut integrated plan for current or future investment opportunities. Qusay al-Abadi, a member of the Parliamentary Economy and Investment Committee, called to cancel the national investment for failing to ensure the success of the investment process in the country. *See* Ahmed Hussein, *Ebadi Suggests Canceling Iraqi*

serving Iraqi development priorities. [126] In addition, the NIC could have played a greater role in supporting Iraqi legislators and the government via identification of key obstacles to foreign investment inflow, with a view to adopting appropriate solutions considering direct contact of the NIC with investors, which enables the NIC to spot obstacles to smooth inflows of foreign investments into Iraq.[127]

Iraq's foreign investment promotion policy has never been commensurate with the country's investment needs. Shortcomings in terms of promotion have been a key characteristic of the NIC; the NIC has never established a promotion unit through which it may raise awareness of the parties concerned through media campaigns, conferences, or websites, thus creating a "foggy" perspective in the already investor-reluctant investment environment. [128]

Furthermore, despite the participation of the NIC in international and national affairs, the organization needs more effective and active participation to attract individuals and corporations to Iraq by displaying available investment opportunities, distributing promotional booklets and holding direct meetings with key investors or companies to provide first-hand knowledge of investment projects in the country.[129]

In addition, the NIC Marketing Department lacks strategic means for targeting and building relationships with clients. Most NIC employees do not master communication and foreign-language skills. The mechanisms adopted to follow planning and project-licensing

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National Investment Commission, IRAQI NEWS (Oct. 11, 2012), *available at* http://www.iraqinews.com/baghdad-politics/ebadi-suggests-canceling-iraqi-national-investment-commission/ (last visited Oct. 28, 2013); John Lee, *Sadrist MP calls for Abolition of NIC*, IRAQ BUS. NEWS (Jan. 11, 2013), *available at* http://www.iraq-businessnews.com/?s=Failure+of+iraq+National+Investment+ Commission&x=42&y=16 (last visited Oct. 28, 2013); Qusay al-Abadi, *Call to Cancel the Investment Commissions*, ALL IRAQ NEWS (2012), *available at* http://www.alliraqnews.com/index.php?option=com_content&view=article&id=:2012-10-11-16-37-41&catid=41:2011-04-08-17-27-21&Itemid=86 (last visited Oct. 28, 2013).

126. NIC suggestions, proposed by local investment commissions, should be studied, prioritized, and then listed as part of the wider national investment plan. *See* SUPPORTING INVESTMENT POLICY AND GOVERNANCE REFORMS IN IRAQ, *supra* note 4, at 16, 18.

127. The NIC argues that it has never been enabled to serve as an independent, empowered member to adopt an investment attraction and sustainment strategy, but suffers from governmental and political pressures. *See id.* at 20.

128. The NIC lacks sufficient and accurate information about the investment environment in Iraq, particularly about the legal framework to establish investments, seize available investment opportunities, and provide statistics and studies. *See id.* at 38.

129. *See* Mohammed al-Musawi, *Weaknesses in the Performance of Investment Commissions*, 18 AL-QADISIYA L. SCI. 350 (2013) (in Arabic).

processes such as design, purchase, production, distribution, marketing, post-transaction services, search, and development are still paper-based.[130] Furthermore, the NIC Department of Statistics has only limited and far from accurate statistics, which lack any classification or analyses. This leads to difficult investment decision-making in the light of uncertainties owing to a lack of a reliable database.[131]

The performance of the NIC has always been distorted by conflicts and interference with ministries. Despite entrusting the NIC with the responsibility of planning and executing investment projects, the investment and development departments in other government bodies that are entrusted with establishing ministry specific investments are still in charge of such planning and execution. This led to a lack of a comprehensive investment vision.[132] Therefore, the long-awaited objective of reconstructing the national economy has never materialized. This was further worsened by the presence of weak political will in standardizing the existing institutional framework of action, the controversial applicable laws, which are too ambiguous to settle such duplication of roles.[133]

The NIC–provincial investment commission relationship is all about interference in terms of power and capacities despite the supervisory powers given to the NIC and the requirements that such provincial bodies act in line with the National Investment Plan.[134] However, there is an objection to the non-regulation of potential conflicts between the NIC and provincial or territorial counterparts. A clear manifestation of this conflict materialized in cooperation cessation and contract termination threats delivered by the Iraqi Government to Shell and Exxon Mobil, should the latter sign contracts with the Government of Iraqi Kurdistan.[135] As explained by the Central Government, the reason behind such disputes is that the Kurdistan Board of Investment is not authorized to issue oil exploration

130. *See* Zainab Abbas, *National Investment Commission Under the Hammer*, 18 AL-QADISIYA L. SCI. 350 (2011) (in Arabic).

131. SUPPORTING INVESTMENT POLICY AND GOVERNANCE REFORMS IN IRAQ, *supra* note 4, at 38.

132. USAID, *supra* note 122, at 27.

133. *Id.* at 38, 47.

134. al-Musawi, *supra* note 129.

135. The Exxon Mobil-Kurd oil deal spat spotlights Iraq's juggling act between politics and investments. *See* Alice Fordham & Dan Morse, *Exxon Mobil Dispute Deepens Arab-Kurd Spit in Iraq*, WASH. POST (Apr. 5, 2012), *available at* http://articles.washingtonpost.com/2012-04-05/world/35453128_1_kurdistan-regional-government-kurdish-region-exxon-mobil (last visited Nov. 4, 2013).

licenses.[136] The Iraqi Ministry of Oil continually requests that Kurdistan notify the ministry of all oil agreements signed by the latter with international companies.[137] In turn, the Ministry of Natural Wealth and Resources in Kurdistan argues that the Iraqi Constitution gives Iraqi provinces the right to enter into contracts with oil companies.[138] It appears that such disputes will persist because of the lack of legislation for regulating Iraqi oil wealth.[139] The Iraqi legislature is blamed for not referring to the legal personality of the governorate non-provincial investment authorities so that it can enjoy the same personality as the National Investment Authority in Baghdad. This lack of legal personality would limit their powers regarding issuance of investment licenses for investors considering such authorities' financial dependence.[140]

For these reasons, some Iraqi writers and officials have called for a "Supreme Investment Council" along the lines of the Supreme Energy Council, which was formed in neighboring Arab countries. This council is supposed to consist of the NIC, Ministry of Finance, Ministry of Planning, and representatives from departments of investment in other ministries and bodies under the management of the Ministerial Cabinet.[141]

The objective of setting up the Supreme Investment Council is to settle existing disputes between the NIC and ministries and standardize investment plans and efforts.[142] This can be realized by setting up the

136. The Iraqi Government declared the illegality of production-sharing agreements between foreign companies and the Kurdistan Regional Government. Rex J. Zedalis, *Iraqi Oil Revenues from its Sale: A Review of How Existing Security Council Resolutions Affected and the Past ad May Shape the Future*, 18 EUR. J. INT'L L. 499 (2007). For instance, Hussain al-Shahristani, Deputy Prime Minister of Energy Affairs, said, "Iraq was 'weighing measures' that it may take against Exxon after the company signed what the central government considers to be illegal contracts with the Kurds." *Id.*

137. *See* Johnny West, *Iraq's Last Widow: Diffusing the Risks of a Petro-State* (Ctr. For Global Dev., Working Paper No. 266, 2011); Abbas, *supra* note 130.

138. ZEDALIS, *supra* note 28, at 31.

139. Iraqi Oil Minister Mr. Ghadban stated, "I am not optimistic that the energy law will be adopted in the coming months, and I would be happy if it is adopted by the end of the year." He also stated that, "The more the law is delayed, the more we will have problems such as the one with Exxon Mobil." *See* Kadim Ajrash & Nayla Razzouk, *Iraq's Oil Law May Be Pushed Till End of 2012, Ghadhban Says*, BLOOMBERG (Feb. 2, 2012), *available at* http://www.bloomberg.com/news/2012-02-02/iraq-s-energy-law-may-be-delayed-for-rest-of-year-ghadhban-says.html (last visited Oct. 30, 2013).

140. al-Musawi, *supra* note 129.

141. al-Abadi, *supra* note 125.

142. SUPPORTING INVESTMENT POLICY AND GOVERNANCE REFORMS IN IRAQ, *supra* note

proposed Supreme Investment Council, which will have the upper hand in decisions taken by ministries and the NIC, thus leading to the commitment of conflicting parties to the enforcement of the same. Considering its high-level political management, the Supreme Investment Council may well overcome the obstacle of political rifts. However, this study argues against the establishment of the Supreme Investment Council, thus adding another obstacle to the already obstacle-ridden institutional framework. The viability of a national investment commission under the role assigned to the Supreme Investment Council is questionable. If the solution is to introduce an administrative council, reform should be introduced *a fortiori* to the NIC. Accordingly, the key critique thrown at the suggestion lies in the violation of principles on which Investment Law No. 13 of 2006 is based.

B. Bureaucracy in Land Allocation for Investment Projects

In the pre-1991 war era, Iraq had an outstanding position in the Middle East thanks to its distinguishable abilities in public sector management, which used to have a segment of well-trained and highly qualified civil servants.[143] While good institutional capabilities still exist across several fields, the long years of war and international isolation resulted in the following issues: (1) diminished investments in key domains of public sector management which diminished the administrative capabilities of civil service; (2) very large numbers of public sector employees stemming from a lack of job opportunities elsewhere (the Iraqi Government has become one of the largest pools of employees worldwide); (3) limited e-governance and automation; (4) lower credit standards, higher corruption rates, and a weaker public sector; and (5) inefficient economic governance in general.[144] All these factors combine to yield a weaker and less efficient government, particularly when it comes to the ability to provide key services and assume responsibility for organizational responsibilities.[145]

The main shortcoming to be spotted here is the strictly central administration that rules by unquestionable orders and the

4, at 37.

143. Coyne & Pellillo, *supra* note 6.

144. USAID, *supra* note 122, at 52.

145. *See, e.g.*, ABBAS ALNASRAWI, THE ECONOMY OF IRAQ: OIL, WARS, DESTRUCTION OF DEVELOPMENT AND PROSPECTS,1950-2010 168-169(2010); SUPPORTING INVESTMENT POLICY AND GOVERNANCE REFORMS IN IRAQ, *supra* note 4, at 102.

accompanying red tape that takes the form of a series of orders and bodes.[146] This type of administration has fallen afoul of requirements for investments because the latter requires simple, out-of-the-box, and swift mechanisms to come to fruition.[147]

Along with the complicated political transition, the administration related challenges prevented the enforcement of necessary structural changes to re-engineer the government and its mechanisms. Red tape, lack of administrative efficiency, and blackmailing investors are key obstacles to investments, as seen by Sami al-Aa'raj, head of the NIC.[148]

The One-Stop-Shop Authority (OSSA) is the only entity an investor would visit if willing to be in Iraq. The OSSA facilitates the investment process by equipping investors with the investment permit without interference by the bureaucratic red tape.[149]

However, the one-stop-shop policy has not eliminated the red tape; even by bringing investment and land allocation licensing processes to a more complicated level there is still the requirement to obtain approvals from a large number of ministries and bodies.[150] For example, considering Iraq's position as the world's second largest country with oil reserves, the exploration operations for which are still underway, approval must be obtained from the Ministry of Oil to establish an investment on a given part of land. Difficulties can be easily imagined if

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146. *See* Coyne & Pellillo, *supra* note 6.

147. *Id.*

148. *See* Abdul Malik Mahmoud, *Investment in Iraq: Reality or Illusion?*, 83 ALRRAÚD MAG. 8 (2012). Abdullah al-Ismaili, head of Development Affairs at the Omani Gulf Energy Company, said that the investment process has several obstacles and red tape to the extent of scaling down ambitions of foreign investors, particularly in terms of obtaining licenses for investments and importing materials to be used for such investments. *See* al-Musawi, *supra* note 129. In turn, Taymour al-Byali, the representative of a U.S. construction company, said that the current situation in Iraq requires many measures, most of which are complicated. *See* Mahmoud, *supra*. Furthermore, the Vice President of the Parliamentary Committee on Provinces, Mansour at-Tamimi, told Free Iraq Radio that the investment problem in Iraq is very complex owing to myriad obstacles, highlighting that the way investors are dealt with is too poor for them to maintain their investments in Iraq. Accordingly, the investment environment has become repellent rather than attractive. At-Tamimi also revealed that the one-stop-shop has failed in terms of investment facilitation. Selling or leasing lands for purposes of investment is very complicated because of red tape and conflicts between investment authorities and institutional owners of such lands. *See* Abbas, *supra* note 130.

149. *See* JAMES A. BAKER III & LEE H. HAMILTON, THE IRAQ STUDY GROUP REPORT (2006), *available at* http://media.usip.org/reports/iraq_study_group_report.pdf (last visited Oct. 28, 2013).

150. SUPPORTING INVESTMENT POLICY AND GOVERNANCE REFORMS IN IRAQ, *supra* note 4, at 35-36.

the reply obtained from the Ministry of Oil is "oil or other sources of energy soil tests are not finalized."[151]

The NIC is also required to obtain approvals from the Ministry of Water Resources, [152] Ministry of Electricity,[153] Ministry of Defense, Ministry of Interior, [154] Ministry of Finance,[155] Ministry of Construction and Housing,[156] Ministry of Environment, Ministry of Tourism and Antiquities,[157] and Customs and Free Zones Authority before any investment license can be issued.

Considering the inherent red tape and delays, obtaining approvals from the aforementioned departments inevitably leads to significantly delayed efforts by the NIC, especially because of the political disputes between the NIC and the political "references" of such ministries and bodies.

C. Financial Markets

Any outdated legislation that regulates companies operating in the Iraqi financial market must be amended to catch up with the new Iraqi economic trend toward a market economy and to keep up with the

151. Abbas al-Yasiri, *Corruption in the Form of Bureaucracy: The Investment Projects as a Case Study*, 79 J. KUFA U. 352 (2013) (Iraq).

152. Iraq is an agricultural country wherein the rivers Euphrates and Tigris flow in addition to many creeks and water bodies that irrigate vast agro lands. Therefore, the NIC must obtain the approval of the Ministry of Water Resources and the Ministry of Agriculture to ensure that there is no conflict between an investment and public or private rights on the site proposed for such investment. *See* Abbas, *supra* note 130.

153. Iraq has an electricity grid that encompasses almost every part of the country. Considering the severe power shortage, the Government has prioritized projects of the Ministry of Electricity. For its part, the NIC is committed to non-conflict with grid lines or the projects of the Ministry of Electricity. *See* Mahmoud, *supra* note 148.

154. Since 2003, Iraq has faced a wave of terrorism and instability causing change in heavy security forces across Iraqi cities. Therefore, it is the NIC's duty to avoid issuing an investment license unless approvals of security institutions are obtained first. *See* al-Musawi, *supra* note 129.

155. The Ministry of Finance is the body entrusted with allocating government-owned lands. *Id.* Therefore, it holds the power to allot a piece of land to the NIC. *See id.*

156. The Ministry of Housing exerts enormous efforts to build housing communities in a large number of governorates and on vast sites under a long-term plan to build five million housing units. *Id.* Accordingly, the Ministry of Housing must be contacted to ensure non-conflict with NIC projects. *See id.*

157. Iraq has been home to the civilizations of Babylon, Assyria, Sumer, and Akkad in addition to the Islamic civilization. Mahmoud, *supra* note 148. Because of this, monuments are almost ubiquitous, and excavation efforts for artifacts of these prior civilizations are underway in many sites. This has caused the NIC's commitment to not introducing investment projects that may be harmful to archeological sites. *See id.*

legislation regulating international financial markets.[158] A lack of legal protection takes away the confidence of Iraqi and foreign investors and capital owners and holds them back from operating effectively in such a market. Furthermore, this market suffers from weak monitoring tools and measures, which secures minimum disclosure and transparency for those concerned—a fact that has given rise to companies operating in the Iraqi market with limited finances, with the exception of banks that are required by the Central Bank to hold a minimum capital of 250 billion Iraqi Dinars, compared to 15 billion Iraqi Dinars for money transfer companies, 150 million Iraqi Dinars for exchange companies, 1–2 billion Iraqi Dinars for small- and medium-sized loan companies, and 150 million Iraqi Dinars for financial investment companies.[159] In addition, some companies have weak or limited databases, much to the detriment of investors in terms of taking safe and quick consultative decisions.[160] Other weaknesses include lack of flexibility in the prevailing interest rate structure, especially with banks and insurance companies that offer mid- and long-term loans for real estate purposes.[161]

V. DEMONSTRATION OF THE HYPOTHESIS: IRAQ RANKING IN INTERNATIONAL INDICATORS OF THE INVESTMENT CLIMATE

Many international bodies and organizations provide investors and decision makers with digital information that helps them make investment decisions. This help takes the form of a number of indices that clarifies the efficiency of an investment environment.[162] Statistical studies have proven that there is a close relationship between a country's rank on such indices and how much investment it attracts.[163] To boost the stance of this study and show how faulty governmental reforms have proven to be obstacles to foreign investment in Iraq, the

158. *See Doing Business in Iraq: A Legal Guide*, ÇEKTIR & BAŞARI L. FIRM (2011).

159. *See* Daveed Gartenstein-Ross & Joshua D. Goodman, *The Global Economic Crisis & Iraq's Future*, THE JEWISH POL'Y CENTER, *available at* http://www.jewishpolicycenter.org/966/global-economic-crisis-iraq-future/ (last visited Oct. 28, 2013).

160. Benjamin B. Brockman-Hawe, *The Iraqi High Court: A Retrospective and Prospective View*, 14 TILBURG L. REV. 422 (2008).

161. THE WORLD BANK, REPUBLIC OF IRAQ: FINANCIAL SECTOR REVIEW 11(2012).

162. Daniel Kaufmann & Aart Kraay, *Governance Indicators: Where Are We, Where Should We Be Going?*, 23 WORLD BANK RES. OBSERVER 1 (2008).

163. UNCTAD, *supra* note 5.

following points examine Iraq's performance in the investment climate on the basis of international indices.

A. Index of Economic Freedom

Economic freedom is one of the most important investment-attracting factors because it constitutes the best means for reaching an advanced level of growth and economic welfare. Economic freedom is measured using a number of variables that seek to figure out how open an economy is and how much the state interferes with its economy. [164]

Iraq has continued to miss a position on the 2013 index because of a lack of reliable data on economic liberalism within the country. Iraq has been categorized among the countries with zero economic liberalism, and a 4.9-point classification on the index during 1997–2001. In 2002, this classification went up to 5, which is the highest ceiling for a total lack of economic liberalism, thus marking an unmistaken situation of zero economic liberalism, a tighter grip on economic activities, and expansion of state or government control. [165]

To have the pre-2003 Iraq so classified among states with zero economic liberalism is a result that sounds pretty logical because of the economic policies and measures adopted by the country's pre-2003 governments. This period was an era of heavy state interference with its economy. However, in post-2003 Iraq, there has been an economic reformist approach with a view to larger economic liberalism. However, the steps adopted by Iraq have never been sufficiently convincing to merrit any enhancement considered in its classification.

B. Ease of Doing Business Index

The Ease of Doing Business Index, created and updated annually by the World Bank Group (WBG) and International Finance Corporation (IFC), is a compound index consisting of ten sub-components that make up the base for a business-doing environment. This index measures how a country's laws and governmental procedures affect its economic situation while focusing on the small-

164. *See 2013 Index of Economic Freedom: About the Index*, HERITAGE FOUND. & WALL ST. J. (2013), *available at* http://www.heritage.org/index/about (last visited Oct. 30, 2013). The Heritage Foundation introduced this index in 1995 in conjunction with the Wall Street Journal. Other bodies concerned with measuring economic freedom include the Fraser Institute of Canada and the Dubai International Financial Center (DIFC).

165. *See 2013 Index of Economic Freedom: Iraq*, HERITAGE FOUND. & WALL ST. J. (2013), *available at*
http://www.heritage.org/index/pdf/2013/countries/iraq.pdf (last visited Oct. 30, 2013).

and medium-scale enterprise sector with a view toward developing benchmarks for measuring and comparing business environment conditions in developed and developing countries.[166]

In 2013, Iraq ranked 165 out of 185 countries on the Ease of Doing Business Index, pushing it two ranks behind its placement in 2012. Iraq debuted on this Index in 2005, when it ranked 114 out of 155 countries, before moving behind to 145 out of 175 in 2006 and 146 in 2007 and 2008, with a persistent backward trend to 152 in 2009 and 166 in 2010 and 2011. These classifications explain the difficulties encountered by the Iraqi investment, which is additional proof of the futility of the post-2003 reforms.[167]

C. Country Risk Rating

The country-based risk assessment indices include a number of indications for investment- hosting countries that affect the flow-in of foreign investments. These include political, economic, and financial risks. Iraq has always been ranked low on all these indices, which is further proof of the obstacles to investing in Iraq. The unanimous categorization of Iraq by all these indices indicates the height of the risks facing investments in Iraq. Country-based risk assessment indices are issued by several specialist bodies, and the following are some of them:

1. International Country Risk Guide

The BRS International Country Risk Guide is a monthly guide first issued in 1980 that measures investment-related risks.[168] This guide covers 140 countries, including Iraq, which remained among the high-risk countries untill 2012. From 2004 to 2007, Iraq was among the very high-risk countries but moved forward to the moderate risk category in 2008, only to move back to the high-risk category from 2009 to 2012.[169]

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166. *Ease of Doing Business and Distance to Frontier*, WORLD BANK GROUP & INT'L FIN. CORP. (2013), *available at* http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB14-Chapters/DB14-Ease-of-doing-business-and-distance-to-frontier.pdf (last visited Oct. 30, 2013).

167. *Doing Business 2013: Economy Profile: Iraq*, WORLD BANK GROUP & INT'L FIN. CORP. (2013), *available at* http://www.trade.gov/iraq/build/groups/public/@tg_iqtf/documents/webcontent/tg_iqtf_003994.pdf (last visited Oct. 30, 2013).

168. *International Country Risk Guide Methodology*, PRS GROUP (2013), *available at* http://www.prsgroup.com/PDFS/icrgmethodology.pdf (last visited Oct. 30, 2013).

169. *Political Risk Rating: Iraq*, PRS GROUP (2012), *available at*

2. Euromoney Country Risk

This index is semiannually issued by the magazine *Euromoney* to measure a country's ability to meet its foreign obligations, such as debt service, paying for imports when due, and freedom to transfer investment returns and capital. This index has nine sub-indices with various weights. The greater the percentage of an index, the lower the risk that a country would not meet its obligations.[170]

In total, 185 countries are covered by this index. According to the 2012 results, Iraq belongs to the high-risk category of states. In 2004–2011, Iraq has been swinging between the very high-risk to high-risk categories.[171]

3. Institutional Investor Index

The Investment Corporation index has been issued semiannually since 1998 and covers 173 countries.[172] Iraq was categorized among the high-risk countries during 2010–2012. From 2004 to 2009, Iraq was a very high-risk country, except for 2008 when it was a high-risk country.[173]

4. Dun & Bradstreet Index

This index measures country specific international commercial exchange-related risks, paying attention to assessing country specific risks that are not related to a country's ability to meet the obligations of not only debt repayment, investment capital and returns, and payment for imports to exporters, but also missed exportation and investment opportunities. The index in question depends on four categories of variables that cover political risks, macro-economic risks, external, and commercial risks.[174] Covering 132 countries, the index has classified

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http://www.prsgroup.com/FreeSampleRequest.aspx?fs=/prsgroup_shoppingcart/freedata.aspx@@ctry_id=44 (last visited Oct. 1, 2013).

170. *World Risk Average*, EUROMONEY COUNTRY RISK (2013), *available at* http://www.euromoneycountryrisk.com/ (last visited Oct. 29, 2013).

171. *Iraq's wiki*, EUROMONEY COUNTRY RISK (2014), *available at* http://www.euromoneycountryrisk.com/Wiki/Iraq (last visited Mar.15, 2013).

172. *Global Rankings*, INSTITUTIONAL INV. (2013), *available at* http://www.institutionalinvestor.com/Research/4143/Global-Rankings.html (last visited Sep. 14, 2013).

173. *Id.*

174. *Country Risk Subscriber Zones*, DUN & BRADSTREET INDEX (2013), *available at* http://www.dnbcountryrisk.com/?page=fctryrisk1 (last visited Sept. 25, 2013).

Iraq among the highest risk group from 2004 to 2012.[175]

5. Coface Index

This index measures the risks related to a country's failure to repay its debts and highlights how corporate financial obligations are affected by the performance of the local economy, local political conditions, and economic relations with the outer world. Countries are classified into two key groups: (1) Investment Class Countries A, which branches out into four classes (A1–A4) and (2) Speculation Class Countries (B, C, and D). According to this 164-state index, Iraq belongs to Group 2, with a low class of D, i.e., Iraq is categorized as a high-risk country.[176] Two of the negative results that emerges from a Coface index of 2014 are "Ethnic and religious rivalries complicating the establishment of the rule of law and fuelling the risk of civil war; Insecurity and institutional weaknesses delaying reconstruction and investment".[177]

D. Transparency Index

The Transparency Index was started in 1993 by Transparency International, which defines "corruption" as "abuse of public office for private gain." This index measures the transparency level by determining corruption levels among public servants and politicians.[178] Iraq was introduced to TI's reports in 2003. Iraq ranked 113 internationally and 16 in the Arab world, with a 2.2-point[179] index, dropping down to 2.1 in 2004 to rank 129 internationally and 17 in the Arab world. In 2005, the index went up to 2.2, leading Iraq to rank 137 internationally and 17 in the Arab world. Iraq dropped in 2006 and 2007 to international ranks of 160 and 178, respectively, and 17 and 16, respectively, in the Arab world, with a 1.9-point index in 2006 and 1.4 in 2007. In 2008, the status of Iraq worsened to hit 1.3, ranking 178, but went back up in 2009, 2010, and 2011 as ranking 176, 175, and 169,

175. *Country Risk: Iraq*, DUN & BRADSTREET (2013), *available at* https://www.dbai.dnb.com/int/en/dbai_frame.html (last visited Sept. 25, 2013).

176. *Economic Studies: Iraq*, COFACE (2013), *available at* http://www.coface.com/Economic-Studies-and-Country-Risks/Iraq (last visited Oct. 29, 2013).

177. *Economic Studies: Major Macroeconomic Indicators: Iraq*, COFACE (2013), *available at* http://www.coface.com/Economic-Studies-and-Country-Risks/Iraq (last visited Mar. 14, 2014).

178. *Who We Are: Our history, 1993 In the beginning*, TRANSPARENCY INT'L (2013), *available at* http://www.transparency.org/whoweare/history (last visited Oct. 29, 2013).

179. *Corruption Perceptions Index*, TRANSPARENCY INT'L (2012), *available at* http://cpi.transparency.org/cpi2012/results (last visited Oct. 30, 2013).

respectively, with 1.5, 1.8, and 18 points in 2012.[180]

The quoted indices simply add to a distrustful investment environment and the growing reluctance of investors to investing in Iraq owing to lack of transparent transactions.

E. Governance Indicator

Governance Indices are issued by the World Bank Group following the collection of respective elements from various sources. These indices monitor governance and institutions entrusted with power in a given country. Such monitoring includes the mechanisms of electing, supervising, and replacing a country's government, a government's ability to develop and enforce sound and efficient policies, and respect from citizens and the state for institutions that govern a country's economic and social relations.[181]The Percentile Index is adopted here to figure out where Iraq stands among the rest of the world.

1. Regulatory Quality Index

This index develops perceptions of a government's ability to develop and enforce sound policies and regulations that help encourage private sector growth.[182] Iraq's ranks on this index have been 7.4/2003, 3.4/2004, 5.4 /2005, 6.9/2006, 7.3/2007, 13.1/2008, 16.7/2009, 15.8 /2010, and 12.8/2011. This is but an indication of the deteriorating and inefficient regulatory frameworks to bring investments into Iraq.[183]

2. Government Effectiveness Index

This index develops perceptions on the efficiency of public services and civil service and the degree of independence of the latter from political pressures. It also analyzes the sound mechanisms used for government policy development and enforcement, as well as the credibility of the government in terms of realizing these policies.[184] Iraq

180. *Id.*

181. *The Worldwide Governance Indicators (WGI) Project*, WORLD BANK GRP., *available at* http://info.worldbank.org/governance/wgi/index.aspx#home (last visited Oct. 30, 2013).

182. *Regulatory Quality*, WORLD BANK GRP., *available at* http://info.worldbank.org/governance/wgi/pdf/rq.pdf (last visited Oct. 30, 2013).

183. *Worldwide Governance Indicators: Iraq Index*, WORLD BANK GRP. (2012), *available at* http://info.worldbank.org/governance/wgi/index.aspx#reports (last visited Sept. 16, 2013) [hereinafter Iraq Index].

184. *Government Effectiveness*, WORLD BANK GRP., *available at* http://info.worldbank.org/governance/wgi/pdf/ge.pdf (last visited Oct. 30, 2013).

has secured low ratings in this respect: 1.5\2003, 2.0\2004, 1.0\2005, 0.5\2006, 2.9\2007, 8.7\ 2008, 9.1\2009 & 2010, 10.4\ 2011.[185]

These ratings indicate the inefficiency of the Iraqi Government's administrative performance. This is no surprise considering the conditions of the Baath Government till its toppling by the Coalition Forces in 2003. Despite the little improvements made since 2007, the ratings remain below the investors' expectations.

3. Index of Political Stability and Absence of Violence

This index measures the perceptions of potential instability, such as potential government instability or toppling by unconstitutional means, and violent cases with political and terroristic motives.[186]

Iraq had very low ratings from 2003 to 2011: 0.5/2003, 0.0/2004, 0.5/2005, 0.0/2006, 0.5/2007, 1.4/2008, 2.4/2009, 1.9/2010, 3.8/2011.[187] These ratings reveal the country's unstable political situation and higher waves of violence and terrorism. Therefore, efforts must be exerted to alleviate political rifts and enshrine national interests for a better political reality, which is currently experiencing moderate improvement.

4. Rule of Law Index

This index evaluates the confidence of the parties working with the state in terms of the latter's commitment to sound legal practices as per the rule of law principle, especially as it relates to contract enforcement, property rights, police, and courts, while ensuring such parties have necessary protection against arbitrary orders or decisions in individual cases.[188] Iraq ranked low on this index between 2003 to 2011: 2.9/2003, 0.5/2004 & 2005, 1.0/2006 to 2008, 1.4/2009, 1.9/2010, and 2.3/2011.[189] These figures prove the lack of state prestige and omission on the part of public authorities to enforce applicable laws with equality and observation of realities in Iraq. Therefore, foreign investors may be dubious about the efficiency and enforceability of legal rules and regulations in the countries they intend to invest.

In a nutshell, and as suggested by these indices, the investment

185. Iraq Index, *supra* note 183.

186. *Political Stability and the Absence of Violence/Terrorism*, WORLD BANK GRP., *available at* http://info.worldbank.org/governance/wgi/pdf/pv.pdf (last visited Sept. 25, 2013).

187. Iraq Index, *supra* note 183.

188. *Rule of Law*, WORLDWIDE GOVERNANCE INDICATORS, *available at* http://info.worldbank.org /governance/wgi/pdf/rl.pdf (last visited Oct. 30, 2013).

189. Iraq Index, *supra* note 183.

environment in Iraq has consistently secured low rating despite moderate improvement in some of these rankings during different periods. However, improvements have not been made to the extent that enables the recovery of Iraqi investment environment. In contrast, Iraq still lacks a sound, healthy, and competitive environment, which would attract foreign investors. Therefore, a clear investment promotion strategy coupled with boosting the recent approaches adopted over the years that have shown the best index ratings for Iraq must be adopted.

VI. ROADMAP: RECOMMENDATIONS THAT SHOULD BE ADOPTED

There is no "silver bullet" for foreign investor aversion to Iraq. Nevertheless, there are certain reforms that may well alleviate foreign investors' concerns and establish a sustainable investment friendly environment.

The general reform framework is all about introducing constitutional amendments, combating terror under a rule-of-law approach adopted by a strong and transparent (both centrally and locally) government, and introducing incentive and guarantee-based pro-foreign investment legislation.

A. Address Inherent Determinants

By showing that the Iraqi Government's strategy did not effectively address these challenges, this subsection highlights the importance of creating a safe environment for foreign investors and dealing with the risks encountered by these investors Iraq by addressing the country's security and political challenges, need for institutional reform by governance, and modernization of investment environment laws.

1. Constitutional Revision

Constitutional revision of power distribution between the central government and Kurdistan Province on one hand and the central government and other non-provincial governorates on the other[190] is the

190. The Iraqi Constitution adopted a federal system for dealing with the Kurdistan Province. Sabah Al-Bawi, *Influences of Ambiguity of Constitutional Provisions on the Administrative System of Iraq*, 33 U. PA. J. INT'L L. 1165, 1165 (2012). This system applies decentralized administration when it comes to the central government non-provincial governorate relationship. *Id.* Constitutional provisions are so unclear that several disputes erupted across various fields, casting shadows on foreign investment companies. *Id.* Furthermore, foreign investments that entered into oil contracts with the Kurdistan Province

starting point for constitutional reform. Despite the current decentralized administration of governorates, the current administrative structures adopt an unsteady approach toward Kurdistan, but a strong approach toward other governorates. Federalism and decentralized administration have not been enforced effectively in the modern sense of the concept, while public governorate-based directories are nothing short of "seconded" circuits of various centralized ministries.[191]

A reformist paper about the decentralization policy must address the administrative and structural organization at the province level, in the Kurdistan Province, in non-provincial governorates, roles and responsibilities at each level, mobilization and allocation of resources, institutional development, and capacity building. A reformist paper must be based on a comprehensive survey of all existing laws and practices that could be developed through consultative measures adopted in conjunction with the concerned parties.

The conflict of federal, provincial, and governorate laws that are not clearly regulated by the Constitution is a major obstacle to foreign investments in Iraq. Therefore, amending Article 115 of the Iraqi Constitution[192] is a key issue because the Article prioritizes the Province Law in reference to the distribution of powers in the event of a dispute with the federal government. In contrast, other specific Articles refer to the federal law as the dominating law when applied to cases of dispute between provincial or governorate laws. Surely, this trend is compatible with sound legal logic.

The other suggestion is amending Article 122.5 of the Iraqi Constitution, which allows Provincial Councils to disobey the laws of the central legislature. Paragraph 2 of this Article gives governorates large administrative and financial powers, but relevant laws do not identify such large powers. Accordingly, the provision results in a dispute between the central government, which is annoyed by the concept of powers, and the governorates, which demand an expanding

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have been penalized by the Iraqi Federal Government, which deems any contract it does not control as invalid. *See id.*

191. *See* Michael J. Kelly, *The Kurdish Regional Constitution Within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause*, 114 PENN ST. L. REV. 707 (2010).

192. *See* Article 115, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, which reads: "All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute."

interpretation.[193]

Such disputes and conflicts have been a stumbling block to establishing a healthy foreign investment environment, even leading foreign investors to lose confidence in Iraqi laws. Penalties have been imposed on foreign companies owing to their agreements with Kurdistan without the consent of the federal government. These penalties have caused a hostile atmosphere between provincial councils and Kurdistan on one hand and the central ministries on the other.

Establishing a successful system for the distribution of wealth in Iraq requires a clear interpretation of Articles 111 and 112 of the Iraqi Constitution[194] up to enactment of the Oil & Gas Law. As a consequent step, the central government is required to develop and enforce transparency and accountability systems that ensure a better exploitation of resources out of decentralization; otherwise, state-driven anti-red-tape efforts will grow more costly, with more chances for wider-scale corruption. The central government can play a key role in formulating public policies to attract investors, controlling the public, evaluating institutions that are in direct contact with investors, and supervising the decentralized opportunities available for investment.

Promoting a pro-foreign-investment culture in local, closed communities is an essential effort that must involve better legal awareness of foreign properties. The federal government can contribute to the benefits of foreign investments. Furthermore, the social role of the government and civil society organizations may be evident in managing the means of contact with foreign investors and local communities to break the psychological barriers that form a part of the legacy of the colonization era further awakened by the 2003 occupation of Iraq.

2. Strengthening Anti-Terrorism Efforts

Boosting security stability is a key cornerstone to building an investment attracting environment. As far as decade long terrorism stricken Iraq is concerned, efforts of combating terrorism require the following:

193. Al-Bawi, *supra* note 190, at 1167.

194. The Government of the Kurdistan Province insists on the "existing field" phrase in Article 112, which provides for the control of oil and gas matters by the oil-producing provincial and governorate governments. This means that newly discovered fields will be controlled directly by the relevant province and/or governorate. The Central Government, in turn, insists on Article 111 of the Constitution, which reads, "Oil and gas are owned by all the people of Iraq in all the regions and governorates." *See id.* at 1168.

a. Combating Terrorism Financing

The government should consider adopting new legislation on confiscation of assets, money-laundering, and combating terrorism financing with a view to allowing more room for law enforcement that hinders financing terrorism and organized crime.

b. Fighting Terrorism According to the Rule of Law

Iraq's anti-terrorism efforts should move ahead while focusing on the rule of law by litigating imprisoned terrorists using the applicable Iraqi laws. The government should ensure joint responsibility of all bodies concerned with enforcing applicable laws while moving ahead with the capacity building of key government bodies and officials to combat terror and international organized crime per existing laws. Furthermore, the government is required to work with the international community to update the laws and tools used to stand against fast-growing criminal and terrorist networks.

It is essential to exert tremendous effort to enforce court orders and judgments and step up cooperation between the judiciary and Judgment Enforcement Office of the Ministries of Justice and Interior. The unending prison breaks by terrorism condemned inmates must be stopped. Government officials should honor final judgments through improved administrative and criminal mechanisms.

c. Cooperating Widely in Counter-Terrorism Efforts

The government should expand its cooperative efforts across its federal, provincial, and local system of government to combat terrorism, whether Iraq-based or otherwise. Careful exchanges of information between several government bodies, along with ensuring joint but carefully distributed roles and procedures between local anti-terrorism departments and all federal security agencies is the best means of combating major threats.

3. Combating Corruption Flu

Several agencies such as the Commission of Integrity,[195] the

195. A key anti-corruption body was established by Decree No. 55 of 2004, which was issued by the Interim Coalition Authority. *About COI*, COMM'N OF INTEGRITY, *available at* http://www.nazaha.iq/en_news2.asp?page_namper=e2 (last visited Oct. 30, 2013). A key distinctive feature of this body is its independence from governmental and parliamentary supervision. *Id.* The body was established to enforce the country's anti-corruption laws, public service standards, and conduct social awareness campaigns that add to stronger demands for transparent and accountable, clean leadership. *Id.*

Inspector General,[196] and the Board of Supreme Audit [197] assume the burden of combating corruption in Iraq. The growing corruption rates in Iraq are due to the double-control, balance, and law enforcement standards, with actions of the judiciary and parliamentary powers also being in a similar position. All the abovementioned bodies have been pressured to achieve certain results and have hence caused damage to the overall anti-corruption system. There are key procedures that should be established by the government for effectively combating corruption.

a. Strengthening Anti-Corruption Institutions

Effective leadership for any agency or organization is determined by the employment authority. In Iraq, integrity bodies still need to boost the appointment of Commission of Integrity employees and public inspectors by the House of Representatives, as provided for in relevant law, by moving away from the political quota-based trend. Filling future vacancies by means of the random choice of public inspectors by supervising bodies (such as the best employees of the Board of Supreme Audit) would be a means of ensuring fair appointments. The same applies to the Central Bank of Iraq and Office for Reporting Money Laundering. Moreover, procedures and measures requiring determination of beneficiary owners to prevent and disclose transfers of criminal revenues should be legislatively endorsed.[198] Furthermore, there is an urgent need to activate and build the capacities of the Office for Reporting Money Laundering of the Central Bank of Iraq and develop new systems to settle conflicts of interest between the integrity officers.

b. Improving Accountability

Better accountability practices require the adoption of a group of measures, such as annual submission of financial statements to the Board of Supreme Audit and House of Representatives, regulating

196. This office was established by Decree No. 57 of 2004. MINISTRY OF OIL, *available at* http://www.oil.gov.iq/ (last visited Oct. 30, 2013). It is charged with conducting reviews and audits of and investigations into ministerial works to check for any abuses of power and violations of laws governing public service. *Id.*

197. The oldest controlling institution as it dates back to 1927 as per Law No. 17. Board's Law, BD. OF SUP. AUDIT (2013), *available at* http://www.d-raqaba-m.iq/pages_en/about_law_e.aspx (last visited Oct. 30, 2013). Formerly the Public Audit Office, it aims at conducting financial auditing to check corruption, fraud, and misuse of public funds for the purposes of disbursement and use. *Id.*

197 United Nations Convention against Corruptoin art. 52, Oct. 31, 2003, U.N. Doc. A/58/422.

disclosures of income and ensuring submission to the Commission of Integrity, including capacity building to use such disclosures to expose corruption, and developing integrity, accountability, and control capacities of parliament members and governorate board members, particularly in major fields such as oil and gas, public finance, public expenditure constraints, corruption, and law enforcement. Similarly, the containment of political influence to weaken the control and influence of government employees is required. Financing political parties and disclosure of sources thereof should be regulated. The enforcement of effective anti-corruption measures at supreme levels (including imprisonment sentences commensurate with relevant crimes), prevention of criminal revenues from falling into the hands of corrupt persons, and development and enforcement of long-term capacity-building programs for combating the corrupt practices of government officials at all levels of civil service are required. In addition, government capacity should be enhanced to combat corruption and nepotism through the promotion of a professional civil service that adopts transparent policies of human resources management, including the existing efficiency-based systems and clarifying the role of the applicable Code of Conduct. Iraq needs sustained assistance to establish an anti-money-laundering system in order to detect, investigate, freeze, confiscate, and return lost assets and to immediately boost initial legal cooperation with neighboring countries and countries further from its borders. Other steps include combating money laundering by enacting appropriate legislation, supporting strong capacity building efforts for the Office for Reporting Money Laundering, and establishing a monetary intelligence unit with the Central Bank of Iraq under strong and independent leadership. These steps should be followed by a list of public officials to be monitored and developed in this respect. Finally, control, monitoring, and supervisory bodies need a better level of inter-coordination, especially between the Board of Supreme Audit and Commission of Integrity.

c. Complying With International Commitments

Despite approving the United Nations Convention against Corruption by virtue of Law No. 35 of 2007, Iraqi legislators are required to adopt all necessary measures to ensure effective enforcement of the said Convention and observe the provisions thereof in all laws enacted thereby. To achieve this goal, it is time to approve Article 12 of the Convention, which regulates mechanisms of control, supervision, and accountability adopted by the State in cooperation with

the private sector. Furthermore, working on harmonizing internal codes of conduct for public servants and internationally and regionally approved rules is a must. Other measures Iraq needs to undertake include international cooperation to combat money laundering crimes and coordinate efforts for the same, approval of the principle of exchangeable international judicial assistance and international cooperation in criminal and civil fields, and confiscation of corruption-generated revenues and returning the same to the country of origin. Finally, electronic means for detecting and following up on corruption and cross-border corruption-generated revenues must be implemented.

4. Rehabilitation of Infrastructure

The Iraqi Government should take up achieving good economic growth ratings as a key priority, an endeavor that requires a comprehensive and advanced program to develop and enhance the existing infrastructure. The major challenge to this program is the electricity sector because securing current and future electricity needs by the most cost-efficient means is inevitable to push forward the country's economic growth and reduce production costs.

To upgrade the infrastructure in Iraq, the government should establish a supreme council for the reconstruction of infrastructure with the mission of planning, overseeing, and coordinating efforts of the concerned ministries in accordance with an explicit future vision. The proposed council needs specialist management in the field of infrastructure and economy. Further, the Iraqi infrastructure database should have complete and continuously up-to-date data. In addition, there must be a specialist bank concerned primarily with financing various infrastructure projects for low interest rate loans while seeking to manage such loans in a manner that secures necessary liquidity for infrastructure service projects without compromising the development of such services on the grounds of lack of necessary liquidity. Meanwhile, there must be deliberate and constant endeavors to encourage infrastructure-based investments in accordance with modern finance schemes such as concession and management contracts, which secure private sector involvement by realizing double digit return ratings in return for provision of quality services and maintenance for such projects. Unequivocally, this requires a competitive approach, private sector involvement, fewer restrictions to these markets, and regulation of the same as per market economy rules.

B. Reform of the Legal Framework

The purpose of this subsection is to seek the relevant benefits and offer them in the form of a "guiding manual" for the Iraqi Government for use in order to handle its investment-environment problems, mainly by amending and modernizing investment environment laws.

1. Activation of Protection of Intellectual Property

At the center of the reform efforts is the establishment of effective institutions to deter violations against intellectual property rights, which should begin in conjunction with the launch of a public awareness campaign to respect these rights. In a related development, unifying the rules of property rights scattered in several laws under a single law is also necessary. Likewise, legal wording contained in the legislation of property rights should be clear and not allow for more than one interpretation. Additionally, the country's intellectual property laws should be identical to the provisions of the TRIPS agreement. These reforms as well as their role in the protection of intellectual property will lead to the acceleration of Iraq's accession to the WTO.

2. Enforcement of International Arbitration Awards

The Iraqi Investment Law allows for national arbitration as per Iraqi laws or international arbitration through referral to any internationally recognized arbitration body, as provided for under Article 27/4.[199] However, this Article is inconsistent with provisions of the Law on Enforcement of Foreign Judgments in Iraq No. 30 of 1928 because it does not include any provision for enforcing foreign arbitration judgments in Iraq. Furthermore, Article 1 of the aforesaid law requires that for a foreign judgment to be enforced in Iraq, it needs to be issued by a foreign competent court formed outside Iraq.[200]

As long as there is no law allowing for the enforcement of foreign judgments, Article 27/4 of the Iraqi Investment Law is futile. This is further complicated by the fact that Iraq is not a party to international conventions on arbitration. Consequently, as a procedural guarantee for settlement of investment disputes, efficient arbitration is up to standard

199. National Investment Law [NIL] art. 27 (2007), *available at* http://trade.gov/static/iraq_investmentlaw.pdf. "If one of the parties to a dispute is subject to the provisions of this law, they may, at the time of signing the agreement, agree on a mechanism to resolve disputes including arbitration pursuant to the Iraqi law or any other internationally recognized entity." *Id.*

200. Haddad, *supra* note 104.

in Iraqi legislation. Therefore, this paper proposes amendment of Law No. 30 on Enforcement of Foreign Judgments in Iraq of 1928 in order to provide for enforcement of arbitration judgments as per the terms and conditions required thereof.

The above analysis clarifies that the enforcement mechanism of foreign arbitration decisions has terminated all efforts exerted to identify or develop effective settlement mechanisms for foreign investment disputes in Iraq. Therefore, signing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958, has become inevitable because arbitration clauses in foreign contracts require enforcement of arbitration awards. This shall become a reality only by joining the said Convention, entering into bilateral international agreements, or enactment of a new Iraqi arbitration law.

3. Promote Judiciary Independence and Capabilities

Iraqi courts are key players in investment dispute settlements. Accordingly, it is imperative for the courts to have the power to deal with foreign investment contracts. This shall be a key milestone to back up upgrading capacities and establishing judicial independence and security.

a. Boosting Judicial Independence

In seeking an independent judiciary, there is a dire need to provide a sufficient number of judges and judicial courts to boost the course of civil and commercial proceedings. Through judicial education and capacity building, the SJC will be able to maintain high professional standards for new judges. The much sought after independent judicial system can be shielded from political influence by enforcing laws that provide immunity to the judiciary. In addition, a relevant suggestion is making more information and statistics regarding cases available to the general public in order to spread awareness on legal culture and judicial transparency.

b. Upgrading Judicial Capacities

Judicial newcomers' capacities must be built alongside efforts to educate current judges through systemic training, continuous learning, and updating relevant curricula. The Judicial Development Institute assumes a key role in such continuous learning efforts. Long-term activities can be technologically updated along with state-of-the-art means of reviewing and presenting cases. Advanced training for the judiciary in commercial and civil laws, as well as effective use of the

commercial structure of cases and handing down judgments are among areas of desired development. Additionally, commercial and civil legal proceedings must be upgraded to promote a scientific and technical court environment. Systemic reviews and continuous improvements in enforcement of judgments (especially foreign arbitration judgments) and court orders will contribute to better judicial capacities.

c. Enhancing Judicial Security

Judicial reforms in Iraq require short-term consideration of the joint responsibility of the Supreme Judicial Council (SJC) and the Ministry of Interior (MoI) for judicial security. This objective is attainable via a judicial security place clarifying the MoI's or SJC's responsibility for judicial security. This plan shall cover details of personal security, court security, and safe and secure houses for judges.

C. Reorganization of the Investment Framework

This measure aims to determine rehabilitation mechanisms of the investment framework—an objective achievable by discussing available solutions and recommending rectification of defects in the overall investment process.

1. Activating the Role of Investment Commissions

The key suggestion for a reformist plan starts with the initiation of a comprehensive scheme concerning the Law of Civil Service and Public Administration. This scheme should enhance the links between civil service and administrative reforms, enhance public finance management, and build provincial capacities to provide non-central services.

Reforms of the Law of Civil Service should adopt the key values of modern management, namely efficiency-based appointments; performance assessments and evaluations; successful planning; role determination; delineation of responsibilities and relationships between civil servants, ministers, and other elected officials; and codification of ethical values and standards for the benefit of the society. In addition, there is a need to establish secondary legislation to strengthen the civil service compliance framework and links between civil service and administrative reforms.

In a nutshell, Iraq needs to establish integrated e-governance to wipe out forms of financial and administrative corruption and provide services (absent red tape) to investors through state-of-the-art e-portals across public institutions.

This study suggests entrusting the Ministry of Finance with obtaining approvals from the ministries and government bodies in the course of any potential investments. This is because the Ministry of Finance owns all public lands that are not allotted to other ministries or bodies. Thus, the Ministry of Finance is supposedly responsible for the determination of all land available for investments, contacting other ministries to ensure that these are free of current or proposed activities by such ministries, and establishing the viability of introducing investments thereto. This suggestion ensures full knowledge and determination of the lots available for investment and thus enhances investment planning and promotion. Another benefit is minimizing the red tape associated with obtaining a host of ministerial approvals.

2. Removal of Bureaucratic Obstacles

For addressing institutional obstacles, it is hereby suggested to introduce a "Liaison Department" to serve as a linking point between the NIC and other ministries and bodies concerned, for better understanding and coordination. The suggested structure of such Liaison Department is based on assigning the management thereof to the NIC, with deputy ministers accounting for other members. Ministries that are directly concerned, such as the Ministries of Finance, Planning, Housing and Construction, and Industry, should be introduced as members of the suggested Department along with other members belonging to the ministries and bodies as needed in a manner commensurate with their roles in support investment projects.

3. Developing the Iraqi Financial Market

There are a number of key recommendations to enhance the Iraqi financial market, the most significant among which is increasing cooperation opportunities between Iraqi financial market components in terms of their respective services and amending the existing financial and banking legislations that regulate and control operations of non-banking economic institutions to ensure compatibility with market-driven economy requirements, develop performance among such institutions, use e-systems to run their work, and ensure sufficient legal guarantees to win investors' trust. Relevantly, an extensive durable database must be created for public entities in the Iraqi financial market to enable decision makers to make objective decisions regarding entities working therein. Another key step is providing a non-banking financial entity friendly investment climate by encouraging the creation of market-making companies, investment guarantors, and finance

companies, including small and medium loan companies. Further, banks and companies must be encouraged to issue bonds allowed under Companies Law No. 21 of 1997, as doing so is a key tool to increasing capital and developing investment awareness of good revenues. Working on developing clear mechanisms and directives to transform the central Iraqi economy to a market-driven economy adds up to taking the aforementioned steps. These actions would help dispel the ambiguities, difficulties, and gaps posed by such transformation during the transitional period.

VII. CONCLUSION

In today's critical stage of Iraq's modern history, efforts to attract foreign investors are underway. Foreign investors have always been reluctant to break into this harsh investment environment given its particularities, such as the military force driven transformation from a dictatorship to a democracy and the transformation from a socialist to a liberal system of government. This has resulted in Iraq's inability to apply democratic ways of government and its fragile relationship with liberalism, which hinders its financial and economic openness with the rest of the world widely. Further, the current socialist laws of commerce and economy are still in force alongside new liberal laws, thus leading to a conflict between laws meant to regulate the same aspects of an action.

Analytically speaking, this article has revealed the seriousness of the risks of investing in Iraq to foreign investors. In addition, this article spots the key obstacles in the Iraqi investment environment and provides suggestions for Iraqi legislators and government for the development and enhancement the investment environment. This conclusion requires further legislation tantamount to the International Investment Law in addition to ratification of relevant international conventions and consideration of the conclusion of more bilateral investment agreements; these measures would send positive messages about the seriousness of the incentives and legal guarantees for foreign investments in Iraq. Equally important is an appropriate consideration of the challenges being faced by the concerned investment authorities and public service bodies, as these may affect the efforts to enhance Iraq's worldwide rank in foreign investment. To a large extent, codes of shielding investment authorities against political influences should be adopted. Meanwhile, initiatives developed by investment authorities to attract foreign investors must be provided with political support.

THE LIBOR MANIPULATION SCANDAL & THE WHEATLEY REVIEW:

A BAND-AID ON A KNIFE WOUND

John Weldon[†]

CONTENTS

† J.D. expected 2014, Syracuse University College of Law. The author would like to thank Professor Shannon P. Ryan and Dean Christian C. Day for their academic guidance.

I. INTRODUCTION

Take out a pencil and a piece of paper. Now write down the number five and put fourteen zeros after it. Now, going from right to left, place a comma after every three zeros. Finally, put a dollar sign in front of the number. Now, look at the number.

$500,000,000,000,000.

Five Hundred Trillion Dollars. To the majority of the public, that amount of money is the equivalent of "a million bajillion" dollars. It is more than thirty-three times the 2011 Gross Domestic Product of the United States[1] and, if stacked in $100 dollar bills, would be taller than (and consume) the Empire State Building.[2] However, five hundred trillion dollars is the amount of money that was left in the hands of greedy investment bankers looking to make a quick buck. How? Since its institution, the London Interbank Offered Rate ("LIBOR") has been left unregulated. As a result, a few greedy individuals manipulated the rate for their own financial advantage at the expense of every individual who has ever taken out a loan. And how much money does LIBOR affect? Five Hundred Trillion Dollars.

LIBOR is a benchmark interest rate that reflects the cost of borrowing for banks and has been used to set an estimated $500 trillion worth of financial instruments.[3] A number of banks have been accused

1. *See GDP (current US$)*, THE WORLD BANK, *available at* http://data.worldbank.org/indicator/NY.GDP.MKTP.CD (last visited Oct. 9, 2013).

2. *See generally US Debt Ceiling Visualized in $100 Bills*, DEMONOCRACY INFO, *available at* http://demonocracy.info/infographics/usa/us_debt/us_debt.html (last visited Oct. 9, 2013).

3. *See* Heidi N. Moore, *LIBOR for Mortals: An Easy Explainer*, MARKETPLACE (July 3, 2012, 3:40 PM), *available at* http://www.marketplace.org/topics/world/easy-street/libor-mortals-easy-explainer (last visited Oct. 9, 2013).

of attempting to manipulate LIBOR from 2005 through 2009.[4] The manipulation stemmed from two sources: (1) derivative traders, colluding with counterparts at other banks in attempting to manipulate LIBOR submissions to boost individual trading profits; and (2) executive level focused 'decisions' or collaborations to falsely lower LIBOR submissions in order to give an artificial impression of sounder financial strength.[5]

Out of the potential twenty banks believed to be involved, to date, only UBS and Barclays have admitted rate manipulation and false reporting.[6] Subsequently, Barclays negotiated a $450 million settlement which was divided amongst the U.S. Commodity Futures Trading Commission, the U.S. Department of Justice, and the Financial Services Authority.[7] To date, the U.K. and the U.S. criminal investigations have been led by the Serious Fraud Office and the Department of Justice, respectively.[8]

While much of the focus thus far has been on the actions taken by governments and regulators, this Note will focus on the institution and history of LIBOR, the manipulation of LIBOR from 2005 through 2009, and the evidence supporting collusion between banks to manipulate LIBOR. Furthermore, this Note will examine a regulation proposal and recommendations to the LIBOR system by Martin Wheatley, a top U.K. regulator, and how his proposal fails to address the culture of the banking system. Finally, this Note will propose the creation of a "whistle blowing" incentive system to be instituted along with a

4. *See* James O'Toole, *Explaining the Libor Interest Rate Mess*, CNNMONEY (July 10, 2012, 12:07 PM), *available at* http://money.cnn.com/2012/07/03/investing/libor-interest-rate-faq/index.htm (last visited Oct. 9, 2013).

5. *See* Halah Touryalai, *Regulators Instructed Barclays to Lower Libor: Del Missier Testifies*, FORBES (July 16, 2012, 1:42 PM), *available at* http://www.forbes.com/sites/halahtouryalai/2012/07/16/regulators-instructed-barclays-to-lower-libor-del-missier-testifies/ (last visited Sept. 20, 2013); *see also* James O'Toole, *Winners and Losers in Libor Mess*, CNNMONEY (July 12, 2012, 5:10 AM), *available at* http://money.cnn.com/2012/07/12/investing/libor-consumers/index.htm (last visited Sept. 20, 2013).

6. *See UBS Fined $1.5B over Libor Manipulation*, FOXBUSINESS (Dec. 19, 2012), *available at* http://www.foxbusiness.com/industries/2012/12/19/ubs-fined-15b-over-libor-manipulation/ (last visited Oct. 9, 2013).

7. *See Barclays Will Pay $450M for Manipulation Interest Rates*, USA TODAY (July 27, 2012) *available at* http://usatoday30.usatoday.com/money/industries/banking/story/2012-06-27/barclays-penalty/55854212/1 (last visited Oct. 9, 2013).

8. *See id.*; *see also* Jill Treanor, *Serious Fraud Office to Investigate Libor Manipulation*, GUARDIAN (London) (July 6, 2012), *available at* http://www.guardian.co.uk/business/2012/jul/06/serious-fraud-office-libor-investigation (last visited Sept. 20, 2013).

regulatory overhaul of the LIBOR system.

Part II of this Note will provide background information on LIBOR, specifically how LIBOR is calculated and how it affects any person who takes out a loan. Part III of this Note will present an overview of the LIBOR manipulation through investigation into Barclays Bank, specifically through violations found by regulatory authorities and the settlement between Barclays and the Commodity Futures Trading Commission ("CFTC"). Part IV of this Note will display evidence suggesting that LIBOR submitting banks colluded to manipulate LIBOR during the 2007 and 2008 financial crisis. Part V of this Note will discuss Martin Wheatley's proposed reforms to the LIBOR system and the reaction it received from the public. Part VI of this Note will discuss the problems within Wheatley's regulation scheme, specifically its failure to account for the banking culture among LIBOR submitting banks. Finally, Part VII of this Note will recommend reform for LIBOR and the institution of "whistle blowing" incentives for LIBOR submitting banks.

II. LIBOR

This section provides background information on LIBOR. Part A defines LIBOR and how it is calculated, while Part B discusses what information is taken from LIBOR and how it affects any common person that takes out a loan.

A. What is LIBOR?

LIBOR is an interest rate set in London through submissions of lending rates by eighteen major banks.[9] The submission by each bank is a calculation of how much interest each bank would have to pay to borrow from one of the other banks.[10] The British Bankers' Association ("BBA"), with assistance from the Foreign Exchange and Money Markets Committee, selects the specific banks that will submit rates for the calculation of LIBOR based on the bank's market volume,

9. Moore, *supra* note 3. The complete list of all 18 banks that contributed to fixing LIBOR are as follows: (1) Bank of America, (2) Bank of Tokyo-Mitsubishi UFJ Ltd, (3) Barclays Bank PLC, (4) BNP Paribas, (5) Citibank NA, (6) Credit Agricole CIB, (7) Credit Suisse, (8) Deutsche Bank AG, (9) HSBC, (10) JP Morgan Chase, (11) Lloyds Banking Group, (12) Rabobank, (13) Royal Bank of Canada, (14) Société Générale, (15) Sumitomo Mitsui Banking Corporation, (16) The Norinchukin Bank, (17) The Royal Bank of Scotland Group, and (18) UBS AG. *US Dollar Panel*, BBALIBOR (May 2012), *available at* http://www.bbalibor.com/panels/usd (last visited Sept. 20, 2013).

10. Moore, *supra* note 3.

reputation, and assumed knowledge of the currency concerned.[11] The selection of banks occur each year, but rarely result in any change.[12] Many well-known banks such as Bank of America, Barclays, JPMorgan Chase, Deutsche Bank, and HSBC are among the banks selected by the BBA.[13]

The use of LIBOR can be traced back to the late 1960's, when the rate that banks used to borrow money was set and governed by a "small group of like-minded bankers" based in London.[14] Minos A. Zombanakis, a former banker at Manufacturers Hanover, recalls the first LIBOR loan, an $80 million loan extended by a group of banks to Iran. He explained, "we had to fix a rate, so I called up all the banks and asked them to send to me by 11 a.m. their cost of money. We got the rates, I made an average of them all and I named it the London interbank offered rate."[15] For the next fifteen years, the banks set the rate at which banks could lend to each other roughly as Zombanakis described.[16] Although this may be shocking in today's financial world, there was a trust amongst bankers that they would truthfully submit their rates without looking out for their own interests.[17]

In 1986, the banks asked the BBA to bring a measure of uniformity into the market and to devise a benchmark to act as a reference for new financial instruments, such as Forward Rate Agreements, that were actively trading in the market.[18] Rather than negotiating the underlying rate or forming rates by taking averages of ad-hoc panels, banks could now use a standard rate.[19] This facilitated the operation of markets and made benchmarking more transparent and objective.[20]

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11. *LIBOR, Information About the London InterBank Offered Rate*, GLOBAL-RATES, *available at* http://www.global-rates.com/interest-rates/libor/libor-information.aspx (last visited Sept. 20, 2013) [hereinafter LIBOR, global-rates].

12. *Id.*

13. Moore, *supra* note 3.

14. *Id.*; Landon Thomas, Jr., *Trade Group for Bankers Regulates a Key Rate*, N.Y. TIMES (July 5, 2012), *available at* http://nytimes.com/2012/07/06/business/global/the-gentlemens-club-that-sets-libor-is-called-into-question.html?pagewatned=all&_r=0 (last visited Oct. 8, 2013).

15. Thomas, Jr., *supra* note 14.

16. Moore, *supra* note 3; Thomas, Jr., *supra* note 14.

17. Moore, *supra* note 3.

18. *Historical Libor Rates*, BBALIBOR, *available at* http://www.bbalibor.com/explained/historical-perspective (last visited Oct. 9, 2013) [hereinafter BBALIBOR]; *Timeline: How the Libor scandal unfolded*, TELEGRAPH (London) (Dec. 19, 2012), *available at* http://www.telegraph.co.uk/finance/libor-scandal/9754981/Timeline-How-the-Libor-scandal-unfolded.html (last visited Oct. 8, 2013).

19. BBALIBOR, *supra* note 18.

20. *Id.*

At first, LIBOR was a benchmark for only a few currencies, which included the American dollar, the British pound sterling, and the Japanese yen.[21] Over the years, LIBOR expanded to include sixteen currencies, but is presently a benchmark for only ten currencies.[22] To date, regulators estimate that LIBOR supports more than $500 trillion worth of financial instruments, ranging from simple mortgages to risky derivative transactions, worldwide.[23]

Currently, LIBOR is calculated in a similar way that Zombanakis described. Each bank that is selected by the BBA answers the specific question "at what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 a.m.?"[24] The bank then looks at its own financials, looks at how much interest it would have to pay to borrow from another bank, and submits a rate.[25] The BBA compiles all of the submissions from the banks and presents the information to Thomson Reuters, a global provider of business information.[26] Once Thomson Reuters collects all of the rates from the panel banks, the highest and lowest twenty-five percent of the submissions are eliminated.[27] Then, Thompson Reuters takes an average of the remaining rates to produce the official LIBOR rate.[28] As this process suggests, LIBOR must rely on accurate and truthful submissions from each of the banks or LIBOR will be skewed in one direction and the system will fail.

So why does it matter if LIBOR is skewed in one direction? Well, LIBOR is the primary way to measure the health of the banking system worldwide.[29] Many banks will rely on this rate to determine the risk involved with lending and "whether the other banks they do business

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21. LIBOR, global-rates, *supra* note 11.

22. *Id.* The ten currencies are as follows: (1) American dollar, (2) Australian dollar, (3) British pound sterling, (4) Canadian dollar, (5) Danish krone, (6) European euro, (7) Japanese yen, (8) New Zealand dollar, (9) Swedish krona, and (10) Swiss franc. *Id.*

23. *See* Yuval Rosenberg, *Libor-gate Explained: Why Barclays' Scandal Matters*, FISCAL TIMES (July 6, 2012), *available at* http://www.thefiscatimes.com/Articles/2012/07/06/Libor-gate-Explained-Why-Barclays-Scandel-Matters.aspx#page1 (last visited Sept. 20, 2013).

24. BBALIBOR, *supra* note 18; *see also* Rosenberg, *supra* note 23.

25. Moore, *supra* note 3; *see also* Rosenberg, *supra* note 23.

26. Moore, *supra* note 3.

27. *Id.*; *see also* Matthew Jensen, *The Uses of LIBOR and the Victims of its Manipulation: A Primer*, AMERICAN (Aug. 23, 2012), *available at* http://www.american.com/archive/2012/august/the-uses-of-libor-and-the-victims-of-its-manipulation-a-primer (last visited Oct. 8, 2013).

28. Moore, *supra* note 3.

29. *Id.*

with are good for the money."[30] In simple terms, if LIBOR is high, it means that banks do not believe the other banks are in good financial health and are less likely to pay back loans that they will receive.[31] If LIBOR is low, it makes the banking system look healthy and creditworthy.[32] However, this correlation between LIBOR and financial health may incentivize banks to submit lower rates. If a bank continues to submit higher rates than its peers, which will be publicly available, it may tip off the market that the bank is more risky or desperate for cash. Once the market or investors obtain this information, they may invest with other banks and cause banks submitting higher rates to lose business. Therefore, if the majority of panel banks consistently submitted low LIBOR rates, the remaining banks may underestimate their true lending rate to refrain from reporting higher rates.

B. Who is Affected by LIBOR?

To many people, LIBOR may seem like financial jargon thrown around by bankers at a cocktail party. However, LIBOR affects virtually every common person who obtains a loan.[33] In the U.S., banks have used LIBOR to set the borrowing rate for student loans, adjustable-rate mortgages, and car loans.[34] In the U.K., many of the same products rely on LIBOR.[35]

For example, if a person has an adjustable-rate mortgage, it will usually be tied to LIBOR.[36] With an adjustable-rate mortgage, a borrower will lock in an interest rate, typically a low one, for a fixed period.[37] Once that period ends, usually in three, five, or twelve months, the mortgage rate resets to the current interest rate of the index.[38] If LIBOR is lower when the mortgage rate resets, a borrower's monthly payment will be lower; however, if LIBOR is higher, a

30. *Id.*

31. *Id.*

32. *Id.*

33. Moore, *supra* note 3; *see also* Jensen, *supra* note 27.

34. Moore, *supra* note 3; *see also* Jensen, *supra* note 27.

35. *See* BBALIBOR, *supra* note 18.

36. Donna Fuscaldo, *Libor: What It Means for US Consumer Loans*, BANKRATE (Aug. 3, 2013), *available at* http://www.bankrate.com/finance/banking/libor-what-it-means-for-us-consumer-loans.aspx (last visited Oct. 13, 2013); *see also* Kirsten Grind, *What Libor Means for You*, WALL ST. J. (Aug. 3, 2012), *available at* http://online.wsj.com/article/SB10000872396390443545504577565120728037852.html (last visited Oct. 13, 2013).

37. Fuscaldo, *supra* note 36; *see also* Grind, *supra* note 36.

38. Fuscaldo, *supra* note 36; *see also* Grind, *supra* note 36.

borrower's premium will rise.[39]

The process is very similar for a person with student loans tied to LIBOR. It is common for students to take out loans with a rate that is LIBOR plus 2% or LIBOR plus 7%.[40] If a student signs a loan when LIBOR is high, the loan repayment will be more expensive than if LIBOR is low. In both cases, the loan rate rests on the foundation that banks will submit honest and accurate LIBOR rates and will not consider their own interests when making submissions.

Although inaccurate or dishonest submissions will affect LIBOR, the change of LIBOR impacts an individual's finances differently. If an individual has the financial security to handle increases in mortgage or student loan premiums, an increase in LIBOR may not have a substantial effect on the individual. However, for people who are simply making mortgage or student loan payments and do not have the financial wherewithal to deal with an increase in LIBOR, the effects could be devastating. Therefore, a bank that is manipulating LIBOR, either higher or lower, to stay aligned with the market or to affect derivative positions, will drastically effect individuals who rely on banks for trustworthy and well-founded financial instruments.

III. BARCLAYS BANK LIBOR MANIPULATION

This section provides an overview of the LIBOR manipulation scandal presented through the recent investigations into Barclays Bank. Part A describes Barclays's attempts to manipulate LIBOR. Part B describes the violations found by the Commodity Futures Trading Commission ("CFTC") under the Commodities Exchange Act and provides a discussion of the settlement between Barclays and CFTC.

A. Evidence of Manipulation

In the midst of the 2007 financial crisis, the credit markets began to freeze up as banks began to suffer losses on their American subprime mortgages.[41] As a result, banks were reluctant to lend to one another, which led to shortages of the funding system worldwide.[42] As described earlier, when banks are reluctant to lend to one another, a bank's LIBOR submission will be higher and it will look less credit worthy to

39. Fuscaldo, *supra* note 36; *see also* Grind, *supra* note 36.

40. Fuscaldo, *supra* note 36; *see also* Grind, *supra* note 36.

41. *The Libor Scandal: The Rotten Heart of Finance*, ECONOMIST (July 7, 2012), *available at* http://www.economist.com/node/21558281 (last visited Oct. 13, 2013) [hereinafter *Rotten Heart of Finance*].

42. *Id.*

the market.

At the time of the financial crisis, Barclays claimed it was submitting "honest rates" and other banks were submitting suppressed rates, this caused investors to question the financial health of Barclays.[43] However, the CFTC responded by instituting its own investigation into Barclays and uncovered emails between Barclays' traders and traders in other banks asking each other to artificially manipulate LIBOR.[44] Upon the release of this information, Barclays admitted to manipulating its LIBOR submissions so they were more aligned with the rates of rival banks.[45] Barclays instructed its LIBOR submitters to submit numbers that were high enough to be in the "top four" and thus discarded from the calculation, but not so high as to draw attention to the bank.[46] In its defense, Barclays claimed that it informed the regulators and the Bank of England that banks were submitting lower rates than they could actually lend at, and Paul Tucker, the deputy governor of the Bank of England, authorized Barclays' suppressed submissions.[47]

As the investigations continued, the CFTC found additional evidence of Barclays manipulating LIBOR to not only keep its submission in line with other panel banks, but also to benefit its derivative positions in swaps and futures that were tied to LIBOR.[48] From January 2005 through May 2009, at least 173 requests for altered LIBOR submissions were made to Barclays' submitters.[49] Depending on the trader's derivative position, the requests asked for a higher or lower LIBOR submission.[50] To put the manipulation in perspective, if Barclays traders were able to affect the rate in their favor by only one

43. *Id.*

44. *Id.*

45. *Id.*; *see also* Joe Nocera, *Libor's Dirty Laundry*, N.Y. TIMES (July 6, 2012), *available at* http://www.nytimes.com/2012/07/07/opinion/libors-dirty-laundry.html (last visited Oct. 13, 2013).

46. *Rotten Heart of Finance*, *supra* note 41; *see also* Nocera, *supra* note 45.

47. *Barclays Reveals Bank of England Libor Phone Call Details*, BBC NEWS (July 3, 2012), *available at* http://www.bbc.co.uk/news/business-18695181 (last visited Oct. 13, 2013) [hereinafter *Barclays Phone Call Details*].

48. *Id.*

49. Lindsay Fortado & Silla Brush, *Barclays Fined by U.K., U.S. for Falsifying Libor Rates*, BLOOMBERG BUSINESSWEEK (June 27, 2012), *available at* http://www.businessweek.com/news/2012-06-27/barclays-said-to-be-nearing-libor-settlement-with-fsa-cftc (last visited Oct. 13, 2013); *see also* Dan Jones, *'Done . . . for You Big Boy': The Barclays LIBOR Messages*, INVESTMENTWEEK (June 27, 2012), *available at* http://www.investmentweek.co.uk/investment-week/news/2187554/-done-for-boy-barclays-libor-messages (last visited Oct. 13, 2013).

50. *See* Simone Foxman, *How Barclays Made Money on LIBOR Manipulation*, BUS. INSIDER (July 10, 2012), *available at* http://www.businessinsider.com/how-barclays-made-money-on-libor-manipulation-2012-7 (last visited Oct. 13, 2013).

basis point, or .01%, it would likely make the traders more than $2 million.[51] This amount of money created large incentives for traders to manipulate the rate with untruthful and inaccurate submissions. Additionally, many of these requests were personal favors between traders; replies from LIBOR submitters included phrases such as "for you, anything" and "done . . . for you big boy."[52] In another instance, a trader thanked a Barclays LIBOR submitter by saying, "Dude. I owe you big time! Come over one day after work and I'm opening a bottle of Bollinger [champagne]"[53],[54]

In essence, traders were helping each other make money at the cost of ordinary borrowers of loans benchmarked on LIBOR. They asked each other for favors, so it seemed personal. In the financial industry, traders cut deals with each other all the time,[55] as maintaining relationships with other banks is sometimes just as important as making money. However, when traders negotiate with financial instruments such as LIBOR submissions, an official benchmark and a prime indicator for market health, they can drastically affect the lending market and investors that rely on honest rates.

B. Barclays Violations of the Commodities Exchange Act

After the CFTC completed its investigation, the CFTC sanctioned Barclays for three major violations. This section will explain each violation and will conclude by discussing the Barclays settlement and how it spawned additional investigations into other rival banks for manipulating LIBOR.

C. Sanctions against Barclays

First, the CFTC alleged that Barclays made false, misleading, or knowingly inaccurate reports of LIBOR. Section 9(a)(2) of the Commodities Exchange Act ("CEA") makes it unlawful for any person "knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate

51. *Id.*

52. Fortado & Brush, *supra* note 49; Jones, *supra* note 49.

53. *See* CHAMPAGNE BOLLINGER, *available at* http://www.champagne-bollinger.com/en_UK/welcome (last visited Oct. 13, 2013).

54. Fortado & Brush, *supra* note 49; Jones, *supra* note 49.

55. Moore, *supra* note 3.

commerce."[56] Here, the CFTC found that Barclays, through the transmission of an electronic spreadsheet to Thompson Reuters, knowingly delivered American dollar, Japanese yen, and British pound sterling LIBOR submissions through the mail or interstate commerce that contained market information concerning costs of borrowing, liquidity conditions, and stress in the money markets.[57] Additionally, Barclays's submissions were false, misleading, or knowingly inaccurate because they were not based on costs of borrowing unsecured funds in the pertinent markets, but rather were based on impermissible factors such as: (1) the management directive to lower Barclays' submitted rates to manage market and media perceptions of Barclays; and (2) the derivatives positions of swaps traders.[58]

Second, CFTC alleged that Barclays attempted to manipulate LIBOR. Under section 9(a)(2) of the CEA, it is unlawful for "any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity."[59] Two elements are required to prove an attempted manipulation: (1) an intent to affect the market price; and (2) an overt act in furtherance of that intent.[60] Here, the CFTC found that Barclays traders specifically intended to affect the price at which the daily rights would be fixed.[61] The fixings, accomplished by calling Barclays submitters and asking for higher or lower submissions, were done in order to benefit the derivative positions or to benefit the derivatives trading positions of traders at other banks, with whom they actively coordinated.[62]

Third, the CFTC alleged that the Barclays traders aided and abetted traders at other banks to manipulate LIBOR. The CFTC alleged that the Barclays swap traders and the traders at the other panel banks discussed LIBOR submissions that would benefit each banks' respective derivative trading positions.[63] The traders at other panel banks asked

56. 7 U.S.C. § 13 (2006).

57. Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, As Amended, Making Findings and Imposing Remedial Sanctions, In the Matter of: Barclays PLC, Barclays Bank PLC and Barclays Capital Inc., (CFTC 2012) No. 12-25, at 26, *available at* http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfbarclaysorder062712.pdf (last visited Mar. 5, 2014) [hereinafter CFTC Order].

58. *Id.*

59. 7 U.S.C. § 9 (2006).

60. CFTC Order, *supra* note 57, at 26.

61. *Id.*

62. *Id.*

63. *Id.* at 28.

the Barclays swap traders to instruct the Barclays LIBOR submitters to submit a certain rate, or submit a rate in a direction higher or lower, that would benefit the derivatives' positions of the traders at other panel banks.[64]

D. Barclays Settlement and the Spawn of Global Investigations into other Panel Banks

Almost immediately after the CFTC published its allegations, Barclays paid over $450 million to three regulators in the U.S. and the U.K., and its chairman, Marcus Agius, resigned.[65] Additionally, Barclays Chief Executive Officer, Bob Diamond, and Chief Operating Officer, Jerry Del Misser, stepped away from their positions without taking 2012 bonuses.[66] However, after the CFTC report was published, the evidence that Barclays' traders aided and abetted traders at other banks to manipulate LIBOR spawned criminal investigations into other banks' executives and the individuals that contributed to submitting false interest rate data for setting the benchmark.[67] As noted by Gary Gensler, the chairman of the CFTC, the Barclays LIBOR settlement initiated global investigation into rate-rigging at more than a dozen big banks that contributed to setting LIBOR during the period of manipulation.[68]

Additionally, the CFTC report initiated private lawsuits and class actions against the panel banks that made submissions to set LIBOR. Collusion among banks to fix LIBOR, either higher or lower, can have an enormous effect on a number of sectors, so there is a vast pool of potential victims who can seek compensation.[69] As stated by Steve Berman, managing partner for Hagens Berman, "[w]hile the settlement with the CFTC does punish Barclays and other banks, it does little to address the losses of perhaps thousands of investors who were

64. *Id.*

65. Moore, *supra* note 3; *see also* Sara Schaefer Muñoz & Max Colchester, *Top Officials at Barclays Resign Over Rate Scandal*, WALL ST. J. (July 3, 2012), *available at* http://online.wsj.com/article/SB10001424052702304299704577503974000425002.html (last visited Oct. 8, 2013).

66. Muñoz & Colchester, *supra* note 65.

67. Peter J. Henning, *What the Barclays Settlement Means for Other Banks*, DEALBOOK (July 3, 2012), *available at* http://dealbook.nytimes.com/2012/07/03/whats-next-after-the-barclays-settlement/ (last visited Oct. 8, 2013).

68. Ben Protess, *Libor Case Energies a Wall Street Watchdog*, DEALBOOK (Aug. 12, 2012, 8:57 PM), *available at* http://dealbook.nytimes.com/2012/08/12/libor-case-energizes-gensler-and-the-c-f-t-c/ (last visited Oct. 8, 2013).

69. *Id.*

financially harmed by the conspiracy."[70] Therefore, investigations into other panel banks and private lawsuits will continue into the foreseeable future.

IV. EVIDENCE OF MANIPULATION AMONG LIBOR SUBMITTING BANKS

This section discusses the evidence suggesting that panel banks colluded to manipulate LIBOR during the 2007 and 2008 financial crisis. As stated earlier, the Barclays settlement initiated an overwhelming number of private lawsuits and class actions. Many of these actions will rely on the following allegations to build their cases. Part A will discuss evidence supporting that panel banks artificially suppressed LIBOR. Part B will describe the discrepancy between LIBOR and Eurodollar deposit rates. Part C will provide evidence that LIBOR quotes "bunched" around the fourth lowest quote.

A. Evidence Supporting that Panel Banks Artificially Suppressed LIBOR

As previously discussed, LIBOR is a calculation of how much interest each bank would have to pay to borrow from another bank or a bank's borrowing costs. However, LIBOR is not the only method of calculating a bank's borrowing costs. Certain statistics, such as the probability of default, calculate the degree of likelihood that the borrower of a loan or debt will not be able to make the necessary scheduled repayments.[71] These calculations are estimated on a daily basis by analyzing each banks equity and bond prices, accounting information, and general economic conditions (i.e. interest rates, unemployment rates, and inflation rates).[72] These factors are essentially the same factors used when determining LIBOR submissions. Therefore, one would assume that the two statistics, LIBOR and probability of default, which account for the same economic factors and measure a bank's lending rate, would have a positive coefficient. However, during the financial crisis, these rates were in opposition. As

70. Press Release, Hagens Berman Sobol Shapiro LLP, Hagens Berman Files Class Action Against Barclays Bank, Others Over Euribor Rate Fixing (July 6, 2012), *available at* http://www.prnewswire.com/news-releases/hagens-berman-files-class-action-against-barclays-bank-others-over-euribor-rate-fixing-161635455.html (last visited Feb. 8, 2014).

71. *Default Probability*, INVESTOPEDIA, (2013), *available at* http://www.investopedia.com/terms/d/defaultprobability.asp#axzz2B1I8WVXm (last visited on Oct. 8, 2013).

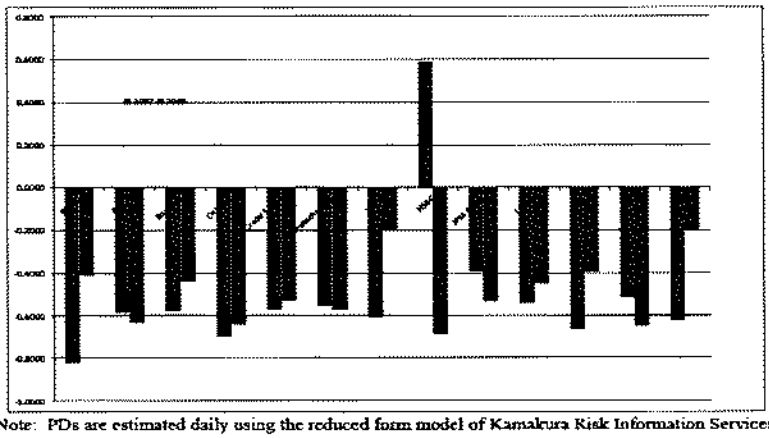
72. *See generally* Jens Hilscher et al., *Measuring the Risk: A Modern Approach*, 90 RMA J. 60 (2008).

seen from the figures below, which list all panel banks that submitted LIBOR rates in 2007 and 2008, the correlation coefficients were negative.

To put these coefficients in perspective, if one variable is increasing and the other is also increasing then the correlation is "positive."[73] However, if the variables diverge in opposite directions, then the correlation "negative."[74] Finding a negative coefficient between a bank's daily LIBOR quotes and the daily probabilities of default suggests that as the probability of default increases, the LIBOR quotes decreases. However, that would violate fundamental finance theory because both LIBOR and probability of default are based on the same economic factors. If both rates are based on the same economic factors, then both statistics should move in the same direction and display a positive coefficient. However, as displayed by the graphs below, the probability of default and LIBOR quotes throughout the financial crisis display a negative coefficient. This was true for every LIBOR submitting bank, except HSBC, in both 2007 and 2008. Additionally, the same negative coefficient resurfaces regardless of whether the data is spread over a one-month, a three-month, or a twelve-month term. This disregards any possibility of coincidence between the two statistics. Therefore, this would suggest that banks are suppressing LIBOR quotes to avoid revealing the higher rates that reflect the true (higher) probabilities of default.

FIGURE 1

Graph 1: Correlation Coefficients Between Each Bank's Daily LIBOR Bid and Probability of Default (PD), One-Month Term

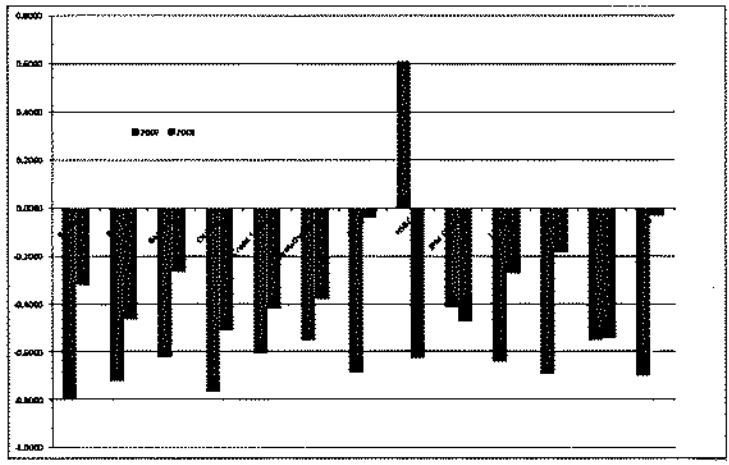


(Note: PDs are estimated daily using the reduced form model of Kamakura Risk Information Services.)

73. A.K. SHARMA, TEXT BOOK OF CORRELATIONS AND REGRESSION 5 (2005).
74. *Id.*

FIGURE 2

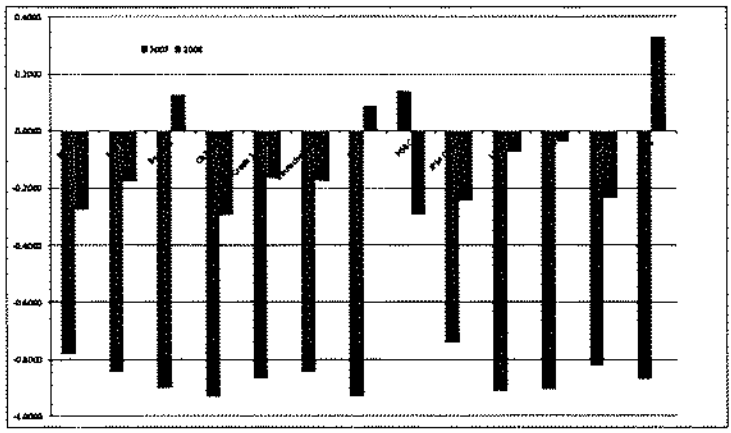
Graph 2: Correlation Coefficients Between Each Bank's Daily LIBOR Bid and Probability of Default (PD), Three-Month Term



(Note: PDs are estimated daily using the reduced form model of Kamakura Risk Information Services.)

FIGURE 3

Graph 4: Correlation Coefficients Between Each Bank's Daily LIBOR Bid and Probability of Default (PD), Twelve-Month Term



(Note: PDs are estimated daily using the reduced form model of Kamakura Risk Information Services.)

B. Evidence Supporting a Discrepancy Between LIBOR and Eurodollar Deposit Rates

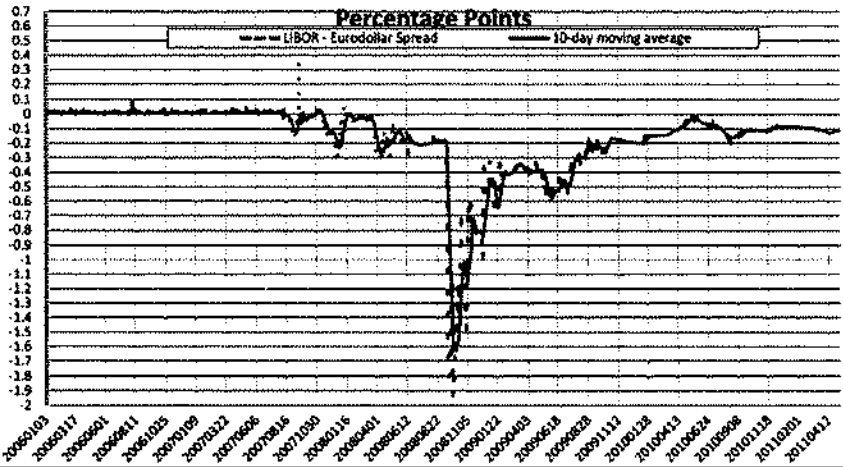
The Eurodollar deposit rates are analogous to LIBOR because they

reflect the rates at which banks in the London Eurodollar money market lend American dollars to one another, just as LIBOR is intended to reflect rates at which panel banks in the London interbank market lend American dollars to one another.[75] Economic and statistical analysis strongly supports the Federal Reserve Eurodollar Deposit rate as an accurate benchmark for measuring the validity of LIBOR as reported by the panel banks.[76] Furthermore, because LIBOR and Eurodollar Deposit Rates measure the lending cost to banks of Eurodollar deposits, consider important market and financial fundamentals (i.e. monetary policy, market risk, and interest rates), and incorporate risk factors, absent manipulation, the spread between the rates should always be zero or close to zero.[77] However, that was not the case.

As seen in Figures 4 and 5, from January 5, 2000, to about August 7, 2007, the spread remained positive and very close to zero. However, from August 8, 2007, through May 17, 2010, which is the time period of alleged manipulation, the spread became negative and reached levels of negative 35 basis points. Additionally, during the two-week period following the bankruptcy of Lehman Brothers, the spread reached levels as high as 153 basis points. Therefore, this evidence demonstrates that the panel banks were suppressing their LIBOR quotes and colluding to suppress LIBOR.

FIGURE 4

Figure 3: BBA LIBOR - Federal Reserve Eurodollar Spread in Percentage Points



75. Amended Complaint and Demand for Jury Trial at ¶ 68, In Re Libor-Based Financial Instruments Antitrust Litigation, (S.D.N.Y. Aug. 30, 2012) MDR No. 2262, *available at* http://www.hausfeldllp.com/content_documents/9/Stamped-LIBOR-OTC-Plaintiffs-FINAL.pdf (last visited Oct. 13, 2013).

76. *Id.* at ¶71.

77. *Id.*

FIGURE 5

Bank Name	Average Spread between September 16, 2008 and September 30, 2008	Average Spread between August 8, 2007 and May 17, 2010
1.Bank of Tokyo-Mitsb.	-120 basis points	-25 basis points
2. Bank of America	-144 basis points	-30 basis points
3. Barclays	-87 basis points	-25 basis points
4. Citi	-142 basis points	-32 basis points
5. CS	-122 basis points	-27 basis points
6. Deutsche Bank	-129 basis points	-31 basis points
7. HBOS	-110 basis points	-29 basis points
8. HSBC	-141 basis points	-32 basis points
9. JP Morgan Chase	-153 basis points	-35 basis points
10. Lloyds	-146 basis points	-30 basis points
11. Norin Bank	-126 basis points	-25 basis points
12. Rabo Bank	-143 basis points	-32 basis points
13. Royal Bank of Canada	-140 basis points	-28 basis points
14. Royal Bank of Scotland	-140 basis points	-26 basis points
15. UBS	-141 basis points	-29 basis points
16. West	-138 basis points	-35 basis points

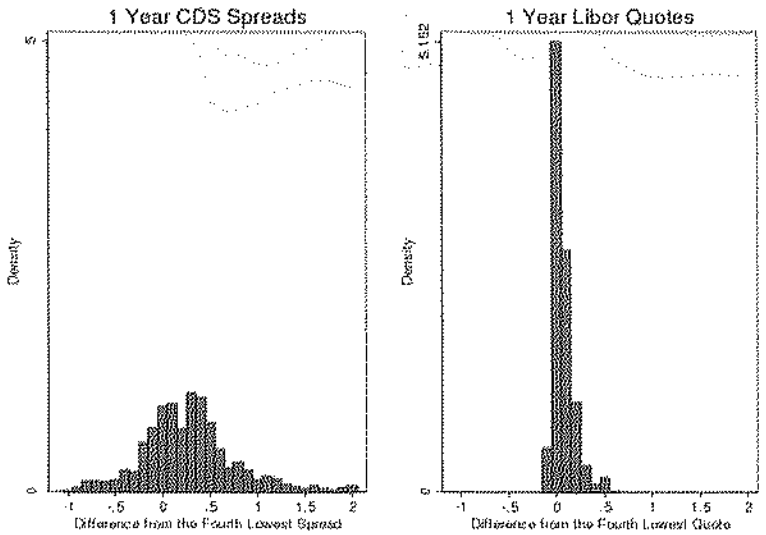
C. LIBOR Quotes "Bunched" Around the Fourth Lowest Quote Supports Manipulation

Because of the way LIBOR is calculated, by discarding the four highest and lowest reported rates and averaging the remainder, if a number of banks sought to act in concert to depress LIBOR, evidence would display a strong concentration around the fourth-lowest rate.[78] During the time period when LIBOR was allegedly suppressed, evidence demonstrates that the banks, specifically Citigroup, Bank of

78. *Id.* at 55.

America, and JP Morgan Chase, submitted rates that displayed suspicious "bunching" around the fourth lowest quote.[79] This can be seen from Figure 6 below. After compiling all the banks LIBOR submissions, quotes tend to "bunch" around the fourth-lowest spread. However, when comparing this data against 1-year CDS spreads, which is also an indicator of a bank's financial health, the CDS spreads do not "bunch" around the fourth-lowest rate and are more evenly distributed. It is well established that "if banks were truthfully quoting their costs, we would expect these distributions to be similar,"[80] which is not the case here. Following the same reasoning described with LIBOR and probabilities of default stated earlier, if two statistics are based on the same economic factors, their results should be similar. If not, the results would disprove basic economic theory. Therefore, the LIBOR rates suspicious "bunching" around the fourth-lowest rate, while CDS spreads are evenly distributed, suggest manipulation between submitting banks.

FIGURE 6



V. REFORM OF LIBOR: THE WHEATLEY REVIEW

Martin Wheatley, a top U.K. regulator for the Financial Service

79. *Id.*

80. Connan Andrew Snider & Thomas Youle, *Does the Libor Reflect Banks' Borrowing Costs?*, SOC. SCI. RES. NETWORK (Apr. 2, 2010), *available at* http://www.econ.umn.edu/~youle001/libor_4_01_10.pdf (last visited Oct. 5, 2013).

Authority ("FSA"), conducted an investigation of possible reforms to the LIBOR calculation method in order to prevent another manipulation scandal. Part A of this section will begin by presenting Wheatley's findings, and then Part B will introduce his recommendations for reform. Finally, Part C will share immediate reactions to Wheatley's report. If Wheatley's proposal is adopted, it will be included in the financial services reform bill.[81] This bill is before parliament and is scheduled to receive royal assent next year.[82]

A. Initial Findings From the Wheatley Report

Wheatley's preliminary recommendation is to reform the current LIBOR system rather than implement a full replacement benchmark rate.[83] In order to replace the benchmark entirely, one must prove that: (1) LIBOR is beyond repair; (2) LIBOR is subject to a better alternative that existed in this moment in time; and, critically, (3) an immediate and smooth transition to that alternative could be made.[84] Wheatley concluded that none of these conditions were met and found that a reform would be a more realistic solution than a full overhaul.[85] Due to the overwhelming number of financial instruments benchmarked on the current LIBOR system, a move to replace LIBOR would "pose an unacceptably high risk of significant financial instability" and cause large-scale litigation between parties holding contracts that reference LIBOR.[86] Additionally, throughout the current manipulation scandal, "there has been no noticeable decline in the use of LIBOR by market participants."[87] This signals that the market has not lost complete confidence in the current benchmark rate and that a wholesale replacement of LIBOR would be an overreaction to the current situation.

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81. *See* Brooke Masters, *Libor to be Regulated 'Without Delay'*, FIN. TIMES (Oct. 17, 2012, 4:31 PM), *available at* http://www.ft.com/intl/cms/s/0/6d20d018-1865-11e2-80e9-00144feabdc0.html (last visited Oct. 5, 2013).

82. *Id.*

83. Martin Wheatley, Managing Director, *Pushing the Reset Button on LIBOR*, FSA (Sept. 28, 2012), *available at* http://www.fsa.gov.uk/library/communication/speeches/2012/0928-mw.shtml (last visited Oct. 5, 2013) [hereinafter Wheatley, *Pushing the Reset Button*].

84. *Id.*

85. *Id.*

86. Martin Wheatley, *The Wheatley Review of Libor: Final Report* 7, GOV.UK (2012), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/191762/wheatley_review_libor_finalreport_280912.pdf (last visited Oct. 4, 2013) [hereinafter Wheately, *Final Report*].

87. *Id.*

B. Wheatley's Recommendations for LIBOR Reform

After Wheatley decided to maintain the current LIBOR system, he proposed three major changes to regain trust in the benchmark rate and prevent another large-scale manipulation.[88]

First, Wheatley suggested that the British Bankers' Association ("BBA") hand over the authority to regulate LIBOR to the FSA.[89] The current manipulation scandal, occurring over a lengthy period of time, provides evidence that the BBA failed to properly oversee the LIBOR-setting process and should take no further role in the administration and governance of LIBOR.[90] Once authority is transferred, the FSA should institute an independent committee headed by the FSA's approved persons.[91] The committee's obligation would include: surveillance and scrutiny of submissions; publication of a statistical digest of rate submissions; and periodic reviews addressing the issue of whether LIBOR continues to meet market needs effectively and credibly.[92]

Second, Wheatley suggested that the FSA's independent committee institute a clear, consistent, and effective regulatory regime that underpins all activity.[93] This would include the authority to write and implement rules in relation to the LIBOR process, supervise the conduct of the firms and individuals involved in the process. . .and "take regulatory action for misconduct."[94] The independent committee would require increased transparency from banks by mandating LIBOR submissions be explicitly supported by transactional data that properly identifies the bank's current lending rate.[95] Additionally, if banks continue to manipulate LIBOR, the FSA's independent committee would be able to impose public censure or financial penalty.[96]

Third, Wheatley suggested that the government should amend current legislation to allow the FSA to "prosecute manipulation or attempted manipulation."[97] This would enable the FSA to use criminal powers for the worst cases of attempted manipulation.[98] Currently, the FSA only has statutory powers to investigate various offenses under the

88. Wheatley, *Pushing the Reset Button*, *supra* note 83.
89. *Id.*
90. *Id.*
91. *Id.*
92. Wheatley, *Final Report*, *supra* note 86, at 12.
93. Wheatley, *Pushing the Reset Button*, *supra* note 83.
94. Wheatley, *Final Report*, *supra* note 86, at 16.
95. *Id.* at 27.
96. *Id.* at 12.
97. Wheatley, *Pushing the Reset Button*, *supra* note 83.
98. *Id.*

Financial Services Market Act 2000 and insider dealing under the Criminal Justice Act 1993.[99] Therefore, the FSA is not in a position to investigate and prosecute LIBOR manipulation.[100] Although Wheatley noted that introducing criminal sanctions for LIBOR submissions might create overlap with existing fraud offenses, create financial uncertainty, and unintentionally criminalize unrelated activities, the civil sanctions may not be sufficient to deter the large financial benefits that might be obtained from manipulating LIBOR.[101]

C. Immediate Reaction to the Wheatley Review

In his review, Wheatley stated, "in relation to the question of whether administering LIBOR should become a regulated activity, most of the responses addressing this issue were in favor of regulation."[102] Following the report, banking trade bodies, politicians, lawyers, and buy-side representatives confirmed his opinion and were in favor of regulation.[103] Andrew Tyrie, who is leading the government-mandated probe into banking standards in the U.K., stated that "[t]he Wheatley Review is a welcome initial step . . . it has rightly stripped the BBA of responsibility for LIBOR . . . brings LIBOR within the scope of regulatory oversight and criminal law . . . and ensure[s] that LIBOR can't be rigged again."[104] Additionally, Simon Lewis, Chief Executive of the Global Financial Markets Association, said, "the Wheatley Review is timely and outlines clear recommendations for change . . . [GFMA] believes that all systemically important financial benchmarks should be subject to regulatory oversight." Furthermore, the BBA released a statement saying, "the BBA has strongly stated the need for greater regulatory oversight of LIBOR and tougher sanctions for those who try to manipulate it."[105]

99. Wheatley, *Final Report*, *supra* note 86, at 18.

100. *Id.*

101. *See id.*

102. *Id.* at 12.

103. *Wheatley Review: Reaction from the City*, FIN. NEWS (Sept. 28, 2012), *available at* http://www.efinancialnews.com/story/2012-09-28/martin-wheatley-libor-report-city-of-london-reaction (last visited Oct. 9, 2013) [hereinafter Reaction From City].

104. *Id.*

105. Press Release, British Bankers' Association, BBA Statement on Conclusions of Wheatley Review into LIBOR (Sept. 28, 2012), *available at* http://www.bbalibor.com/news-releases/bba-statement-on-conclusions-of-wheatley-review-into-libor (last visited Oct. 7, 2013).

VI. PROBLEMS WITH WHEATLEY'S REGULATION SCHEME

This section discusses why Wheatley's proposed regulation scheme fails to account for the current financial structures among banks. Wheatley's proposed scheme is another increased transparency and regulation scheme that is instituted only after the damage occurred. Evidence will show that Wheatley's regulation scheme fails to address the collusion problem between the banks. Without addressing these problems, banks will continue to act in their best interest regardless of the sanctions or regulatory systems imposed.

A. Failure to Address Vague Definitions

After the 2008 financial crisis, there has been a trend in favor of increased financial regulation.[106] However, to this day, four years after the biggest financial crisis since the Great Depression, many of these regulation schemes still have not been implemented. Additionally, in the view of many scholars, many of the recent financial regulation schemes have been far from successful.[107] The prominent explanation for this delay is that in many of these regulations the wording and definitions are too vague and, if left alone, would lead to expansive regulation.[108] To solve this problem, regulating bodies continue to work together to interpret the legislations' intent which has only pushed back the date which regulation will take effect.

Wheatley's proposal runs into many of the same problems. For example, Wheatley proposes that "the new regulated activities should be *defined* in such a way as to cover the production of the submissions, the calculation of the benchmark, . . . systems and controls regarding . . .

106. Letter from KPMG, FINANCIAL SERVICES REGULATORY PRACTICE LETTER (2010), *available at* http://kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/regulatory-practice-letters/Documents/rpl-1013-otc-derivatives.pdf (last visited Oct. 7, 2013); Mike Colodny, *Federal Reserve Board: Testimony of J. Nellie Liang, Director of Financial Stability Policy and Research, on the Financial Oversight Council, given on April 14, 2011*, LAWYERS.COM (June 1, 2011), *available at* http://government.lawyers.com/blogs/archives/13638-Federal-Reserve-Board-Testimony-of-J.-Nellie-Liang,-Director-of-Financial-Stability-Policy-and-Research,-on-the-Financial-Oversight-Council,-given-on-April-14,-2011.html (last visited Oct. 7, 2013) (providing evidence through the Dodd-Frank Act, EMIR, and Volcker Rule that the response of the 2008 financial crisis was increased financial regulation).

107. *See Mercatus Scholars on the Dodd-Frank Financial Reform Bill*, MERCATUS CENTER, *available at* http://mercatus.org/features/mercatus-scholars-comment-dodd-frank-financial-reform-bill (last visited Sept. 20, 2013).

108. Troy S. Brown, *Legal Political Moral Hazard: Does the Dodd-Frank Act End Too Big to Fail?*, 3 ALA. C.R. & C.L.L. REV. 1, 27 (2012).

the processes for identifying and querying suspicious submissions."[109] However, Wheatley fails to give any guidance on how to actually define these tasks. He does not include any factors that should be considered when producing submissions or calculating the benchmark; rather, he states that calculations should be "market led" to adapt to current market conditions.[110]

Furthermore, to increase transparency, Wheatley suggests that LIBOR submissions should be explicitly and transparently supported by transactional data.[111] Unlike his definition requirement discussed above, Wheatley gives "LIBOR submissions guidelines" which set out the specific transactional data that contributing firms should use to determine their assessment of their interbank lending.[112] However, to provide flexibility for submitters when transactional data is unavailable, Wheatley asks submitters to "use their experience of the inter-bank deposit market and its relationships with other markets," and allows adjustment based on "interpolation or extrapolation from available data."[113] In other words, if the bank is actually carrying out unsecured inter-bank deposit transactions then it should use that transactional data to support its submissions. If not, which commonly occurs, banks are still able to use their judgment based on "experience," "relationships," and "research" of market data.[114] In essence, Wheatley trusts traders with discretionary power to make honest and accurate submissions when trading data is unavailable to support submissions. These are the same factors that created the opportunity for manipulation in the first place.

Therefore, Wheatley fails to give specific intentions for definitions within the regulation scheme, which will lead to overregulation and delay implementation. Further, where Wheatley attempts to provide definitions, opportunities for continued manipulation remain blatantly

109. Wheatley, *Final Report*, *supra* note 86, at 13 (emphasis added).

110. *Id.*

111. *Id.* at 27.

112. *Id.* at 28.

113. Matt Levine, *It's the Beginning of the End for Danish Kroner Libor*, DEALBREAKER (Sept. 28, 2012), *available at* http://dealbreaker.com/2012/09/its-the-beginning-of-the-end-for-danish-kroner-libor/?utm*source=feedburner&utm*medium=feed&utm_campaign=Feed%3A+dealbreaker+dealbreaker+%28Dealbreaker%29&utm_content=Google+Reader (last visited Sept. 20, 2013).

114. *See id.*; *see also* Richard E. Farley, *The Future of LIBOR—The Final Report from the Wheatley Review*, Paul Hastings LLP 1,2 (2012), *available at* http://www.paulhastings.com/Resources/Upload/Publications/2260.pdf (last visited Oct. 7, 2013).

evident.

B. Failure to Address Banking Culture

As stated earlier, evidence suggesting banks were colluding to manipulate LIBOR spawned Wheatley's investigation. Collusion is an agreement amongst competitors to suppress rivalry that relies on interfirm communication or transfers.[115] The suppression of interfirm rivalry leads to firms earning monopoly profits.[116] Here, evidence suggested that banks, which usually compete within the industry, colluded with each other to suppress rivalry and enhance profits.[117] Wheatley's solution to this problem is to "increase transparency" and "impose criminal sanctions."[118]

However, Wheatley overlooks the fact that a culture was created amongst banks to collude with each other to maximize profits. Only increasing transparency and instituting criminal sanctions fails to properly address this problem. One should consider the following.

First, although other benchmark rates exist that could substitute LIBOR, in the wake of the biggest manipulation scandal to date, there was no noticeable decline in the use of LIBOR.[119] This suggests that these colluding banks experience no threat of substitutes to other benchmark rates and will still control the vast amount of financial instruments within the market through LIBOR. In essence, they have a monopoly among investors within the LIBOR market.

Second, as stated earlier, Wheatley's submission platform leaves opportunity for LIBOR submitters to make submissions based on their own judgment from "experience," "relationships," and "research" of market data. This is the same situation for LIBOR submitters when they were completely unregulated before the Wheatley report. Therefore, as long as potential profits outweigh the potential sanction or fines, Wheatley's suggestions will not change the colluding nature around LIBOR because major threats to the benchmark rate are absent and opportunities for manipulation are still available.

Now, what would be the immediate response to such an argument? Make sure Wheatley's sanctions or criminal penalties are high enough to deter banks from colluding to manipulate LIBOR. However, if

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115. *See* ROBERT C. MARSHALL & LESLIE M. MARX, THE ECONOMICS OF COLLUSION: CARTELS AND BIDDING RINGS VIII (2012).

116. *Id.* at 5.

117. *See* Foxman, *supra* note 50.

118. Wheatley, *Final Report*, *supra* note 86, at 18.

119. *See id.* at 7.

opportunities arise, which they will, where LIBOR rates are based on trader's "experience," "relationships," and "research" of market data, then it will be very difficult for regulatory bodies to impose criminal sanctions without a bank admitting its wrongdoing like Barclays. However, the current regulatory structure and the profitable business relationship between banks makes such a situation very unlikely.

First, the regulatory structure makes an admission of manipulation unlikely. The ability of the bank to maximize personal benefit is based on the ability to predict what the other side will do in response to either abiding by the regulations or manipulating LIBOR.[120] Given that in almost all cases the regulatory body has less funds, personnel, resources, and expertise than its bank counterparts, there is little to be gained in the long run by cooperating, and much to be gained by maximizing its own benefit.[121] Therefore, if the regulatory body does not have the means to properly overlook every submission of banks, submissions may continue to be manipulated to maximize personal gain.

Second, the relationship between banks makes an admission of manipulation unlikely. The banks involved in submitting LIBOR rates are amongst the biggest and most respected banks in the world.[122] In addition, LIBOR submitting banks participate in a vast amount of financial transactions with each other. If one bank was to report manipulation of another bank, it may jeopardize a working business relationship. Sacrificing a business relationship, especially a profitable one, would likely outweigh the choice to come forward to comply with Wheatley's regulation scheme.

Therefore, Wheatley's proposed criminal sanctions will not affect the banking culture and incentives to collude in the long run.

VII. PROPOSAL FOR LIBOR REFORM

This section provides insight on a possible solution to shortcomings within the LIBOR system and Wheatley's proposal. Part A will characterize the present regulator-regulatee system that is currently in place and explain why only regulation will not be sufficient. Afterwards, Part B will explain a possible solution to alter the

120. DAVID RUBENS ASSOC., THE REGULATORY SYSTEM – WHY IS IT FAILING? 1, 7 (2012), *available at* http://www.davidrubens-associates.com/PDFS/DRA_The%20Regulatory%20System%20-%20Why%20Is%20It%20Failing_Aug2012.pdf (last visited Feb. 8, 2014).

121. *Id.*

122. *Top 10 Investment Banks*, BANKS AROUND THE WORLD, *available at* http://www.relbanks.com/worlds-top-banks/top-investment-banks (last visited Oct. 8, 2013).

regulatory structure.

A. LIBOR Regulation and Modern Day Game Theory

As explained earlier, Wheatley proposed a regulatory structure that would place all LIBOR submitting banks under the governance of the FSA. However, the supervisory role of the regulatory bodies, with threat of punitive action, only creates a modern day game theory and makes collusion among banks the optimal solution.

Game theory attempts to look at the relationships between participants in a particular model and predict their optimal decisions.[123] The most well-known example is the prisoner's dilemma.[124] For example, imagine that two prisoners are offered the opportunity to either deny a charge or give evidence against the other one.[125] If both Prisoner A and Prisoner B stay silent, they each receive one month imprisonment.[126] If they both provide evidence against the other, they each receive three months imprisonment.[127] However, if one prisoner rats on the other, who in turn stays silent, then the prisoner who gives the evidence goes free, and the prisoner who was betrayed receives one year imprisonment.[128]

It is well recognized that the optimal strategy in the above situation is to give evidence against the other person.[129] Although both sides would attain a lower sentence if they stayed silent, the prisoners have no control over each other's actions and will give up each other.[130] However, the optimal strategy changes if the prisoners can adjust their strategy based on previous experience. This is a more practical view for comparison with the financial regulatory structure. In such a situation, commonly identified as 'tit for tat,' the optimal strategy would be to repeat what the other party did on the first occasion. If the first choice was to cooperate, then continue to cooperate. If the first choice was to

123. *Game Theory*, INVESTOPEDIA, *available at* http://www.investopedia.com/terms/g/gametheory.asp (last visited Oct. 8, 2013).

124. *See Prisoner's Dilemma*, ANNENBERG LEARNER, *available at* http://www.learner.org/courses/mathilluminated/units/9/textbook/04.php (last visited Sept. 20, 2013); DAVID RUBENS ASSOC., *supra* note 120, at 6.

125. ANNENBERG LEARNER, *supra* note 124.

126. *Id.*

127. *Id.*

128. *Id.*

129. *See* ANNENBERG LEARNER, *supra* note 124; DAVID RUBENS ASSOC., *supra* note 120, at 7.

130. *See* ANNENBERG LEARNER, *supra* note 124; DAVID RUBENS ASSOC., *supra* note 120, at 7.

betray, then continue to betray. [131]

Here, strong evidence supports the conclusion that LIBOR submitting banks have been "cooperating" for an extended period of time. As seen in the 'tit for tat' theory, it is mutually beneficial for all parties involved to continue to "cooperate." However, unlike the prisoners in the example who seek less jail time, "mutually beneficial" for LIBOR submitting banks equals extraordinary financial gains. Additionally, the incentive to "cooperate" only increases if one includes the fact that most regulators are less funded and resource intensive than the majority of LIBOR submitting banks. If regulators cannot provide funds for proper supervision or banks realize they are more likely to get away with manipulation than face punitive damages, then banks will only continue to "cooperate." Therefore, a regulatory structure must be instituted that creates a situation that makes LIBOR submitting banks "betray" each other rather than "cooperate."

B. Creation of a "Whistle Blowing" Incentive System

As stated above, if banks are not deterred from cooperating then financial regulations will be ineffective. However, a "whistle blowing" incentive system incorporated within Wheatley's proposed regulatory scheme could turn the LIBOR submitting banks against each other.

A similar program was instituted within the Dodd-Frank Wall Street Reform Act, which rewards 10 to 30 percent of monetary sanctions for whistleblowers who report to the Securities and Exchange Commission ("SEC") original information leading to securities law enforcement actions that recover more than $1 million. [132] As a result, the SEC reported that the "whistle blowing" program received 3,001 formal written whistleblower "tips" seeking consideration for an award in 2012 (excluding tips that reported alleged violations that were received from persons who were ineligible to receive a bounty). [133]

Here, if a similar "whistle blower" program was instituted, the

131. *See* ANNENBERG LEARNER, *supra* note 124; DAVID RUBENS ASSOC., *supra* note 120, at 7.

132. Ben Kerschberg, *The Dodd-Frank Act's Robust Whistleblowing Incentives*, FORBES (Apr. 14, 2011), *available at* http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/ (last visited Oct. 7, 2013).

133. Scott J. Wenner, *United States: SEC Report Confirms Substantial Dodd-Frank Whistle-Blowing Activity, Illustrating Need for Employers To Be Proactive – And Careful*, MONDAQ (Nov. 29, 2012), *available at* http://www.mondaq.com/unitedstates/x/208852/Whistleblowing/SEC+Report+Confirms+Substantial+DoddFrank+WhistleBlowing+Activity+Illustrating+Need+For+Employers+To+Be+Proactive+And+Careful (last visited Oct. 7, 2013).

dynamic between the regulator and a LIBOR submitting bank would be altered. Banks would no longer be subjected to possible punitive damages from the regulators, but they also could be subjected to "whistle blowing" claims made by other banks or players in the industry. Additionally, if "whistle blowing" incentives are comparable to the gains made by manipulating LIBOR, banks would be more likely to "blow the whistle." LIBOR submitting banks would be able to make similar short term profits by tipping regulators of misconduct, but would do so without apprehension of their own misconduct. Such a program would incentivize LIBOR submitting banks to betray each other and "blow the whistle" rather than "cooperate."

VIII. CONCLUSION

The LIBOR manipulation scandal is considered one of the biggest scandals the financial world has seen to date. While in 1960, when LIBOR was instituted, an unregulated system to set the world's largest benchmark for lending may have been acceptable, it is clear that structural changes are needed. The evidence presented in this Note points not only to a couple greedy individuals looking to make a quick buck (or million), but an industry wide manipulation, that included some of the most powerful corporations within the financial industry. Additionally, as this Note has illustrated, the manipulation did not just affect the financial markets, but had devastating effects to almost every person that went to the bank and took out a loan.

Wheatley's proposal is a much-needed step. LIBOR needs to be heavily regulated to prevent a scandal like this from ever happening again. However, Wheatley's proposal does not fix the problem and contains multiple shortcomings. First, a banking culture was created amongst banks to collude with each other to maximize profits. If this culture is not altered, banks will just look to other ways to make money to compensate for any sanction a regulatory body will impose. Additionally, most, if not all, of these banks engage in a vast amount of financial transactions together and reporting partner banks' attempted manipulation may jeopardize these relationships. Second, Wheatley leaves room for submitters to use their own "experience" and "relationships" to set LIBOR. In effect, Wheatley gives LIBOR submitters large discretion for setting the rate, which is exactly what created the opportunity for manipulation.

To solve these problems, this Note has discussed an incentive program to change the structure between financial regulators and the LIBOR submitting banks. If a system is implemented that makes it more or equally profitable to "blow the whistle" than collude, future

manipulation will be prevented.

WHO'S YOUR DADDY?

THE INTERNATIONAL MARKET FOR AMERICAN SPERM

Samantha C. Robbins[†]

"America is the largest exporter of sperm. But what happens when all those kids grow up and decide to go looking for Daddy?"[1]

-Jay Newton-Small
TIME Magazine

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† J.D. Candidate, Syracuse University College of Law, 2014. I would like to thank Professor Tara J. Helfman for her invaluable guidance and insight throughout the writing of this note. Additionally, I would like to thank my siblings and parents for their unwavering love and support. Thank you for always believing in me. Finally, for more than words can

1. Jay Newton-Small, *Frozen Assets*, TIME (Apr. 16, 2012), at 49.

I. INTRODUCTION

The U.S. is sending a lot of *semen* abroad – but not sailors. Currently, the U.S. is the number one exporter of human sperm.[2] The French may be the expert in romance, and Latin Americans may flaunt their machismo, but it is American sperm that foreigners want.[3] While the rest of the world may not respect our goods and services – the French bomb McDonald's[4] – one author has commented that "it's nice to know this country can still produce in one area where it counts. And in great quantities."[5]

Sperm donation has ballooned into a multi-billion dollar global industry. Internationally, countries have been moving towards regulation of sperm donation over the last twenty years.[6] Such regulations include banning anonymous donation, regulating the number of children fathered by a given donor, placing eligibility requirements on donors, and creating registry systems for children to obtain information about their biological fathers.[7] However, "growing pressures" on the U.S. to impose regulations on sperm donation have been to no avail.[8] And, with scant regulations in place, numerous legal complications have surfaced.

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2. Buck Wolf, *Sending Sperm Abroad*, ABC NEWS (Dec. 16, 2005), *available at* http://abcnews.go.com/US/Sex/story?id=93277&page=1 (last visited Oct. 10, 2013).

3. *Id.*

4. John-Thor Dahlburg, *To Many French, Ugly American is McDonald's*, L.A. TIMES (Apr. 22, 2000), *available at* http://articles.latimes.com/2000/apr/22/news/mn-22176 (last visited Oct. 10, 2013).

5. Wolf, *supra* note 2.

6. Mark Ballantyne, *My Daddy's Name is Donor: Evaluating Sperm Donation Anonymity and Regulation*, 25 RICH. J.L. PUB. INT. 569, 571 (2012).

7. *Id.*

8. ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, MY DADDY'S NAME IS DONOR 53 (2010).

This note purports to critically examine the legal issues that have surfaced as a result of such a *lassiez-faire* U.S. approach to artificial insemination. Further, this note engages in an analysis of domestic legislation relating to artificial insemination, comparing the U.S.'s approach with other countries that have elected to place restrictions or bans on donor anonymity.

Section II of this note offers a brief overview of the history of artificial insemination by donor ("AID"), and the modern industry. Section III analyzes several international approaches that have been undertaken in addressing AID. Section IV sets out various legal issues due to the inadequacy of the American legal system in the artificial insemination industry. And finally, this note concludes with Section V, where I propose possible remedies to curtail the potential liabilities that accompany non-regulated AID.

II. ARTIFICIAL INSEMINATION BY DONOR

It is difficult to grasp the depth and breadth of the current market for artificial insemination without providing a brief historical overview and an analysis of the current industry in the U.S.

A. What is Artificial Insemination by Donor?

Artificial insemination, also known as "assisted reproduction," is defined as a "method of causing pregnancy other than sexual intercourse."[9] Assisted reproduction has been primarily used to "assist individuals who are unable to conceive children," whether due to actual infertility of either partner, or the "social structure in which [an individual or couple] self-[identifies]."[10]

Artificial insemination has been used for over two centuries as an alternative method to sexual intercourse as a means of achieving conception.[11] There are several types of artificial insemination, and each carries with it different rates of success: intrauterine insemination (fertilization);[12] intra-fallopian insemination;[13] and in vitro

9. UNIFORM PARENTAGE ACT § 102(4) (2002) (the term includes "intrauterine insemination").

10. Vanessa L. Pi, *Regulating Sperm Donation: Why Requiring Exposed Donation is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 381 (2009) (quoting Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKLEY J. GENDER L. & JUST. 18, 24 (2008)).

11. Jennifer M. Vagle, *Putting the "Product" in Reproduction: The Viability of a Products Liability Action for Genetically Defective Sperm*, 38 PEPP. L. REV. 1175, 1201 (2011).

12. Intrauterine insemination (fertilization) is fertilization by injection of sperm into

fertilization.[14]

There are "two broad categories" of artificial insemination, distinguished by who provides the sperm: (1) artificial insemination by husband, in which the recipient-mother's husband is the individual providing the sperm; and (2) AID, where the sperm is provided by a male other than the recipient-mother's husband.[15] With AID, the identity of the donor "may or may not be known to the recipients(s)."[16]

B. The History

The concept of artificial insemination has existed since about 200 A.D.[17] Jewish commentary written between 400 A.D. and 1200 A.D. reveals an interest in the possibilities of artificial insemination.[18] One commentator during this period posed the question of "who would be the legitimate father of a child born by accidental fertilization of an egg from indirect contact, such as from bath water."[19]

The first occurrence of human artificial insemination was in the late 1700s, and there is a dispute over where it occurred.[20] One account credits England, while the other credits a French doctor.[21] The first performance of artificial insemination in the U.S. was in 1884, at Jefferson Medical College in Pennsylvania.[22]

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the uterus. Ninety percent of couples usually conceive within the first six cycles or treatments, making an average success rate of fifteen percent for each treatment. *Artificial Insemination Tips: Success Rates of Artificial Insemination*, LIFETIPS (2012), *available at* http://infertility.lifetips.com/cat/64201/artificial-insemination/index.html (last visited Oct. 10, 2013).

13. Intra-fallopian insemination is fertilization by the injection of sperm directly into the fallopian tubes. The average success rate is thirty percent. *Id.*

14. In vitro fertilization is fertilization of an egg by sperm in a test tube or petri dish. The success rate for achieving pregnancy is an average of thirty percent, but once pregnant, the success rate for live birth is eighty-three percent. *Id.*;
Vagle, *supra* note 11, at 1201; *see* Dawn R. Swink & J. Brad Reich, *Caveat Vendor: Potential Progeny, Paternity, and Product Liability Online*, 2007 BYU L. REV. 857, 860-61 (2007).

15. Swink & Reich, *supra* note 14, at 860-61.

16. *Id.*

17. Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN'S STUD. 173, 176 (1996) (Artificial insemination was used on animals first, "possibly as early as the fourteenth century.").

18. *Id.*

19. *Id.*

20. *Id.* at 176-77.

21. *Id.* at 177.

22. Denise S. Kaiser, *Artificial Insemination: Donor Rights in Situations Involving Unmarried Recipients*, 26 J. FAM. L. 793, 794 (1988).

AID was initially a response to male infertility and, given associated "unresolved moral and legal questions," the early use of artificial insemination was considered an intensely private matter: "[s]ecrecy thus benefited the physician, the woman receiving the sperm, any child born as a result of the procedure (who were called 'artificial bastards' by some critics), and the husband whose infertility needed to be masked from public view."[23] Later, artificial insemination received attention as a means of preventing the transmission of genetic diseases.[24] However, doctors continued to select donors for mother recipients.[25]

With the advent of cryopreservation technologies,[26] the U.S. sperm banking industry grew rapidly,[27] and the procedure has been welcomed by those wishing to conceive.[28] In 1969 an estimated ten sperm banks were in operation.[29] Now there are nearly 700 sperm banks in the U.S.[30] The fertility industry in the U.S., which amassed to $979 million in 1988, is projected to be worth $4.3 billion in 2013.[31] In sum, artificial insemination has transformed from what was initially considered a primarily doctor-dominated process, to a consumer-driven *industry*.

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23. Vagle, *supra* note 11, at 1202; *see also* Kaiser, *supra* note 22, at 794 (explaining that AID was initially regarded as a "sensational procedure" and labeled by early practitioners as "immoral and equivalent to adultery"); Harlow, *supra* note 17, at 177 (recognizing that physicians who women consulted were often adamantly opposed to AID because they believed that "such a proposition came from the devil").

24. Vagle, *supra* note 11, at 1202.

25. *Id.*

26. "Cryopreservation: The process of cooling and storing cells, tissues, or organs at very low temperatures to maintain their viability." *Definition of Cryopreservation*, MEDICINENET.COM, *available at* http://www.medterms.com/script/main/art.asp?articlekey=7252 (last visited Oct. 10, 2013).

27. Vagle, *supra* note 11, at 1202.

28. "Today, it is estimated that between ten and twenty percent of married couples in the United States cannot conceive. The procedure is naturally welcomed by these couples as perhaps their only means of parenting a child other than by adoption. This procedure has also been welcomed by those single women who are either unable to conceive naturally or chose AID as an alternative means of conception." Kaiser, *supra* note 22, at 795. AID has also been welcomed by lesbian couples. Newton-Small, *supra* note 1, at 51 (explaining that, "[m]ost international sperm business has been for heterosexual couples with fertility challenges, but that is changing as more cultures accept lesbians as single parents—two groups that compose by some estimates up to 60% of the U.S. market").

29. Vagle, *supra* note 11, at 1202.

30. *Sperm: America's most renewable resource?* CBS NEWS (Apr. 5, 2012), *available at* http://www.cbsnews.com/8301-505269_162-57409735/sperm-americas-most-renewable-resource/ (last visited Oct. 10, 2013).

31. *Id.*

III. A MOVE TOWARDS INTERNATIONAL REGULATION

Given the significance of the artificial insemination industry over the last twenty years, a move has been made internationally towards regulation.

A. Sweden: The Forerunner

Sweden was one of the earliest states to regulate AID. Swedish society is considered by scholars, not solely in a material or a political context, but with philosophical or even moral significance, as epitomizing the good life.[32] In that context, Sweden can be seen as the forerunner of a new social order.[33] A model of "social ethics," and a "nation above suspicion," Sweden's ideological underpinnings are consensus and transparency.[34] And, Swedish legislation of AID is no exception to this notion of transparency.

Prior to 1985, AID was performed worldwide without any legal restrictions.[35] Thus, the provider of the semen was anonymous not only to the recipient couple, but also to the donor offspring.[36] However, a case in Sweden highlighted the need for legislative enactment to protect a child of AID.[37] There, the social father of a child conceived through AID sought, and won, release from fatherhood in a lawsuit, referring to the fact that he was sterile.[38] And, because the semen provider was unknown, the child thereby became "fatherless."[39]

The debates accompanying the introduction of the legislation were passionate.[40] However, legislation finally came as a result of a four-year investigation by a government-appointed committee charged with reviewing AID, and advising whether legislation or regulation was necessary.[41] The Committee in favor of legislation maintained that the rights of children had to be protected, and that was best achieved by

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32. KRISTINA ORFALI, *The Rise and Fall of the Sweedish Model*, A HISTORY OF PRIVATE LIFE: RIDDLES OF IDENTITY IN MODERN TIMES 417 (Antoine Prost & Gerard Vincent, eds., 1991).

33. *Id.* at 418.

34. *Id.*

35. A. Lalos, K. Daniels, et al., *Recruitment and Motivation of Semen Providers in Sweden*, 18 HUM. REPROD. 212, 212 (2003).

36. *Id.*

37. K. Daniels, A. Lalos, et al., *Semen Providers and Their Three Families*, 26 J. OF PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 15, 15 (2005).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

permitting access to the identity of the donor.[42] In contrast, those against such regulation argued that it would lead to the end of donor insemination in Sweden, as no one would elect to donate.[43]

Notwithstanding such concerns, in 1985 Sweden introduced groundbreaking legislation that required all semen providers to furnish identifying information about themselves.[44] Becoming the first country in the world to regulate the practice of AID, Sweden enacted the Swedish Law of Artificial Insemination ("SLAI").[45] SLAI gave "'sufficiently mature' donor offspring the right to 'obtain identifying information concerning their donor[s,] . . . in other word[s,] . . . donor[s] could be *identified*.'"[46] Further, the legislation imposed requirements upon physicians, requiring them to keep records identifying donor information for at least seventy years.[47]

While there was a temporary decline in donor availability, the decline reversed itself despite predictions that the law would deter sperm donation.[48] In fact, one study, which presented data covering the pre- and post-legislation period, revealed that there had been an increase in the number of semen providers recruited.[49] The subjects of the study were the current semen providers at two Swedish Fertility Clinics: Karolinska, located in Stockholm; and Umeå, located in the northern part of Sweden.[50] The study, conducted by anonymous questionnaires, was aimed at getting answers from semen providers in Sweden regarding factors associated with their requirement and motivation.[51] The response rate was 100%.[52]

While there were demographic differences between the two clinic populations,[53] the corresponding data showed that providers were in total agreement that their desire to assist infertile couples was their sole,

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42. Daniels, *supra* note 37, at 15.

43. *Id.* (emphasis added).

44. Chia R. Rosas, *A Necessary Compromise: Recognizing the Rights of a Donated Generation to Tame the Wild Wild West of California's Sperm Banking Industry*, 37 SW. U. L. REV. 393, 406-07 (2008).

45. *Id.* at 406-07.

46. *Id.* at 407 (emphasis added).

47. *Id.*

48. *Id.*

49. Daniels, *supra* note 37, at 15-16; *see also* Rosas, *supra* note 44, at 407.

50. Daniels, *supra* note 37, at 16.

51. *Id.*

52. *Id.*

53. There was a difference in how the two groups of sperm donors first became aware of AID, which may reflect the different ways in which the clinics approach recruitment. *Id.* at 16-19.

or main motivating factor, in becoming a provider.[54] The study highlighted the fact that semen providers have a drive to help infertile couples regardless of the possibility of future contact by genetic offspring.[55] In sum, semen providers *can* be recruited within a system that provides for their potential future identification to offspring.

B. The United Nations Convention on the Rights of the Child (1989)

On November 20, 1989, the United Nations ("UN") adopted, without a vote, the Convention on the Rights of the Child ("CRC").[56] The CRC is a "legally binding international instrument" that sets forth basic human rights for children (people under 18 years old).[57] The human rights recognized in this treaty had never previously been protected in an international treaty. They include the child's right to identity and the right to know his or her parents.[58] It is, for the aforementioned reasons that the terms of the CRC are worth exploring.

The *travaux preparatoires*[59] provide a useful reference point in interpreting the final draft.[60] Dr. Jamie Sergio Cerda was the Argentinean sponsor of the article, and the original wording proposed by Argentina is as follows:

The child has the inalienable right to retain his true and genuine personal, *legal* and family identity.

In the event that a child has been fraudulently deprived of some or all of the elements of his identity, the State must give him special protection and assistance with a view to re-establishing his true and genuine identity as soon as possible. In particular, this obligation of the State includes restoring the child to *his blood relations* to be brought up.[61]

The *travaux preparatoires* illustrate that at least from Argentina's perspective, the right to a "true and genuine" identity – a legal identity – is a specific right worthy of international recognition.

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54. Daniels, *supra* note 37, at 20.

55. *Id.*

56. George A. Stewart, *Interpreting the Child's Right to Identity in the U.N. Convention to the Rights of the Child*, 26 FAM. L. Q. 221, 221 (1992).

57. *Convention on the Rights of the Child*, UNICEF (May 25, 2012), *available at* http://www.unicef.org/crc/ (last visited April 4, 2013).

58. Stewart, *supra* note 56, at 221.

59. "Preparatory works."

60. Stewart, *supra* note 56, at 222.

61. Report of the Working Group on a Draft Convention on the Rights of the Child, U.N.Doc. E/CN.4/1986/39 (Mar. 13, 1986) (emphasis added); *see also id.* at 222-23.

The final text of the CRC strongly suggests that the members agreed that the right to identity necessitated protection in the international arena.[62] For instance, Article 8 provides:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.[63]

Further, in Article 7, the UN recognized the significance of a child's "right to acquire a nationality" and, "as far as possible, the right to know and be cared for by his or her parents."[64] Transcripts of the debates at the time make it "clear that the term 'parents' in this clause includes biological parents in the first instance, and that the Convention therefore militates against the practice of anonymous gamete donation."[65]

However, the final version of the CRC, described by Dr. Cerda as a "negotiated compromise,"[66] is riddled with elusiveness and ambiguity. For instance, a major problem arises from the use of the term "identity," in Article 8.[67] Significantly, the term is not defined in Article 8, nor is "identity" defined elsewhere in the CRC.[68] In place of a definition are *elements* of identity – nationality, name, and family relations as recognized by law.[69] In addition, the original draft proposed by Argentina provided for an enforcement provision.[70] However, there is

62. Stewart, *supra* note 56, at 223.

63. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 8, *available at* http://www.ohchr.org/en/professionalinterest/pages/crc.aspx (last visited Oct. 1, 2013).

64. *Id.* art. 7; *see* Rosas, *supra* note 44, at 408 (maintaining that the "CRC 'recognize[s] the significance of children knowing who they are and where they have come from'") (citation omitted).

65. David J. Velleman, *Persons in Prospect, Part II: Gift of Life*, 36 PHIL. & PUB. AFF. 221, 225 n. 12 (2008).

66. According to Dr. Jamie Sergio Cerda, the "negotiated compromise" was in part determined by significant hesitations and fears expressed by many of the working group members. Jamie Sergio Cerda, *The Draft Convention on the Rights of the Child: New Rights*, 12 HUM. RTS. Q. 115, 116 (1990).

67. *Id.*; *see also* Stewart, *supra* note 56, at 224.

68. Convention on the Rights of the Child, *supra* note 63; *see also* Stewart, *supra* note 56, at 224.

69. Convention on the Rights of the Child, *supra* note 63; *see also* Cerda, *supra* note 66, at 116; Stewart, *supra* note 56, at 224.

70. "In the event that a child has been fraudulently deprived of some or all of the

no longer an explicit obligation for a state to reunite a child with his or her blood relations.[71] Further, while Article 7 of the Convention stipulates the right to know one's parents, this right is hedged with the qualification, "as far as possible."[72]

As suggested by Dr. Cerda, the nature of the new rights created by the convention will "depend on the development of the legal systems of the countries concerned."[73] Further, developments in the area of genetic engineering "*should* be covered by an element in Article 8 relating to the duty of states to preserve the identity of the child."[74] Though, despite its shortcomings, the treaty may have given rise to the elimination of donor anonymity around the world.[75]

C. Canada

Canada similarly has undertaken regulations of the AID industry. Canada is a federation of ten provinces and three territories.[76] The roles and responsibilities for Canadian heath care are shared between the national and provincial-territorial governments.[77] According to the Canada Health Act (1985), the federal government is responsible for both administering the national principles or standards of the health care system,[78] and providing funding to help pay for health care services through cash and tax transfers to the provinces-territories.[79] The provincial-territorial governments are responsible for the "management,

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elements of his identity, the State *must give him special protection and assistance* with a view to re-establishing his true and genuine identity as soon as possible." Report of the Working Group on a Draft Convention on the Rights of the Child, U.N. Doc. E/CN.4/1986/39 (Mar. 13, 1986) (emphasis added).

71. Stewart, *supra* note 56, at 225.

72. Convention on the Rights of the Child, *supra* note 63.

73. Cerda, *supra* note 66, at 117.

74. *Id.* (emphasis added).

75. Rosas, *supra* note 44, at 408. To date, the U.S. and Somalia are the only countries that have not ratified the CRC. *Status of Treaties: Convention on the Rights of the Child*, UNITED NATIONS (Sept. 11, 2012), *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Oct. 9, 2013).

76. Jean Hassee, *Canada: The Long Road to Regulation*, *in* THIRD PARTY ASSISTED CONCEPTION ACROSS CULTURES: SOCIAL, LEGAL, AND ETHICAL PERSPECTIVES 55, 55 (Eric Blyth & Ruth Landau eds., 2004); *see Provinces and Territories*, GOVERNMENT OF CANADA (Dec. 5, 2011), *available at* http://www.canada.gc.ca/othergov-autregouv/prov-eng.html (last visited Oct. 9, 2013).

77. Hassee, *supra* note 76.

78. *Id.* at 55.

79. *Id.*

[organization], and delivery of health services for their residents."[80]

In Canada, semen – unless donated to a spouse or sexual partner – is regulated like a drug.[81] As such, because it is a drug, semen must pass through a "battery of checks" under the Food and Drugs Act and "Processing and Distribution for Assisted Conception Regulations," which includes a six-month "quarantine period" during which the sperm is frozen.[82] Though Canada initially had a "hands off" approach with regulation of sperm, the recent and groundbreaking case of *Pratten v. British Columbia* – "the first of its kind in North America" – put British Columbia "on par with the U.K. and several other European Nations, as well as the state of Victoria, in Australia, in banning anonymous gamete donation."[83]

The May 2011 decision banned anonymous sperm donation, holding that anonymity is harmful to the child and is "not in the best interest of donor offspring."[84] In her opinion, Madam Justice Adair highlighted both physical and mental health problems that arise as a result of donor anonymity.[85] Preliminarily, the Court found that "donor offspring fear that their health can be comprised, and may be seriously compromised, by the lack of information about their donor . . . [E]ven with the availability of genetic testing, a good old-fashioned family history is more predictive, and genetic testing is best interpreted in the context of a family history."[86] The Court concluded that the lack of information about the donor further comprises a child's health because of their inability to "have conditions that are inherited or genetic, diagnosed or treated."[87] The Court also recognized that donor offspring "commonly, and legitimately[,] fear inadvertent consanguinity."[88]

Moreover, the Court noted that like adoptees, donor offspring

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80. Hassee, *supra* note 76, at 55.

81. Processing and Distribution of Semen for Assisted Conception Regulations, 2006, SOR/96-254 (Can.); *see also Age, sex, location. . .sperm count? Free sperm donors online*, PROUD PARENTING (Apr. 4, 2012), *available at* http://www.proudparenting.com/node/16831 (last visited Oct. 1, 2013) (explaining that semen is regulated as a drug in Canada, unless it is donated to a spouse or sexual partner).

82. *Age, sex, location. . .sperm count? Free sperm donors online*, *supra* note 81.

83. Alison Motluk, *Canadian court bans anonymous sperm and egg donation*, NATURE (May 27, 2011), *available at* http://www.nature.com/news/2011/110527/full/news.2011.329.html (last visited Oct. 1, 2013).

84. Pratten v. British Columbia, 2011 BSCS 656, ¶ 215 (Can. B.C.).

85. *Id.* ¶ 111.

86. *Id.* ¶ 111(a).

87. *Id.* ¶ 111(b).

88. *Id.* ¶ 111(f).

experience a "sense of loss and incompleteness."[89] Thus, the Court recognized that, for psychological reasons, children have a need for identifying information to "complete their personal identities and to alleviate the stress, anxiety and frustration caused by not knowing. Donor offspring demonstrate a strong commitment to searching for information about the other half of their genetic make-up."[90] Moreover, when they are unable to obtain such information, donor offspring "experience sadness, frustration and anxiety . . . [t]hey feel the effects both for themselves and, when they become parents, for their own children."[91] Similarly, the Court noted that the secrecy, which often shrouds the process of conception, can have "devastating effects on donor offspring when the truth is revealed."[92]

The Court allowed the province fifteen months to generate a new adoption law that would recognize the rights of those conceived via donors and to bring it in accordance with the Charter of Rights and Freedoms.[93] However, the province appealed the decision and the plaintiff maintains that the case will likely go before the Supreme Court of Canada.[94] If the ruling is upheld by the Supreme Court, the entire country would have to comply, and would join other jurisdictions that have banned anonymity for sperm donors.[95]

D. The United States: The "Best" Interests of the Child?

1. The "Best Interests" Principle

The broadly stated general principle of the "best interests of the child" is all too often misapplied in the U.S. Though the best interests of children are usually a consideration in cases concerning parental

89. Pratten, 2011 BSCS ¶ 111(i).

90. *Id.* ¶ 111(d).

91. *Id.* ¶ 111(e).

92. *Id.* ¶ 111(g).

93. *Id.* ¶¶ 332, 335(b).

94. *Olivia Pratten Case: Sperm Donor Information Should be Shielded, B.C. Argues*, HUFF POST (Feb. 14, 2012), *available at* http://www.huffingtonpost.ca/2012/02/14/olivia-pratten-case-sperm-donor-information_n_1277512.html (last visited Oct. 2, 2013).

95. The Court of Appeals for British Columbia overturned the lower court's decision, ruling that there is no constitutional right to know the identity of one's parents. James Keller, *Olivia Pratten, Sperm Donor Case Won't be Heard by Supreme Court*, THE CANADIAN PRESS (May 30, 2013), *available at* http://www.huffingtonpost.ca/2013/05/30/olivia-pratten-sperm-case-supreme-court_n_3359567.html (last visited Feb. 19, 2014). Failing to provide any reasoning, the Supreme Court of Canada declined to hear the case. *Id.* Nonetheless, it is still significant that a trial court found donor anonymity unconstitutional, and further supports the notion that the move towards abolishing AID anonymity is on the horizon.

rights, they are not the *primary* consideration.[96]

If one looks to the infamous case of *Michael H. v. Gerald D.* – which is often referred to as establishing the right to privacy in the marital relationship – what happened to the "best interests of the child," Victoria?[97] The facts were, in brief, as follows: Carole D. and Gerald D. were married, during which time Carole became involved in an adulterous affair with Michael H; Carole became impregnated with a young girl, Victoria, who turned out to be Michael's child; Gerald D. held Victoria out to be his daughter, but Michael H. and Victoria, through guardian ad litem, sought visitation rights for Michael.[98]

There, the United States Supreme Court found that Michael failed to adduce modern or historical precedent recognizing the power of a natural father to assert parental rights.[99] As such, the Court rejected petitioner's argument, finding that Michael had no constitutionally protected liberty interest sufficient to maintain his father-daughter relationship with Victoria.[100]

When an individual denies the importance of biological ties – irrespective of what brilliant judge, scholar, etc., uttered that denial – how can that individual be said to read world literature with *any comprehension*? The following has been offered in regards to this dilemma:

> How do they make any sense of Telemachus, who goes in search of a father he cannot remember? What do they think is the dramatic engine of the Oedipus story? When the adoptive grandson of Pharaoh says, 'I have been a stranger in a strange land,' what do they think he means? How can they even understand the colloquy between Darth Vader and Luke Skywalker? [With], the revelation 'I am your father.'[101]

As the aforementioned stories illustrate, persons unacquainted with their origins have been perceived throughout history as tragically disadvantaged.[102] There must be some reason why persons, living at different places and times, under dramatically different conditions, have

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96. In Article 3 of the Convention on the Rights of the Child, the "best interests" of the child are deemed to be a "primary consideration" for all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Convention on the Rights of the Child, *supra* note 63.

97. Michael H. v. Gerald D., 491 U.S. 110 (1989).

98. *Id.*

99. *Id.*

100. *Id.*

101. Velleman, *supra* note 65, at 256.

102. *Id.*

converged on the *same* opinion: a relationship with one's biological parents is essential to a child.[103] It is in the child's *best interests*.

However, the arguments for secrecy in the AID context rarely invoke the "best interests" of the child.[104] The notion that information about one's origin should be withheld from children because it is in their best interests is a "stark form of welfarism," which could be used to "justify many forms of state manipulation deemed to be of benefit to citizens."[105] In actuality, "would anyone choose to live his or her entire life on the basis that he or she had been deliberately deceived about their genetic origin?"[106]

One proposed rationale for secrecy has been the parents' interest in having a "normal family." Parents may feel threatened by the possibility that their child's biological father could appear and disrupt their family.[107] Alternatively, parents may not want people to know that they resorted to AID.[108] Though, in these justifications, the child is really being used as a means to his or her parents' end.[109] Meaning, the interests of the parents in achieving this seemingly "normal family," are paramount to any needs of the child. However, using one person as a means to another's end can never be right, "unless the person has consented to be so used. [And] as the AID children grow towards adulthood . . . they are more and more being made an object of contempt."[110]

2. Anonymity Regulation

Regulation of sperm donation in the U.S. remains relatively non-existent.

a. The Food and Drug Administration

The Food and Drug Administration ("FDA") currently provides the only federal means to regulate AID. The FDA regulation falls under 21 CFR § 1271, which proposes to create a "unified registration and listing

103. Velleman, *supra* note 65 at 256.

104. *See* Michael Freeman, *The New Birth Right? Identity and the Child of the Reproduction Revolution*, 4 INT'L J. CHILD. RTS. 274 (1996).

105. *Families and Children: From Welfarism to Rights, in* CHRISTOPHER MCCRUDDEN, INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN 317 (Clarendon Press, 1994).

106. *Id.*

107. Hollace S. W. Sawonson, *Donor Anonymity in Artificial Insemination: Is It Still Necessary?* 27 COLUM. J. L. & SOC. PROBS. 151, 180 (1993).

108. *Id.*

109. Mary Warnock, *The Good of the Child*, 1 BIOETHICS 141, 151 (1987).

110. *Id.*

system for establishments that manufacture human cells . . . and to establish donor-eligibility, current good tissue practice, and other procedures to prevent the introduction, transmission, and spread of communicable diseases . . . ."[111] Accordingly, under § 1271, FDA regulation of sperm banks is divided into three pertinent areas: (1) Establishment; (2) Registration and Product Listing, Donor Eligibility; and (3) Current Good Tissue Practice ("CGTP").[112]

Sperm banks and clinics must register with the FDA and update registration annually.[113] They must register with the FDA using Form FDA 3356, which asks for very basic information, such as the center's physical mailing address and the establishment's function (i.e. type of tissue(s) it maintains).[114]

Under the FDA's Donor Eligibility rules, both anonymous and non-anonymous donors must undergo a physical examination and medical history interview, which includes assessments of their physical and "relevant social behavior."[115] The physical examination requires that sperm donors be tested for communicable diseases, but there is no federal requirement that sperm banks screen for genetic diseases.[116] As for the latter test ("relevant social behavior"), according to the FDA there are twenty-nine "risk factors," which include men who have had sex with other men in the preceding five years, persons who have injected drugs for non-medical reasons in the preceding five years, and persons who have engaged in sex in exchange for money or drugs.[117]

The FDA's CGTP requirements include periodic inspections of fertility institutions to evaluate compliance with the Donor Eligibility

111. 21 C.F.R. § 1271.1(a) (2007).

112. *See generally id.*; Pi, *supra* note 10, at 382-83.

113. 21 C.F.R. § 1271.21(a) (2007).

114. *Id.*; FOOD AND DRUG ADMINISTRATION, FORM FDA 3356, ESTABLISHMENT REGISTRATION AND LISTING FOR HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASKED PRODUCTS, *available at* http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Forms/UCM082428.pdf (last visited Sept. 30, 2013).

115. 21 C.F.R. § 1271.21(a) (2007).

116. Jacqueline Mroz, *In Sperm Banks, A Roll of the Genetic Dice*, N.Y. TIMES (May 14, 2012), *available at* http://www.nytimes.com/2012/05/15/health/in-sperm-banks-a-matrix-of-untested-genetic-diseases.html?pagewanted=all&_r=0 (last visited Sept. 30, 2013).

117. FOOD AND DRUG ADMINISTRATION, GUIDANCE FOR INDUSTRY: ESTABLISHMENT REGISTRATION AND LISTING FOR HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASKED PRODUCTS, IV.E (2012), *available at* http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidance/tissue/ucm073964.htm#DONORSCREENING12171.75 (last visited Sept. 30, 2013).

Rule and record-keeping standards. However, this type of mandatory record-keeping does not require sperm banks to "track donors' health, disclose information to donor-conceived children, or even place limits on the number of births resulting from one donor."[118]

b. State Regulation

Individual states regulate aspects of the AID process by licensing sperm banks, controlling the process, and determining parental legitimacy. Additionally, twenty-four states have created regulatory legislation addressing the operations of sperm banks, though varying in terms of how much they ultimately choose to regulate. For example, some states set forth explicit requirements for AID, such as requiring it be performed under the supervision of a licensed physician.[119] Others set forth specific testing requirements.[120] In addition, most states regulate the parent-child relationship by establishing who are the biological and legal parents of a child conceived through AID.[121]

(1) The Uniform Parentage Act

The Uniform Law Commission ("ULC") provides states with "non-partisan, well conceived, and well drafted legislation" that brings clarity and stability to critical areas of state statutory law.[122] The ULC is comprised of practicing lawyers, judges, legislators and legislative staff, and law professors, who have been appointed by state governments, and the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, to research, draft, and promote enactment of uniform state laws in areas where "uniformity is desirable and practical."[123] Accordingly, the ULC revised the Uniform Parentage Act ("UPA") in 2000, and amended it in 2002.[124] The UPA is considered the most

118. 21 C.F.R. § 1271.80; Anetta Pietrzak, Note, *The Price of Sperm: An Economic Analysis of the Current Regulations Surrounding the Gamete Donation Industry*, 14 J. L. & FAM. STUD. 121, 125 (2012).

119. Pi, *supra* note 10, at 384.

120. *Id.*

121. Beth G., *U.S. Sperm Donation Laws by State*, KNOWN DONOR REGISTRY, *available at* http://knowndonorregistry.com/component/content/article/166-legal/private-donation-laws/114-us-sperm-donation-laws-by-state (last visited Sept. 25, 2013); Pi, *supra* note 10, at 384.

122. *About the ULC*, UNIFORM LAW COMMISSION (2012), *available at* http://uniformlaws.org/Narrative.aspx?title=About%20the%20ULC (last visited Sept. 25, 2013).

123. *Id.*

124. *Parentage Act*, UNIFORM LAW COMMISSION (2012), *available at* http://uniformlaws.org/Act.aspx?title=Parentage%Act (last visited Sept. 25, 2013).

important Uniform Act addressing children's rights,[125] and has been accepted in nine states,[126] with numerous others enacting significant portions of the model act.[127]

Section 702 of the UPA states that "a donor is not a parent of a child conceived by means of assisted reproduction."[128] Moreover, commentary to Section 702 clarifies that if a child is conceived as a result of AID, then the donor is not a parent of the resulting child.[129] Further, the donor can neither sue to establish parental rights, nor be sued for child support for the resultant offspring.[130] In sum, "donors are eliminated from the parental equation."[131] Therefore, as a matter of law, the sperm donor has "no paternal rights or responsibilities,"[132] nor does the child have any recourse for seeking parental support – or love.

Thus, the UPA is inherently different from the CRC in that the UPA explicitly states its refusal to recognize a child's right to know and be cared for by a parent.[133] Although the U.S. has not given a reason for why it has not elected to ratify the CRC, one possibility is the "hesitance of conservative organizations that believe ratification would have implications for issues like abortion, education, and discipline," or, alternatively, the notion that the CRC is "anti-family."[134]

c. Individual Sperm Banks

To a certain extent, sperm banks are self-regulating, and may voluntarily choose to implement rules and regulations upon

125. Swink & Reich, *supra* note 14, at 871.

126. The Uniform Parentage Act has been enacted in Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. *Legislative Fact Sheet-Parentage Act*, UNIFORM LAW COMMISSION (2012), *available at* http://uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act (last visited Sept. 25, 2013).

127. Although Alaska, Arizona, New York, North Carolina, and Tennessee have not adopted the Uniform Parentage Act, AID is mentioned in their statutes – either directly or indirectly – stating that a child conceived through artificial insemination and born to a married couple is the natural and legitimate child of both parents. ALASKA STAT. § 25.20.045 (LexisNexis 2013); ARIZ. REV. STAT. ANN. § 25-501(B) (2012); N.Y. DOM. REL. LAW. § 73(1) (McKinney 2013); N.C. GEN. STAT. § 49A-1 (LexisNexis 2013); TENN. CODE ANN. § 68-3-306 (LexisNexis 2013); *see also* Pietrzak, *supra* note 118, at 127; Swink & Reich, *supra* note 14, at 871.

128. UNIF. PARENTAGE ACT § 702 (2002).

129. *Id.*

130. *Id.*

131. *Id.*

132. Swink & Reich, *supra* note 14, at 871.

133. *Compare* UNIF. PARENTAGE ACT § 702 (2002), *with* Rosas, *supra* note 44, at 408.

134. Pi, *supra* note 10, at 394.

themselves.[135] For example, Cryogenic Laboratories is a bank committed to tracking, monitoring, and evaluating each donor specimen in order to acquire, among other things, knowledge of donor fecundity and geographical distribution of donor progeny.[136] Also, the NW Cryobank bank has a webpage aimed at providing the public with notice of any important updates to donor health history information.[137] There, a donor number is listed along with any health updates, such as notices that a donor has since been treated for testicular cancer, or that a child has experienced growth and developmental problems.[138] In contrast, some sperm banks avoid regulating any aspect of sperm donation.[139]

d. Private Organizations

Professional organizations attempt to govern important aspects of the sperm donation process by publishing standards and guidelines. However, they are non-binding, and merely suggestive.[140] For instance, the American Society for Reproductive Medicine (ASRM) sets advisory guidelines.[141] Regarding anonymity, the ASRM supports the prerogative of sperm donors to remain anonymous.[142] The ASRM also recommends that institutions, clinics, and sperm banks maintain sufficient records to allow a limit to be set for the number of pregnancies for which a given donor is responsible.[143] According to ASRM October 2012 recommendations, in a population of 800,000, a limitation of a single donor to no more than twenty-five children would avoid any "significant increased risk of inadvertent consanguineous conception."[144] Further, with regard to the records of each donor, the

135. Pi, *supra* note 10, at 386.

136. *About our Donors*, CRYOGENIC LABORATORIES, *available at* http://www.cryolab.com/aboutDonors.shtml (last visited Oct. 1, 2013).

137. *Donor Health Updates*, NW CRYOBANK, *available at* https://www.nwcryobank.com/donor-health-updates/ (last visited Oct. 1, 2013).

138. *Id.*; *see* Ballantyne, *supra* note 6, at 580.

139. *Free Genes Included With Your Purchase*, NW ASSOCIATION FOR BIOMEDICAL RESEARCH (2007), *available at* www.nwabr.org/education/pdfs/Cases/Genes_Included.doc (last visited Oct. 1, 2013) [hereinafter "Free Genes"]; *See* Mroz, *supra* note 116; Ballantyne, *supra* note 6, at 581.

140. Pi, *supra* note 10, at 387.

141. Ballantyne, *supra* note 6, at 580.

142. *Id.*

143. *Recommendations for Gamete and Embryo Donation: A Committee Opinion*, ASRM (Oct. 16, 2012), *available at* http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/2008_Guidelines_for_gamete(1).pdf (last visited Oct. 1, 2013).

144. *Id.*

ASRM opines that a subsequent follow-up evaluation of the donor should be undertaken so as to avoid any adverse outcomes including inheritable diseases identified pre-conceptually or postnatally.[145]

Similarly, the American Fertility Society (AFS) and the American Association of Tissue Banks (AATB) issue non-binding guidelines that emphasize the importance of genetic testing.[146] For example, the AFS recommends that donor records of genetic history be made available on an anonymous basis at the request of the recipient and the resulting child(ren).[147] Moreover, the AFS recommends ten pregnancies per donor, or even less than that if the pregnancies are a part of a smaller geographic subgroup of the general population. The AATB sets out similar recommendations.[148]

e. Courts

American courts have similarly failed to address the regulation of AID. Although no court has directly faced the issue of anonymity, the case of *In re K.M.H.*, decided by the Supreme Court of Kansas in 2007, indirectly upheld donor anonymity.[149] There, the Court upheld a Kansas statute, which provided the following:

The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.[150]

In response to the Equal Protection challenge, the court found that the statute served two legitimate governmental objectives: (1) "encouraging men who are able and willing to donate sperm . . . by protecting the men from later unwanted claims for support from mothers or the children;"[151] and (2) protecting "women recipients as well, [by] preventing the potential claims of donors to parental rights and responsibilities."[152]

Further, in its Due Process analysis, the Court recognized "the continued evolution in regulation of artificial insemination in this and

145. *Recommendations for Gamete and Embryo Donation*, *supra* note 143.
146. Pietrzak, *supra* note 118, at 128-29.
147. *Id.* at 128.
148. *Id.* at 128-29.
149. *See generally In re* K.M.H., 169 P.3d 1025 (Kan. 2007).
150. *Id.* at 1029.
151. *Id.* at 1039.
152. *Id.*

other countries."[153] In particular, the Court noted that Britain and the Netherlands now ban anonymous sperm donations, which "formally recognize[s] the *understandable desires* of at least some children conceived through artificial insemination to know the males from whom they have received half of their genes."[154] However, the Court held that "in weighing the interests of all involved" as well as the policies that are furthered, the legislation was constitutional.[155] It is worth mentioning that the best interests of the child were only appropriately discussed in Judge Hill's dissenting opinion.[156]

In sum, the phrase, in the child's "best interests" is really a nullity with respect to AID cases.

IV. LEGAL PROBLEMS

The fertility industry is booming.[157] Today, women in the U.S. shop for "sperm donors in online catalogs in much the same way as they might shop for a date through a matchmaking service . . . a piece of furniture[,] or potential car."[158] And, the evolution of the Internet has only made "sperm shopping all the easier."[159] Potential mothers can simply log onto sperm banks' websites and plug in a picture of her husband, or Brad Pitt, and facial-recognition software will look for, and locate, the closest possible donor match."[160] Moreover, customers can compare donors' heights and weights, ethnicity, physical traits, educational and professional accomplishments, view baby pictures, and listen to an audiotape of the donor expounding the meaning of life and why sperm donation appealed to him.[161]

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153. *In re K.M.H.*, 169 P.3d at 1041.

154. *Id.* (emphasis added).

155. *Id.* at 1042.

156. "I raise my hand and ask a different question. Who speaks for the children in these proceedings? As applied by the majority in this case, this generative statute of frauds slices away half of their heritage. A man who was once considered a 'putative father' in the initial child in need of care proceeding is now branded a mere 'semen donor.' The majority offers the children sympathy. But is this in their *best interest*? The trial court never got to the point of deciding the *best interests* of the children because it was convinced that such a consideration was barred by the operation of [the statute] to a known donor . . . only the voices of the mother and 'semen donor' are heard." *Id.* at 1051 (Hill, J., dissenting) (emphasis added).

157. Marquartdt, *supra* note 8, at 5.

158. *Id.* at 16.

159. *See generally* Swink & Reich, *supra* note 14, at 858 (arguing that the Internet has increased the availability of, and the market for, donor sperm to a larger audience "than ever imagined").

160. Newton-Small, *supra* note 1, at 51.

161. Marquartdt, *supra* note 8, at 16.

It is not only women in the U.S. who can access these catalogues, though. Financial analysts call sperm a "growth sector" in the American economy – and it is actually one of the few in which the U.S. is running a significant trade surplus.[162] The U.S. currently exports sperm to at least 60 countries, including Venezuela, Kenya, and Thailand.[163] As of late 2005, ABC News reported that the top four sperm banks in the U.S. controlled 65% of the global market.[164] And the second largest U.S. facility – Fairfax Cyrobank – says 10% of its sales are exports, and the third largest – Xytex Cryo International – does more than a third of its business abroad.[165]

The reason is that in the U.S., anonymity is still permitted. As previously established, in contrast to U.S. donors, other countries do not permit their donors to remain anonymous. Consequently, the U.S. now views itself as a "destination[] for couples [and single mothers] who wish to circumvent stricter laws."[166] Accordingly, several countries, including Canada and Sweden, are some of U.S. sperm banks' biggest customers.[167] Indeed, Canada imports 90% of its sperm.[168]

However, with no regulations defined in the U.S. – the number one exporter of sperm[169] – we find ourselves in the "Wild West" phase of global sperm sales,[170] confronted with a plethora of legal issues.

A. Parental Ties

"My Daddy's Name is Donor" was the first study to conduct an in-depth investigation into the psychological effect of being a donor child. The 2010 study, which surveyed a sample of 485 donor children between the ages of eighteen and forty-five years old, yields startling

162. "There's talk that America can't make anything anymore . . . Asia now controls vast sectors of the international high-tech business. Our foreign-trade deficit has ballooned to a record annual rate of $425 billions. But whatever economic problems America may have, we can at least raise our fists and tell the world with pride that we are the No. 1 exporter of sperm." Wolf, *supra* note 2.

163. Newton-Small, *supra* note 1, at 50.

164. *Id.* This number has presumably gone up considering the overall increase in the market, and the varying restrictions placed by countries.

165. *Id.*

166. Marquartdt, *supra* note 8, at 5.

167. Alex Dickinson, *The Daily Exclusive: The Seed of a Trend*, DAILY, (May 29, 2012), *available at* http://www.thedaily.com/page/2012/05/29/052912-news-sperm-bank-exports-1-3/ (last visited Mar. 4, 2013).

168. Newton-Small, *supra* note 1, at 50.

169. Wolf, *supra* note 2.

170. Newton-Small, *supra* note 1, at 51.

results.[171] First, the study reveals that young adults conceived through sperm donation experience profound struggles with their origins and identities.[172] For instance, a majority of donor-conceived adults – a full 65% – agree that their sperm donor is half of who they are.[173] Similarly, 53% of donor offspring agree that it hurts when they hear other people talk about their genealogical background.[174]

Second, the study suggests that AID itself is psychologically detrimental to donor children.[175] For example, the study reveals that donor offspring are twice as likely as those raised by biological parents to have problems with the law.[176] Moreover, the study reveals that donor offspring are 1.5 times more likely than those raised by biological parents to report mental health problems; and twice as likely to report substance abuse problems.[177] This point is further elaborated by Katrina Clark, a child conceived through AID:

[E]motionally, many of us are not keeping up. We didn't ask to be born into this situation, with its limitations and confusion. It's hypocritical of parents and medical professionals to assume that biological roots won't matter to the "products" of the cryobanks' service, when the longing for a biological relationship is what brings customers to the banks in the first place. We offspring are recognizing the right that was stripped from us at birth – the right to know who both our parents are.[178]

Finally, and perhaps most importantly, the study suggests that donor children disfavor anonymous donation.[179] In fact, nearly two-thirds of grown donor offspring support the right of offspring to have non-identifying information about their biological father, to know his identity, to have the opportunity to form some kind of relationship with him, to know about the possible existence of half-siblings conceived with the same donor, and to have the opportunity to form a relationship with those potential half-siblings.[180] Moreover, donor offspring whose

171. Marquardt, *supra* note 8, at 19.

172. *Id.* at 7.

173. *Id.* at 7, 21, 109.

174. *Id.* at 7, 28.

175. *Id.* at 37-38.

176. Marquardt, *supra* note 8, at 9, 115.

177. *Id.*

178. Katrina Clark, *My Father was an Anonymous Sperm Donor*, WASH. POST (Dec. 17, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/12/15/AR2006121501820.html (last visited Oct. 6, 2013).

179. Marquardt, *supra* note 8, at 11-12.

180. *Id.*

parents kept their origins a secret (so that the donor found out the truth in an accidental or unplanned way) were 51% more likely to report depression or other mental health issues, 36% more likely to struggle with substance abuse, and 29% more likely to have had problems with the law. [181]

B. Health

The failure of the FDA to require that sperm donors be screened for genetic diseases has produced abysmal and permanent consequences.

For instance, sperm donor "F827" "aced" all the tests: he was healthy; he said his parents and grandparents were healthy; and, under a microscope, his chromosomes looked "perfect."[182] Accordingly, he turned out to be quite prolific, and his deposits to a Michigan sperm bank in the 1990s produced *eleven* children. However, his "deposits" also carried with them an extremely rare disease. [183]

Severe Congenital Neutropenia ("SCN") is a disease that normally affects one in five million individuals.[184] As such, when Dr. Laurence Boxer, the director of pediatric hematology and oncology at the University of Michigan in Ann Arbor, was presented with five cases within four families in Michigan, "there was clearly something amiss."[185] SCN is an "extremely serious blood disease," and it can be fatal for children under three years of age.[186] Additionally, patients who contract this disease are highly vulnerable to infections and prone to leukemia.[187] Moreover, all persons infected with this disease need expensive daily shots to augment their immune system.[188]

Dr. Boxer soon determined that all four families had used donor sperm, and the same donor at that: F827. However, the anonymity of the donor was protected by his legal arrangement with the sperm bank.

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181. Marquartdt, *supra* note 8 at 12, 112. Although they fared better than those whose parents tried to keep it a secret, those children who say their parents were always open about their origins, still exhibit an elevated risk of negative outcomes. *Id.* at 12-13.

182. Denise Grady, *As the Use of Donor Sperm Increases, Secrecy Can Be a Health Hazard*, N.Y. TIMES (June 6, 2006), *available at* http://www.nytimes.com/2006/06/06/health/06opin.html?pagewanted=all (last visited Oct. 1, 2013).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Grady, *supra* note 182.

188. *See id.*

As such, the bank was unable to release the donor's name, nor did they have any way to contact him.[189] Despite it being seemingly obvious that F827 was the carrier of SCN, an "ethics panel ruled that his remaining specimens could not be tested without his permission."[190] Accordingly, Dr. Boxer and his colleagues proceeded with advanced genetic testing without using the donor's specimens, and concluded that the donor carried a mutation of the gene involved in causing SCN.[191]

Similarly, after being unable to conceive a second child, Sharine and Brian Kretchmar of Yukon, Oklahoma also elected the path of AID.[192] However, after their baby boy, Jaxon, failed to have a bowel movement in the first day or so after birth, doctors knew something was wrong.[193] Jaxon immediately underwent surgery, and the doctors returned with terrible news: Jaxon had cystic fibrosis.[194] It was later discovered that not only did Mrs. Kretchmar carry the gene for cystic fibrosis (a fact previously unknown to her), so, too, did the Kretchmars' donor.[195]

The Kretchmars' lives have been irrevocably changed as a result of their son's illness. Cystic fibrosis is a progressive disorder that causes thick, sticky mucus to build up in the lungs and digestive track.[196] Accordingly, everyday Jaxon must take more than twenty pills, needs several nebulizer treatments, and must regularly don a special vest that shakes his torso to help loosen the congestion in his body.[197] The life expectancy of someone with cystic fibrosis is about thirty-seven years.

Sadly, these situations are not unique: a donor in California passed on a hereditary kidney disease; a donor in the Netherlands who fathered eighteen children was later found to have a serious neurological disease that his offspring have a fifty-fifty chance of inheriting;[198] and ten children inherited a deadly heart defect known as hypertrophic cardiomyopathy.[199] In fact, in households everywhere, children conceived with donated sperm are suffering from serious genetic

189. *See* Grady, *supra* note 182.
190. *Id.*
191. *Id.*
192. Mroz, *supra* note 116.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. Mroz, *supra* note 116.
198. Grady, *supra* note 182.
199. Mroz, *supra* note 116.

conditions inherited from men they have never met.[200] Though hundreds of cases have been documented, it is likely that there are "thousands more."[201]

C. Accidental Incest

Given the failure to regulate the gamete industry, sperm banks in the U.S. are primarily self-regulating entities. Although some individual banks have elected to limit the number of donations or births per donor, this decision is left to individual sperm banks.[202] Typically, a single sperm donation is divided up into multiple donations and sold to numerous recipients.[203]

Moreover, apart from voluntary guidelines issued by professional organizations, sperm banks are not required to report the number of live births per donor.[204] Rather, sperm banks are solely required to report "pregnancy success rates achieved by such program through each assisted reproductive technology."[205] This means that even *if* a bank were to impose a regulation that limited the number of donations per donor, the donor could go elsewhere.[206] As such, a sperm donor can be the biological parent of several children, and the possibility of accidental incest between donor siblings becomes a genuine concern. If that donor is considered a "prime candidate,"[207] the likelihood becomes even stronger. And, in the U.S., beyond any voluntary resources (i.e. Donor Sibling registry), donor children have "absolutely no way of knowing how many of them actually share the same biological parent."[208]

The chances of accidental consanguinity have become increasingly unsettling. Cynthia Daily and her partner used a sperm donor to conceive a baby eight years ago, with hopes that their son would eventually get to know some of his half siblings – "an extended family

200. Mroz, *supra* note 116.

201. *Id.*

202. Pi, *supra* note 10, at 389.

203. Grady, *supra* note 182.

204. Pi, *supra* note 10, at 389; *see* Michelle Dennison, *Revealing Your Sources: The Case For Non-Anonymous Gamete Donation*, 21 J. L. & HEALTH 1, 15-16 (2008).

205. 42 U.S.C. § 263a-1 (a)(1) (2011).

206. Dennison, *supra* note 204, at 15 (explaining that "there is no requirement that banks engage in "cross-clinic information sharing").

207. "Almost every clinic reports having a most-requested donor, whose gametes are so popular with prospective parents that the clinic (and the donor) has trouble keeping up with the demand." *Id.*

208. *Id.* at 16.

of sorts."[209] So, Ms. Daily searched a Web-based registry created to help connect children fathered by the same donor.[210] And, as the years went on, Ms. Daily watched the number of children in her son's group grow.[211] Today, there are 150 children in this group, all conceived from the same donor, and more on the way.[212]

As such, it is obvious why parents of some of those children now fear that their sons and daughters could one day unknowingly meet up with their half siblings and commit incest. Accordingly, parents have taken measures to hopefully avoid this type of incident: "My daughter knows her donor's number for this very reason . . . she's been in school with numerous kids who were born through donors. *She's had crushes on boys who are donor children.* It's become part of [her] sex education."[213] However, the aforementioned case of engaging in "sex ed" with one's daughter is not the "norm."

In actuality, most mothers who get their sperm elsewhere quite often do not tell their child that their biological father is anyone other than the parent raising them.[214] Further, even the child's pediatrician may not be told the truth, as parents "simply, and grossly inaccurately, report their own family and medical histories as the child's."[215] As such, the question is not what will happen *if* persons engage in accidental consanguinity, but rather, what will happen *when* they do. Should these donor children *really* be the ones to blame?

V. CONCLUSION: MOVING FORWARD

In light of these problems, it is clear that the U.S. should follow the lead of Sweden and other nations (including Britain, the Netherlands, and Switzerland), and end the practice of anonymous AID.

Primarily, the concern as to whether this regulation would lead to decreased donations is without merit. Though, even if it were to decrease, the real issue is whether the children's right to know trumps the donor's right to privacy. And, if the U.S. were operating on a system of "best interests" of the child, then the answer would undoubtedly be yes – the interest of the child trumps the interest of the

209. Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES (Sept. 5, 2011), *available at* http://www.nytimes.com/2011/09/06/health/06donor.html?pagewanted=all (last visited Feb. 13, 2013).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* (emphasis added).

214. Marquartdt, *supra* note 8, at 16.

215. *Id.*

donor – always. Studies show that AID causes direct psychological harm to donor children, even more so when those donors are anonymous. Consequently, something needs to be done to help curb those detrimental effects.

In terms of helping those born before the law is changed, a national registry system should be enacted. At minimum, this registry system should provide current AID children unrestricted access to medical information and help them find their biological kin, when mutually agreeable. Moreover, if donor children request medical information about their biological father where good cause is shown (i.e. when it is medically necessary), this information should be made immediately accessible, and efforts to ascertain it should be undertaken by the government.

Moving forward, the U.S. should enact a national health registry system of record keeping to which all banks and "donees" can access. Doctors of donor children should be required to provide any adverse medical updates of these patients to the system. Further, parents and sperm recipients should be required to update this health registry system. Although one could argue that this may place a "high burden" on parents, it is *necessary* to curtail the spread of genetic diseases. So, too, should sperm banks be required to keep detailed records of AID donors, and provide any other updates that may have slipped through the cracks. Also, this registry should be designed to alleviate any fears of an accidental incestuous relationship, and minimize psychological harm experienced by donor-conceived children.

To further reduce the possibility of consanguinity, limits should be placed on the number of children that can be conceived through one donor. More specifically, as suggested by ASRM, in a population of 800,000, a limitation of a single donor to no more than twenty-five children would avoid any significant risk of inadvertent consanguineous conception.[216] However, if the population were much smaller, the number of children would necessarily need to be proportionally decreased. Accordingly, sperm banks should maintain sufficient records to allow a limit to be set for the number of pregnancies for which a given donor is responsible, and update them in a system to which all banks can gain access. By keeping such records, this would

216. *Recommendations for Gamete and Embryo Donation: A Committee Opinion*, ASRM (Oct. 16, 2012), *available at* http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/2008_Guidelines_for_gamete(1).pdf (last visited Oct. 1, 2013).

eliminate the possibility for the proliferation of one donor's sperm in several banks.

In sum, this seemingly impenetrable veil of secrecy and anonymity in the practice of AID must be eradicated.